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THE
SOUTHWESTERN REPORTER

WITH KEY-NUMBER ANNOTATIONS

VOLUME 151
PERMANENT EDITION

CONTAINING ALL THE CURRENT DECISIONS OF THE
SUPREME AND APPELLATE COURTS OF

ARKANSAS, KENTUCKY, MISSOURI, TENNESSEE
AND TEXAS

WITH TABLE OF SOUTHWESTERN CASES IN WHICH
REHEARINGS HAVE BEEN DENIED
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REHEARINGS DENIED

[Cases in which rehearings have been denied, without the rendition of a written opinion, since the publication of the original opinions in previous volumes of this Reporter.]

KENTUCKY.

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Citizens' Bank v. Crittenden Record-Press, 150 S. W. 814.

Forrest v. Winter, 149 S. W. 981.

Royal Neighbors of America v. Hayes, 150 S. W. 845.

Tyler v. First Nat. Bank, 150 S. W. 665.

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(xv)†

THE
SOUTHWESTERN REPORTER
VOLUME 151

WHITE v. WHITE.

(Court of Appeals of Kentucky. Dec. 6, 1912.)

1. LANDLORD AND TENANT (§ 232*)—TIME—JUDGMENT FOR RENT.

Upon recovery of a judgment for an annual rent, each year's rent should bear interest from January 1st following its maturity.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 935-939; Dec. Dig. § 232.*]

2. APPEAL AND ERROR (§ 1234*)—SUPERSEDEAS BOND—EFFECT.

Under Civ. Code Prac. § 748, the obligors in a supersedeas bond are expressly made liable for any judgment the Court of Appeals may order to be rendered.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4761-4777; Dec. Dig. § 1234.*]

On petition for rehearing. Petition overruled.

For former opinion, see 150 Ky. 283, 150 S. W. 388.

HOBSON, C. J. [1] The sum of \$500 is fixed in the opinion as the rent of the farm for each year, to be divided between the parties in interest. Each year's rent will bear interest from January 1st following its maturity as fixed in the judgment of the circuit court.

[2] By the terms of the supersedeas bond the obligors therein are liable for any judgment this court may order to be rendered. See Civil Code, § 748; also original opinion in *White v. White*, 150 Ky. 283, 150 S. W. 388.

Petition overruled.

LEVY'S EX'X et al. v. LEEDS.†

(Court of Appeals of Kentucky. Dec. 5, 1912.)

1. WILLS (§ 441*)—CONSTRUCTION—ASCERTAINING INTENTION.

A testator's intention must be gathered, not only from the instrument itself, but from his relation to the parties in interest, the family arrangements, and circumstances surrounding him; and in ascertaining the intention the language of the will may sometimes be changed, words discarded as surplusage, or other words supplied, and words and sentences transposed.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. § 968; Dec. Dig. § 441.*]

2. WILLS (§ 616*)—CONSTRUCTION—REQUESTS FOR LIFE WITH POWER OF DISPOSITION.

A testator gave his property, including two houses and lots, to his wife for life, with full power to sell it, or any part thereof, and invest and reinvest the proceeds, and gave one-half of all that might remain at her death in trust for a daughter, during her life, such one-half to include a specified one of the houses and lots to be occupied by her free of charge during her life. It further provided that the trustee should not sell such house and lot without the consent of the daughter and her husband. *Held*, that the will imposed no limitation upon the power of the wife to sell such house and lot during her lifetime.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. §§ 1418-1430; Dec. Dig. § 616.*]

Appeal from Circuit Court, Jefferson County, Chancery Branch, Second Division.

Action between Moses Levy's executrix and others and Mary E. Leeds. From the judgment, the executrix and others appeal. Reversed and remanded, with directions.

Alfred Selligman and Joseph Selligman, both of Louisville, for appellants. Harrison & Harrison and James S. Pirtle, all of Louisville, for appellee.

NUNN, J. This appeal is from a judgment of the second division of the chancery branch of the Jefferson circuit court, construing the will of Moses Levy. The case was tried upon an agreed state of facts, which shows, among other things, that in 1902 Moses Levy owned a large estate, consisting of both real and personal property; that he made a will on that date; that he died leaving surviving him Henrietta Levy, his wife, and two children, a son, Frederick Levy, and a daughter, Lena, who married Emil S. Tachau; that he owned two lots fronting on First street in the city of Louisville; that during the lifetime of Moses Levy he, his wife and son, resided in one of these houses, and his daughter and her husband resided in the other. In the first clause of his will he directed that his debts be paid, and made many special bequests to charitable institutions. In the seventh clause thereof he provided as follows:

"(7) All the rest and residue of my estate of every kind and wherever situated I give and bequeath and devise to my beloved (wife)

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Henrietta Levy, for and during her life, with full and complete power and authority to her, to sell, dispose of, convey, invest and reinvest the same, or any part thereof, or the proceeds thereof from time to time as she may deem proper, the proceeds in such case to be held and controlled by her upon the same terms and conditions and with the same powers and authority as the original estate under this will, but no purchaser or purchasers from my wife shall be required to look to the application, investment or reinvestment of said proceeds or any part thereof.

"I further authorize and empower my said wife in her discretion to loan or advance to my son, Frederick Levy, from time to time so as to enable him to continue or go into business, such sum or sums as in her judgment will not in the aggregate exceed one-half of what will be said Frederick's share of said residuary estate under the provisions of this will at the time of my wife's death. Said Frederick shall execute his promissory note or notes to my wife as executrix of this will for the amount of such loans or advancements payable at such time or times as she may direct and bearing interest from their date at five per cent. per annum payable at such intervals as she may direct, and he shall be charged with such loans or advancements in the final division of my residuary estate under this will.

"I give, bequeath and devise all that may remain at the death of my wife of my estate given and devised by this clause to her as follows, to wit: One-half thereof I give and devise to my son, Frederick Levy, subject to a charge for such sum or sums as may have been loaned or advanced to him as hereinbefore authorized and remain unpaid at the time of her death, and in allotting such one-half to my son Frederick there shall be included therein as part thereof the house and lot now occupied by me as a residence, the same lying on the west side of First street in Louisville, Ky., beginning at a point. [Here follows description.] The other one-half of my estate given and devised to my wife by this clause and remaining at the time of her death I give and devise to the Fidelity Trust & Safety Vault Co. of Louisville, Ky., as trustee and in trust for my daughter, Lena Tachau, for and during her life, with remainder over upon my said daughter's death as hereinafter set forth.

"Said trustee shall pay the income of said one-half in quarterly-yearly installments to my said daughter, Lena, during her life and her receipts shall be sufficient evidence of the payment thereof to her. In allotting said one-half share as aforesaid, to said trustee, there shall be included therein as part thereof a house and lot now occupied by said Emil S. Tachau and Lena Tachau as a home, the same lying on the west side of First street in said city of Louisville, immediately adjoin-

ing the house and lot allotted my son Frederick as above on the north beginning [here follows description] which house and lot my said daughter shall be permitted during her life to occupy as a home free of charge. Said trustee shall have the duties, rights and powers concerning said trust estate herein-after set forth," etc.

The will further provided that the trust company could not sell this house and lot situated on First street without the written consent of Lena Tachau and her husband, Emil S. Tachau.

After the will was probated, the widow and two children joined in a deed conveying the two houses and lots situated on First street to Mary E. Leeds for the consideration of \$12,000. Mrs. Leeds took possession of them, and has rented them out, collected the rents, paid the taxes and other charges thereon from that time to the present. It appears that Mrs. Leeds arrived at the conclusion that the will did not give Henrietta Levy, as executrix of her husband's will, the right nor power to sell the house and lot occupied by Lena Tachau; that she could not, therefore, pass a fee-simple title to it, as the husband of Lena Tachau did not join in the conveyance nor give his written consent. And it was for the settlement of this question that the parties agreed upon the facts and presented them to the lower court for settlement, as required by the Code. There is no question about the title being in Mrs. Leeds to the place occupied by Moses Levy and his wife during his life, which was also the place Frederick Levy was to get under certain contingencies named in the will. The only question for this court to consider is: Did a fee-simple title pass to Mrs. Leeds by the deed of the widow, Henrietta Levy, in her own right and as executrix of the will of her husband? If it did, the judgment must be reversed; if it did not, the judgment must be affirmed. To settle this question we must ascertain the intention of the testator from the entire will.

[1] Appellee's counsel contend that the intention of the testator must be gathered from the instrument itself, as well as from the relation of the testator to the parties in interest, the family arrangements, and the circumstances which surrounded the testator at the time he made the will, and that, in order to ascertain his intention, it is sometimes permissible to change the language of the will, to discard words as surplusage when they appear to be without meaning as used, to supply words, to transpose words and sentences, and many authorities are cited to support this contention, among them being *Buschemeyer v. Klein*, 139 Ky. 124, 129 S. W. 551. This is the correct rule in the construction of wills; therefore appellee's counsel claim that the following language, "which house and lot my said daughter shall be permitted during her life to occupy as a home free of charge," limits the power and right

of the widow, the executrix, to sell and convey this house and lot.

[2] This language of the will, taken by itself, would seem to have that effect; but it does not so appear when considered in connection with the will as a whole. In the first part of the clause above copied, he devised to his wife, Henrietta Levy, all the rest and residue of his estate of every kind, wherever situated, for and during her life, with full and complete power and authority to sell, dispose of, convey, invest, and reinvest the same, or any part thereof, or the proceeds thereof, from time to time as she may deem proper. Further along in the same clause he used the following language: "I give, bequeath and devise all that may remain at the death of my wife of my estate given and devised by this clause to her as follows." He then continues by giving one-half of what remained to his son, and by disposing of the other one-half as follows: "The other one-half of my estate given and devised to my wife by this clause and remaining at the time of her death I give and devise to the Fidelity Trust & Safety Vault Co. of Louisville, Ky., as trustee and in trust for my daughter, Lena Tachau, for and during her life, with remainder over upon my said daughter's death as hereinafter set forth." Thus it will be seen that the language of the will which permitted Lena Tachau to occupy the house free of charge had reference to her occupancy after the death of Henrietta Levy, and while the daughter's estate was in the hands of the Fidelity Trust & Safety Vault Company. It is evident that the testator did not use this language intending to limit the power that he had given his wife to sell and convey his property during her life. He seems to have had great confidence in the honesty and business ability of his wife. He expressly, without any character of limitation, invested her with full and complete power to *sell and convey all* of his estate, both real and personal, or any part thereof.

The only language in the will which it is claimed placed any limitation upon the wife's right to sell and convey is that copied above, and that is only applicable after the death of Henrietta Levy, at which time the daughter's estate is to be in the hands of the Trust Company. He knew and was willing to risk the love of the mother for the daughter; and he knew that, as he had devised the mother considerable property, she would provide for the daughter and protect her interests. Taking the will as a whole, it seems that he scarcely expected his wife to dispose of these houses and lots, and expected that they would be undisposed of at her death; but there is nothing in the will indicating a purpose on his part to limit his wife's right in that respect. He was willing to risk her business acumen in that regard. The will appears to have been prepared by a person

who understood the meaning of the language used. The will is plain and unambiguous, and there is no necessity to discard, transpose, or to supply words, or to change sentences, etc., to arrive at the true intention of the testator. It appears that the widow, in her individual right and as executrix, conveyed both of the houses and lots to Mrs. Leeds. Her daughter and son both joined in the deed, but unnecessarily. Her right and power was complete under the will of her husband, and her deed alone would have been sufficient to convey the fee-simple title to Mrs. Leeds.

For these reasons, the judgment of the lower court is reversed and the cause remanded, with directions to the lower court to dispose of the matter as indicated in the opinion.

HATFIELD v. HATFIELD.

(Court of Appeals of Kentucky. Nov. 27, 1912.)

1. EASEMENTS (§ 3*)—RESERVATION OF WAY—APPURTENANCES.

Where a grantor of land reserved for himself a way to the highway, such reservation, being for the benefit of land retained, is an appurtenance to that land, and passes to the grantor's subsequent grantee, though not expressly mentioned in the deed.

[Ed. Note.—For other cases, see Easements, Cent. Dig. §§ 8-12; Dec. Dig. § 3.*]

2. EASEMENTS (§ 44*)—EXTENT OF RIGHT—WAYS.

A grantor reserved through the land granted an existing way to the public highway. The way struck the highway at such an angle that to turn to the left it was necessary to make a short turn up an incline, and, to avoid this, the grantor habitually drove across the highway making a curve on his land across the road, thus having an easy turn to the left. *Held*, that, upon repair of the highway obviating this dangerous curve, the right of the grantor or his subsequent grantees to use the land across the highway was lost.

[Ed. Note.—For other cases, see Easements, Cent. Dig. §§ 98-100; Dec. Dig. § 44.*]

Appeal from Circuit Court, Grayson County.

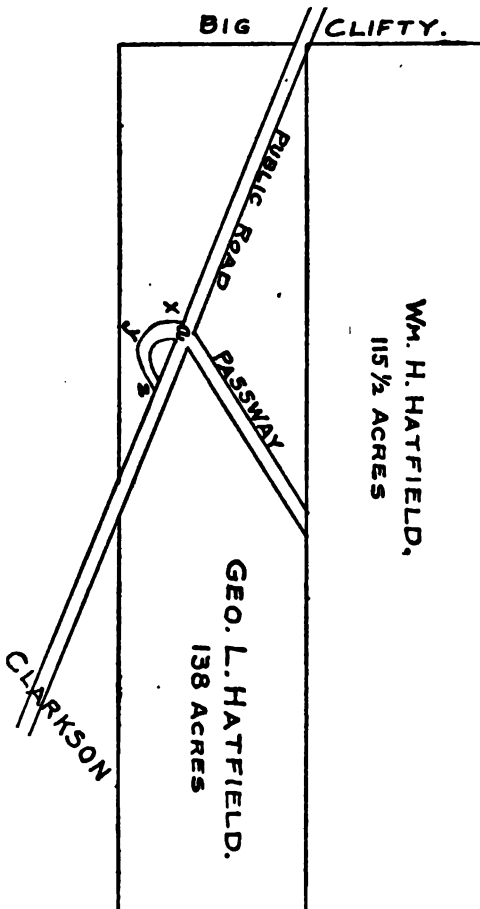
Action by William H. Hatfield against George L. Hatfield. From a judgment for defendant, plaintiff appeals. Affirmed.

G. W. Stone and J. C. Graham, both of Leitchfield, for appellant. Chas. V. Higdon and Z. T. Proctor, both of Leitchfield, for appellee.

HOBSON, C. J. William Hatfield brought this suit against George L. Hatfield to recover damages for the stopping up of a pass-way by the latter. On a trial of the case before a jury there was a verdict and judgment for the defendant. The plaintiff appeals.

The facts of the case are these: H. C. Wooldridge, who then owned a tract of 253½ acres of land, conveyed 138 acres of

the tract to George L. Hatfield. The public road leading from Big Clifty to Clarkson ran through the tract. Wooldridge had a passway leading out to the road and striking the road at an angle, so that to turn toward Clarkson it was necessary to make a rather sharp curve up an incline. To avoid this, for a number of years Wooldridge had driven across the road, making a curve on his own land beyond it, and coming back to the public road. The public road had become washed, and the public had for some years followed this curve, and had not traveled the public road. In this condition of things in the deed to George L. Hatfield Wooldridge inserted the following stipulation: "It is expressly understood and agreed by the parties hereto that the road and right of way now existing through the tract hereby conveyed, shall remain open to the party of the first part." On January 4, 1909, Wooldridge sold and conveyed to W. H. Hatfield the remaining 115½-acre tract which he owned. In this deed there is no mention of the passway referred to, but by it Wooldridge conveyed the land "together with all the appurtenances thereunto belonging." The situation at the time this deed was made is shown by the following plot:



In August, 1911, the road supervisor repaired the public road and put it back on its original location, and, when this had been done, George L. Hatfield put his fence along the line of the public road, so that William Hatfield could no longer drive on the curve beyond the road indicated by the figures xyz on the plot; this curve being 100 feet long, and there being a space of 10 feet between it and the county road at the widest place. The thing in controversy is the right of William Hatfield to drive over the curve xyz, which is on the other side of the county road from his place. The circuit court told the jury that the reservation of the passway in the deed from H. C. Wooldridge to George L. Hatfield gave the plaintiff no right to the passway beyond the public road, or that part embracing the curve xyz. Of this instruction appellant complains.

[1] The purpose of Wooldridge in making the reservation was to retain for himself a way out when he sold the land lying between himself and the public road. This reservation was made for the benefit of the tract which he still owned and afterwards sold to William H. Hatfield. It was an appurtenance to that tract and passed to the grantee of that tract though it is not expressly mentioned in the deed; for, being an appurtenance, it ran with the land. *Gibson v. Porter*, 15 S. W. 871, 12 Ky. Law Rep. 917; *Kamer v. Bryant*, 103 Ky. 729, 46 S. W. 14, 20 Ky. Law Rep. 340; *Ray v. Nally*, 89 S. W. 486, 28 Ky. Law Rep. 425. But what Wooldridge reserved was a passway out to the public road.

[2] The right of way referred to in the deed was the right of way to the public road. When he reached the public road, the right of way ended. The object of the reservation was to give him a way out to the public road. It was not contemplated that he should have a right of way beyond the public road. It is true that he had been in the habit of driving beyond the road for convenience, but a reservation in a deed should not be extended so as to give him rights beyond the public road, when the purpose was to give him a right of way out to the road. We therefore conclude that the circuit court properly instructed the jury that the defendant had the right to close up the curve on the far side of the road.

If Wooldridge had continued to own the whole tract, can it be believed that he, when he fenced and cleared the land, would have kept up this curve on the far side of the public road, after that road was put back in its original location? In the construction of a reservation of a passway in a deed the grantor cannot demand of his grantee greater rights than a man would reasonably exercise in his own right if he owned both pieces of land. Each must exercise his rights with due regard to the rights of the other. The parties must be presumed to contem-

plate that in time the land would be cleared and inclosed, and they cannot be presumed to have contemplated that there should be two roads here, after the county road was put back in the proper place and the land was cleared and inclosed.

But under the deed William H. Hatfield has a right of way out, and, if the angle is too sharp for him to turn with reasonable convenience toward Clarkson, he is entitled to have the passway widened at this point so as to have a reasonable space to turn in the direction of Clarkson. No doubt the parties can agree as good neighbors upon a reasonable cutting off of the sharp angle at the point a; but if they cannot, and George Hatfield obstructs this angle so as to prevent William Hatfield from having a reasonable outlet in going in the direction of Clarkson, he may have remedy.

There is no question of adverse possession in the case, as the rights of the parties accrued when their deeds were made in 1908 and 1909. Before this all the land belonged to Wooldridge, and George L. Hatfield now owns his body of land subject to the reservation made in his deed.

Judgment affirmed.

RITTER v. BOARD OF EDUCATION OF EDMONSON COUNTY.

(Court of Appeals of Kentucky. Dec. 3, 1912.)

1. SCHOOLS AND SCHOOL DISTRICTS (§ 69*)—SCHOOLHOUSE—ABANDONMENT OF SITE.

The intention of a school board to change the site of a school and the letting of a contract to build on the new site on which work was begun, but discontinued by order of the board, who decided to build on the old site, was not an abandonment of the old site within a deed providing that, on abandonment for school purposes, the site should revert to the grantors; school at the time being taught in it.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. § 174; Dec. Dig. § 69.*]

2. SCHOOLS AND SCHOOL DISTRICTS (§ 68*)—STATUTES—SCHOOLHOUSES—TITLE TO PROPERTY.

A school board may erect a school on a site held under a deed providing that, on the abandonment of such site for common school purposes, the site should revert to the grantor under Ky. St. § 4426a, giving the board power "to purchase, lease or rent school sites." Section 4437, requiring a fee title for schoolhouse lots, being an earlier statute, and in conflict, does not apply.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. §§ 170-173; Dec. Dig. § 68.*]

3. SCHOOLS AND SCHOOL DISTRICTS (§ 68*)—SCHOOLHOUSES—SCHOOL BOARD—DISCRETION.

In an action to restrain the erecting of a schoolhouse, evidence held to warrant a finding that the board did not abuse its discretion in choosing the old site.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. §§ 170-173; Dec. Dig. § 68.*]

Appeal from Circuit Court, Edmonson County.

Action by L. H. Ritter to enjoin the County Board of Education of Edmonson County from erecting a schoolhouse. From a judgment dismissing the action, plaintiff appeals. Affirmed.

Logan & Hazell, of Frankfort, for appellant. Grider & Logan, of Brownsville, for appellee.

NUNN, J. This action was brought by appellant, a resident of subdistrict No. 1, of district No. 3, to enjoin the county board of education of Edmonson county from erecting a schoolhouse on a certain site which had been selected by the board. On a trial in the lower court the injunction was dissolved, and the action dismissed.

It appears that the place where the trustees were having the house erected was called the "old site"; that it was the place where the common school had been maintained in the district for at least 60 years; that it was used as such for at least 40 years before the trustees obtained a deed for it. It further appears that appellant's vendor and one of his adjoining neighbors made the deed to the district, and inserted therein the following clause: "Should the lot of ground cease from any cause to be the site for the common school of said district said lot is to revert to its grantors, and the house then standing is to be the property of the district to be removed from said lot."

[1] It appears that from four to six months before the board selected the old site upon which to erect this house it had selected another site 200 or 300 yards distant from the old site; that it had let the contract to build the house on this site, and the contractor had commenced the work. Appellant claims that by these acts the district abandoned this property, and it reverted to the grantors in the deed, or their heirs or assigns, and that he was entitled to most of the lot as his grantor conveyed most of it. It appears that, soon after the contractor began work on the new site, the board of education notified him to cease work; that within a few days after giving the notice the board met in the old schoolhouse, and considered the matter with reference to the change of site, and adjourned to meet another day; that they did meet again and finally rescinded the order making the change to the new site, and selected the old site, and directed the building to be erected there. There is nothing in the statutes to prevent the board from changing its mind and rescinding the order referred to. It had a perfect right to do so, and to select another place for the erection of the schoolhouse. The intention, which existed for a few months, to change the site of the school-

house, did not have the effect of itself to abandon the old site. The house on the old site was still in use—school was at that time being taught in it. The site was never changed. The intention of changing it was abandoned before the removal was complete.

[2] Appellant contends that the board had no right to erect the schoolhouse upon the old site, as it did not have the fee-simple title to it, and that his action ought, therefore, to have been sustained for two reasons: First, because the district had abandoned this site; second, because the deed containing the clause above quoted shows that the district had not the fee-simple title to the lot. The first reason, as above stated, is without foundation. As to the second, it is our opinion that the board had such a title as would authorize it to construct the building thereon. Section 4426a, Kentucky Statutes, says the county board of education shall have the power "to purchase, lease or rent school sites, to build, to repair and to rent schoolhouses," etc. This seems to be conclusive of the board's right to erect the house. Appellant's contention is that section 4437, Kentucky Statutes, an act of 1893, requires the school board to own the property in fee simple. It seems that this act is in conflict with the act of 1908 referred to in section 4426a, for this section expressly provides that the county board of education has power to purchase, lease, or rent schoolhouse sites. See, also, *Evans v. Cropp*, 141 Ky. 514, 133 S. W. 221.

[3] Appellant also contends that the county board abused its discretion in selecting the old site upon which to erect the schoolhouse, as the ground is rough, steep, and covered with large rocks; that it is unsanitary because the spring from which the school obtains water is lower than the schoolhouse, and is polluted by drainage from the school grounds, and therefore injurious to the health of the children attending the school. There was much testimony introduced showing that appellant's contentions are correct, but there was much more introduced showing that his claims were without foundation; that the place selected was better suited than any other near the center of the school district; that it was a nice shady place; that the spring afforded fine water, and was within 30 or 40 steps of the house; that the drainage from the school grounds entered a branch, but none of it flowed into the spring; that the spring is not what is called a "boiling spring," but came from under a large hill back of the schoolhouse; that the new site spoken of was more level than the old site, but had no shade or water nearer than the old site. It is admitted that the old grounds are rough, that it has considerable rock scattered over it, which appellant's witnesses said were dangerous to the children, but

appellee's witnesses testified that the rock could be removed without much expense. A large majority of the school patrons of the district petitioned the board to erect the house on the old site, and we cannot say that the evidence shows that it abused its sound discretion in doing so.

For these reasons, the judgment of the lower court is affirmed.

LONG v. BARBER ASPHALT PAVING CO. et al†

(Court of Appeals of Kentucky. Nov. 29, 1912.)

1. MUNICIPAL CORPORATIONS (§ 646*) — STREETS—EXISTENCE.

Where a street improved for travel has not been dedicated to the public or accepted or recognized by the municipality as such, the street is not a public street, though the owners intend to dedicate it to the public.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1419; Dec. Dig. § 646.*]

2. MUNICIPAL CORPORATIONS (§ 450*)—STREET IMPROVEMENTS—ASSESSMENT DISTRICTS.

Where territory on one side of a street to be improved at the cost of territory in an assessment district was divided into squares by streets, while the territory on the other side was not so divided, the assessment district on the latter side must be limited to a line running the same distance from the street that the line on the other side of the street is run.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1073, 1074; Dec. Dig. § 450.*]

3. MUNICIPAL CORPORATIONS (§ 465*)—STREET IMPROVEMENTS—ASSESSMENTS.

Where an assessment district for a street improvement has been properly fixed, the cost of the improvement must be apportioned to the property in the district, so that all of the property will bear its just proportion of the cost.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1108; Dec. Dig. § 465.*]

4. VENDOR AND PURCHASER (§ 198*)—INCUMBRANCES—LIENS FOR STREET IMPROVEMENTS.

Since a lien for the cost of a street improvement does not attach until the apportionment warrant has been issued, land in an assessment district conveyed after the ordinance for the improvement and the letting of the contract but before the work was done is not then incumbered by such a lien.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 408-412; Dec. Dig. § 198.*]

Appeal from Circuit Court, Jefferson County, Chancery Branch, Second Division.

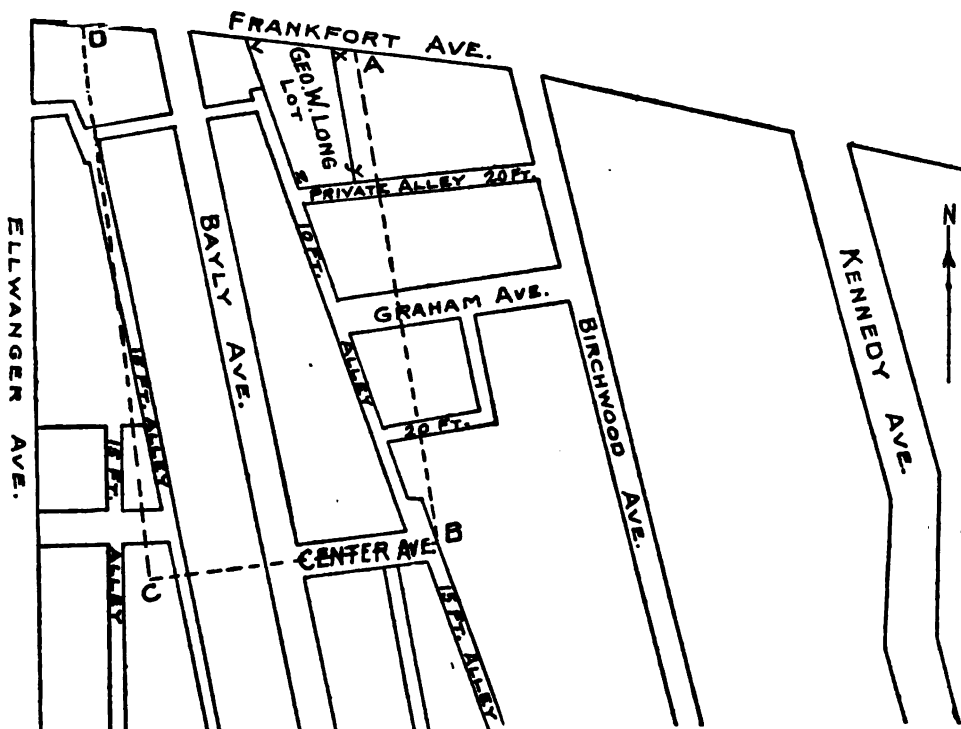
Action by the Barber Asphalt Paving Company against George W. Long, who filed a cross-petition against Nancy Jane Birch. From a judgment for plaintiff and in favor of Nancy Jane Birch on the cross-petition, defendant appeals. Reversed as to plaintiff, and affirmed as to Nancy Jane Birch.

A. Lanier and Du Relle & Fleece, all of Louisville, for appellant. William Furlong and Furlong, Woodbury & Furlong, all of Louisville, for appellees.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes
† Rehearing denied January 14, 1913.

LASSING, J. By an ordinance approved April 7, 1910, the city council of Louisville ordered the original construction of Bayly avenue from Frankfort avenue to Center avenue extended, and directed that "said work should be done at the cost of the owners of the ground on the east side of Bayly avenue from Frankfort avenue to the center line of Center avenue extended and extending back to a line midway between Bayly avenue and a private way, known as Birchwood avenue; and on the west side of Bayly avenue to the center line of Center avenue extended and extending to the line midway between Bayly and Ellwanger avenues." On May 16th following a contract for the original construction of this street was awarded to the Barber Asphalt Paving Company. On July 15th, and before the work was begun on the contract, George W. Long purchased of Nancy Jane Birch a tract of land lying, in part, within the zone affected by this improvement, said property being shown on the accompanying map by the letters x, y, v, z.

ceiving that the apportionment was inequitable and unjust, George W. Long and certain other property holders declined to pay the warrants issued against their property. The contractor instituted suit, in which it sought to have their property subjected in satisfaction of the warrants. In his answer the defendant, Long, resisted payment upon three grounds: First, that the ordinance was invalid, because the provisions of sections 2832 and 2833, Kentucky Statutes, had not been followed; second, because council erred in fixing the east line of the assessment district a greater distance from Bayly avenue than the western boundary line of said district was situated from said avenue; and, third, because certain property within the zone of the improvement was entirely omitted from assessment. He also made his answer a cross-petition against his vendor, Nancy Jane Birch, and pleaded as to her that, inasmuch as the improvement had been directed and the contract therefor let prior to his purchase of the property, under his contract



Work was begun shortly thereafter on the contract, and it was completed early in October. Immediately upon its completion, apportionment of the cost was made and warrants therefore were by the city of Louisville issued and placed in the hands of the contractor. In apportioning the cost, the city followed the provisions of the ordinance fixing the assessment district. The eastern boundary of the assessment district is evidenced by the dotted lines A-B, and the western boundary by the dotted lines C-D. Con-

with her she was answerable on her warranty for any assessment which should be made against his property, and sought to have her required to pay such assessment as the court should, upon final hearing, hold his property answerable for. Issue was joined, proof taken, and upon final hearing the chancellor was of opinion that there was no merit in these respective contentions of the defendant, Long, and judgment was entered in accordance with the prayer of the petition, and dismissing his cross-petition. Long ap-

peals, and seeks a reversal both as to the validity of the ordinance and the apportionment warrant issued against his property, and the finding of the chancellor against him on his cross-petition against Nancy Jane Birch.

[1] On the west side of Bayly avenue, the territory is defined into squares by principal streets, whereas on the east side of Bayly avenue the territory is not so defined, unless Birchwood avenue is a public way or street, for the distance from Bayly avenue to the first public street or road east of Bayly avenue is about 2,400 feet, a distance greatly in excess of the length of a city block. Council, in the draft of the ordinance, for this improvement, treated Birchwood avenue as though it were a public way or street, although in the ordinance it is referred to as a private way. There is no evidence in the record showing that this Birchwood avenue has ever been dedicated to the public as a street, or accepted or recognized by the city as such, although it is undoubtedly in its appointments equipped as well, if not better, than most of the public streets in the city. Still, the fact that it is highly improved cannot make of it a public street or way, if no steps have been taken to dedicate it to the public use. Defendant in his pleading denies that it is a public way, and there is no evidence whatever supporting the position of the plaintiff to the contrary. With the record in this condition we are constrained to hold that Birchwood avenue has not been shown to be a public way or street. A similar question arose in *Nevin v. Roach*, 96 Ky. 492, 5 S. W. 546, 9 Ky. Law Rep. 819. In that case it was shown that a street known as Madison, while improved, had not in fact been dedicated to the public use, or accepted by the city, although the owners contemplated so dedicating it at the time. It was held, upon consideration here, that the fact that it had been improved and that the owners intended to dedicate it to the public use was not sufficient, the court saying: "But it has never been accepted by the city, and therefore the case must be considered without regard to such a street, and it was not in existence when the improvement was ordered and the contract entered into, or when the work was completed."

[2] To the east of Bayly avenue the property is not divided or defined into squares by principal streets, and we have a case where the property on one side of the street is defined into blocks or squares by principal streets, and on the other side it is not. This identical question has likewise been before this court in the case of *Preston v. Roberts*, 12 Bush, 570, which arose out of the original construction of Barrett avenue in the city of Louisville. Brent avenue was a dedicated street lying to the east of Barrett avenue, and the assessment district was fixed at a point midway between Barrett avenue and Brent avenue. Upon the west side of

Barrett avenue there was no dedicated or principal street within the distance of an ordinary city block, and council, in its ordinance, fixed the assessment district at a point 252 feet west of Barrett avenue. This figure was adopted upon the assumption that this distance would be halfway between Barrett avenue and a street which would in the future be opened to the east thereof and at a distance of 504 feet from Barrett avenue. The validity of this ordinance and apportionment was contested, and, upon consideration here, were held to be invalid. The court said: "Assessments should be made in accordance with the facts existing at the time, and cannot be properly based upon speculation as to what will occur in the future." To the same effect are *Cooper v. Nevin*, 90 Ky. 85, 13 S. W. 841, 11 Ky. Law Rep. 875, *Nevin v. Roach*, 86 Ky. 492, 5 S. W. 546, 9 Ky. Law Rep. 819, and *City of Louisville v. Selva*, 106 Ky. 730, 51 S. W. 447, 52 S. W. 809, 21 Ky. Law Rep. 349, 620.

In *City of Louisville v. American Standard Asphalt Co.*, 125 Ky. 497, 102 S. W. 806, 31 Ky. Law Rep. 133, the litigation arose over the original construction of Rosewood avenue. The ordinance providing for its construction treated the territory on both sides of said avenue between Baxter and Von Borries avenues as being divided into squares by principal streets. The court found that the next street, running parallel with Rosewood avenue on the east, was 1,500 feet from Rosewood avenue; that this was too great a distance to be treated as a city square; and that, therefore, the assessment district should extend east of Rosewood avenue only to the same distance that it extended to the west thereof. In disposing of the question, the court said: "Now, what is the requirement of the charter in a case like this: Here the territory on the west side of the improvement was defined into squares, then under the express language of the charter the tax district on that side must be one-half the depth of the squares, and, this being true, the tax district on the east side can only be the same depth. This is necessary to comply with the requirements of the law of equality of burden. *Preston v. Roberts*, 12 Bush, 584; *Cooper v. Nevin*, 90 Ky. 88 [13 S. W. 841, 11 Ky. Law Rep. 875]. The general council have no more discretion in fixing the tax district for the east side than they have for the west side." The opinions in these cases are conclusive of the rights of the parties here. The ordinance correctly defined the boundary of the assessment district on the west side of Bayly avenue, and the territory to the east of Bayly avenue, not being divided or defined into squares by principal streets, the ordinance should have limited the assessment district on the east side of Bayly avenue to a line running the same distance therefrom that the assessment line on the west side of the avenue was run. In other

words, if the line C-D is 250 feet from Bayly avenue, the line A-B should be a like distance therefrom.

[3] As to the second proposition, the statute provides that the cost of the construction must be apportioned to all of the property within the assessment district. The claim is that certain property lying within this district was omitted from assessment. This contention is not seriously denied, but it is insisted that a portion of the property so omitted belonged to appellant, and that to assess it for its proportionate share of the cost would increase, rather than diminish, the burden of taxation as to him. This contention, however, is based upon the idea that the assessment line lying to the east of Bayly avenue, as fixed in the ordinance, is correct; but since it has been determined that this assessment line is not correct, and under a correct assessment not nearly so much of appellant's property will lie within the assessment zone, we are unable to determine whether the assessment of this omitted property would be beneficial or harmful to him. However, inasmuch as the case must be reversed for other reasons, it is unnecessary to enter into a consideration of this question. When the assessment zone has been properly fixed, as above indicated, and the cost of the improvement is apportioned to the property in said zone, the statute should be strictly complied with and all of the property lying within said zone made to bear its just proportion of the cost. This disposes of the questions raised in the litigation between the contractor and the appellant, Long.

[4] As to the claim asserted by appellant against Nancy Jane Birch, we are of opinion that the ruling of the chancellor thereon was correct. Cases might arise where a distinction can be drawn between an incumbrance and a lien, but in the case under consideration there is no incumbrance until there is a lien. They are identical or synonymous, for the reason that, until the apportionment warrant is issued, there is no lien; and, in the absence of a lien, there is no incumbrance. The property is never liable for any part of the cost of the improvement until the apportionment warrant is issued. The right of the city to impose upon abutting property the cost of the original construction of a street is one of purely statutory origin. The owner of the property is not liable, in any event for the cost of the improvement, but the property itself is placed in lien therefor. This lien does not attach until the apportionment warrant has been issued. Until this has been done, the property cannot be said to be incumbered or burdened with any part of the cost of the improvement, for the reason that the burden has not been laid upon it. It is not the ordinance pro-

viding for the improvement, nor the letting of the contract, that burdens the property with its share of the cost of the improvement, but it is the improvement itself for which the property is held answerable. The lien must attach at some time, and this the statute provides shall exist from the date of the apportionment warrant. Now, although, at the time of the conveyance by Mrs. Birch to appellant, the improvement had been ordered and the contract let, the work had not, in fact, been done, and the contractor, under the broadest and most liberal construction that could be placed upon his contract, had, at the time of this purchase by appellant, no claim whatever upon this property for anything; and hence there was no incumbrance upon the property for which his vendor is in any wise answerable, and the chancellor correctly so held.

Judgment reversed as to the contractor, Barber Asphalt Paving Company, and affirmed as to appellee, Nancy Jane Birch.

BOARD v. LUIGART et al.

(Court of Appeals of Kentucky. Nov. 27, 1912.)

1. LANDLORD AND TENANT (§ 274*)—RENT-DISTRESS—REMEDIES FOR WRONGFUL DISTRESS.

The remedies for wrongful distress for rent prescribed by Ky. St. § 2303, and Civ. Code Prac. § 653, both of which require the tenant to execute a forthcoming bond for the property distrained, are not exclusive; Ky. St. § 2310, providing a remedy by replevin, section 7 providing remedy by action without bond, and the common law affording a similar remedy.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 1154-1166; Dec. Dig. § 274.*]

2. LANDLORD AND TENANT (§ 274*)—RENT—WRONGFUL DISTRESS—DOUBLE DAMAGES.

In a common-law action for damages for wrongful distress, double damages provided for by Ky. St. § 2312, cannot be recovered, as it is in the nature of a statutory penalty.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 1154-1166; Dec. Dig. § 274.*]

3. SHERIFFS AND CONSTABLES (§ 139*)—WRONGFUL DISTRESS—LIABILITY—DOUBLE DAMAGES.

An officer who executes an illegal distress warrant or writ of attachment is liable only for the actual or market value of the property wrongfully seized or sold under the writ, and cannot be mulcted in double damages.

[Ed. Note.—For other cases, see Sheriffs and Constables, Cent. Dig. §§ 297-307; Dec. Dig. § 139.*]

4. LANDLORD AND TENANT (§ 274*)—SHERIFFS AND CONSTABLES (§ 137*)—WRONGFUL DISTRESS—NATURE OF ACTION.

A petition in an action to recover damages for the illegal seizure and sale of household goods distrained for rent, averring that plaintiff occupied the premises under an agreement to pay a stipulated sum per month, which sum was to be derived from an illicit business to be conducted in the premises, that during the last months of the tenancy plaintiff derived no in-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

come from the premises, and hence, no rent was due for which distress would lie, and that, despite this and the fact that the property distrained was exempt, the principal defendant illegally instigated and caused the defendant constable to unlawfully distraint plaintiff's property which, being illegally sold at public auction, was purchased by the principal defendant—states a cause of action both at common law and under the statute as against the principal defendant and an action at common law against the constable for wrongful seizure and sale of the property distrained, the gist of the action not being to recover damages for a malicious suing out of the distress warrant, or for the malicious prosecution of a civil action.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 1154-1166; Dec. Dig. § 274; * *Sheriffs and Constables*, Cent. Dig. §§ 280-289; Dec. Dig. § 137.*]

Appeal from Circuit Court, Fayette County.

Action by Lucy Board against Gustave Luigart and others. From a judgment dismissing the petition, plaintiff appeals. Reversed and remanded.

R. S. Crawford and J. H. Minogue, both of Lexington, for appellant. J. A. Edge, of Lexington, for appellees.

SETTLE, J. This is an appeal from a judgment of the Fayette circuit court sustaining a demurrer to, and dismissing, appellant's petition, in an action to recover damages for the alleged illegal seizure and sale of her household goods under a distress warrant wrongfully issued for rent.

The petition, as amended, admits the renting by appellant of a house and lot in the city of Lexington from the appellee Gustave Luigart, and alleges that it was, with his knowledge, occupied and maintained by her as a bawdyhouse, and that for the use thereof he was to receive from her \$60 per month, payable out of the proceeds or income derived from the illicit business she was to conduct therein; that she did, pursuant to the contract with the appellee Luigart, occupy and maintain the premises as a house of ill fame from some time in the year 1907 down to and including the month of July, 1911, during which time she paid to him a large part of the income derived from its maintenance as a house of ill fame, and all the rent that was due him thereon to the end of July, 1911; and that though she continued to occupy the property for some months after July, 1911, she neither paid nor owed him any rent upon the property for these months, as she derived no income thereon from the illicit business for which it was rented.

It is further alleged in the petition that she was and is the owner of a lot of household goods, kitchen furniture, piano, and other personal effects, an itemized list of which is filed with and made a part of the petition; that in November, 1911, the appellee Luigart wrongfully caused to be issued a distress warrant against appellee for rent alleged to be due him from her for the

house and lot in question, which the appellee J. P. Embree, a constable of Fayette county, at the instigation and direction of the appellee Luigart, illegally levied upon the household goods, kitchen furniture, piano, and other property belonging to appellant described above, and thereafter, on the 13th of November, 1911, over the objection of the appellant, illegally sold same at public auction, at which sale the appellee Luigart became the pretended purchaser at the price of \$225, a sum greatly less than its actual value; that the property was then reasonably worth \$1,250, and the whole thereof was exempt from distress for rent and also from sale under execution, which fact was at the time well known to the appellees Luigart and Embree as before its distraint, and again, before the sale thereof, they were both so notified by appellant, and that she claimed it as exempt property. It is also alleged in the petition that appellant is now and was at the time of the seizure and sale of the property mentioned a bona fide housekeeper and person with a family, consisting of herself and four infant children; that she had no provisions, including breadstuffs and animal food, to sustain her family for one year or any part of that time; that practically all the property sold by appellees under the distress warrant consisted of articles which, under section 1697, Kentucky Statutes, were and are exempt from execution and distress for rent, and should have been specifically set apart to her as a person with a family; and that to the remainder she was and is entitled under the section, supra, in lieu of the provisions for the support of herself and family for the year, which she did not own or have on hand, and which remainder was not of value equal to \$40 for each member of the family.

[1, 2] It is stated in the brief of counsel for appellant that the demurrer to the petition was sustained on the ground that appellant's only remedy against the distress warrant was the executing of a bond and presenting her defense to same as pointed out by section 2303, Kentucky Statutes, and that she could not by an action, as here attempted, recover of appellees damages for the illegal seizure and sale of her property. On the other hand, it is contended by counsel for appellees that the demurrer was sustained, because, in the opinion of the circuit court, the only remedy of the tenant in such a case is to execute the bond provided for by section 653 of the Civil Code, and make defense to the distress warrant when judgment is sought by the landlord on the bond; and that a judgment in favor of the tenant in a proceeding on the bond referred to is a prerequisite to the latter's right to sue to recover damages for the illegal seizure and sale of her property. Neither of these propositions is sound. As to the first, it is sufficient to say that section 2303,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Kentucky Statutes, applies solely to attachments for rent, and, under its provisions, a person in possession of the property attached for rent may, as allowed by section 214, Civil Code, execute bond to the effect that the property or its value shall be forthcoming and subject to the order of the court on the trial of the attachment, or the defendant in the attachment may, as allowed by section 221, Civil Code, execute the bond therein mentioned to perform the judgment of the court, and thereby obtain a discharge of the attachment and restitution of any property taken under it or of the proceeds thereof, leaving the attaching landlord to his remedy on the bond. If the bond be given under section 214, Code, it is only an obligation for the forthcoming of the property; but, if given under section 221, its effect is to discharge the attachment, and to remove the attached property from the custody of the court and its officers. In a proceeding to enforce the payment of the bond given under section 221, neither the sufficiency of the grounds of attachment nor the liability of the property levied upon can be inquired into. On the other hand, the execution of the bond provided for by section 214 does not prevent the person giving it, or any claimant of the property, from setting up his claim thereto and resisting the grounds of attachment when judgment is attempted to be obtained on the bond; indeed, section 29, Civil Code, makes it his duty to assert his claim or make his defense. In the event the distress warrant is issued in behalf of the landlord for rent the tenant may replevy the amount demanded as provided by section 2310, Kentucky Statutes, which would prevent him from making any defense to the distress warrant, or he may execute the bond allowed by section 653, Civil Code, which provides: "If an officer levy or be about to levy a distress warrant upon any property, the tenant, his assignee or under tenant may exercise, with one or more sufficient sureties, to be approved by the officer, a bond to the party in whose favor the warrant issued, to the effect that he will pay to such party the amount of the rent specified in the warrant, with ten per cent. thereon, if the property be of the value of the rent so specified; or, if it be of less value, that he will pay to such party the value thereof, and ten per cent. thereon. For the purpose of taking this bond the officer shall cause the property to be appraised as is provided in section 646. The appraisalment shall be annexed and referred to in the bond. Upon the giving of the bond, the levy, if one have been made, shall be discharged, and the bond and warrant shall be returned to some justice of the peace of the county, if the amount claimed do not exceed fifty dollars; and, if it exceed that sum, to the clerk's office of the circuit court of the county." If the bond provided for in section 653, Civil Code,

be given by the tenant, he may, when the party to whom the bond is executed shall move the court for a judgment thereon against the obligors, as provided in section 654, Civil Code, "make defense upon the ground that the distress was for rent not due in whole or in part or was otherwise illegal; or, if the property was levied upon, that it was by statute exempt from the levy; and may make any defense, by way of set off or counterclaim that is allowed by the Code in actions."

The remedy thus provided by sections 653 and 654 of the Civil Code is not, however, exclusive. The tenant may not be financially able to give the bond, or he may not wish to do so, and prefer by action to recover damages for the illegal seizure and sale of his property under the distress warrant, as allowed by section 7, Kentucky Statutes, which provides: "If property be distrained or attached without good cause for suing out such distress or attachment, the owner of such property may, in an action against the party suing out the distress or attachment, recover damages for the wrongful seizure; and if the property be sold, also damages for the sale thereof, and, the defendant's costs, in the distress or attachment including reasonable attorney's fees. In such cases the plaintiff shall not be held to allege or prove malice on the part of the defendant." It will be observed that this section permits the recovery of damages against the person wrongfully suing out the distress or attachment, and in such case section 2312, Kentucky Statutes, allows the recovery of "double damages for the wrongful seizure, and if the property be sold, for double the value thereof." The tenant may, however, instead of suing under the statute, bring a common-law action for damages against the person wrongfully procuring the distress warrant or attachment and the officer executing same for the wrongful seizure and sale of his property under the writ; but in such case the double damages allowed by section 2312, Kentucky Statutes, cannot be recovered. *Bell v. Norris*, 79 Ky. 48; *Garnett v. Jennings*, 44 S. W. 382, 19 Ky. Law Rep. 1712. The double damages or double the value of the property sold, provided for in section 2312, is in the nature of a penalty for which the person wrongfully suing out the attachment or distress is alone liable.

[3] The officer who executes the attachment or distress is only responsible in any event for the actual or fair market value of the property wrongfully seized or sold under the writ.

[4] The petition in the instant case appears to state a cause of action both at the common law and under the statute as against the appellee Luigart; but the facts alleged, if established by evidence, will also authorize a recovery against the appellee Embree, the officer executing the distress warrant, as

in a common-law action, for the wrongful seizure and sale of the property distrained, namely, its fair market value when sold.

Yet another remedy, in addition to those mentioned, that of suing for a recovery of the specific property taken under a distress warrant, is afforded the tenant by section 33, Civil Code, which provides: "An action to recover the possession of specific personal property taken under a distress warrant, if it be brought by the tenant, or his assignee or under tenant, may be against the party who sued out the warrant; and the property claimed in such case may, under an order for its delivery, be taken from the officer who seized it, if he have no other claim to hold it, other than that appearing from the warrant. The indorsement of the levy on the property made upon a warrant by the officer holding it, shall be a sufficient taking of the property to sustain an action against the party who sued out the warrant." Section 31 allows such an action by the tenant against the officer taking the property; and section 82 the substitution of the plaintiff in the writ for the officer sued, upon the application either of the plaintiff or defendant, in the distress warrant.

The present action is not, as appellees' counsel seem to think, one to recover damages of appellees for a malicious suing out of a distress warrant, or for the malicious prosecution of a civil action, which can only be maintained after a judgment has been rendered determining that the property seized and sold was not subject to distraint. It is simply an action to recover damages for the wrongful issuance of the distress warrant and the wrongful seizure and sale of appellant's property thereunder, upon the grounds that the appellee Lugart was not entitled to the rent claimed, and that the property seized and sold under the distress warrant was exempt under the law. It follows from what we have said that in sustaining the demurrer to the petition the circuit court erred.

Wherefore the judgment is reversed and cause remanded, with directions to the circuit court to overrule the demurrer, and for further proceedings consistent with the opinion.

DURBIN, Sheriff, v. OHIO VALLEY TIE CO.

(Court of Appeals of Kentucky. Dec. 6, 1912.)

1. TAXATION (§ 611*)—REVIEW—FINDING OF CHANCELLOR—SUFFICIENCY OF EVIDENCE.

Evidence, in an action to enjoin a collection of taxes, held sufficient to support a finding that the owner had no notice of the assessment made by a county board of supervisors.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1242, 1245-1257; Dec. Dig. § 611.*]

2. TAXATION (§ 863*)—MODE OF ASSESSMENT—NOTICE OR DEMAND.

An assessment of taxes by the county board of supervisors, without notice to the taxpayer, is void.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 603-606; Dec. Dig. § 863.*]

Appeal from Circuit Court, Estill County.

Action for injunction by the Ohio Valley Tie Company against A. M. Durbin, Sheriff. Injunction made perpetual on final hearing, and the Sheriff appeals. Affirmed.

Clarence Miller, of Irvine, for appellant. Riddell & Friend, of Irvine, for appellee.

HOBSON, C. J. The Ohio Valley Tie Company is a corporation, having its principal office and place of business in Glendean, Breckinridge county, Ky. It bought a number of ties on Station Camp creek and its tributaries, which it floated down to Irvine, and there loaded them on the cars by means of a hoist which it maintains. It failed to give in a list of its property to the assessor as of September 1, 1908. The county board of supervisors, in January following, made an assessment of its property at \$11,500. The sheriff demanded payment of the taxes, and was about to enforce collection by a levy when it brought this suit to enjoin the collection of the taxes, on the ground that the assessment was void. On a final hearing of the case, the circuit court perpetuated the injunction. The sheriff appeals.

The facts of the case, as shown by the record, are these: Previous to 1904 the Dean Tie Company was in business in Estill county. In that year, however, it went out of business, and was succeeded by the Ohio Valley Tie Company. The board of supervisors, after making the assessment referred to, adjourned for a week, and directed notice to be given to the persons against whom assessments had been made. A notice was sent to the Dean Tie Company of an assessment against it. This notice was received by a man named Scrivener, who, a month or more afterwards, gave it to the general manager of the Ohio Valley Tie Company. This was the first notice that he had of the assessment by the board of supervisors, and it was some time after the board had adjourned. He then went before the county court and moved that court to exonerate the company from the assessment; but the county court refused to entertain the motion or allow any entry to be made of it. Thereupon this suit was brought. The company offered to pay the taxes upon the property which it in fact had in the county, excluding from the assessment the ties it owned, which were in transit through the county. The circuit court enjoined the collection of the excess of the taxes over and above the amount which the company admitted it owed.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

[1] We give some weight to the finding of the chancellor on questions of fact; and we cannot say that the chancellor erred in holding, under the evidence, that the company had no notice of the assessment made by the board of supervisors, or that the amount of the tax which he required it to pay was less than it really owed.

[2] In *Mt. Sterling Oil Co. v. Ratliff*, 127 Ky. 1, 104 S. W. 988, 31 Ky. Law Rep. 1229, we held that an assessment by the board, without notice to the taxpayer, was void. We said: "While the board of supervisors seem to be empowered to assess all property that may have escaped the notice of the assessor, even though the name of the owner be undiscovered, it is without authority either to assess, or increase an assessment of, property without notice to the taxpayer."

This case was followed and approved in *Ward v. Wentz*, 130 Ky. 705, 118 S. W. 892. In that case we further said: "Under our statute the board of supervisors is given large powers and a wide discretion. Where its procedure is in conformity to the statute, its action is conclusive. In view of the large powers given, it should therefore proceed in strict conformity to the statute. The notice therein required is a jurisdictional fact, and, unless it is given, the board of supervisors has no power to act. Although appellees' agent knew the assessment had been raised, he did not appear before the board for the purpose of having it reduced. Such knowledge on his part did not dispense with the necessary notice required by the statute. If, however, he had actually appeared before the board of supervisors for the purpose of securing a reduction, this would have dispensed with the necessity for notice, as the entry of an appearance by a party to an action dispenses with the necessity for the service of process."

These decisions are conclusive of the case before us.

Judgment affirmed.

Z. HARRELL & CO. v. DANKS.

(Court of Appeals of Kentucky. Dec. 5, 1912.)

LOGS AND LOGGING (§ 3*)—SALE OF STANDING TIMBER—TIME FOR REMOVAL—"UNFORESEEN CASUALTY OR MISFORTUNE."

A sale of standing timber, to be removed within a given time, is a sale of only so much of the timber as is removed within that time, or in a reasonable time thereafter, if the purchaser is prevented from removing it by act of God or of the seller, or by some unforeseen casualty or misfortune; and where standing timber was sold in May, 1910, to be removed in a year, and cutting was delayed until August and hauling until November, though the roads were in good condition in the fall, and it could easily have been removed, and though the buyer knew that the roads in winter would be bad, the buyer was not prevented from removing it by "unforeseen casualty or misfor-

tune," and had no right to enter to remove it after the expiration of the year.

[Ed. Note.—For other cases, see *Logs and Logging*, Cent. Dig. §§ 6-12; Dec. Dig. § 3.*]

Appeal from Circuit Court, Muhlenberg County.

Action by R. W. Danks against Z. Harrell & Co. Case transferred to equity, and from a decree for plaintiff defendants appeal. Affirmed.

Glenn & Simmerman, of Hartford, and Taylor & Eaves, of Greenville, for appellants. Willis & Meredith, of Greenville, for appellee.

CLAY, C. On May 19, 1910, plaintiff, for the consideration of \$400 cash, sold to defendants, Z. Harrell & Co., all the timber on the south side of the public road where he then lived, with the exception of the sassafras and mulberry, which were reserved. The contract was in writing, and contained the following provision: "Z. Harrell & Co. to have twelve months to work the timber off the land."

Plaintiff brought this action against defendants to recover damages in the sum of \$325. He alleged in his petition that after May 19, 1911, the defendant forcibly and unlawfully entered upon his said land and cut and removed certain timber therefrom. Defendants pleaded that all the timber which they removed from the land in question after the expiration of the 12 months provided in the contract was cut before the contract expired, and that they were prevented from removing same within the contract time by the unusual and unprecedented water fall, which made it absolutely impossible for them to remove the logs and ties so cut within the 12 months next after May 19, 1910, after which time they did not cut any timber of any kind from the land. Plaintiff filed a reply traversing the allegations of the answer. On motion of defendants, the case was transferred to equity. On final hearing, the chancellor rendered judgment in favor of plaintiff for \$200. Defendants appeal.

The evidence shows that the defendants never began to cut the timber until the month of August, 1910, and that they did not begin to haul the timber from the land until the middle or latter part of November, 1910. They then hauled until about the 1st of January. After that they did no hauling until after May 19th, when the time for removing the timber expired. The timber for which a recovery is sought was removed during the months of June and July. The defendants showed by several witnesses that there was a freeze in December, followed by a thaw a few days later, which caused the roads to become very muddy. In addition to this, there was an unusual rainfall during the winter months and the early spring, and during all this time it was prac-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

tically impossible to do any hauling. On the other hand, there was testimony to the effect that the weather during the fall of 1910 was fine for hauling, and that with one team and one crew of hands the timber could have been removed from the land in 100 days, and with more teams it could have been removed in a shorter time. It was also shown that, while the roads were muddy during the winter months, the conditions were not much worse than usually prevailed at that time of the year.

Defendants insist that, as the trees in question were severed within the time fixed by the contract of sale, they became the personal property of the defendants, and, in the absence of a clause in the contract forfeiting the title, the title remained in the defendants, and they had a right to remove the timber from plaintiff's land. In support of this position we are cited to the cases of *Walcutt v. Treisch*, 82 Ohio St. 263, 92 N. E. 423, 29 L. R. A. (N. S.) 554, and *Plumer v. Prescott*, 43 N. H. 277. While these cases sustain the proposition contended for by defendants, they are not in accord with our decisions upon the question. It is the well-settled rule in this state that a sale of timber on a certain tract of land, to be removed within a given length of time, is a sale of only so much of the timber as is removed within that time, or in a reasonable time thereafter, in case the purchaser is prevented from removing the timber by act of God or of the seller, or by some unforeseen casualty or misfortune over which he had no control. *Jackson v. Hardin*, 86 S. W. 1119, 27 Ky. Law Rep. 1110; *Chestnut v. Green*, 120 Ky. 385, 86 S. W. 1122, 27 Ky. Law Rep. 838; *Ford Lumber & Mfg. Co. v. v. Cress*, 132 Ky. 317, 116 S. W. 710; *Bell Co. Land & Coal Co. v. Moss*, 97 S. W. 354, 30 Ky. Law Rep. 6.

In an extended note to *McRae v. Stillwell*, 111 Ga. 65, 36 S. E. 604, 55 L. R. A. 513, the authorities on the question are collated, and the rule to be deduced therefrom is thus stated by the editor: "Where the conveyance specifies a particular time for the removal of the timber, the purchaser has generally been held to have forfeited all rights in the timber not removed within the time specified, although a few cases hold that he still retains the title to the timber but cannot remove the same, as his right of entry is gone. It would seem that the mere cutting of the trees within the time specified, without their removal from the land, is insufficient to preserve the purchaser's rights in the timber; but the manufacture of them into timber has been held a sufficient removal of them, although such timber still remains on the land."

The question is: Are the facts of this case sufficient to bring it within the exception to the rule that the timber must be

removed within the time specified in the contract? In other words, were defendants prevented from removing the timber by extraordinary rainfalls, or by the act of the seller? There is evidence to the effect that there were unusual rains during the winter and early spring of 1911; that during this period the roads were very muddy, and the timber could have been removed only with great difficulty and expense, if, indeed, it could have been removed at all. At the same time the evidence shows that during the summer of 1910, and the fall of that year, the roads were in good condition, and the timber could have been easily removed during that time. The evidence also shows that the defendants knew of the probability that the roads during the winter months would become muddy and difficult to haul over, although they might not have anticipated that the conditions would be quite as bad as they afterwards turned out to be. With knowledge of this fact, they delayed cutting the timber until the month of August, and never began to haul at all until in the month of November. The chancellor was of the opinion that the defendants could not postpone the removal of the timber for a period of six months, during which time it could have been easily removed, and then complain that, because the roads were unusually muddy and impassable during the winter months, they were prevented from removing the timber by some act of God, or unforeseen misfortune or casualty over which they had no control. After carefully considering the evidence, we see no reason why we should reach a different conclusion.

The only other circumstance relied upon to bring the case within the exception to the rule is the testimony of one of defendants' drivers to the effect that plaintiff stated that he (plaintiff) "would not haul through the mud." Plaintiff denies making the statement; but, whether he made it or not, we are not inclined to hold that the remark was a sufficient interference on the part of plaintiff to excuse the defendants from the necessity of removing the timber within the time specified in the contract. The remark, if made at all, was made in the month of January, 1911, when defendants say that the roads were so muddy that they were unable to haul to any advantage.

Judgment affirmed.

LOUISVILLE & N. R. CO. v. ALLNUTT.
(Court of Appeals of Kentucky. Dec. 3, 1912.)

1. RAILROADS (§ 848*)—EVIDENCE—SUFFICIENCY—VERDICT.

In an action for personal injuries to a child at a railroad crossing, evidence held to warrant a verdict for the plaintiff.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1138-1150; Dec. Dig. § 848.*]

2. RAILROADS (§ 338*)—CONTRIBUTORY NEGLIGENCE—INFANTS—RAILROAD CROSSINGS.

A child of eight years is not charged with the same degree of care for his safety as an adult, and a railroad which has not given such a child, injured at a crossing, such warning of the movement of a train reasonably sufficient to prevent a child of his years from putting himself in peril cannot escape liability on the ground of contributory negligence.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1096-1099; Dec. Dig. § 338.*]

3. RAILROADS (§ 350*)—CONTRIBUTORY NEGLIGENCE—EVIDENCE.

In an action for personal injuries to a child at a railroad crossing, evidence *held* sufficient to take the question of the child's contributory negligence to the jury.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1152-1192; Dec. Dig. § 350.*]

4. RAILROADS (§ 347*)—RAILROAD CROSSINGS—ADMISSIBILITY—PERSONAL INJURIES.

To show the duty a railroad owes the public at a crossing, evidence may be introduced to show the character of the crossing and the use of it by the public, not only at the time of an accident under investigation, but for a reasonable time before.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1124-1137; Dec. Dig. § 347.*]

5. RAILROADS (§ 312*)—CROSSINGS—DUTIES.

A railroad must take notice of the location, use, and character of public crossings, and exercise such care as may be necessary to give reasonably sufficient warning of the movement of trains and cars to those using the crossing.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 988-1001, 1003; Dec. Dig. § 312.*]

6. APPEAL AND ERROR (§ 1056*)—HARMLESS ERROR—EXCLUDING EVIDENCE.

In an action for personal injuries to a child at a railroad crossing by a car on which there was no brakeman, it was not prejudicial to exclude evidence that, even had there been a man on the car at the time of the accident, he could not have stopped the car, where the recovery was based on insufficient warning.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4187-4193, 4207; Dec. Dig. § 1056.*]

7. RAILROADS (§ 350*)—CROSSINGS—DUTIES.

Where a railroad crossing was an exceptionally dangerous one, which many school children had to cross, it cannot be said, as a matter of law, that having a watchman alone, or ringing the bell or blowing the whistle alone, or having a man stationed on the moving cars alone, would be adequate to afford reasonable protection to the public.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1152-1192; Dec. Dig. § 350.*]

8. RAILROADS (§ 349*)—CROSSING ACCIDENTS—"GROSS NEGLIGENCE."

The pushing of cars over a crossing at a time when there were school children at the crossing, without ringing a bell or blowing a whistle, or without any person on the cars to control or give warning, the watchman on duty giving no warning, was "gross negligence," which is a reckless or wanton disregard of the rights or safety of others, or the doing of an act intentionally or maliciously, and punitive damages were properly allowed.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1151; Dec. Dig. § 349.*]

For other definitions, see Words and Phrases, vol. 4, pp. 3168-3173; vol. 8, p. 7675.]

Appeal from Circuit Court, Kenton County, Common Law and Equity Division.

Action by Allie Allnutt against the Louisville & Nashville Railroad Company. Judgment for plaintiff, and defendant appeals. Affirmed.

S. D. Rouse, of Covington, and Benjamin D. Warfield, of Louisville, for appellant. Wm. A. Byrne, of Covington, for appellee.

CARROLL, J. In November, 1908, the appellee, Allie Allnutt, then about eight years old, was run over by one of the cars of the appellant company, and as a result lost both of his legs. To recover damages for the injury thus sustained, he brought this suit against the appellant company, and on the first trial of the case the damages in his favor were assessed by the jury at \$19,000, but a motion for a new trial on behalf of the railroad company was sustained, and this verdict set aside. On the second trial there was a verdict in favor of appellee for \$5,000 and this verdict, on his motion, was set aside. On the trial from which this appeal is prosecuted there was a verdict and judgment in favor of appellee for \$11,750. To the ruling of the court in setting aside the first judgment, the appellee excepted and prepared, in regular form, a bill of exceptions and transcript of the evidence. To the ruling of the court in setting aside the second judgment, the appellant excepted and prepared, in due form, a bill of exceptions and transcript of the evidence. So that the record on this appeal consists of the record made up on each of the three trials, and we are asked by appellant to reverse the judgment on the last trial and direct the entry of a judgment on the verdict on the second trial, upon the ground that the trial court improperly set aside the verdict on that trial. On the other hand, we are asked by appellee to direct the lower court to enter a judgment for the amount of the verdict on the first trial, upon the theory that the court improperly set aside that verdict, but, if this cannot be done, that the judgment on the last trial be affirmed. As we have concluded to affirm the judgment on the last trial, it does not seem necessary to notice the arguments of counsel in respect to the preceding trials, but we may say that the discrepancy between the amount of the verdict on the first and second trials is largely accounted for by the fact that on the second trial the court refused to instruct the jury that they might award punitive damages.

Except in one particular, there is little controversy about the facts of this case. Latonia is a city of several thousand people, and one of the principal, if not indeed the principal, street in the city is Southern avenue, which is crossed by the tracks of the appellant railroad company. At the point

where the railroad crosses this avenue there were, when the accident happened, 17 separate tracks in use by the railroad company, covering a space of some 200 feet in width across the avenue. At virtually all hours of the day there were trains, sometimes two or three of them at the same time, moving on the tracks across the avenue, and hundreds of people, in using this avenue each day, on foot and in vehicles, had to cross all of these tracks. Including the public who made use of this street and who were required to cross these tracks, were a large number of school children who lived on the west side of the railroad and attended two schools that were situated on the east side of the railroad, and when these children were going to school in the morning and returning in the afternoon this avenue, where it crosses the railroad tracks, was crowded with children romping, running, and playing, as school children usually do.

On the day Allie Allnut was injured he was returning about 4 o'clock in the afternoon from school on the east side of the tracks to his home on the west side, in company with a crowd of children. The evidence in his behalf shows that when he got to the eastern track Blackburn, the crossing watchman for the railroad company, was standing about the middle of the crossing, and between the tracks, not engaged at the time in warning the children that there was danger from moving trains—merely standing at his post. That appellee and other children, who were in his immediate company, walked or ran by Blackburn, without any notice or warning from him, and that, when appellee had passed Blackburn and gotten to the last track on the west side, Blackburn halloed at him, when he turned around, and, as he did so, stumped his toe and fell on the track, and about that time Blackburn, who had discovered that the child was going on the track in front of the moving train, made an effort to rescue him, and in the attempt fell on him, and just as appellee fell on the track a freight car, pushed by an engine, ran over his legs. The evidence for the railroad company is, in substance, that Blackburn, when he saw the children coming toward the track on the east side, went to meet them for the purpose of stopping them from crossing, as a train was switching on the western track; that some of the children stopped, in obedience to his request or order, and some of them, including Allie Allnut, ran by him; that when his attention was called to the fact that some of the children had gone by him, and in the direction of the moving train, he ran after them and caught Allie Allnut just as he got on the track in front of the moving cars, and in his effort to save him came near being run over himself. The car that ran over the child was the front car of a cut of six cars being pushed by an engine, and it had been uncoupled from the

car behind it for the purpose of "kicking" it into a siding, towards which the engine was pushing it. There was no brakeman or other employé of the company on the car or cut of cars, nor was there any alarm or warning of the movement of the train by the ringing of the engine bell or other means. As the car had been disconnected from the engine and the car immediately behind it, of course the engineer could not control the movement of the car, and the condition was practically the same as if this car had been started by a movement of the engine across the avenue and was running without any person in control of it.

The grounds relied on for a new trial are: (1) That the court erred in refusing to direct a verdict for the railroad company; (2) that the verdict is flagrantly against the evidence; (3) that error was committed in permitting witnesses Oliver, Niedlander, Braimes, and Huff to testify as to customary conditions at the crossing; (4) that the court erred in refusing to permit Johnson to testify as to the distance in which the car could have been stopped; (5) that error was committed in the instruction.

[1] Concerning the grounds that a peremptory instruction should have been given, or that the verdict should have been set aside as flagrantly against the evidence, little need be said. There was ample evidence to take the case to the jury and to sustain the verdict. According to the evidence for appellee, he did not discover the moving engine and cars until he was in the act of crossing the track on which they were running, and did not have any warning from Blackburn or any one else of the movement of the train.

[2] It is true the car that ran over appellee was moving at a slow rate of speed, and that if he had been careful he could have seen it, but a child of eight years is not charged with the same degree of care for his own safety as an adult would be. It is probable that a grown person in crossing these tracks would keep a sharp lookout for the movement of trains, and in view of the danger attending the crossing would have exercised unusual care for his own safety. But, unless appellee was given such warning or notice of the movement of the train as would be reasonably sufficient to prevent a child of his years from putting himself in a place of peril, the railroad company cannot escape responsibility for the accident that befell him upon the ground that, except for his contributory negligence, it would not have happened. The warning or notice that might be amply sufficient in the case of a grown person might be entirely inadequate and insufficient in the case of a child of eight years, and therefore to excuse the railroad company, as a matter of law, from blame for an accident like this, under the conditions existing when it happened, the

evidence should show that appellee was given such warning as would be reasonably sufficient to put a child of his years upon notice of the danger, and this the evidence does not do.

[3] On the contrary, the evidence for appellee shows that he received no notice or warning from the watchman until he was on the track in front of the moving car, and too late to escape injury, and that there was no one on the car to warn him of his peril. This being so, the question was for the jury, and they were instructed that, if they believed "from the evidence that at the time and place of the accident to the plaintiff mentioned in the evidence, but before the plaintiff had gone upon the railroad track upon which he was injured, the plaintiff knew, or by the exercise of ordinary care could have known, of the approach of the car by which he was injured upon said track to the crossing at said place, and that thereafter plaintiff went upon said railroad track in front of said approaching car and was run over and injured by it, and if the jury shall further believe from the evidence that the act of the plaintiff in going upon said railroad track, under such circumstances as the jury shall believe from the evidence then and there existed, was a failure on the part of the plaintiff to exercise such care as children of his age, experience, and discretion ordinarily exercise under the same or similar circumstances, the jury shall find a verdict for the defendant." In our opinion this instruction correctly submitted to the jury the proper measure of care it was incumbent upon appellee to exercise for his own safety. *City of Owensboro v. York*, 117 Ky. 294, 77 S. W. 1130, 25 Ky. Law Rep. 1397; *Kentucky Hotel Co. v. Camp*, 97 Ky. 425, 30 S. W. 1010, 17 Ky. Law Rep. 297; *Davis v. Ohio Valley B. & T. Co.*, 127 Ky. 800, 106 S. W. 843, 32 Ky. Law Rep. 627, 15 L. R. A. (N. S.) 402; *Smith v. National C. & T. Co.*, 135 Ky. 671, 117 S. W. 280.

[4] The witnesses Oliver, Niedlander, Braimes, and Huff were permitted by the trial court, over the objection of counsel for appellant, to testify as to the use of this crossing by the public on and for a reasonable time continuously before the day of the accident, and as to the number of trains that used the tracks at the crossing at the time of the accident and for some time before, and they said that at the time of the accident, and for many months before, this crossing was used every day by great numbers of people, on foot and in vehicles, and that crowds of school children used it in the morning and afternoon in going to and returning from school. They further said that trains and cars were almost continually moving upon some of the tracks at this crossing, and that sometimes as many as two and three trains would be moving at the same time. This evidence was entirely com-

petent for the purpose of showing the dangerous character of this crossing, and the duty that the railroad company was under to have it so protected as to give reasonably sufficient warning to the traveling public of the danger attending its use.

[5] In cases like this, a railroad company is chargeable with knowledge of the duty it owes of exercising such care as may be required to afford reasonably sufficient protection to the public. It must take notice, as other people do, of the location, use, and character of public crossings, and exercise that degree of care at each of them that may be necessary to perform its legal duty. This duty, in many cases, is larger than it is in others, and for the purpose of showing the measure of duty the railroad company owes, and the notice of this duty it will be presumed to have, evidence may be introduced to show the character of the crossing, the conditions existing, and the use of it by the public, not only at the time of the accident under investigation, but for a reasonable time before.

[6] It also complained that the court committed error in refusing to permit Frank Johnson, an employé of the company, to testify in what space the car could have been stopped if a man had been on the car at the brake at the time the appellee was injured. We are not entirely prepared to say that this evidence should not have been admitted as a circumstance tending to show that, if one of the employés of the company had been on the car, he could not have averted the accident. But it is very clear that this evidence had no material bearing on the case, for if it should be assumed, or even admitted, that a man in charge of the car could not have stopped it in time to have saved appellee after he came on the track, it would not in any degree lessen the liability of the company. The duty it was under to have some person on the car was not limited to the efforts this person might make in stopping the car, but extended to the efforts he might have made to warn appellee not to go on the track. It is quite probable from the evidence that, when appellee got on the track, the car could not have been stopped in time to avoid running over him, but, if there had been a person on the car, he might have prevented the child from getting on the track. In any event, we are satisfied that the exclusion of this evidence did not prejudice the rights of the company.

Much complaint is made of the instruction defining the duty of the company. This instruction reads in part as follows: "In the operation of the defendant's engine and cars or trains over the said crossing, it was the duty of the defendant's agents or servants in control of its engine, cars, or trains to give reasonable and timely warning, by the ringing of a bell or the blowing of a whistle, of the approach of its engine or

cars or trains to said crossing to persons upon or about to go upon said crossing, and in backing cars across said crossing it was the duty of the defendant to have some one stationed upon the cars in such a position that he could discover the presence of persons upon or about to go upon the crossing, for the purpose of giving warning of the approach of the cars, and for the purpose of avoiding injury to persons in peril or apparent peril of being struck by the cars, if in the management of the cars after the discovery of their peril or apparent peril those in control of the movement of the cars could, by all reasonable means at their command, stop the car and avoid injury to them. If the crossing was an unusually dangerous one, it was the duty of the defendant to provide a watchman or watchmen reasonably sufficient to give reasonable and timely warning to the public using said crossing of the approach of trains." The objections urged to this instruction are that it imposed upon the railroad company the duty (1) of giving warning of the approach of the train by ringing the bell or blowing the whistle; (2) of having some one stationed on the car which ran over the appellee; (3) of having one or more watchmen at the crossing, if this was necessary to reasonably protect it. In support of these objections the argument is made by counsel "that, at a crossing where a flagman is maintained, the duty imposed upon him supersedes the other specified duties as to such crossings where no flagman is maintained. In other words, having a flagman at the crossing is the most extraordinary precaution that a railroad company can take. * * * Where this is done, and where the flagman performs the duties imposed upon him, * * * the railroad company, through said flagman, has performed its full duty in the way of affording both warning and protection to the highway traveler on the crossing." The effect of this argument, as we understand it, is that, when a railroad company has a watchman stationed at a crossing, the presence of this watchman, if he performs his duty, relieves it from the duty of ringing the bell, sounding the whistle, or having a man on a car that is being pushed in front of an engine or backed by an engine over the crossing, and from operating its train over the crossing at a reasonable rate of speed, and from keeping a lookout for the presence of travelers. Or, in other words, when a railroad company has a watchman stationed at a crossing, however dangerous the crossing may be, or however great the number of people who may use it, it may run its trains without notice or warning of any kind other than such as the watchman may be able to give, and may back or push cars without any person on them to control their movements or give warning to persons about to

get on the track, and may run them at any speed it pleases.

[7] We are unable to agree with counsel in this conception of the duty that a railroad company owes at a crossing like the one in question. At some crossings one watchman who fully performed his duty might be legally sufficient, and the company might be relieved from the performance of the other duties it usually owes to the public at crossings. At other crossings a compliance with the statutory duties of ringing the bell and blowing the whistle, and in addition keeping a lookout, and running at a reasonable speed, might fulfill its duty without a watchman. Again at other crossings its duty might require it to have a watchman, to give warning of the movement of trains, and also to have a person stationed on cars being backed or pushed, and at yet other crossings gates might be necessary. No exact measure of duty can be laid down that would be applicable to all crossings. At each public crossing the railroad company must use that degree of care that is reasonably sufficient for the purpose of giving notice and warning of the movement of trains and cars to the public having the right to use the crossing, and this degree of care depends on the situation and surroundings of the crossing, the number of trains using it, and the number of the public who use it. *Cincinnati, New Orleans & Texas Pacific Ry. Co. v. Champ*, 104 S. W. 988, 31 Ky. Law Rep. 1054; *Kentucky Central R. R. Co. v. Smith*, 93 Ky. 449, 20 S. W. 392, 14 Ky. Law Rep. 455, 18 L. R. A. 63; *Central Passenger Ry. Co. v. Kuhn*, 86 Ky. 578, 6 S. W. 441, 9 Ky. Law Rep. 725, 9 Am. St. Rep. 309; *L. & N. R. R. Co. v. Popp*, 96 Ky. 99, 27 S. W. 992, 16 Ky. Law Rep. 369.

Having this view of the duty a railroad owes at a public crossing, we think the court correctly advised the jury that it was the duty of the railroad company to exercise such care as was reasonably sufficient to protect the crossing, although this duty might require it to employ the means pointed out in the instruction. Under the undisputed facts, the crossing was an exceptionally dangerous one, and it cannot be said, as a matter of law, that having a watchman alone, or ringing the bell or blowing the whistle alone, or having a man stationed on the moving cars alone, would be an adequate performance of its duty, or that all of these precautions were not necessary to afford reasonable protection to the public.

[8] It is further insisted that it was error to instruct the jury that they might, in addition to compensatory, award punitive damages. In a number of cases we have ruled that in personal injury cases punitive damages are only allowable unless the act that caused the injury complained of was intentionally or maliciously done, or the injury

was the result of a reckless or wanton disregard of the rights or safety of others on the part of the wrongdoer. *Louisville & Nashville R. R. Co. v. Wilkins*, 143 Ky. 572, 138 S. W. 1023; *Continental Coal Corporation v. Cole*, 146 Ky. 821, 143 S. W. 386; *Straight Creek Coal Co. v. Huddleston*, 147 Ky. 94, 143 S. W. 775; *C., N. O. & T. P. Ry. Co. v. Ackerman*, 148 Ky. 435, 146 S. W. 1113. This is the degree or quality of conduct that constitutes, in the meaning of the law, gross negligence, entitling the injured party to more than compensatory damages, and, whenever the trial court is of the opinion that the pleadings and evidence show that the wrongdoer has been guilty of the character of conduct above described, he should instruct the jury on the subject of punitive damages. With this definition of what constitutes gross negligence entitling the injured party to punitive damages, it only remains to be seen whether or not the evidence justified the instruction on this subject.

It is true the railroad company had a watchman at this crossing, but this is the only care it exercised to protect the public, having the right to use it, from injury by moving trains, and it is apparent from the evidence that the presence of this watchman was entirely inadequate to afford reasonably sufficient protection to the public at the time appellee was injured. It is probable that at sometimes during the day he could adequately guard the crossing, and it is likely that if its use had been confined to adults he could have given them sufficient notice and warning to save them from injury. But the evidence shows, and the railroad company should be charged with notice of it, that this crossing, during the morning, as well as in the afternoon, was crowded with school children going to and returning from school, and during the time the crossing was used by these children their safety demanded more efficient protection than one watchman could afford. The presence of the watchman did not lessen the other duties it owed to the public at this time in moving its trains, or excuse it from exercising the same care it would be required to exercise if no watchman had been stationed there. This being our view of the duty the company owed at the time appellee was injured, it follows that it was such a reckless disregard of the safety of the children using the crossing as amounted to gross negligence to push a train of cars over the crossing without bell or whistle sounding, or without any person on the cars to control or give notice or warning of their movement. We have so written in a number of cases. *Peltier v. L. & N. R. R. Co.*, 29 S. W. 30, 16 Ky. Law Rep. 500; *L. & N. R. R. Co. v. Potts*, 92 Ky. 30, 17 S. W. 185, 13 Ky. Law Rep. 344; *Conley v. C., N. O. & T. P. Ry. Co.*, 89 Ky. 402, 12 S. W. 764, 11 Ky. Law Rep. 602; *Kentucky Central Ry. Co. v. Smith*,

93 Ky. 449, 20 S. W. 392, 14 Ky. Law Rep. 455, 18 L. R. A. 63; *C., N. O. & T. P. Ry. Co. v. Ackerman*, 148 Ky. 435, 146 S. W. 1113.

The judgment is affirmed.

ROSE et al. v. MONARCH.

(Court of Appeals of Kentucky. Dec. 3, 1912.)

CONTINUANCE (§ 7*)—MOTIONS—DISCRETION.

In ruling on motions for continuance, the trial court is exercising a discretionary power.

[Ed. Note.—For other cases, see *Continuance*, Cent. Dig. §§ 17, 18; Dec. Dig. § 7.*]

On petition for rehearing. Petition overruled.

For former opinion, see 150 Ky. 129, 150 S. W. 56.

HOBSON, C. J. The facts of the case of *Hollis v. Watson*, 89 S. W. 548, 28 Ky. Law Rep. 550, were materially different from the facts of this case. The circuit court has a discretion in ruling on motions for continuance, and we cannot say his discretion was abused here.

Petition overruled.

CHESAPEAKE & O. RY. CO. v. MEYERS.

(Court of Appeals of Kentucky. Dec. 3, 1912.)

1. APPEAL AND ERROR (§ 204*)—RULINGS ON EVIDENCE—OBJECTIONS—WAIVER.

A defendant who did not object to the admission of improper testimony may not avail himself of the error on appeal.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 1258-1280; Dec. Dig. § 204.*]

2. EVIDENCE (§ 99*)—PERSONAL INJURIES—EXAMINATION BY PHYSICIAN.

A plaintiff suing for a personal injury may testify what physicians examined him, and that defendant's physician examined him.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 123, 137-143; Dec. Dig. § 99.*]

3. APPEAL AND ERROR (§ 1060*)—HARMLESS ERROR—MISCONDUCT OF COUNSEL.

The remark of counsel of plaintiff suing for a personal injury that defendant was insinuating that plaintiff was exaggerating, made in response to an objection to the admission of evidence, is not prejudicial, though improper in the absence of anything to show any such insinuation.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 4135; Dec. Dig. § 1060.*]

4. RAILROADS (§ 347*)—ACCIDENTS AT CROSSINGS—DEFECTIVE CROSSINGS—EVIDENCE—ADMISSIBILITY.

In an action for injuries to a traveler caused by a defect in a railroad crossing, the evidence that wheels of vehicles of other travelers had been caught in the defect was admissible to show whether or not the crossing was in a dangerous condition, the condition at the crossing being practically the same at the time of the occurrences testified to as at the time of the accident complained of.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1124-1137; Dec. Dig. § 347.*]

5. APPEAL AND ERROR (§ 1046*)—HARMLESS ERROR—IMPROPER REMARK OF TRIAL COURT.

Where defendant moved for a peremptory verdict at the close of plaintiff's case, and, when the motion was overruled, informed the court that he rested and would offer no evidence, the statement of the court to the jury that defendant had no evidence to introduce was not prejudicial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4128-4134; Dec. Dig. § 1046.*]

6. NEW TRIAL (§ 162*)—EXCESSIVE DAMAGES—POWER OF COURT TO REDUCE.

The general rule that trial courts have no power to remit any part of a judgment, and, if the judgment is excessive, they must award a new trial, does not apply where the items constituting the damages recovered are separable, so that the court may eliminate those not properly recoverable, in which case the court may require plaintiff to remit, or may, on plaintiff's motion, remit the damages representing items not properly recoverable.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 324-329; Dec. Dig. § 162.*]

7. DAMAGES (§ 228*)—EXCESSIVE DAMAGES—POWER OF COURT TO REDUCE.

Where, in an action for personal injuries, there was evidence that an operation would cost \$200, but such operation was not shown to be reasonably necessary, and there was a general verdict for \$5,700, necessarily composed of \$5,000 for general damages, \$400 for loss of time, and \$300 for physician's bill incurred and to be incurred, the court could, on motion of plaintiff, remit the item of \$200 physician's bills for the operation, and award judgment for the balance.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 576-579; Dec. Dig. § 228.*]

8. RAILROADS (§ 350*)—ACCIDENTS AT DEFECTIVE CROSSINGS—RAILROAD CROSSINGS—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

Whether a traveler injured on a defective railroad crossing was guilty of contributory negligence *held*, under the evidence, for the jury.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1152-1182; Dec. Dig. § 350.*]

9. RAILROADS (§ 326*)—ACCIDENTS AT DEFECTIVE CROSSINGS—CONTRIBUTORY NEGLIGENCE.

Where a traveler on a highway knew of the defective condition of a railroad crossing, and he failed to exercise for his own safety such care as ordinarily prudent persons ordinarily would exercise under similar circumstances, and his lack of care contributed to the injuries received, and but for such lack of care he would not have been injured, he could not recover.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1037-1042; Dec. Dig. § 326.*]

10. DAMAGES (§ 132*)—PERSONAL INJURIES—EXCESSIVE DAMAGES.

A man sustained an injury to his head, affecting one of the nerves, and an injury to his leg and hand, rendering the hand practically useless, and he suffered greatly from its swollen condition. Time lost was worth \$400, and he incurred a physician's bill for \$100. *Held*, that a verdict for \$5,500 was not excessive.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 372-385, 396; Dec. Dig. § 132.*]

Appeal from Circuit Court, Campbell County.

Action by William C. Meyers against the

Chesapeake & Ohio Railway Company. From a judgment for plaintiff, defendant appeals. *Affirmed*.

Galvin & Galvin, of Cincinnati, Ohio, and William A. Burkamp, of Newport, for appellant. Ramsey Washington and Howard M. Benton, both of Newport, for appellee.

CLAY, C. The Oneonta and Twelve Mile road is a county road running between Alexandria, the county seat of Campbell county, and Oneonta, a station on the Chesapeake & Ohio Railroad, and a landing on the Ohio river. The road is used by a large number of people. Across this road the Chesapeake & Ohio Railway Company maintains two tracks—a main and a spur track. The two tracks are just far enough apart to allow cars to clear each other in passing. Between two of the rails of the spur track, at a point on the road, is an opening about 2½ inches wide. This condition existed at the time of the accident hereinafter referred to, and had existed for several years. Charging a failure of duty on the part of the railroad company in permitting the road and its tracks, at the point where the tracks crossed the road, to become and remain in a dangerous condition, and that, while driving across the track, one of the runners of his sled was caught in the opening between the two rails of the spur track, thereby causing him to be thrown from his sled and injured, plaintiff, William C. Meyers, brought this action to recover damages. He asked damages in the sum of \$6,300, of which \$300 was for medical services incurred and to be incurred, \$1,000 for loss of time, and \$5,000 for mental and physical suffering and permanent impairment of his power to earn money. The item for loss of time was subsequently amended to read \$575. The jury returned a verdict in favor of the plaintiff for \$5,700. On motion of plaintiff the sum of \$200 for medical services to be incurred in the future was remitted. Judgment was entered in favor of plaintiff for \$5,500. Defendant appeals.

The accident took place on March 20, 1911. At the time of the accident plaintiff was returning to his home from Oneonta station. He was driving a sled which was being drawn by a pair of mules. In crossing the spur track one of the runners of the sled caught in the opening between the two rails, and plaintiff was thrown out. His leg was bruised between the knee and the hip. He received a blow over the eye, which injured the supra-orbital nerve, and caused a catarrhal condition of his head. The principal injury was to his hand, which became badly swollen and inflamed, and remained in that condition for several months. The tendons of the hand were so affected that plaintiff has practically lost the use of it. This con-

dition is permanent. Plaintiff was confined to his bed two or three months, and could not walk on his leg for five or six months. He suffered intensely from his injuries, and it is very probable that he will continue to suffer for some time to come. The testimony showed that up to the time of the trial he had incurred a physician's bill of \$100. There was also evidence that, in order to have an operation performed, it would be necessary to incur an additional physician's bill of \$200.

[1] While it was not proper for the court to permit the two physicians who examined plaintiff for the purpose of testifying to state what the reasonable value of their services was, defendant did not object or except to their testimony, and cannot therefore avail itself of the error.

[2] The court did not err in permitting plaintiff to testify that defendant's physician examined his hand. There was no impropriety in permitting him to tell what physicians examined him, and to tell who they were, even if one of them happened to be a physician in the employ of the defendant.

[3] While the remark of plaintiff's counsel when this evidence was objected to, to the effect that the other side was insinuating that they were exaggerating, and they wanted to show that they gave them every opportunity they wanted, was improper in the absence of anything in the record showing that such was the case, we are not inclined to hold that the statement was prejudicial error.

[4] During the progress of the trial, the court permitted two or three witnesses to testify either that the wheels of their vehicles had been caught in the opening in the spur track, or they had seen vehicles of others so caught. It was shown that, when these occurrences took place, conditions were practically the same. In admitting this testimony the court admonished the jury that it could be considered for the sole purpose of throwing light on the question whether or not the crossing was in a dangerous condition or otherwise, and for no other purpose. One of the issues was: "Did defendant permit the roadway where its tracks crossed it and its tracks to be and remain in a dangerous condition?" The fact that, conditions being the same, other vehicles were caught in the opening in the spur track, is certainly a circumstance tending to show the dangerous condition of the track and roadway. With the limitation contained in the admonition of the court, we think the evidence was clearly admissible. *Georgetown, etc., v. Cannon*, 7 Ky. Law Rep. 379; 29 Cyc. 611.

[5] At the conclusion of the evidence for plaintiff, the defendant moved for a peremptory. After overruling the motion, the court said: "The defendant informs the court that they have no evidence to intro-

duce." To this statement the defendant objected and excepted. Thereupon the court said: "I don't recall just the expression I used, but the stenographer has it that I indicated to you that the defendant had no evidence to offer, to which the defendant objects. The court withdraws that, and uses the language of the defendant that they would offer none." To this statement the defendant also objected and excepted. Counsel for defendant insists that this statement of the court was very prejudicial, because it not only put the defendant in the attitude of having no evidence to introduce, but attracted with especial emphasis the attention of the jury to this fact. The point is made that the defendant had the right to rest its case upon the evidence introduced by plaintiff, without having the attention of the jury called either to the fact that it would offer no evidence, or it had no evidence to offer. We are unable to see how the statement of the court could have prejudiced the substantial rights of the defendant. Whether defendant says "the defendant rests," or "the defendant will offer no evidence," or "the defendant has no evidence to offer," and the court so informs the jury, the result is practically the same. If, as a matter of fact, the defendant does not offer any evidence, the jury knows it, whether informed by the court or not; and manifestly their verdict cannot be influenced by giving them information of that which they cannot fail to know. While the motion for a new trial was pending, the court, over the objection of the defendant, entered the following order: "Upon motion of plaintiff, the sum of \$200, covering future medical services, is remitted from the judgment recovered March 6, 1912."

[6] It is insisted that, under the practice of this state, trial courts have no power to remit any portion of a judgment, but that, if the judgment is excessive, they must award the defendant a new trial. While this is the general rule (*Brown v. Morris*, 3 Bush, 81; *L. & N. R. Co. v. Earl's Adm'r*, 94 Ky. 370, 22 S. W. 607, 15 Ky. Law Rep. 184), yet where the items constituting the damages recovered are separable, so that the court may eliminate those not properly recoverable from those recoverable, the court has power to require the plaintiff to remit, or may, on plaintiff's motion, remit, so much of the damages as represents the items which are not properly recoverable (*Johnson's Adm'r v. Johnson*, 104 Ky. 714, 47 S. W. 883, 20 Ky. Law Rep. 890; *Masterson v. Hagan*, 17 B. Mon. 325).

[7] Here the plaintiff asked general damages in the sum of \$5,000. The proof shows that he lost eight months' time, and that his time was reasonably worth \$50 a month, making a total of \$400 for time lost. Up to the time of the trial he had incurred a physician's bill of \$100. There was evidence to the effect that an operation on his

hand would cost \$200. However, the witness who so testified also advised against the operation. Manifestly, the verdict is composed of the following items: \$5,000 for general damages; \$400 for loss of time; \$300 for physician's bills, incurred and to be incurred. The evidence fails to show that the operation involving the item of \$200 physician's bills to be incurred in the future was reasonably necessary or would have to be performed, and it being possible to separate this item from the verdict and judgment, and leave the balance of the judgment intact, we conclude that the remittitur of \$200 was properly adjudged.

[8] Another point urged by the defendant is that the court erred in overruling its motion for a peremptory. Particular stress is placed upon the fact that plaintiff himself admits that he knew of the opening between the two rails, and that he had frequently warned others of the danger. It is therefore insisted that if he, with knowledge of the opening, drove his sled into it, he was guilty of such contributory negligence as precludes a recovery. While it is true that plaintiff did know of the existence of the opening, and had known of it for some time, and had also warned others of the danger, yet it also appears that on the occasion in question he had stopped just before reaching the track in question for the purpose of effecting a sale of his tobacco. When he started to cross, there was a man with a team on the other side waiting for him to get over. He says that he thought he heard a train whistle in the distance, and that he had his mind on the approaching train and momentarily forgot the opening in the track. There was also evidence that the sled itself would have a tendency to slide along the tracks. The opening was not a large one, which a person could easily avoid. It is by no means certain that, if he had had his attention fixed on the opening he could have avoided it. It was just as much his duty to use ordinary care to discover the approach of a train and keep out of its way as it was to avoid striking the opening in the rails with his sled. Under the circumstances, therefore, we cannot say as a matter of law that plaintiff was guilty of contributory negligence. The question was one for the jury.

[9] The court told the jury that if they believed from the evidence that on the occasion in question plaintiff, having had previous knowledge of such defective condition in said crossing, failed to exercise for his own safety such care as ordinarily prudent persons ordinarily exercise under the same or similar circumstances, and that such lack of care on his part contributed to the injuries received by him, and but for such lack of care on his part he would not have been injured, they should find for the de-

fendant. This instruction is not subject to complaint.

The defendant offered several instructions, to the effect that if the plaintiff knew of the opening between the rails in the track, and of the danger thereof, and with such knowledge drove upon the crossing and his sled was caught in the opening, the jury should find for the defendant. Instructions of this character were in effect a peremptory instruction for the defendant, and were properly refused for the same reason that the motion for a peremptory was overruled.

[10] Aside from the injury to plaintiff's head, which seems to have affected one of the nerves, and the injury to his leg, which lasted for some time, it appears that plaintiff suffered greatly from the swollen and inflamed condition of his hand, and that his hand is now, and will continue to be, practically useless. That being true, we cannot say that the verdict is so excessive as to strike us at first blush as being the result of prejudice or passion.

Judgment affirmed.

DUFF & ONEY v. ROSE.

(Court of Appeals of Kentucky, Dec. 6, 1912.)

JUDGMENT (§ 138*)—DEFAULT—VACATION—TIME.

An order of the trial court, directing that the allegations of the petition, as amended, be taken as confessed, is an interlocutory order, which may be set aside by the court at a subsequent term, without following the Code provisions for vacating judgments.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 249-251, 254; Dec. Dig. § 138.*]

On petition for rehearing. Former opinion modified, and petition overruled.

For former opinion, see 149 Ky. 482, 149 S. W. 884.

SETTLE, J. A careful reconsideration of the record in this case gives us no reason for withdrawing or changing the conclusion reached in the opinion on the merits of the case. The petition for a rehearing contains, however, a just criticism of that part of the opinion which apparently conveys the meaning that an order made by the trial court at one term, directing that the allegations of the petition, as amended, be taken as confessed, could not be set aside at a subsequent term, except in the manner provided by the Code for vacating judgments.

Manifestly such an order, being merely interlocutory, can for cause be set aside by the court at a subsequent term. What should have been said, and was intended to be said, in the opinion, was that the record showed no grounds for setting aside the order, pro confesso, at the subsequent term. The correction of this error had been made for the publication of the opinion in 149 Ky. 482, 149

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

S. W. 884, before appellee's petition for a rehearing was filed.

The opinion is modified to the extent indicated, but in other respects adhered to. Therefore the petition for a rehearing is overruled.

SHACKLETTE et al. v. GOODALL et al.

(Court of Appeals of Kentucky. Dec. 4, 1912.)

1. FRAUD (§ 50*)—ACTUAL FRAUD—CONSTRUCTIVE FRAUD—BURDEN OF PROOF.

The burden of proving actual fraud is on the party alleging it; but where fraud, implied from the fiduciary or confidential relation of the parties, is charged, the burden is on the person against whom complaint is made to show the fairness of the transaction.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. §§ 46, 47; Dec. Dig. § 50.*]

2. CANCELLATION OF INSTRUMENTS (§ 4*)—CONTRACTS (§ 99*)—GIFTS (§ 47*)—FRAUD—EQUITABLE RELIEF.

Equity will set aside transactions in which influence obtained through confidential relations has been abused, on the ground of fraud and undue influence; and the presumption of fraud arises more readily in case of gifts than in cases of contracts, and the presumption of undue influence is more or less strong, according to the nature of the relation of the parties.

[Ed. Note.—For other cases, see Cancellation of Instruments, Cent. Dig. § 1; Dec. Dig. § 4.* Contracts, Cent. Dig. §§ 448-453, 1197-1199, 1799, 1800; Dec. Dig. § 99.* Gifts, Cent. Dig. §§ 81-86; Dec. Dig. § 47.*]

3. DEEDS (§ 196*)—CANCELLATION—GROUNDS—PRESUMPTIONS.

The mere fact that a grantor was 75 years old when executing deeds to collateral heirs does not raise a presumption of incapacity on his part or undue influence on the grantees' part.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 587-593, 649; Dec. Dig. § 196.*]

4. DEEDS (§ 70*)—CANCELLATION—GROUNDS—CONFIDENTIAL RELATIONS.

The rule that fraud is imputed in cases of voluntary conveyances between persons standing in confidential or fiduciary relations to each other may be extended to conveyances supported by a consideration, where the consideration is so grossly inadequate as to render the conveyance fraudulent.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 165-182; Dec. Dig. § 70.*]

5. DEEDS (§ 196*)—CANCELLATION—GROUNDS—FRAUD—BURDEN OF PROOF.

Where heirs of a deceased grantor sought to set aside a conveyance in trust for a nephew of the grantor on the ground of fraud, and the answer alleged that, though the deed, perhaps incorrectly, recited a consideration of a substantial sum paid, there was, in reality, a valuable consideration for the deed in the services which the nephew had previously rendered the grantor, which services were of greater value than the land conveyed, and there was nothing to show any confidential relations between the grantor and the nephew, more than was implied from the mere fact of kinship, the case of the heirs must rest on actual fraud, and to recover they have the burden of establishing fraud.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 587-593; Dec. Dig. § 196.*]

Appeal from Circuit Court, Ohio County. Action by Sally Shacklette and others against E. H. Goodall and others. From a judgment of dismissal, plaintiffs appeal. Affirmed.

Barnes & Smith and Fogle & Fogle, all of Hartford, for appellants. Heavrin & Woodward, of Hartford, for appellees.

MILLER, J. Jacob C. Warden, a bachelor 75 years of age, residing in Ohio county, died in January, 1911. On and between December 18, 1909, and November 26, 1910, he had conveyed five tracts of land to his collateral kindred. By the first deed, dated December 18, 1909, he conveyed 15 acres to L. R. Goodall, who was the husband of Warden's niece, for a recited consideration of \$300. A second deed was executed by Warden on September 6, 1910, and conveyed 32 acres to his nephew, Jacob B. Warden; the recited consideration being services rendered by said Jacob B. to his uncle. By the third deed, dated October 12, 1910, Warden conveyed 8½ acres to L. R. Goodall, the husband of Warden's niece, for a recited consideration of \$300. The fourth deed was dated November 26, 1910, and conveyed 20 acres of land to E. H. Goodall as grantee, but really in trust for Jesse M. Warden, a nephew of the grantor, for a recited consideration of \$300, paid. The fifth and last deed, dated November 26, 1910, conveyed three-fourths of an acre of land to Jessie Phipps, a grandniece of Warden, for a recited consideration of \$200. The petition alleges that none of the recited considerations was paid.

On January 4, 1912, the appellants, Sally Shacklette, M. L. Phipps, and Laura Greenwood, as heirs at law of Jacob C. Warden, brought this action against the several grantees in the deeds above named, for the purpose of having said deeds canceled and set aside, upon the ground that they were without consideration and had been procured by the undue influence, fraud, and collusion of the several grantees therein. Upon motion of the defendants, the circuit court required the plaintiffs to elect which of the several actions alleged to have been wrongfully joined in the petition they would prosecute; and, in response to that ruling, the plaintiffs elected to prosecute the action to cancel and set aside the fourth deed, dated November 26, 1910, which conveyed 20 acres to E. H. Goodall, in trust for Jesse M. Warden, as above set forth.

The first paragraph of the answer traversed the allegations of the petition, while the second paragraph affirmatively alleged that for many years prior to November 26, 1910, the date of the deed, Jesse M. Warden had rendered personal service, labor, care, and attention to and for Jacob Warden, and at his special instance and request; and that

for and in consideration of said services, and in part payment therefor, Jacob C. Warden had executed and delivered to Goodall, as trustee, the deed sought to be canceled. The reply made the issue by controverting the affirmative allegations of the answer.

The action having been submitted and heard upon the pleadings, without any proof, the circuit judge dismissed the petition, and from that judgment the plaintiffs prosecute this appeal.

[1] The correctness of the judgment of the circuit judge depends upon where the burden of proof lay. Appellants admit that in cases of actual fraud the burden of proof is on the party complaining to prove his case; but he invokes the contrary rule applicable to cases of fraud to be implied from the fiduciary or confidential relation of the parties, where the burden is on the person against whom complaint is made to show the entire fairness of the transaction.

If the facts alleged in the petition were sufficient to put the defendants upon their proof, notwithstanding their answer, the burden was upon them, and the trial judge was wrong in dismissing the petition.

[2] This case, if it can be maintained, comes under the third species of fraud, according to Lord Hardwicke's classification in the leading case of *Chesterfield v. Janssen*, 2 Ves. 125, 1 Lead. Cas. Eq. 428, which is presumed from the circumstances and conditions of the parties contracting. The general rule is that relief will be afforded, in equity, in all transactions in which influence has been acquired and abused, in which confidence has been reposed and betrayed. The relief stands upon a general principle applying to all the varieties of relations in which dominion may be exercised by one person over another. And the presumption of fraud will arise more readily in cases of gifts than in cases of contracts.

The question always is: To what extent may undue influence be presumed from the relation of the parties? This presumption of undue influence is more or less strong, according to the nature of the relation which the parties occupy towards each other. The relation in which the presumption exists, perhaps, in the highest degree is that of solicitor and client; the next highest, that of guardian and ward; then that between parent and child, and trustee and cestui que trust.

In cases of contract between lawyer and client, the burden is on the lawyer of showing its fairness. *Carter v. West*, 93 Ky. 211, 19 S. W. 592, 14 Ky. Law Rep. 191. And the same rule applies to the case of gift from the ward to his guardian immediately after the ward has attained his majority, or while he is still under the guardian's influence.

[3] But in the case at bar none of these fiduciary or confidential relations existed.

While it is true the grantor was 75 years of age, that fact would not, of itself, raise a presumption of incapacity on his part or undue influence on the grantee's part.

Appellants rely upon *Smith v. Snowden*, 96 Ky. 32, 27 S. W. 855, 16 Ky. Law Rep. 353; *Wilson v. Winsor*, 71 S. W. 495, 24 Ky. Law Rep. 1343; *Highland v. Highland*, 73 S. W. 791, 24 Ky. Law Rep. 2242; *Koger v. Koger*, 92 S. W. 961, 29 Ky. Law Rep. 235; and *Hoeb v. Maschinot*, 140 Ky. 330, 131 S. W. 23.

In *Hoeb v. Maschinot*, supra, the rule governing cases of this character was stated as follows: "Where there exists between two persons a relation of confidence and trust, by which one exerts such an influence over the judgment of the other as to subvert the latter's will and independence, a conveyance by the latter to the former will be set aside as fraudulent upon seasonable complaint. Whether such influence was exerted is a question of fact to be determined from the circumstances. Evidence of the fact may consist of such relationship of blood, or consanguinity, or as attorney and client, guardian and ward, physician and patient, and the like; and when such relationship is shown, and a voluntary conveyance beneficial to the grantee, the burden of proving that in that transaction the other mind acted freely, of its own volition, is on the person benefited, or the conveyance will be set aside. *Smith v. Snowden*, 96 Ky. 32 [27 S. W. 855, 16 Ky. Law Rep. 353]; *Maze's Ex'r v. Maze* [99 S. W. 336], 30 Ky. Law Rep. 679. The reason of the rule is it is not customary for people to give away their property, particularly to strangers in blood. It is also known that one who has the entire confidence of another can induce the latter to do with his property that which a stranger could not. Everyday observation is full of incidents of overreaching of that character. Such abuse of confidence is, in law, a fraud."

It will be noticed that the rule as above formulated applies to cases in which there has been a voluntary conveyance which is beneficial to the grantee. And in examining the cases relied upon by appellants it will be found in each case, not only that a confidential relationship existed, but that the deed was without consideration, and was beneficial to the grantee.

In *Smith v. Snowden*, supra, a father and mother, over 70 years of age, conveyed their land to two of their sons, without any consideration; it being pointed out that not even the consideration of love and affection was hinted at.

Likewise, in *Wilson v. Winsor*, supra, a husband and his wife conveyed the wife's land to the husband's brother, for the purpose of preventing her children from receiving any benefit therefrom; and, as it was without consideration, and really for

the husband's ultimate benefit, the court declared it fraudulent.

A similar state of facts controlled *Highland v. Highland*, supra. In that case the husband and his wife conveyed her land to Higbee, and Higbee conveyed it back to the husband; there being no consideration for either conveyance, and the purpose and effect of the two deeds being to convey the wife's land to the husband.

Again, in *Koger v. Koger*, supra, William Koger, Sr., at the age of 86, conveyed his land, for no consideration, to two of his sons, leaving ten of his children and two grandchildren of a deceased daughter, unprovided for.

And in *Hoeb v. Maschinot*, supra, the conveyance was from the mother-in-law to her son-in-law, and without consideration.

[4] It will be noticed, therefore, that the cases relied upon by appellants all come within the rule as above stated in *Hoeb v. Maschinot*, which imputes fraud in cases of voluntary conveyances made between persons who stand in confidential or fiduciary relations to each other. We do not mean to say that the rule is confined in its operation to cases in which there is no consideration, since there may be cases calling for its application, in which the consideration might be so grossly inadequate as to render the conveyance fraudulent, when the other conditions required by the rule are found to exist.

[5] In the case at bar, however, the answer expressly alleges that, although the deed, perhaps incorrectly, recites a consideration of \$300, cash paid, there was, in reality, a valuable consideration for the deed in the services which the nephew had theretofore rendered his uncle, which were of greater value than the land conveyed. This allegation of consideration is not in conflict with the terms of the deed, which recites a consideration of \$300 in cash, since it is not uncommon for parties to a contract to treat the satisfaction of a debt as a payment in money, or cash.

Moreover, there is nothing in the case to show there were any confidential relations between Jacob C. Warden and his nephew, more than are implied in the mere fact of kinship; and, if any presumption is to arise from the bare statement of that relationship, it would be that the uncle was the stronger character of the two.

The pleadings, as we view them, present a case of actual fraud rather than a case of implied or constructive fraud; and, since the rule requires a plaintiff who charges actual fraud to make out his case, the burden was upon appellants, and the circuit judge properly so ruled. *Hunt v. Nance*, 122 Ky. 282, 92 S. W. 6, 28 Ky. Law Rep. 1188.

Judgment affirmed.

RIDDELL v. WILCOX et al.

(Court of Appeals of Kentucky. Dec. 4, 1912.)

1. PARTITION (§ 77*)—SALE OF LAND—STATUTORY PROVISIONS.

Under Civ. Code Prac. § 490, providing that a vested estate jointly owned by two or more persons may be sold by a court of equity though plaintiff or defendant is an infant, where the property cannot be divided without materially impairing its value, or the value of plaintiff's interest, the court may order a sale of real estate owned and in possession of an adult and an infant, though such property consists of an 80-foot lot in a town not having 1,000 inhabitants, where the property was so remote as to make it practically a suburban lot, and where homeseekers do not erect dwelling houses on 40-foot lots, and where it could not be divided without materially impairing its value.

[Ed. Note.—For other cases, see *Partition*, Cent. Dig. §§ 211-223; Dec. Dig. § 77.*]

2. PARTITION (§ 93*)—SALES—IRREGULARITY IN PROCEEDINGS.

Where the court ordered a sale of land owned by an adult and an infant, and the infant was before payment protected by the lien retained by the judgment, any irregularity in the time of the execution of the bond to the infant required by Civ. Code Prac. § 493, did not affect the validity of the sale.

[Ed. Note.—For other cases, see *Partition*, Cent. Dig. §§ 285, 286; Dec. Dig. § 93.*]

Appeal from Circuit Court, Estill County.

Action by Ben F. Wilcox for the sale of property owned by himself and an infant. From a judgment overruling exceptions to the report of sale made to Ann M. Riddell and confirming the sale, Ann M. Riddell appeals. Affirmed.

Hugh Riddell and Robt. R. Friend, both of Irvine, for appellant. R. W. Smith and Clarence Miller, both of Irvine, for appellees.

SETTLE, J. It appears from the record in this case that the appellee Ben F. Wilcox and the infant appellee Maggie Lee Gum are the joint owners of a parcel of ground in Collins addition to the town of Irvine, fronting 80 feet on Main street and having a depth of 150 feet to an alley. The property is without buildings, is otherwise unimproved, and no income or profit therefrom has ever been received by the owners. This action was brought by the appellee Wilcox, one of the joint owners, and B. R. Gum, statutory guardian of the infant Maggie Lee Gum, against the latter to obtain a sale of the property and a division of the proceeds between the joint owners. The infant was properly brought before the court, and a defense made for her by a guardian ad litem. Following the taking of depositions in support of the averments of the petition judgment was rendered by the circuit court directing a sale of the property, and when sold by the commissioners, after due advertisement, the appellant Ann M. Riddell, being the highest and best bidder, became the purchaser at the price of \$800, for which amount

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

she executed, with approved security, a sale bond as required by the judgment bearing interest from date. When the sale was reported to the court by the commissioner, appellant filed exceptions to same upon the ground that the court was without jurisdiction to adjudge a sale of the property, and that her purchase of same and the deed of conveyance therefor from the commissioner could not pass to her a valid title thereto. The exceptions were overruled by the court, and the sale confirmed. Appellant excepted to the judgment manifesting these rulings; hence this appeal.

The petition seems to have rested the right of the joint owners to a sale of the property upon the grounds, first, that it was permissible under section 489, subsec. 3, Civil Code, in order that the infant's share of the proceeds might be applied to her maintenance and education; second, that it was also permissible under section 490, subsec. 2, Civil Code, because of the indivisibility of the property. Waiving a decision of the question whether the sale of the property could have been adjudged on the first ground at the suit of the adult joint owner and statutory guardian of the infant, it is sufficient to say that its sale was authorized on the second ground.

[1] Section 490, Civil Code, provides: "A vested estate in real property jointly owned by two or more persons may be sold by order of a court of equity, in an action brought by either of them, though the plaintiff or defendant be of unsound mind or an infant. (1) If the share of each owner be worth less than one hundred dollars. (2) If the estate be in possession and the property cannot be divided without materially impairing its value, or the value of the plaintiff's interest therein." It is apparent from the averments of the petition, the deeds filed as exhibits, and the proof furnished by the depositions found in the record that the real estate sold was owned jointly and by and in the possession of the appellee Wilcox and the infant appellee Maggie Lee Gum, and that it was a vested estate. It is further manifest from the evidence that the property was and is indivisible; that is, that it cannot be divided without materially impairing its value, and that both joint owners were and are benefited by its sale. At first blush, it would seem that an 80-foot lot might be advantageously divided into two lots, having a frontage of 40 feet each; and this would be true if the ground were situated in a larger and more populous town or city, or, even in the business section of Irvine, where it could be utilized as a site for a mercantile house or office building. But Irvine is a small town of not exceeding 1,000 inhabitants, and this property is so remote from its business and residential centers as to make it practically a suburban lot; and, as according to the evidence homeseekers in Irvine do not erect

dwelling houses upon 40-foot lots, its partition into small lots would render them, at least for many years to come, well nigh valueless, if not wholly unsalable. In view of the foregoing facts, it may well be said that the property is, in the meaning of the Code provision, indivisible. Therefore, it was properly sold as a single lot. It is conceded that the price realized for the property was its full market value and in excess of the amount at which it was appraised.

[2] We have found no irregularity in the proceedings preceding or following the sale. Even the bond to the infant required by section 493, Code, was executed by the guardian before the sale, although it might have been subsequently executed at any time before the payment of the sale bond by the purchaser; the infant being in the meantime protected by the lien retained by the judgment on the property.

As appellant will, under her purchase at the decretal sale and by the deed to be made her by the Commissioner, take a good and marketable title to the property sold, the circuit court in overruling her exceptions and confirming the sale committed no error. Wherefore the judgment is affirmed.

JELICO COAL MINING CO. v. LEE.

(Court of Appeals of Kentucky. Dec. 5, 1912.)

1. MASTER AND SERVANT (§ 278*)—INJURIES TO SERVANT—SUFFICIENCY OF EVIDENCE.

Evidence in an action by a coal mine employé for injuries from the car on which he was riding being derailed by being struck by a hanging cross-beam held to sustain a verdict for plaintiff.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 954, 956-958, 960-969, 971, 972, 977; Dec. Dig. § 278.*]

2. TRIAL (§ 251*)—INSTRUCTIONS—PLEADING TO SUSTAIN.

Where, in a coal mine employé's action for injuries from the car on which he was riding being derailed by being struck by an overhead cross-beam, the defendant pleaded contributory negligence only in general terms, the court did not err in refusing an instruction, not supported by the allegations of defendant's answer, that plaintiff could not recover if he loaded the car and left one end of a piece of timber projecting, so that it struck a post, causing the wreck and his injury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 587-595; Dec. Dig. § 251.*]

3. TRIAL (§ 251*)—INSTRUCTIONS—PLEADING TO SUSTAIN.

While an instruction may be based on acts of contributory negligence contemporaneous with the injury, although they are not pleaded, an instruction based on such acts occurring before or after the injury cannot be given, unless they be specially pleaded.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 587-595; Dec. Dig. § 251.*]

Appeal from Circuit Court, Whitley County.

Action by Larkin Lee against the Jellico Coal Mining Company. From a judgment for plaintiff, defendant appeals. Affirmed.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Tye & Siler, of Williamsburg, for appellant. R. L. Pope, of Williamsburg, for appellee.

NUNN, J. Larkin Lee, a boy 19 years of age, was injured in appellant's coal mine while driving a mule hitched to a cut of two or three cars. The front car, the one upon which he was riding, was thrown from the track, and his thumb was caught between it and a prop on the side of the mine, and mashed off near the second joint. He also received other injuries, but it is not necessary to mention them here. He instituted this action in the lower court to recover damages occasioned by the injuries, and the jury awarded him \$525, and appellant seeks a reversal of the judgment of the lower court for two reasons: First, because the verdict was flagrantly against the evidence; second, because the court erred in instructing the jury.

[1] It appears that Lee had been working in appellant's mine for some time as a "gin hand"; that on December 1, 1910, he, under the directions of his boss, Hollars, commenced to drive a mule hitched to cars along the entry of the mine; that he had never before been engaged at that character of work, and he so informed Hollars before he began; and that he had been so engaged only four or five days before he was injured. The testimony for the boy shows that he was directed to, and did, hitch the mule to the cars which were near the entry of the mine, and which were loaded with timber to be used in the mine; that he took his seat on the front of the front car at the usual place; that, when he had driven the mule about 300 feet along the entry, he, by the aid of a lamp on his cap, discovered one end of a cross-beam which was used to support the roof hanging down six or seven inches, and he ducked so as to pass under it, but some of the timbers on one of the other cars, which extended up above the bed of the cars, struck the hanging cross-beam, and gave the cars such a jerk as to cause the wheels of the front car to leave the track, resulting in the injury to Lee before stated and also in an injury to his leg. The petition alleged that appellant was negligent in placing Lee to work in an entry where such defective and dangerous conditions prevailed, that Lee was ignorant of the danger himself, and that appellant knew or could have known of it by the exercise of ordinary diligence. It was also alleged that the entry through which Lee was driving was too narrow; that it was only about six feet wide, when, to be safe, it should have been nine or more feet wide; that, as the entry was so narrow, the posts which supported the cross-beams used to hold the roof had to be placed dangerously near the car track; that the posts were only from four to six inches from the track when they should not have been closer than

fourteen inches. And it was alleged that Lee was unaware of the dangers incident to the use of such an entry, and that appellant knew it. By its answer appellant made a specific denial of the petition, and alleged contributory negligence in general terms, but did not mention any particular act of Lee constituting such negligence.

Appellee and his witnesses sustained the allegations of the petition. Appellant introduced its boss, Hollars, and he testified that he saw the condition of the cars soon after the wreck and injury to Lee. He stated that he saw the cross-beam down; that it was not caused to fall as stated by appellee, but was knocked down by one of the timbers which was projecting from the bed of one of the cars some inches, and this, in the judgment of the witness, was the cause of Lee's injury. This witness also testified that Lee could have saved himself from injury by spragging the wheels of the car which he failed to do. He says that it was Lee's duty to load the cars, and that he was present and saw him load the cars upon this occasion. Lee testified that he did not load the cars; that they were loaded and ready to be carried into the mine when he was directed by Hollars to hitch onto them; that they were properly loaded; that none of the timbers were projecting from the cars; and that, if any were found in that condition after his injury, it was caused by the shake-up in the wreck. There was also testimony by another witness who was a laborer in the mine, to the effect that this cross-beam was hanging the evening before the accident, and that he had noticed it several times during several days previous thereto.

[2] The court instructed the jury upon appellee's theory of the case as stated in his petition, and there is no criticism of this instruction. The pleading and testimony introduced upon the trial authorized it. The court gave, on behalf of appellant, an instruction on contributory negligence almost in the language of its pleading. Appellant asked an instruction to the effect that if the jury believed Lee loaded the car and left one end of a piece of the timber projecting, and it struck one of the posts and caused the wreck of the cars and his injury, then they should find for appellant. The court refused to give this instruction, and this is the main alleged error which appellant urges for a reversal of the case, and, in support of this contention, it cites the case of *L. & N. R. Co. v. King's Adm'r*, 131 Ky. 347, 115 S. W. 196. In that case such an instruction was authorized for the reason "that it grouped all the facts constituting the defendant's defense of contributory negligence." A defense should be made in the pleading and testimony. There was no allegation in the answer that authorized the court in the trial of the case at bar to give such an instruction. The instruction in behalf of appellee was

based upon his petition in which he had made specific allegations, but no such allegations were contained in the answer upon which to base an instruction in behalf of appellant.

[3] The distinction is: Before a party can have an instruction presenting special facts showing contributory negligence, such facts must be pleaded, if they are shown to have occurred either before or after the injury; but, on the other hand, if the alleged contributory negligent acts occurred at the time of the injury, it is proper to base an instruction on them, although they are not pleaded. If the court had singled out the fact of the improper loading of the cars and based an instruction upon it, the instruction would have been erroneous, for the reason that the testimony of appellant tended to show contributory negligence on the part of Lee, other than the improper loading of the cars; for instance, his failure to sprag the cars. As to this matter, however, Lee says he did not sprag the cars nor attempt to do so, as Hollars had told him not to, and, as the entry was so narrow and the post so close to the track upon which his cars traveled, it would have been dangerous for him to do so.

From what we have already said it appears that the lower court did not err in failing to give a peremptory instruction in behalf of appellant, and that the verdict of the jury is not flagrantly against the evidence.

For these reasons, the judgment of the lower court is affirmed.

HOUGH & SPRADLIN CO. v. CLARK.

(Court of Appeals of Kentucky. Dec. 5, 1912.)

1. MASTER AND SERVANT (§ 118*)—MASTER'S LIABILITY—DEFECTS IN POLES AND METHODS OF WORK—DANGEROUS SUBSTANCES.

Where a wooden rod or pole was the safe and approved means of loading dynamite into a drilled hole, and an overseer, on coming to holes so deep that there was no pole long enough to load them, directed a blasting man to use an iron pipe, with the assurance that it was safe, but which, because of its greater weight and rougher surface end, might and did discharge the dynamite, injuring the blasting man, the master was negligent in not furnishing a reasonably safe appliance for the work, whether or not the overseer knew the danger in using the iron pipe; since a master cannot, in the use of dynamite, direct an inherently dangerous method of handling it, and escape liability by showing that he did not know it was dangerous.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 177, 202, 209; Dec. Dig. § 118.*]

2. MASTER AND SERVANT (§ 289*)—CONTRIBUTORY NEGLIGENCE—ACTING ON ASSURANCE OF SAFETY—DANGEROUS SUBSTANCES.

Where a wooden rod or pole was the safe and approved method of loading dynamite into drilled holes, and, on coming to holes so deep that there was no pole of sufficient length to

be had, a blasting man on the order of his overseer, and upon his assurance of safety, used an iron rod, causing a premature explosion and resulting injury, the question of his contributory negligence was for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1089, 1090, 1092-1132; Dec. Dig. § 289.*]

3. MASTER AND SERVANT (§ 236*)—CONTRIBUTORY NEGLIGENCE—OBEDIENCE TO ORDER—ASSURANCE BY MASTER.

A servant, though assured by an overseer that an iron pipe was a safe tool or appliance in loading dynamite into drilled holes, was guilty of contributory negligence if it was so obviously unsafe that an ordinarily prudent person of the servant's experience would not have used it.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 681, 723-742; Dec. Dig. § 236.*]

4. MASTER AND SERVANT (§ 296*)—ACTION FOR INJURIES—INSTRUCTIONS—CONTRIBUTORY NEGLIGENCE.

In a servant's action for injuries from a premature explosion of dynamite while he was loading it into drilled holes by means of an iron pipe, under the master's order and assurance of safety, where his experience of several years in the use of dynamite in blasting was in evidence, an instruction directing the jury to consider ordinary prudence in the light of the circumstances attendant upon the doing of the work fairly presented the defendant's theory of contributory negligence, notwithstanding such assurance of safety.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1180-1194; Dec. Dig. § 296.*]

Appeal from Circuit Court, Pendleton County.

Action by Joseph C. Clark against the Hough & Spradlin Company. Judgment for plaintiff, and defendant appeals. Affirmed.

S. D. Rouse and D. Collins Lee, both of Covington, for appellant. Applegate & Clarke, of Falmouth, for appellee.

LASSING, J. [1, 2] Appellee, Clark, was engaged as blasting man by the appellant railroad construction company. Part of his duty was to load the drilled holes with dynamite. For this purpose the accustomed and approved instrument was a wooden rod or pole used as a pusher to force the dynamite down into the holes. Coming to a cut demanding deeper holes, appellee found that no pole he had was long enough to load them. The overseer, according to Clark's testimony, directed him to use an iron pipe for the work, assuring him that it was safe. Clark did so. While it was being used in loading a hole into which some 85 sticks of dynamite had been placed, a premature explosion occurred, badly injuring Clark. He sued and recovered judgment for \$2,000, predicated his case upon the unsafe tool supplied him. The company appeals.

The defendant was not entitled to a peremptory instruction. The evidence shows that a wooden pole was safe, and that an iron one, both because of its greater weight,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

and because its rougher surface and end might by abrasion discharge some portion of the crumbled dynamite in the hole, was not safe; that, notwithstanding this fact, Clark was directed by his boss to use it, with an assurance that it was safe. The boss does not undertake to deny the conversation. The master in supplying this iron tool did not furnish his servant a reasonably safe appliance for the work in hand. Clark says that he did not know the danger in the use of the iron rod. It is true that he had some question as to the safety of it, but he obeyed his employer, and accepted his judgment. Whether in doing so he was guilty of contributory negligence was for the jury. *Pullman Company v. Geller*, 128 Ky. 72, 107 S. W. 271, 32 Ky. Law Rep. 884, 129 Am. St. Rep. 295. Whether Newman, the boss, knew as a matter of fact the danger in using the iron rod, is immaterial. A master cannot, in the use of dynamite, direct an inherently dangerous method of handling the dangerous agency, and then escape liability for resulting injury by saying that he did not know the method was dangerous. This is not a case of a confessedly dangerous implement known to the servant, and used by him upon the master's promise to repair, as in *Burch v. Louisville Car Wheel Co.*, 146 Ky. 275, 142 S. W. 414, relied on by appellant, necessitating a special pleading of the fact, as held in that case. On the contrary, this case turns on the primary failure of the master to furnish a safe tool, which is fully pleaded in the petition.

[3, 4] The court told the jury that notwithstanding the master's assurance, if the tool was so obviously unsafe that a person of ordinary prudence would not, under the circumstances, use it, the finding should be for the defendant company. Appellant complains that ordinary prudence, within the facts appearing here, should have been defined explicitly as that which ordinarily would be used by one of Clark's experience in the use of dynamite; i. e., that the jury should have been told that notwithstanding the master's assurance of safety, if the tool was so obviously unsafe that an ordinarily prudent person of Clark's experience would not have used it, they should find for the defendant. The argument is sound; but in our judgment the instruction given fairly presented this idea to the jury. A part of the circumstances surrounding Clark proven upon the trial was his experience of several years in the use of dynamite in blasting. The instruction given directed the jury to consider ordinary prudence in the light of the circumstances attendant upon the doing of this work. While it might well have been somewhat more explicit, it fairly and satisfactorily presented the theory for which appellant contends.

Judgment affirmed.

WOOD v. CUMBERLAND TELEPHONE & TELEGRAPH CO.

(Court of Appeals of Kentucky. Dec. 6, 1912.)

1. TELEGRAPHS AND TELEPHONES (§ 15*)— —MAINTENANCE OF LINES—NEGLIGENCE— —PROXIMATE CAUSE.

Though a telephone company was negligent in insulating its wires, it is not liable for a fire caused by lightning which was carried into a building on the wire, unless but for its negligence the building would not have burned.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. § 9; Dec. Dig. § 15.*]

2. TELEGRAPHS AND TELEPHONES (§ 20*)—IN- SULATION OF WIRES—ACTIONS FOR INJURIES.

In an action to recover damages for a fire alleged to have been caused by the negligent failure of a telephone company to insulate its wires which entered a building, evidence held insufficient to go to the jury.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. § 18; Dec. Dig. § 20.*]

3. TELEGRAPHS AND TELEPHONES (§ 20*)—DE- FECTIVE INSULATION—NEGLIGENCE.

In an action to recover damages for a fire alleged to have been caused by a telephone company's negligence in failing to insulate its wires which entered a building, the plaintiff has the burden of showing that the fire was caused by the company's negligence.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. § 13; Dec. Dig. § 20.*]

4. NEGLIGENCE (§ 136*)—ACTIONS—SUBMIS- SION OF QUESTION TO JURY.

In a negligence action where the evidence is equally consistent with the existence or nonexistence of negligence, the case should not be submitted to the jury; the party affirming negligence having failed to prove it.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. §§ 277-353; Dec. Dig. § 136.*]

Appeal from Circuit Court, Muhlenberg County.

Action by P. S. Wood against the Cumberland Telephone & Telegraph Company. From a judgment for defendant, plaintiff appeals. Affirmed.

Flexner & Gordon, of Louisville, and Willis & Meredith, of Greenville, for appellant. Newton Belcher and Belcher & Sparks, all of Greenville, and Clarence Finn, of Owensboro, for appellee.

SETTLE, J. On the trial of this case in the court below, a verdict was rendered for appellee in obedience to a peremptory instruction given by the court at the conclusion of the appellant's evidence. So the only question arising on this appeal is whether or not the evidence introduced in behalf of the appellant was sufficient to take the case to the jury. The action was brought by appellant to recover of appellee damages for the burning of his storehouse and goods, situated at Belton, a village in Muhlenberg county; it being alleged in the petition that the destruction of the property was caused by the negligence of appellee in

falling to properly insulate its wires connected with and used in operating a desk telephone within the building and in failing to provide the telephone or wires with a lightning arrester; furthermore that the striking of the telephone wires by lightning, somewhere in the vicinity of the building, produced and carried into it an electric current of unusual force which started the fire, either by coming in contact with the goods stored therein, or overheating the wires within the building.

The building was in size 70 feet by 100 feet, constructed of brick with a roof of tin. Its interior was divided into three apartments connected by arched openings in the partition walls, and the buildings, as a whole, occupied as a general or department store. There was a single room built over the southwest corner of the store building, which appellant occupied as a sleeping room, and from this room a stairway led down into the store below. The telephone wires entered the main building at its north or rear end through the upper part of a window to the left of the door, and within the building extended along one of the partition walls, back of pine shelving, connecting with the telephone near a desk in the interior of the building.

The fire occurred about 1 o'clock in the morning, and was first discovered by appellant, who was awakened from sleep by the smoke which entered the bedroom over the store. He made his escape from the building by descending from its roof to that of a coal-house adjoining, thence to the ground. It is manifest from the bill of evidence appearing in the record that the telephone wires were uninsulated where they entered the building, and that they were neither there, nor elsewhere, provided with a lightning arrester; indeed this is admitted by appellee. The evidence shows that porcelain tubes should be used for insulating such wires where the building is entered by them, and that the safety of persons operating telephones requires the use of lightning arresters for grounding the electric currents during the prevalence of electrical or thunder storms.

[1] If it could be said that appellant's right to recover damages, as claimed, depended wholly upon whether appellee's failure to insulate its telephone wires and provide a lightning arrester was negligence, the peremptory instruction should not have been given. But, as it was incumbent on him to further show that such negligence was the proximate cause of the burning of his storehouse and goods, it remains to be determined whether the evidence introduced in his behalf conduced to prove that the telephone wires were struck by lightning outside the building, thereby creating upon them an additional electric current of unusual force which, because of the negligent failure of appellee to properly insulate the wires or

provide a lightning arrester, they conducted into the building and caused the fire.

As said in *City of Louisville v. Bridwell*, 150 Ky. 589, 150 S. W. 672, with respect to an accident resulting in an injury to the person of the plaintiff: "It seems to be well settled in law that, if the injury is the result of concurring causes, for one of which only the defendant is responsible, he must answer; or, where the injury is the combined result of negligence and accident, the negligent party must answer unless the injury would have happened if it had not been negligent." 1 Thompson, § 68; *City of Louisville v. Hart's Adm'r*, 143 Ky. 171, 136 S. W. 212, 35 L. R. A. (N. S.) 207; *Whitman-McNamara Tobacco Co. v. Warren*, 66 S. W. 609, 23 Ky. Law Rep. 2120; *City of Louisville v. Johnson*, 69 S. W. 803, 24 Ky. Law Rep. 685; 29 Cyc. 498.

[2-4] Much of appellant's evidence conduced to prove that, as late as 9 o'clock on the night of the fire, the atmosphere was apparently charged with electricity, which manifested itself in frequent flashes of what is known as sheet lightning in various parts of the horizon. The evidence, however, falls short of showing that the electrical disturbances referred to could have imparted to the telephone wires an electric current of sufficient strength to have overheated them within the building or cause them to transmit the current into and ignite the building or its contents; indeed, no witness saw any display of electricity upon or about the wires, and appellant, who was in the store that night and did not retire until after 9 o'clock, gave no testimony that his telephone was affected in any way by the display of electricity on the outside.

It is true that appellant testified that some time during the night, and before the fire, he was awakened by a "loud clap of thunder" and vivid flash of lightning; and the witness Latham, whose residence is a half mile distant from Belton, testified that, while standing in his door, he heard a loud "clap of thunder" and saw a great flash of lightning apparently in the direction of Belton. He was unwilling to say whether this was 25 minutes after 12 or 25 minutes before 1 o'clock, although he at the time looked at his watch, but was confident that it was one or the other. It is insisted for appellant that the above evidence, together with the fact that the fire was discovered about 1 o'clock, was sufficient to make it reasonably certain that the telephone wires were struck by lightning, which imparted to them a current of electricity so powerful as to cause them, in the absence of proper insulation, to pass it into the store and ignite it. We are unable to accept this conclusion. If the telephone pole from which wires run into the building, and which stood within 50 feet of it, had shown any marks of a lightning stroke, or other poles in the vicinity had shown such marks, or anything in the

appearance of the wires had indicated such an electrical visitation, it would have given support to appellant's theory as to the origin of the fire; but, without such support, the theory rests wholly upon conjecture.

According to the testimony of appellant, the first discovery of the fire was made by him. When first seen by him, the flames were coming out from the cornice and immediately under the eaves of the building in numerous places, and the tin roof was rising and falling from the heated air beneath. Moreover, after he got to the door at the front of the building, where he could see the entire inside, including the central part where the telephone was kept, he could see no light of any kind. From these facts it might well be argued that the fire began in the ceiling and worked its way downward to the contents of the store, and that if the lightning, which accompanied the thunder heard by appellant and Latham, did any execution at all, it struck the store building instead of the telephone lines, and thereby ignited and destroyed it.

In considering the evidence, we have not overlooked the fact that the top of the window, where the telephone wires entered the building, was one of the places, and perhaps the first place, through which the flames were seen by the witness Tipton to proceed; but it should be borne in mind that this window, according to the evidence, was the only one of the building lowered at the top, and it had been kept so from the time the telephone wires were run into the building. Being the only opening to the burning building, it afforded the only outlet for the escape of the heat and flames, and both would naturally follow the draft it produced. We do not mean to express the opinion that the fire resulted from the lightning striking the building, but only to say that the evidence furnishes as much proof of its having occurred in that way as that it was caused by the transmission of an electric current into the building over the telephone wires, which had been imparted to them by lightning. Neither theory is supported by any satisfactory evidence, therefore neither is tenable.

So many fires are of mysterious origin that it may safely be said half of them cannot be accounted for. What may have caused the burning of appellant's storehouse cannot be reasonably ascertained from the evidence upon which he relies in this case. It is simply another mysterious fire originating from an unknown and unexplained cause; and it will not meet the ends of justice to permit a jury to enter the field of speculation or conjecture in order to arrive at a verdict which is to determine the legal rights of litigants. Appellee is not required to account for the fire. On the contrary, the burden is upon the appellant to show that it is in some way chargeable to its negli-

gence, and this he has failed to do. The case comes clearly within the rule announced in *Louisville Gas Co. v. Kaufman & Straus*, 105 Ky. 131, 48 S. W. 434, 20 Ky. Law Rep. 1069; *Hughes v. Railroad Co.*, 91 Ky. 526, 16 S. W. 275, 13 Ky. Law Rep. 72; *Wintuska's Adm'r v. L. & N. R. R. Co.*, 20 S. W. 819, 14 Ky. Law Rep. 579; and numerous other cases, including the very recent case of *McDonald's Adm'r v. Louisville Car Wheel & R. S. Co.*, 149 Ky. 801, 149 S. W. 1142. In *Louisville Gas Co. v. Kaufman & Straus*, supra, the rule in question is thus stated: "When the question is one of negligence or no negligence, it is well-settled law that, where the evidence is equally consistent with either view—the existence or nonexistence of negligence—the court should not submit the case to the jury, for the party affirming the negligence has failed to prove it."

Wherefore the judgment is affirmed.

HATTERICH v. BRUCE.

(Court of Appeals of Kentucky. Dec. 4, 1912.)

1. PARTITION (§ 12*)—JOINT ESTATES OF INFANTS—DOWER RIGHTS—"VESTED ESTATE."

Where infants jointly own land, subject to the unassigned dower of their mother in a third of it, and all live on it, there is a "vested estate" therein, jointly owned and in possession, within Civ. Code Prac. § 490, subsec. 2, authorizing such an estate to be sold in an action by either owner, though one be an infant, if the property be indivisible, so that the sale is properly allowed if the action is brought by the guardian of the infants, the widow consenting to take the present value of her dower, though she join as plaintiff.

[Ed. Note.—For other cases, see *Partition*, Cent. Dig. §§ 38-51; Dec. Dig. § 12.*

For other definitions, see *Words and Phrases*, vol. 8, pp. 7302-7303.]

2. GUARDIAN AND WARD (§ 92*)—SALE FOR PARTITION—BOND OF GUARDIAN.

The bond required by Civ. Code Prac. § 493, to be executed to infants by their guardian before a sale is ordered, need not be given in an action for sale for partition under section 490, subsec. 2; they being protected by section 497, providing that in such action the share of an infant shall not be paid by the purchaser, but shall remain a lien on the land till he comes of age, or his guardian execute bond as required by section 493.

[Ed. Note.—For other cases, see *Guardian and Ward*, Cent. Dig. §§ 358-362; Dec. Dig. § 92.*]

Appeal from Circuit Court, Harrison County.

Action by Mary Bruce, guardian, for sale for partition. From the judgment overruling exceptions to the report of sale, Henry Hatterich, the purchaser, appeals. Affirmed.

Cason & Cox, of Cynthiana, for appellant. Chester M. Jewett, of Cynthiana, for appellee.

SETTLE, J. This is an appeal, prosecuted by the purchaser of real estate at a decretal sale, from a judgment overruling his exceptions to the report of sale and cou-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

firming the report. The real estate consists of a house and lot situated in the city of Cynthiana. The price bid therefor by appellant was \$1,100, which exceeded its appraised value by \$300. It was jointly owned in fee by the four infant children of William Wallace Bruce named in the record, subject to the dower of their mother, Rose C. Bruce, therein.

[1] William Wallace Bruce died intestate November 8, 1906, a resident of Boyle county, Ky., survived by his widow and four infant children. The widow was appointed and duly qualified as statutory guardian of the four infant children, and she in her own right, and as such guardian, and the children in their own right, brought suit, under section 490, Civil Code, to obtain a decree for the sale of the house and lot in Cynthiana and a division of the proceeds among them, according to their respective interests. It is conceded that the parties in interest were all properly before the court, and that the proceedings leading to the decree and sale were in all respects regular.

Confirmation of the sale was resisted by the purchaser, upon the ground that the circuit court was without jurisdiction to adjudicate a sale of the property; it being claimed that the estate was not a vested one, in possession and jointly owned, within the meaning of section 490, subsec. 2, Civil Code. The section of the Code, *supra*, provides: "A vested estate in real property jointly owned by two or more persons may be sold by order of a court of equity, in an action brought by either of them, though the plaintiff or defendant be of unsound mind or an infant: (1) If the share of each one be worth less than \$100.00. (2) If the estate be in possession and the property cannot be divided without materially impairing its value, or the value of the plaintiff's interest therein."

The depositions appearing in the record show, beyond doubt, the indivisibility of the property; that the house thereon is in a bad state of decay and of little value; that it would require from \$800 to \$1,000 to repair the property; and that only by its sale could loss to the joint owners be prevented.

Since the death of William Wallace Bruce, dower in this property has not been assigned the widow; but she and the children have been all the while in possession and control thereof, having together received and used the rents in the ratio of their respective interests. As the jurisdiction to sell the lands of infants is purely statutory, it necessarily follows that in an action brought for that purpose the statute must be substantially pursued. We have repeatedly held that the circuit court is without jurisdiction, under section 490, Civil Code, to order a sale of indivisible real property in an action brought by the widow against an infant, who owns the property subject to the dower right. Ful-

lenwider v. Johnson, etc., 145 Ky. 19, 139 S. W. 1096; Liederkrans Society v. Beck, 71 Ky. (8 Bush) 597; Lee v. James, 81 Ky. 446.

It appears that in Fullenwider v. Johnson, etc., *supra*, the parties interested in the land were the widow and her infant child; the widow being the plaintiff and the infant the defendant in the action. The infant owned the fee, subject to the widow's dower; that is, a life estate in an undivided one-third of the land. This status, it is said in the opinion, did not constitute a joint ownership in the proper meaning of the Code; and that "to constitute a joint ownership the shares of the owners must generally extend to the whole estate, and be such as that neither of the joint owners would have an interest in the proceeds set apart to the joint owner." This conclusion is explained in the opinion, after differentiating the case from that of Atherton v. Warren, 120 Ky. 151, 85 S. W. 1100, 27 Ky. Law Rep. 632, as follows: "Here the whole estate is owned by one, subject to a life estate in one-third, and the life tenant is asking that the property be sold for a distribution of the proceeds; and in the proceeds going to the life tenant the remainderman has an interest, as upon the death of the life tenant her share would go to him, unless the value of the life estate could be paid over to the life tenant. In view of these facts, it cannot be held that the joint ownership is of such a character as to authorize a sale of the property upon the petition of the life tenant."

In Malone v. Conn, etc., and Aims, etc., v. Conn, 95 Ky. 93, 23 S. W. 677, the tenant by the curtesy brought suit against the remaindermen for a sale of the land, under section 490, Code, upon the ground of its indivisibility, but the sale adjudged by the lower court was held invalid, upon the ground that, the possession being wholly with the estate for life (i. e., the life tenant), there was no joint ownership or possession, in the meaning of section 490, Code; therefore its provision did not apply. The doctrine announced in Malone v. Conn and Aims, etc., v. Conn, *supra*, was applied in Berry v. Lewis, 118 Ky. 652, 82 S. W. 252, 26 Ky. Law Rep. 530, Id., 118 Ky. 652, 84 S. W. 526, 27 Ky. Law Rep. 109. Liter v. Fishback, 75 S. W. 232, 25 Ky. Law Rep. 260, and Swearngen v. Abbott, etc., 99 Ky. 271, 35 S. W. 925, 18 Ky. Law Rep. 184, in none of which cases was there a joint ownership or possession of the property sought to be sold, in the meaning of the statute.

In Atherton v. Warren, 120 Ky. 151, 85 S. W. 1100, 27 Ky. Law Rep. 632, it was held that a sale of indivisible real estate would be permitted, under section 490, Code, where, as in that case, one owned the fee in his share, and the other share was owned by a life tenant and remainderman; or, to be more precise as to the interests of the parties, except as to one share, all the joint

owners of the property were vested with the fee. In the one share referred to the remainder was owned by infants, and the life estate by their father.

In *Wormald's Guardian, etc., v. Heinze*, 90 S. W. 1064, 28 Ky. Law Rep. 1022, the judgment of the circuit court refusing a sale of the real estate involved, under section 490, Code, was reversed. Suit was brought by the infant and her guardian to obtain the decree. The property was jointly owned by the infant and her aunt, one moiety each; but the father of the infant owned a dower right in her undivided half, the value of which he was willing to take in money. The father and aunt were made defendants. In the opinion *Atherton v. Warren*, supra, was relied on as an authority in point, and the doctrine therein announced held to entitle the infant to the sale of the property as prayed.

In our opinion, the case at bar comes within the rule declared in *Atherton v. Warren*, and *Wormald's Guardian v. Heinze*. The possession of the property is jointly held by the infants and their mother, though the latter is but the tenant for life in an undivided third in value of the whole; and the property cannot be divided without materially impairing its value and that of the several owners therein. Moreover, the widow asks, and will be permitted to take absolutely, the value of her dower in money, payable out of the proceeds of the property; the amount to be fixed by judgment of the court, according to her life expectancy as estimated by the insurance life tables.

As before remarked, the cases in which apparently similar sales of the property were refused were actions brought alone by the widow as life tenant, or a tenant by the curtesy of the entire property sought to be sold. Whereas here the action was brought by the infants and their guardian, as well as by the life tenant. This case, because of its dissimilarity, is not to be controlled by the opinion in *Fullenwider v. Johnson*, supra; for in that case, although the whole estate was owned by one, subject to the life estate of the widow in one-third, the sale of the property was asked at the suit of the widow alone, and the remainderman, in case of a sale of the property, would have had an interest in the life tenant's share of the proceeds, as upon her death it would go to him. Here the infants can have no interest in the widow's share of the proceeds of the property, as she will be paid the present value of her life estate therein. So, in view of this fact, and the further fact that the sale is asked by the infant owners and their guardian, the joint ownership is of such character as to authorize a sale of the property upon their petition; and, as the widow, by joining as a plaintiff in the petition, is but voluntarily uniting with the in-

fant to accomplish what she would have consented to if made a defendant to the action, the right of the parties to the sale of the property cannot be affected by the fact of her being a plaintiff.

It seems to have been the policy of this court to withhold its approval of sales of real property, under section 490, Civil Code, when made at the suit of life tenants owning unassigned dower therein, or life tenants by the curtesy, but not to prevent such sales when asked by joint owners or tenants in possession, interested as are the infants in this case.

Not only is the proposition last stated supported by *Atherton v. Warren* and *Wormald's Guardian, etc., v. Heinze*, supra, but it is likewise supported by *Jenkins v. McVaw*, 145 Ky. 205, 140 S. W. 150, wherein it was held that a court of equity has jurisdiction, under section 490, subsec. 2, Civil Code, and at the suit of infants by their statutory guardian, to sell real estate owned by them, and in which they also had a right of homestead, under section 1707, Kentucky Statutes. The widow of the decedent and mother of the infants, who owned a dower interest in the land, and was equally entitled with the infants to a homestead, was a plaintiff in the action.

In view of the construction given the provisions of section 490, subsec. 2, Civil Code, by the three authorities last mentioned, we think the circuit court had jurisdiction to adjudge a sale of the property purchased by the appellant.

[2] The validity of the sale was not affected by the failure of the guardian to execute the bond required by section 493, Civil Code, before the sale was ordered. In a sale of property under section 490, subsec. 2, Civil Code, the bond to the infant, required by section 493, need not be given. The judgment provides that the share of each of the infants in the proceeds of the property shall remain a lien thereon, bearing interest, until the guardian of the infants execute bond as required by section 493. This provision of the judgment amply protects the infant, and the required bond may yet be executed by the guardian before payment by the purchaser of the sale bond executed by him. Such procedure is allowed by section 497, Civil Code, which provides: "In the action mentioned in subsection 2 of section 490, the share of an infant, or of a person of unsound mind, shall not be paid by the purchaser; but shall remain a lien on the land bearing interest until the infant become of age, or the person of unsound mind become of sound mind, or until the guardian of the infant, or the committee of the person of unsound mind, execute bond as required by section 493."

Judgment affirmed.

FLUEHART COLLIERIES CO. v. ELAM.

(Court of Appeals of Kentucky. Dec. 5, 1912.)

1. MASTER AND SERVANT (§ 118*)—INJURY TO SERVANT—SAFE PLACE TO WORK.

Where a mining company failed to provide a passageway by which the miners could go from one part of the mine to the other without passing through elevator shafts, and as a result an employé was injured, the fact that there was no statute or rule of the state mining department requiring such passageway did not relieve the company from liability; the duty to provide such passageway being imposed by common-law principles.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 177, 209; Dec. Dig. § 118.*]

2. MASTER AND SERVANT (§ 211*)—INJURY TO SERVANT—ASSUMPTION OF RISK—SAFE PLACE TO WORK.

By accepting employment in a mine, an employé assumed the risk of such accidents as might happen in the ordinary course of his employment, but not any risk arising from failure of the company to exercise ordinary care to furnish him a reasonably safe place in which to work; the risks assumed by a servant not embracing risks brought about by the master's failure to perform his duty.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 557; Dec. Dig. § 211.*]

3. MASTER AND SERVANT (§ 289*)—INJURY TO SERVANT—CONTRIBUTORY NEGLIGENCE.

Where a coal miner with no experience in shaft mines accepted employment in one, and two days thereafter, without having been warned and while in the exercise of ordinary care, was injured from a descending elevator while he was passing through the elevator shaft in obedience to a general order from his foreman to go to the opposite side of the mine to which there was no passageway other than through such shaft, he was not guilty of contributory negligence as a matter of law, though he knew in a general way of the possible danger.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 1089-1132; Dec. Dig. § 289.*]

4. MASTER AND SERVANT (§ 107*)—DUTY OF MASTER—SAFE PLACE TO WORK.

The duty of a coal mining company to provide its employé with a reasonably safe place was not confined to the precise spot in which he worked, but included the places to and from which he might be required to go in performing his duties.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 199-202, 212, 254, 255; Dec. Dig. § 107.*]

5. MASTER AND SERVANT (§ 270*)—INJURY TO SERVANT—EVIDENCE—PRECAUTION AFTER INJURY.

In a coal miner's action for injuries from being struck by a descending elevator while he was passing through the elevator shaft because there was no safe passageway, it was error to admit evidence to prove that a passageway was constructed around the elevator shaft after the accident.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 913-927, 932; Dec. Dig. § 270.*]

6. APPEAL AND ERROR (§ 1050*)—HARMLESS ERROR—ADMISSION OF EVIDENCE.

The admission of evidence of precautions taken by the master by constructing a safe passageway after injury to the employé was harmless, where the uncontradicted evidence showed that the employer was negligent in not having a safe passageway which would obviate the neces-

sity of its employés going through the elevator shaft where plaintiff was injured.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4153-4160, 4166; Dec. Dig. § 1050.*]

7. MASTER AND SERVANT (§ 270*)—INJURY TO SERVANT—EVIDENCE—PRECAUTION AFTER INJURY.

Evidence of subsequent improvements or repairs is excluded because it does not establish that the wrongdoer was guilty of negligence before the accident.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 913-927, 932; Dec. Dig. § 270.*]

Appeal from Circuit Court, Johnson County.

Action by J. C. Elam against the Fluehart Collieries Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Howes & Howes, of Paintsville, and Auxier, Harman & Francis, of Pikeville, for appellant. Fogg & Kirk, of Paintsville, for appellee.

CARROLL, J. This appeal is prosecuted from a judgment for \$1,500 entered upon the verdict of a jury in a suit by the appellee against the appellant to recover damages for personal injuries sustained by him. At the time of the injury complained of the appellee was a coal miner, engaged in working for the appellant coal company. The mine operated by the appellant was what is known as a "shaft mine"; the shaft extending from the surface of the ground a distance of about 110 feet to the coal. In the shaft there were two elevators operated by machinery, situated on the surface of the ground, and these elevators were used for the purpose of bringing coal from the mine to the surface and taking miners and employés of the company to and from the surface to the mine. They were intended to be so operated as that, when one was at the bottom of the mine, the other would be at the surface of the ground, and, when an elevator descended to the floor of the mine, it rested upon a framework of sills; the floor of the elevator being level with the floor of the mine. The shaft in which these elevators ran was located in the main entry of the mine, and the miners in using this entry in going from one side of the mine to the other were obliged to walk through the shaft in which the elevators ran. When one elevator was down to the floor of the mine, the miners would walk through the elevator, but when the elevators were above the mine floor, as often happened, they would walk over the place where the elevator rested when down. The company had not provided any means or method of warning the miners of the descent of these elevators, and, so if one of the elevators was not at the bottom of the mine, the only way in which they could tell where the elevators were was by looking, as no signal or notice was given of their movements. At the time

appellee was injured he was directed in a general way by the foreman to go to another part of the entry, and obedience to this order made it necessary that he should go through the elevator shaft. At this time neither of the elevators were at the bottom of the mine, and, as appellee was passing over the space where the elevators came down, one of them, quickly descending in the usual way, caught him, and he was pressed against the floor of the mine by the bottom of the elevator, receiving severe injuries.

The case for the appellee was put upon the ground that the company was negligent in failing to furnish him a reasonably safe place in which to work, and in failing to warn him of the danger in going through these elevator shafts; while the company defended upon the ground that the appellee assumed the risk of injury in accepting employment, and, besides, was guilty of such contributory negligence as would defeat a recovery.

[1] The evidence shows, practically without contradiction, that the method of requiring the miners to pass through these elevator shafts in going from one part of the mine entry to another was unsafe. It further shows, without contradiction, that a passway could have been made with little expense on the sides of this shaft, through which the employes could have gone with safety in passing from one part of the mine entry to the other, thus avoiding the necessity of going through the elevator shaft. It is further shown by the evidence that there was no time fixed for the descent of these elevators, and that no warning or notice of any kind was given of their descent. In short, the overwhelming weight of the evidence establishes that the company did not exercise ordinary care to furnish appellee a reasonably safe place in which to work, but, on the contrary, furnished him a place in which it was extremely dangerous to work, although it could have been made safe by the expenditure of a few dollars.

It is said, however, by counsel for appellant that as there is no statute in this state requiring mineowners to provide a passageway around elevator shafts, and as the state mine inspecting department did not object to or complain of the failure of the appellant to have the passageway, it should not be treated as having altogether failed in its duty of furnishing appellee a reasonably safe place in which to work. But the fact that there is no statute in this state on the subject of providing a passageway around elevator shafts, or the fact that the state mining department was apparently negligent or indifferent in the performance of its duty, did not excuse appellant from discharging the duty it was under to exercise ordinary care to furnish its employes with a reasonably safe place to work. This duty is imposed upon the master by common-

law principles, and does not require statutory enactment or mining department direction to make it effective. As the evidence for appellee made out a good case in his behalf upon the point that the coal company was remiss in its duty in the respect mentioned, it only remains to be seen if the defenses of assumption of risk and contributory negligence can save the appellant from the loss it invited by its failure to have a passageway.

[2] In accepting employment the appellee assumed the risk of such accidents and resulting injury as might happen to him in the ordinary and customary course of his employment, but he did not assume any risk from accident or injury caused by the failure of the coal company to exercise ordinary care to furnish him a reasonably safe place in which to work. The risk that the servant assumes does not embrace or include risks that are brought about by the failure of the master to perform his duty. This case furnishes a good illustration of this exception of the doctrine of assumption of risk. Here the servant was injured by the failure of the master to exercise ordinary care to furnish him a reasonably safe place in which to work, and when the servant, in the performance of his duty, was injured by the failure of the master in this respect, it is no defense for the master to say that, "although I was negligent and the breach of duty I committed resulted in the injury, nevertheless, you took the risk of nonperformance of duty on my part, and therefore cannot recover."

We have said in more than one case that the doctrine of assumed risk should be sparingly applied, and in this case it has no place at all.

[3] Nor was the appellee guilty of such contributory neglect as would defeat a recovery. It is true he was an experienced miner, but he had never worked in a shaft mine until he accepted employment from appellant two days before he was injured, and, except for the slight knowledge of the manner in which the elevators were operated acquired by his use of the elevators four times during these two days, he had no knowledge gained from experience concerning the danger attending the operation of the elevators of the danger attending the act of passing through the elevator shaft when one of the elevators was not fully down. When he started through the elevator shaft and did not find either of the elevators there, he probably knew that one of them would be down in a short time; just when he had no means of knowing. He also, of course, knew that, if he was caught by the descending elevator, it would cost him his life or cripple him severely. But this knowledge and his failure to wait until the elevator came down did not as a matter of law defeat his right to a recovery. He testified that, when he

was ordered by the foreman to go to another part of the mine, obedience to the order made it necessary that he should pass through the elevator shaft, and that when he got to the shaft, and did not see any elevator there, he looked up the shaft, but did not see the descending elevator, nor did he hear it coming, and started through, and was caught, as before stated.

It is argued by counsel for appellant that appellee should have taken particular pains to find out where the elevator was, and should have exercised a high degree of care to protect himself from injury by it, as he must have known in a short time at least it would come down. He was not, however, under the circumstances, required to exercise more than ordinary care for his own safety, and the question as to whether he exercised the degree of care necessary to excuse him from such negligence as would defeat a recovery was properly submitted to the jury, and the jury in finding a verdict in his behalf must have believed that he exercised the measure of care required of him.

[4] It is also complained that the court committed error in adding to the instruction telling the jury that it was the duty of the appellant to use ordinary care to furnish appellee a reasonably safe place to work the words, "And a reasonably safe way to pass to and from his work while inside the mine, considering the circumstances, place and character of work to be done." We do not think the criticism of this instruction is well taken. It was as much the duty of appellant to exercise care to furnish appellee a reasonably safe way to go to and from his work while inside the mine as it was to exercise care to furnish him a reasonably safe place in which to work. The duty of appellant to exercise ordinary care to furnish appellee a reasonably safe place was not confined to the precise spot in which he worked, but included the places to and from which he might be required to go in performing his duties.

[5, 6] The further error is assigned that the court permitted counsel for appellee to prove that a passway had been constructed around the elevator shaft after the accident to appellee occurred. The admission of this evidence was error, but not prejudicial under the facts of this case.

[7] The ground upon which subsequent improvements or repairs is excluded is that this evidence does not establish that the wrongdoer was guilty of negligence before the accident happened. *Louisville & Nashville R. Co. v. Morton*, 121 Ky. 398, 89 S. W. 243, 28 Ky. Law Rep. 355. But in this case the uncontradicted evidence shows that it was negligence not to have a passway, and so evidence that appellant made a passway after the accident could not have prejudiced

its rights, as in making the passway it only did what all the witnesses said should have been done before the accident.

Upon the whole case we think the appellant had a fair trial, and the judgment is affirmed.

GROSS et al. v. COMMONWEALTH.

(Court of Appeals of Kentucky. Dec. 6, 1912.)

1. CRIMINAL LAW (§ 369*)—EVIDENCE—ADMISSIBILITY.

Where two persons were killed at practically the same instant by the same persons, and possibly by the same shot, the court, on the trial of accused for the murder of one of such persons, properly admitted in evidence the murder of the other to show the whole transaction.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 822-824; Dec. Dig. § 369.*]

2. CRIMINAL LAW (§ 823*)—INSTRUCTIONS—SELF-DEFENSE.

The error in an instruction defining murder and aiding and abetting, arising from the failure to give defendant firing the fatal shot the benefit of the plea of self-defense, but only giving to him the right to defend his codefendants, is cured by an instruction defining the right of self-defense and giving each of defendants the full benefit thereof.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1902-1906, 3158; Dec. Dig. § 823;* Homicide, Cent. Dig. §§ 718, 719.]

Appeal from Circuit Court, Perry County. Ned Gross and others were convicted of manslaughter, and they appeal. Affirmed.

John O. Eversole, of Booneville, and F. J. Eversole, John B. Eversole, Wootton & Morgan, and E. C. Wootton, all of Hazard, for appellants. James Garnett, Atty. Gen., and O. S. Hogan, Asst. Atty. Gen., for the Commonwealth.

TURNER, J. The 15th of February, 1912, was fixed as the time for the trial, at Buckhorn, in Perry County, before the police judge, of Willie and Andrew Johnson, charged with some misdemeanor growing out of reprehensible conduct the Sunday night before at the church in that town. An attempt was made at the time to arrest them; but they resisted and escaped. The four appellants, Ned and Jordon Gross, Steve Sandlin, and Charley Riley, were the chief witnesses against the two boys upon the charge aforesaid. It appears that prior to this time there had been some hostile feeling between some of the appellants and Levi Johnson, an uncle of the two boys; and it is manifest that the feeling was aggravated by the occurrence at the church. On the morning of the 15th of February, Levi Johnson, John Davidson, Thomas Deaton, Joe Smith, and the two boys, Willie and Andrew Johnson, went to Buckhorn from the home of Granville Johnson about two miles distant, for the purpose of attending the trial; but when they reached there they ascertained that Granville

Johnson, who had preceded them, had already succeeded in having the police judge continue the trial to another day. They proceeded to the home of the police judge, where they remained a while, and from there to the home of Levi Johnson, who lived in another part of the town. It appears that the six, all of whom were related in one way or another, remained together, or practically so, the whole day; and it further appears that the two Grosses and Sandlin, who were also related, and the appellant Riley, their associate, had frequent conferences during the day, and remained together most of the time. It is manifest from the whole record that both parties expected trouble during the day; and it is equally plain that neither party took any great precaution to avoid it. After having taken dinner at Levi Johnson's, the Johnson party started back to Granville Johnson's; Levi Johnson and John Davidson riding the same horse. The two Grosses and Riley were standing in front of a store near the post office, and Sandlin was at his residence, a short distance away. After the Johnson party left the post office, where they had stopped a short time, some words passed between John Davidson and one of the Grosses; and thereupon the two Grosses hastily repaired to a coalhouse near the residence of Sandlin, and the shooting began. The evidence is conflicting, both as to who began the wordy altercation and as to who fired the opening shots; but it is manifest that the appellants were well prepared for the difficulty, as it appears that the two Grosses each had their pistols, and that Sandlin had his shotgun conveniently near in his home, loaded with buckshot, and that Riley had that day brought his gun from his home, and had it in the Sandlin residence. After the firing of the first two or more shots with the pistols, Sandlin, through a window in his house, fired two shots with his double-barreled shotgun, and subsequently there was a general firing from both sides. Levi Johnson and John Davidson were each shot several times, and lived only a few minutes. The appellants, at the March term of the Perry circuit court, were all four indicted, charged with the murder of Levi Johnson, in one count, and in another Ned Gross and Steve Sandlin were charged with his murder, and Jordon Gross and Charley Riley with being present and aiding and abetting in the same. They were each found guilty of manslaughter, on a joint trial, and all appeal.

[1] They complain that the lower court permitted the commonwealth throughout the trial to keep before the mind of the jury, by the introduction of its evidence, the fact that John Davidson had also been shot and killed by one or more of appellants, although the appellants were only on trial for the killing of Levi Johnson, and insist that it was prejudicial error to permit evidence of the commission of one crime to go before the

jury when the defendants were on trial for another. In a proper case the point would be well taken; but it appears here that the two men, Johnson and Davidson, were killed at practically the same instant; that they were riding the same horse; that they were killed by the same party, or parties, and possibly even by the same shot. We cannot see how, in any practical way, the court could have avoided keeping from the attention of the jury at all stages of the trial the fact that some one or more of the appellants had killed John Davidson as well as Levi Johnson. It would have been impossible, in fact, to have introduced the evidence before the jury in such way as to enlighten them as to the whole transaction, without continually keeping before them the patent fact that John Davidson was killed at the same time, and practically under the same circumstances, as Levi Johnson. *Miracle v. Commonwealth*, 148 Ky. 453, 148 S. W. 1136.

[2] The first instruction is the one defining murder, and the second deals with the aiding and abetting feature. It is complained of both of these instructions that they do not give the defendant who actually fired the fatal shot the benefit of the plea of self-defense, but only give to him the right to defend his codefendants. And this is true; but in the third instruction this error is cured, as that instruction is a well and carefully drawn definition of the right of self-defense, and gives each of the appellants the full benefit thereof.

A careful reading of the record is most convincing that appellants have each had a fair and impartial trial.

Judgment affirmed.

SAMUELS v. LOUISVILLE RY. CO.

(Court of Appeals of Kentucky. Dec. 6, 1912.)

1. CARRIERS (§ 320*)—PASSENGERS—INJURIES—JURY QUESTION—NEGLIGENCE.

Whether a street car which plaintiff attempted to board was started with an unusual jerk as she boarded it held a jury question in an action for alleged injuries in boarding.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1118, 1126, 1149, 1153, 1160, 1167, 1179, 1190, 1217, 1233, 1244, 1248, 1315, 1325; Dec. Dig. § 320.*]

2. CARRIERS (§ 320*)—PASSENGERS—INJURIES—JURY QUESTION.

Whether a street car passenger was injured as claimed while boarding the car held a jury question in an action for such injuries.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1118, 1126, 1149, 1153, 1160, 1167, 1179, 1190, 1217, 1233, 1244, 1248, 1315-1325; Dec. Dig. § 320.*]

3. CARRIERS (§ 287*)—PASSENGERS—BOARDING CAR—NEGLIGENCE.

It is negligence to move a street car at all before a passenger has reasonable opportunity to reach the platform; but, if he has such opportunity, the company is not liable unless the car is started with an unusual jerk,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Ky.-No. Series & Rep'r Indexes

or unless the passenger be feeble, crippled, etc.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1154–1159, 1161–1166; Dec. Dig. § 287.*]

4. CARRIERS (§ 321*)—CONSTRUCTION—ALLEGATIONS OF INJURY.

A street car passenger's allegation that she was injured "before she had been given a reasonable opportunity to fully board and enter said car," did not allege that the car was started before she had a reasonable opportunity to board it on the platform, but merely that she was injured before she was given an opportunity to enter the car, so that an instruction was not required that plaintiff was entitled to a reasonable opportunity to board the car.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1247, 1326–1336, 1343; Dec. Dig. § 321.*]

5. PLEADING (§ 34*)—CONSTRUCTION.

A pleading is construed most strongly against the pleader.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 66–74; Dec. Dig. § 34.*]

6. TRIAL (§ 252*)—PASSENGERS—INSTRUCTION—CONTRIBUTORY NEGLIGENCE.

In absence of evidence of a passenger's contributory negligence while boarding a car, it was error to instruct on such negligence.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 505, 596–612; Dec. Dig. § 252.*]

7. APPEAL AND ERROR (§ 1068*)—HARMLESS ERROR—INSTRUCTIONS.

The giving of an instruction on contributory negligence without support in the evidence was not prejudicial to plaintiff, where the verdict for defendant did not rest on such instruction.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4225–4228, 4230; Dec. Dig. § 1068.*]

Appeal from Circuit Court, Jefferson County, Common Pleas Branch, Second Division.

Action by Barbara Samuels against the Louisville Railway Company. From a judgment for defendant, plaintiff appeals. Affirmed.

Popham, Trusty & Roose, of Louisville, for appellant. Fairleigh, Straus & Fairleigh and Howard B. Lee, all of Louisville, for appellee.

CLAY, C. Plaintiff, Barbara Samuels, brought this action against defendant, Louisville Railway Company, to recover damages for personal injuries. She charged in her petition that on or about October 30, 1910, she desired to become a passenger on a car of the defendant company at Fourth and N streets in the city of Louisville; that defendant stopped its car at said point for said purpose, whereupon she attempted to board same while the same was at rest, when defendant and its agents in charge of said car, with gross negligence, while she was in a place of peril, and before she had been given a reasonable opportunity to fully board and enter said car, did then and there cause and permit said car to violently start forward with an unusual and violent lurch, whereby she was thrown against portions of the car with great force, and permanently injured in her limbs, body, and back, and in her internal

regions and nervous system, and causing her great mental and physical suffering, and permanently impairing her earning power, to her damage in the sum of \$5,000. Defendant's answer contained a traverse and a plea of contributory negligence. The jury returned a verdict in favor of defendant. Judgment was entered accordingly, and plaintiff appeals.

Plaintiff testifies that she was standing at Fourth and N streets when the car stopped. She had just gotten on the platform when the car gave a surge, and she fell and struck her side on the back rail. The car started with an unusual jerk. When the car started, she was right at the edge of the platform where she got up. When she fell, her side hurt her so badly she could not get her breath. After the accident she suffered a great deal. She first went to see Dr. Coleman, who examined her and told her to return. She did not go to see him again. She afterwards went to see Dr. Gatz, who applied some adhesive plasters to the place where she was hurt. Since the accident she had been unable to do her work well. She could not walk upstairs as she had done previous to the accident, but had to hold to the steps. Her side still hurt her a good deal when she was walking around and doing her work.

Mrs. Annie Eskridge, a neighbor who lived just across the street from plaintiff, was with plaintiff at the time of the accident. She testifies that they had a baby with them, a great-grandchild of plaintiff. She put the baby on first. Plaintiff then started to board the car. Fearing the baby would fall, Mrs. Eskridge got on the car in front of plaintiff. When Mrs. Eskridge reached the center of the platform, the car gave a sudden jerk, which would have thrown her had she not caught the railing. Plaintiff was thrown against the rail of the car. When they returned to plaintiff's home, witness discovered a ridge along plaintiff's side about three inches long, which was swollen and bruised. Nearly every night during the winter, she waited on plaintiff, applying liniments to the bruised parts and rubbing them. Before the accident plaintiff had no difficulty in moving around. During the winter plaintiff was not able to get out and do her work. At the time witness testified, plaintiff had improved, though she was not able to do her work well then.

J. F. Williams, who appeared at the courthouse on the morning of the trial and who had never talked to any one regarding the case, testified that he was on the corner of Fourth and N streets at the time plaintiff was injured. Saw plaintiff getting on the car, when the car started, causing plaintiff to fall and hit her side. Did not think plaintiff had time to get into the car. She had just reached the top step when the car started. Could not say whether the car started with an unusual jerk or not.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes.

Dr. Gatz testified that he was called to attend plaintiff on November 7, 1910. Found very little objective evidence of injury. Plaintiff complained of suffering pain in her back and left side. He prescribed several different liniments for her. Her symptoms were mostly subjective. Upon his last visit, plaintiff's suffering was not as great as it had been before.

For the defendant, Mr. Funk, its general superintendent, testified that he knew nothing of the accident until the suit was filed. He then caused an investigation to be made, and every employé on the line questioned, but was unable to secure any information in regard to the alleged accident. Later, he caused plaintiff's deposition to be taken, and then made another investigation, but was unable to learn anything in regard to any injury to plaintiff at the time and place complained of.

Dr. W. H. Coleman testified that he was consulted by plaintiff on November 4, 1910. Plaintiff complained of soreness between the hips and ribs. The memorandum he took at the time shows, "No abrasion of the skin at all." There was no evidence of injury except her statement that she was suffering. Her condition was normal as to pulse and in other respects.

[1, 2] It is first insisted that, inasmuch as plaintiff made out her case by uncontroverted testimony, the court erred in refusing a peremptory instruction to find for her. While it is true that plaintiff and Mrs. Eskridge say that the car was started with an unusual jerk, J. M. Williams, who claims to have been present and to have seen plaintiff board the car, testifies that he could not say that the car was started with an unusual jerk. In view of this fact, and of the further fact that plaintiff and her chief witness failed to remember certain things which witnesses similarly situated would ordinarily remember, and in view of the fact that the physicians were unable to find any objective symptoms of injury, we conclude that the question whether or not the car was started with an unusual jerk, and whether or not plaintiff was injured was properly submitted to the jury. In a case very similar to this the court held that the jury, in weighing the testimony of the witness, may consider his demeanor and appearance, and from these and other circumstances may conclude that the witness is not worthy of credit, and disregard his testimony. *Howard v. Louisville Railway Co.*, 105 S. W. 932, 32 Ky. Law Rep. 309.

It is next insisted that instruction No. 1 given by the court did not properly present the law of the case. This instruction is as follows: "If you believe from the evidence in this case that the plaintiff, Barbara Samuels, while the defendant's car was standing at Fourth and N streets at the time in regard to which you have heard testimony, attempted to board the same, it became the duty of the agents and employes of the defendant, Louisville Railway Company, to exercise the

highest degree of care to enable her to board the car in safety, and if you believe from the evidence in this case while she was in the act of boarding the car, and before she got to a place of safety upon the car, those in charge of the car started the car suddenly and with an unusual jerk, and she was thrown thereby against the car or any part of it and injured thereby, the law of the case is for the plaintiff and you should so find. But unless you believe from the evidence that while the car was standing she was in the act of boarding the car, and before she got to a place of safety upon the car those in charge of the car negligently suddenly started the car forward with an unusual jerk, and she was thereby thrown against the car and injured, the law of the case is for the defendant, and you should so find."

[3] The particular complaint of this instruction is that plaintiff was entitled to a reasonable opportunity to board the car, and that if the defendant failed to give her a reasonable opportunity to board the car she was entitled to a recovery, whether the car was started by a usual or an unusual jerk, while the instruction authorized a recovery only in the event that there was a sudden and unusual jerk. The principle of law contended for by plaintiff is correct. If a car be moved while a passenger is upon the steps of the car, and before he has had a reasonable opportunity to reach the platform, and he is thereby injured, he is entitled to recover, whether the car is moved by an ordinary and usual or an unusual and unnecessary jerk. The negligence consists in the mere act of moving the car before the passenger has had a reasonable opportunity to board it. *L. & N. R. R. Co. v. Arnold*, 102 S. W. 322, 31 Ky. Law Rep. 414; *C. & O. Ry. Co. v. Borders*, 140 Ky. 548, 131 S. W. 388, 140 Am. St. Rep. 396. On the other hand, where the passenger has had an opportunity to reach the platform of the car, the company is not liable unless the car is started with an unusual jerk, except in those cases where the passenger is old, feeble, crippled, or in a condition which makes it reasonably apparent to those in charge of the car that he needs unusual care and precaution for his protection. *Lexington Railway Co. v. Britton*, 130 Ky. 676, 114 S. W. 295; *I. C. R. R. Co. v. Ball*, 150 Ky. 531, 150 S. W. 668.

[4] If therefore plaintiff had pleaded that the car was started before she had a reasonable opportunity to board the same, or had pleaded facts showing that she was entitled to unusual care and precaution, her complaint of the instruction would be well founded. Such, however, is not the case. She alleges that she was injured "before she had been given a reasonable opportunity to fully board and enter said car."

[5] Under the rule that a pleading must be construed most strongly against the plead-

er, this was simply an allegation that she was injured before she had been given an opportunity to enter the car. We therefore conclude that the instruction complained of is not erroneous when considered in the light of the averments of the petition and the evidence introduced by plaintiff.

[8, 7] Complaint is made because the court gave an instruction on contributory negligence. While it is true that there is no evidence tending to show that plaintiff was negligent while getting on the car, and an instruction on contributory negligence should not therefore be given, it is apparent that the verdict of the jury was not rested on this instruction. That being true, we conclude that the giving of the instruction was not prejudicial to plaintiff's substantial rights. *Shellman v. Louisville Railway Co.*, 147 Ky. 529, 144 S. W. 1060; *Louisville Railway Co. v. Byer's Adm'r*, 130 Ky. 442, 113 S. W. 463; *C. & O. Ry. Co. v. Ward's Adm'r*, 145 Ky. 736, 141 S. W. 72; *Bennett v. Louisville Railway Co.*, 122 Ky. 61, 90 S. W. 1052, 4 L. R. A. (N. S.) 558, 121 Am. St. Rep. 453; *Howard v. Louisville Railway Co.*, 105 S. W. 932, 32 Ky. Law Rep. 309.

Judgment affirmed.

HALL et al. v. BARTRAM'S ADM'R et al.
(Court of Appeals of Kentucky. Dec. 5, 1912.)
TRUSTS (§ 44*)—ESTABLISHMENT—SUFFICIENCY OF EVIDENCE.

In an action to establish a trust in land purchased by defendant's intestate at an execution sale, to satisfy a judgment against plaintiff's ancestor, evidence *held* to sustain a finding that the purchase was made for the purchaser's own benefit, and not in trust for the heirs of such ancestor.

[Ed. Note.—For other cases, see *Trusts*, Cent. Dig. §§ 66-68; Dec. Dig. § 44.*]

Appeal from Circuit Court, Lawrence County.

Action by Goldie Hall and others against John Bartram's administrator and others. From a judgment dismissing the petition, plaintiffs appeal. Affirmed.

H. C. Sullivan and Stewart & Vinson, all of Louisa, for appellants. M. S. Burns, of Louisa, for appellees.

LASSING, J. Samuel Frazier, a resident of Lawrence county, Ky., died some time prior to September, 1896, the owner of a small landed estate in said county. He left surviving him a widow and nine children. After his death one Peter Cline, who had years before procured a judgment against Samuel Frazier, instituted a suit in equity against his widow and heirs at law, in which he sought to have the land sold in satisfaction of his debt. Such proceedings were had that at the September, 1896, term of the Lawrence circuit court, a judgment was rendered adjudging to plaintiff a lien upon the land,

and directing that it be sold in satisfaction of plaintiff's debt, subject to the right of the widow to a homestead therein. Commissioners were appointed to set apart to the widow a homestead. This was done, and the balance of the land was sold. The lands remaining after the homestead was set apart failed to bring a sum sufficient to satisfy plaintiff's debt, interest, and costs, and thereafter the court directed a sale of the homestead tract, subject to the widow's right of occupancy during her life; and in pursuance of this order of court the homestead tract was sold. These lands were purchased by one Lark Maynard, who afterwards assigned a two-thirds interest in his bid and purchase of each tract to John Bartram, and the remaining one-third interest to Elijah Maynard. John Bartram, by assignment, later became the owner of this one-third interest. The widow remained in possession of the homestead tract until her death, about the year 1908. There were living with her at the time of her death her son-in-law, Odd Hall, and his children. When the purchasers, W. H. and John Bartram, demanded possession of the homestead tract, Hall and his children declined to vacate, and they, together with certain others of the children of Samuel Frazier, set up claim to the land, alleging that the purchase of same by W. H. and John Bartram was made pursuant to an arrangement entered into by W. H. Bartram with the heirs at law of Samuel Frazier, deceased, whereby the said W. H. Bartram was to purchase the land, sold at commissioner's sale, and hold it for their benefit. They thereafter tendered to W. H. and John Bartram the money which they paid for said lands, with interest. This the said W. H. and John Bartram declined to accept. Thereupon Odd Hall, as next friend for his children, instituted a suit against W. H. and John Bartram and certain of the heirs at law of Samuel Frazier, whom he made defendants, and sought to have the purchase made by the Bartrams declared to be for the benefit of his children and the other heirs at law of Samuel Frazier, deceased. John Bartram in his answer alleged that he purchased the land for the benefit and protection of W. H. Bartram, and that he had no personal interest in the transaction. W. H. Bartram alleged in his pleading that, after the death of Samuel Frazier, he purchased the interest of six of the heirs of Samuel Frazier in their father's estate, and took from them title bonds or contracts of sale for their said interest; that, after he had made these purchases, Peter Cline undertook to subject the landed estate of Samuel Frazier to the satisfaction of a judgment, which he had procured against the said Frazier many years before; that, when the court directed the land sold in satisfaction of this judgment, he was compelled to, and did, be-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

come a bidder upon the lands to the extent of his interest therein; and that, when Lark Maynard conveyed to him a two-thirds interest in his bid and purchase, this represented his six-ninths interest in the estate which he had bought from the heirs; and that the said Lark Maynard, in pursuance of an agreement and understanding had with the heirs prior to the sale, at the same time conveyed the remaining one-third of his purchase, representing the interest of the three remaining heirs, which he had not bought, to Elijah Maynard. He denied that he had made any arrangement or agreement with the heirs, or any of them, whereby the purchase which he made was to inure to their benefit, or that the land was to be held by him for their benefit, with the understanding that he was to be repaid the purchase price, with interest. Upon this issue proof was taken and the case submitted for judgment. Upon consideration, the chancellor was of opinion that the plaintiffs had failed to show the existence of any trust arrangement between themselves and W. H. Bartram, and he thereupon entered a judgment dismissing their petition. The plaintiffs appeal, and seek a reversal of the finding of the chancellor.

The entire record of the suit of Cline against the heirs and creditors of Samuel Frazier, deceased, is copied into and made a part of this record. From an examination of that record it appears that in the exceptions filed to the report of sale by W. H. Bartram he alleged that he was the owner by purchase of six interests in the estate of Samuel Frazier, and in said pleading he set out the names of the heirs whose interests he had purchased. All of these heirs were at the time parties to the suit. So that it cannot be said that the claim now asserted by W. H. Bartram is the result of an afterthought. By this pleading it is clearly shown that, before the reports of sale were confirmed or deeds made, he was asserting title to six-ninths of this land, under and by virtue of his purchase, from the heirs themselves. The record further shows that, although he had possession of and held all of the land except the homestead interest from the time of his purchase until after the death of the widow, no claim of ownership was ever asserted by any of the heirs at law of Samuel Frazier; nor was there any evidence whatever to the effect that at any time from 1897, when this land was openly and publicly sold to W. H. Bartram, through his agent, did any of the heirs at law of Samuel Frazier offer to repay to him the purchase price, with interest, or any part thereof, or do or say anything in the least indicative of a claim or recognition of a right on the part of any of the heirs of Samuel Frazier, deceased, to any interest in this property. He recognized from the date of his purchase only the right of the

widow to a homestead interest in so much of the farm as the commissioners, appointed by the court for that purpose, set apart to her. He and his brother testify emphatically that there was no arrangement or agreement between him and the heirs, or any of them, whereby he was to become a bidder at the decretal sale of the land for their benefit. There are some facts and circumstances brought out in the evidence which tend to support the contention of appellants. The chief of these is a writing, signed by Lark Maynard either just before or immediately after he bid in this land. Said writing is as follows: "It is hereby understood that in the sale of the Frazier lands each heir shall pay Lark Maynard his part of (\$376.00) three hundred and seventy-six dollars as it comes due, this Amt. being against Samuel Frazier's estate, there being nine shares estate. Feb. 15, 1897. [Signed] Lark Maynard."

Now, it is insisted that, inasmuch as this writing was prepared under the supervision of W. H. Bartram, it was a recognition on his part that the land, when bid in by Maynard acting as his agent, was to be held by him for the benefit of the nine children. Said writing is susceptible of said construction, but, on the other hand, it is likewise susceptible of a construction entirely harmonious with the theory of appellees. At that time there were nine heirs. Six had sold their interest to their uncle, W. H. Bartram. The other three had not disposed of their interest. Bartram was not proposing to buy, except to protect himself. Maynard was to bid in the property and execute bond for the purchase price; and the purpose of this agreement was to show that in bidding Maynard was not acting for himself, but for some one else. Bartram stood in the place of and represented six of the heirs, and, of course, stood answerable or responsible to Maynard for six-ninths of the purchase price, and the other three heirs were responsible, each for his one-ninth. Evidently this latter arrangement was carried out, for Maynard thereafter transferred one-third of his bid and purchase to Elijah Maynard, who had married one of the Frazier girls, and had paid to Lark Maynard the one-ninth interest representing his wife's portion, and the interest of the other two children, who had not sold to W. H. Bartram. Now, if, as contended by appellants, W. H. Bartram had entered into an arrangement with his nephew and nieces whereby he was to purchase and hold this land, as trustee for them, we are at a loss to understand why he took title to only two-thirds, and left three of the heirs to arrange for themselves. Such conduct is inconsistent with the theory advanced by appellants.

When all of the facts and circumstances are considered in connection with the conduct of the parties during the more than

ten years following the sale of this land, we are of opinion that the chancellor was justified in holding that the purchase made by appellees was for their own benefit, and that no trust arrangement or agreement existed between them and any of the heirs at law of Samuel Frazier, deceased.

Judgment affirmed.

SMITH v. SCOTT'S EX'R.

(Court of Appeals of Kentucky. Dec. 5, 1912.)

1. WILLS (§ 88*)—INEFFECTIVE DEED.

Where a testator attempted to divide his property during his life, and executed instruments, using the common terms of conveyancing and containing granting and habendum clauses, but did not acknowledge these instruments or deliver them, and they were treated by his children as ineffectual deeds, they must be accepted as deeds ineffectual to pass any interest because not acknowledged or delivered, for an instrument is not a will if it attempts to pass an interest in the life of the maker and is operative before his death.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 208-217; Dec. Dig. § 88.*]

2. EXECUTORS AND ADMINISTRATORS (§ 138*)—CONSTRUCTION—POWERS OF EXECUTOR.

Where testator's will recited that he desired his executor to sell his home place and invest the proceeds in good interest-bearing bonds or real estate notes, and that he empowered him to execute a deed for the sale of such real estate, the executor had ample power to sell and to convey title to a purchaser.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 560-566, 568-575; Dec. Dig. § 138.*]

Appeal from Circuit Court, Simpson County.

Action by Lewis D. Scott's executor against D. W. C. Smith. From a judgment for plaintiff, defendant appeals. Affirmed.

L. B. Finn, of Franklin, for appellant. Roark & Finn and G. T. Finn, all of Franklin, for appellee.

LASSING, J. Lewis D. Scott died testate, a resident of Simpson county, Ky., the owner of certain real estate. By his will, which was duly probated, he directed his executor to sell said real estate. In pursuance of said authority, Dave Scott, whom he named as executor, sold the land to D. W. C. Smith and tendered him a general warranty deed therefor. Conceiving that there was a defect in the title, Smith declined to accept the deed. Thereupon the executor instituted a suit to compel him to do so.

[1] The defendant by way of defense, while admitting that the title to said property was perfect in the decedent, pleaded that the decedent in his lifetime had executed a writing whereby he conveyed, or attempted to convey, the land in controversy to one of his children for life, with remainder to said child's children, if he had any living at his death, and, if not, then the land should revert to his estate; that, by reason of said writing, the

executor had no power to convey and pass title to the fee to said land; and that he should not, on this account, be required to accept the deed so tendered to him. In his reply, the executor admitted that the decedent, in his lifetime, attempted to divide his landed estate among his children, and convey to each the portion thereof which he desired him to have; that he, in furtherance of this desire, executed and delivered to one of his children, a daughter, a deed to one portion of his land; but that, although he prepared deeds to his two sons, they were never acknowledged by him or delivered to his sons; and that he died while they were in this condition. He pleaded further that the children and heirs at law of said decedent had never attempted to take or hold the lands under said incomplete writings; and that they were not then laying claim to said lands in any manner, except under and by virtue of the will of decedent, which had been probated and under which the executor had made the sale. The incomplete deeds had been filed in a suit between the two sons and their sister, in which they attempted to have the deed made to her by their father set aside. The record in that suit was searched for said papers, but they had been lost or misplaced; and, there being no copies extant, neither the original papers nor copies could be filed with the record in this case. From the evidence heard, it is clear that these writings were intended as deeds. The draftsman, in the preparation, had used language in the caption, granting, and habendum clauses, commonly used in conveyancing, and, while the papers were each signed by decedent, they were never acknowledged or delivered, and at his death were found at his home among his private papers. Since the said papers were neither acknowledged nor delivered, they cannot operate as deeds; and, unless they can be treated as wills, they cannot be regarded as having any binding force or effect.

In *Ward v. Ward*, 104 Ky. 857, 48 S. W. 411, 20 Ky. Law Rep. 986, the distinguishing characteristic between a will and a deed is pointed out to be that, in a deed some estate vests in the grantee during the life of the grantor, whereas under a will no estate is granted or vests until after the death of the testator. In *Eckler v. Robinson*, 96 S. W. 845, 29 Ky. Law Rep. 1038, the court, speaking through Chief Justice Hobson, said: "The rule is that, if a paper passes no interest in the lifetime of the maker, whatever may be its form, if it is operative only upon his death, it is a will and to be effective must be probated. On the other hand, the object of all construction is to arrive at the intention of the parties and their intention, where it is apparent on the face of the papers, will be carried into effect if it can be fairly done under its terms." Accepting

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

then, the intention of the decedent, at the time these writings were drawn, as a guide in determining their character, we are constrained to hold that they were intended by him as deeds and not as wills. After his death, his children viewed them in the same light, for they never probated, or offered to probate, them. Being incomplete as deeds, they are of no binding force or effect whatever.

[2] The only remaining question is, Does the language used by the testator confer upon the executor power to sell and convey his real estate? Upon this point the will provides: "I desire that my executor hereinafter appointed sell the home place [this is the land in question] located north of Franklin, Ky., on the Louisville and Nashville pike and invest the proceeds in good interest bearing bonds or real estate notes. * * * I hereby appoint my brother Dave Scott as my executor empowering him to execute deed to the sale of the real estate mentioned above and to act without bond." This is an unqualified direction, first, that his executor shall make a sale of this land; and, second, that, having made the sale, he shall convey the land. Authority could not have been given in any more direct, positive, or unambiguous terms. The chancellor correctly held that the executor was empowered to make the sale and by deed convey or pass the title to his purchaser. We are further of the opinion that the deed tendered by the executor passed the fee-simple title to the land; and, appellant having failed to show any good reason why he should not accept the deed and pay for the land, the chancellor did not err in requiring him to do so.

Judgment affirmed.

HINKEL & EDELEN v. PRUITT.

(Court of Appeals of Kentucky. Dec. 5, 1912.)

SUNDAY (§ 19*)—INJURIES TO PROPERTY—VOID CONTRACT.

Though a contract hiring a horse for a pleasure drive on Sunday may have been void under Ky. St. § 1321, the owners of a horse would not thereby be precluded from maintaining an action of tort for the death of the horse from the negligent manner in which it was driven after the defendant secured possession of it.

[Ed. Note.—For other cases, see Sunday, Cent. Dig. §§ 50-53; Dec. Dig. § 19.*]

Appeal from Circuit Court, Nelson County.

Action by Hinkel & Edelen against T. Pruitt. From a judgment for defendant, plaintiffs appeal. Reversed and remanded.

W. H. Fulton and Geo. S. & Jno. A. Fulton, all of Bardstown, for appellants. Nat W. Halstead and Sam W. Eskew, both of Bardstown, for appellee.

HOBSON, C. J. Hinkel and Edelen own a livery stable in Bardstown. They brought this suit against T. Pruitt to recover for the

loss of a horse. The material allegations of the petition are these:

"On the ——— day of September, 1911, at the special instance and request of defendant, T. Pruitt, they hired him a horse and buggy with the understanding and agreement that he would drive said horse not more than 10 or 12 miles, but they say that said defendant, not observing said agreement, but in violation thereof, drove said horse some 34 miles or more, and so carelessly and neglectfully drove said horse as to cause same to die from said reckless and neglectful driving about one-half hour after his return to plaintiffs' stable from said drive, and plaintiffs say that the death of said horse was due to the fast and long and hard drive so recklessly and negligently made and done by the defendant, and said horse was of the value of two hundred dollars (\$200), and plaintiffs have been damaged in the sum of \$200 by defendant's reckless and negligent acts in the premises." The defendant filed an answer in which he denied the allegations of the petition. Afterwards he filed an amended answer as follows: "Defendant avers that he hired said horse and buggy and said horse sued for herein and mentioned and described in the petition herein on the 3d day of September, 1911; that said 3d day of September, 1911, was a Sabbath day, usually known as Sunday, and that the only contract, understanding, or agreement which he had with the plaintiffs with reference to said horse and buggy was had, made, and done on said Sabbath day, the 3d day of September, 1911, and that he hired said horse and buggy from plaintiffs on said Sabbath day, and used said horse and buggy on said Sabbath day only, and returned it to the plaintiffs on said Sabbath day. He says that said entire transaction was made, had, and done on the Sabbath day, and that the contract made and entered into by and between the plaintiffs and this defendant with reference to the hiring of said horse was all made on said Sabbath day, or Sunday, and that at the time said defendant hired said horse and buggy from the plaintiffs that he notified said Edelen from whom he hired said horse and buggy that he was hiring said horse simply for a pleasure drive, and not as a matter of necessity at all, and the plaintiff Edelen well knew that the purpose for which this defendant was hiring said horse and buggy was a matter of a pleasure drive on said Sunday afternoon. And he says that said plaintiffs hired said horse and buggy to this defendant simply for a pleasure drive, and same was to be used by defendant for a pleasure drive, and not in a case of, or for any matter of, necessity at all, and all of this the plaintiffs well knew at the time they hired the said horse and buggy to this defendant, and know same now." The plaintiffs demurred to the amend-

ed answer. The court overruled the demurrer, and, the plaintiffs standing upon their demurrer, their petition was dismissed. They appeal.

Section 1321, Ky. St., among other things, provides: "No work or business shall be done on the Sabbath day, except the ordinary household offices, or other work of necessity or charity, or work required in the maintenance or operation of a ferry, skiff or steamboat, or steam or street railroads." Under this statute, it has been held that contracts made on Sunday are void, and that no action can be maintained thereon. *Slade v. Arnold*, 14 B. Mon. 287; *Murphy v. Simpson*, 14 B. Mon. 419. It is insisted for appellee that a pleasure ride not being a work of necessity or mercy, and the liveryman knowing at the time the purpose for which the horse was hired, the contract was void, and no action lies. But the case involves a tort committed subsequently to the making of the contract.

The gist of the plaintiffs' cause of action is the defendant's negligent driving of the horse. Their cause of action does not necessarily rest on the contract between them and the defendant. It rests on the tort which the defendant committed in abusing the horse after he got it in possession. The fact that he got the horse in possession on Sunday does not excuse him if while so in possession he by his negligence killed the horse. A man who has the possession of the property of another on Sunday is as much under obligation not to mistreat it as on any other day. If the defendant had gone to the plaintiffs' barn and taken the horse out without any contract with them, and so driven it as to kill it, he could not excuse himself on the ground that the wrong was done on Sunday. But he was as much bound to take reasonable care of the horse when he got it on Sunday under a void contract as he would be if he had so gotten it on any other day. The plaintiffs' consent for him to use the horse on Sunday simply gave him the rightful possession of the horse; but, though he was rightfully in possession, when he abused the horse, he committed a tort for which he is liable. In *Newbury v. Luke*, 68 N. J. Law, 189, 52 Atl. 625, the court in disposing of a case like this said: "In the present case the defendant argues that the plaintiff's right of action rests upon a contract of bailment made on Sunday, and, as that contract is void, the action must fail. The fallacy is exposed by reference to the fundamental maxim—'causa proxima, non remota, spectatur.' The Sunday hiring and the Sunday driving happened to furnish the conditions under which the death of the horse was occasioned. But its death was the direct and natural result of the overdriving and abuse, and of these alone. These causes would have produced the same result if they had occurred

on any other day of the week, just as it would have produced it had they occurred without any contract of bailment whatever. It follows that the Sunday violation is as clearly nonessential upon the defendant's liability as are such questions as exact location of the occurrence, the day of day, the color of the horse, and the sex. But, if an inquiry into the contract of bailment were material, what is the result? If the contract falls, because made on Sunday. That destroys the defendant's right to drive the horse, but it certainly does not destroy the right to overdrive it. It vitiates the temporary right of use, but it does not destroy the permanent right of property. In so far as it leaves the defendant's liability upon the same basis as if the horse had been taken without the leave or license of the plaintiff. To same effect, see *Nodine v. Doherty*, 10 Barb. (N. Y.) 59.

In *Costello v. Ten Eyck*, 86 Mich. 49 N. W. 152, 24 Am. St. Rep. 128, the defendant had taken the plaintiff's horse to graze, and the horse had died from being subjected to a disease by negligence of the defendant; but he insisted that he was liable for the death of the horse because the contract was made on Sunday. Regarding this contention, the court said: "Having taken the horse into his possession, though under a void contract, he yet owed a duty to the plaintiff to exercise some degree of care over it. He was bound to give the plaintiff notice of the disease, so that the plaintiff might have removed the property, or have taken some precaution himself, or have refused to put the horse in the pasturage there." In *Merritt v. Earle*, 29 N. Y. 86 Am. Dec. 292, the plaintiff delivered horses to a carrier on Sunday. The horses were lost. When sued, the carrier defended on the ground that the contract was made on Sunday. In answer to this contention the court said: "But it is not material whether the contract made was good or void. It was enough to entitle the plaintiff to recover, that the defendant, being a common carrier, had in his custody for transportation the plaintiff's property, and by his negligence or in violation of duty it was lost. It gave the plaintiff a right of action which was disconnected from the statute relating to the observance of Sunday. *Allen v. Sewell*, 2 Wend. [N. Y.] 328." In *Hughes v. Atlantic Steel Co.*, 136 Ga. 511, 71 S. E. 728, 36 R. A. (N. S.) 547, Ann. Cas. 1912C, it was held that a servant who was working on Sunday in violation of law was injured by the incompetence of a fellow servant employed by the master also in violation of the Sunday statute, and the master relied on the statute in bar of a recovery. It was held that the servant could recover as the violation of Sunday law was not the efficient cause of the injury; and in a note thereto a number of other cases are collected, the courts have

ing that it is no defense to a carrier that a passenger was traveling on Sunday in violation of law, or that the servant was employed in violation of the Sunday law. See, also, *I. C. R. Co. v. Dick*, 91 Ky. 434, 15 S. W. 665, 12 Ky. Law Rep. 772; *Commonwealth v. L. & N. R. R. Co.*, 80 Ky. 291, 44 Am. Rep. 475.

We do not see that the case here can be distinguished from those cited. The carrier commits a tort when he suffers a passenger to be injured by his negligence or when he loses that which he undertakes to carry. The master commits a tort when by his negligence his servant is injured. In all these cases, although the contract was in violation of the Sunday law, a recovery has been allowed for the tort, and we do not see that a horse delivered to another under a contract of hiring or other bailment can on principle be distinguished. While there are not a few decisions holding otherwise, it seems to us that the rule above indicated is in keeping with the previous rulings of this court and rests upon sound principle. In *Power v. Brooks*, 7 Ky. Law. Rep. 204, it was said that, where a liveryman who hires a team to a customer on Sunday knows that the customer is hiring it only for a pleasure trip, there is a violation of the Sunday law, and the contract is void. The principle there laid down would apply if this were a suit on the contract of hiring to recover the price agreed to be paid for the use of the horse. But, if we leave out of view entirely the contract and the breach of it, there remains the fact that the defendant committed a tort by overdriving the horse, if he thus negligently brought about its death. The fact that the contract was void did not license him to abuse the horse with impunity, and, if he committed a tort by not taking reasonable care of the horse after he got it in his possession, he is liable.

Judgment reversed and cause remanded for further proceedings consistent herewith.

TAYLOR v. PURDY et al.

(Court of Appeals of Kentucky. Dec. 6, 1912.)

1. WILLS (§ 88*)—WHAT CONSTITUTES—DISTINGUISHED FROM "DEED."

Where an instrument contained the usual words of conveyance, having premises, habendum, tenendum, reddendum, condition, warranty, and covenants, and was not authenticated as a will, but was acknowledged as a deed, it must be accepted as a deed, the grant being in the present tense, for a will is an instrument which vests no present interest, but only appoints what is to be done after the death of the maker.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 208-217; Dec. Dig. § 88.*]

For other definitions, see Words and Phrases, vol. 8, pp. 7463-7468; vol. 2, pp. 1919-1924; vol. 8, p. 7630.]

2. GIFTS (§ 18*)—"GIFT INTER VIVOS"—DELIVERY.

To constitute a gift inter vivos, there must be a delivery, either actual or symbolical.

[Ed. Note.—For other cases, see Gifts, Cent. Dig. §§ 29-33; Dec. Dig. § 18.*]

For other definitions, see Words and Phrases, vol. 4, pp. 3091-3093; vol. 8, p. 7671.]

3. GIFTS (§ 22*)—DELIVERY—REQUISITES.

A delivery to effectuate a gift must be according to the nature of the thing given; hence the gift of property, evidenced by a written instrument executed by the donor, is valid upon delivery of the instrument.

[Ed. Note.—For other cases, see Gifts, Cent. Dig. § 37; Dec. Dig. § 22.*]

4. GIFTS (§ 49*)—DELIVERY—INSUFFICIENCY.

In an action involving title to personalty, evidence held to sufficiently establish the delivery of a deed of gift.

[Ed. Note.—For other cases, see Gifts, Cent. Dig. §§ 95-100; Dec. Dig. § 49.*]

5. GIFTS (§ 47*)—DELIVERY—PRESUMPTIONS.

Where a deed of gift in favor of infant beneficiaries appeared in the possession of the trustee of the gift, its delivery will be presumed.

[Ed. Note.—For other cases, see Gifts, Cent. Dig. §§ 81-86; Dec. Dig. § 47.*]

6. GIFTS (§ 4*)—DESCRIPTION OF PROPERTY—SUFFICIENCY.

Where a deed of gift conveyed all of the donor's estate, real and personal, the description was sufficiently definite to be valid and carried with it a note in favor of the donor.

[Ed. Note.—For other cases, see Gifts, Cent. Dig. §§ 3, 17; Dec. Dig. § 4.*]

Appeal from Circuit Court, Marion County.

Action by John Taylor against William S. Purdy and others. From a judgment dismissing the petition of plaintiff to subject certain land to execution, he appeals. Affirmed.

John McChord, of Lebanon, for appellant. W. H. Spragens and S. A. Russell, both of Lebanon, and C. C. Boldrick, guardian ad litem, of Lebanon, for appellees.

MILLER, J. At the September, 1909, term of the Marion circuit court, the appellant Taylor recovered a judgment against the appellee W. S. Purdy for \$600; and at the January, 1910, term of the same court, Taylor recovered a further judgment against Purdy for \$200. On February 4, 1911, Xerxes Purdy I, the father of W. S. Purdy, died intestate, leaving the appellee W. S. Purdy and Mrs. Bettie Thornton as his only children and heirs at law. On March 27, 1911, Taylor caused executions to issue upon his judgments, and levied them upon W. S. Purdy's supposed undivided half interest in a farm of 106 acres in Marion county, which had belonged to his father, Xerxes Purdy I. It developed, however, that on July 5, 1909, Xerxes I had conveyed his farm to his grandson, Xerxes II, for \$2,000; the purchase price being evidenced by the note of Xerxes II, the purchaser, for that amount.

Furthermore, on May 28, 1910, Xerxes I had executed the following paper, known in the record as the deed of gift to wit: "Brad-

fordsville, Ky., May 28, 1910. This deed of gift and conveyance, made and entered into this May 27th, 1910, by and between Xerxes Purdy, Sr., of Bradfordsville, Ky., party of the first part and Lucy Ann Purdy his wife of the 2nd part witnesseth: That the said X. Purdy, Sr., in consideration of the love and affection he bears his wife, has given and does by these presents give, grant and convey to the said Lucy Ann Purdy his wife, all the right, title and interest, now vested in him to any real estate, and all the personal estate of every kind whatever, which he now holds or may die possessed of, to have and to hold in fee simple during her natural life, and at her death to be divided equally between the children of W. S. Purdy and Mrs. Bettie Thornton, wife of Dr. Geo. Thornton, to be held in trust, and used and invested for the benefit and advantage of said children by their parents, the said W. S. Purdy and Mrs. Bettie Thornton, during the lifetime of said parents. Witness my hand this May 28th, 1910. X. Purdy, Sr." Both deeds were properly acknowledged before a notary public, and were recorded on April 8, 1911, more than two months after the death of Xerxes I. Taylor brought this action to set aside the deed to Xerxes II upon the ground that it was voluntary and had never been consummated by a delivery of the deed to the grantee, and to subject W. S. Purdy's interest in the farm to the payment of appellant's debt. The petition further alleged, in the alternative, that, if the deed to Xerxes II was valid, the deed of gift, which conveyed all the estate of Xerxes I to the children of W. S. Purdy and Mrs. Thornton, was not only procured by fraud and duress, and had never been delivered, but was ineffectual in law for any purpose, even should its delivery be conceded or established. The issue as to duress and undue influence has been abandoned, and the case has been tried here upon the issues raised as to the delivery of the two papers, and the legal effect of the deed of gift.

At the time the two deeds were executed, Lucy Ann Purdy, the wife of Xerxes I, was living. Mrs. Purdy died, however, on July 19, 1910, about seven months prior to the death of her husband. It is established by the proof, if not conceded, that the sale to Xerxes II was bona fide and for a fair price. He, however, paid nothing upon his purchase money note for \$2,000, which was found among the papers of Xerxes I after his death. Appellant contends that the deed of gift of May 28, 1910, did not operate either to establish a trust in favor of W. S. Purdy and Mrs. Thornton and their children, or as a gift *inter vivos*, because neither the deed nor the note was ever delivered to either of them; and, since that paper was ineffectual for any purpose, one-half the estate of Xerxes I descended, under the statute, to his son W. S. Purdy, and is liable for appellant's debt. Appellant further contends that, if the deed of

gift should be treated as having been delivered, and as sufficient to establish a gift, it was nevertheless testamentary in character, and, not having been executed as a will, it failed of operation for that reason, thereby causing the property to descend as above indicated. On the other hand, the appellees insist that the deed of gift contains a good declaration in trust, and that it was delivered by Xerxes I during his lifetime to W. S. Purdy, one of the beneficiaries under the deed. The circuit court took appellees' view of the case and dismissed the petition, and from that judgment Taylor prosecutes this appeal.

[1] As to the contention that the paper of May 28, 1910, is testamentary in character, rather than a deed, and must fail for want of proper execution under the statute, little need be said. The rule is that, if the instrument has no present operation, if it intended to vest no present interest, but only appoints what is to be done after the death of the maker, it is a testamentary instrument, and good only if made and proved as a will. *Rawlings v. McRoberts*, 95 Ky. 350, 25 S. W. 601, 15 Ky. Law Rep. 771; *Basket v. Hassell*, 107 U. S. 602, 2 Sup. Ct. 415, 27 L. Ed. 500. In *Rawlings v. McRoberts*, supra, we said: "The contention of the appellants, who were the plaintiffs below, is that, although the document is couched in the form of a deed, and has the usual words of conveyance, yet it is, in fact, a testamentary disposition of the property described, and hence a will. They sue for the land sought to be conveyed to the appellees, because the writing, as a will, is not effective through lack of proper attestation under the statute. It is, of course, true that the form of the instrument is not conclusive of the intention of the maker of it, nevertheless, if the writing have all the requisites of a deed, it is a fact throwing light on the intention. Here we have grantor and grantee and the ordinary words operative of conveyance; we have the thing granted, the consideration expressed, the execution, including signing, attestation, and acknowledgment, delivery, acceptance, and registration. As Lord Coke would put it we have the premises, habendum, tenendum, redendum, condition, warranty, and covenants." See, also, *Hunt v. Hunt*, 119 Ky. 42, 82 S. W. 998, 26 Ky. Law Rep. 973, 68 L. R. A. 180, 7 Ann. Cas. 788.

The paper under consideration is in the form of and authenticated as a deed. It is not authenticated as a will, and in our opinion was never intended to operate as a will. On the contrary, as was pointed out in *Rawlings v. McRoberts*, supra, the words of the grant—those which are operative of conveyance—are in the present tense, and became effective immediately upon the delivery of the instrument; and, under the authorities above referred to, it must be treated as a deed.

[2] In order for personal property to pass

as a gift *inter vivos*, there must be a delivery of the property, either actual or symbolical. *Payne v. Powell*, 5 Bush, 249; *Merritt v. Merritt's Ex'r*, 9 Ky. Law Rep. 721; *Rodemer v. Rettig*, 114 Ky. 637, 71 S. W. 869, 24 Ky. Law Rep. 1474; *Simmonds v. Simmonds*, 133 Ky. 498, 118 S. W. 804; *Forworthy v. Adams*, 136 Ky. 403, 124 S. W. 381, 27 L. R. A. (N. S.) 808, Ann. Cas. 1912A, 327; *Stark v. Kelley*, 132 Ky. 376, 113 S. W. 498; *Basket v. Hassell*, 107 U. S. 602, 2 Sup. Ct. 415, 27 L. Ed. 500.

[3] As to what will amount to a delivery, 20 Cyc. 1196, says: "Delivery, to be effectual, must be according to the nature and character of the thing given, and hence may be actual or constructive according to the circumstances. There must, however, be a parting by the donor with all present and future legal power and dominion over the property. The general rule is that a gift of property, evidenced by a written instrument executed by the donor, is valid without a manual delivery of the property. However, there must be a delivery of the instrument declaring the gift in order to make such gift valid."

The above rule is, in effect, approved in *Bunnell v. Bunnell*, 111 Ky. 566, 64 S. W. 420, 65 S. W. 607, 23 Ky. Law Rep. 800, 1101. So much of the opinion in *Payne v. Powell*, 5 Bush, 252, as declares that a transfer of personal property by writing alone will not satisfy the requirements of delivery was unnecessary to the decision of that case, as was explained in *Rodemer v. Rettig*, 114 Ky. 637, 71 S. W. 869, 24 Ky. Law Rep. 1474. If, therefore, the deed of gift was delivered by the grantor, the case comes directly within the rule above announced.

[4, 5] Upon the issue of delivery, the evidence is brief. It appears from the testimony of Reynlerson, the notary who took the acknowledgement to the deed of gift, that he carried it to his office for the purpose of writing out his certificate, and then delivered the deed to W. S. Purdy, one of the trustees named therein. There is no other testimony upon this point; and, in the absence of any testimony explaining or attacking the delivery thus made by Reynlerson, we must assume that he acted properly and at the direction of the grantor. Moreover, the deed appearing in the possession of the trustee, a presumption of its delivery will be indulged on behalf of the infant beneficiaries. The delivery having thus been shown, the deed operated as a gift *inter vivos*.

[6] Appellant contends, however, that the description of the property conveyed is too indefinite to embrace the note of Xerxes II for \$2,000. We do not attach much importance to this suggestion. In *Graham v. Botner*, 18 Ky. Law Rep. 638, 37 S. W. 583, George Nellman conveyed to his sister by deed "all his property, real and personal"; and, in answer to the argument that the description of the property was too indefinite

and uncertain to pass anything, the court said: "The description of the property conveyed enables those who claim under it, as against George and his heirs, to identify it. It affords a means of identification; and, if George Nellman was living, he could neither assail the deed on the ground of fraud, nor would he be permitted to say that, when he conveyed all his estate, real and personal, it was so indefinite as to render the conveyance void, for it could be shown by proof allunde what estate he had when the writing was delivered. *Pond v. Bergh*, 10 Paige [N. Y.] 140; *Wilson v. Boyce*, 92 U. S. 320 [23 L. Ed. 608]; [*Parker v. Teas*], 79 Ind. 235; [*McCasland v. Aetna Life Ins. Co.*] 108 Ind. 130 [9 N. E. 119]."

The deed under consideration is as broad in its terms as the deed in *Graham v. Botner*, supra. It conveyed all of the grantor's right, title, and interest in any real estate, and all the personal estate of every kind, which he then had, or might have, at the time of his death, to his wife, Lucy Ann Purdy, for life, and at her death it was to be divided equally between the children of W. S. Purdy and Bettie Thornton, for whose use and benefit it was to be held during the lifetime of their parents.

We are of opinion that the deed of May 28, 1910, operated as a gift *inter vivos*; and, that being true, it is unnecessary to consider whether it created a valid trust.

The judgment of the circuit court was right, and it is affirmed.

THOMAS' ADM'R v. EMINENCE DISTILLING CO.

(Court of Appeals of Kentucky. Dec. 4, 1912.)

1. DEATH (§ 76*)—CAUSE—SUFFICIENCY OF EVIDENCE.

In an action for a boy's death claimed to have been caused by fever and spinal meningitis, resulting from water negligently polluted by defendant distilling company, evidence held not to show that the polluted water proximately caused the boy's death.

[Ed. Note.—For other cases, see *Death*, Cent. Dig. § 94; Dec. Dig. § 76.*]

2. DEATH (§ 76*)—EVIDENCE—CAUSE OF DEATH.

It must appear, beyond a mere possibility or a bare probability, that the alleged negligence caused decedent's death in order to recover.

[Ed. Note.—For other cases, see *Death*, Cent. Dig. § 94; Dec. Dig. § 76.*]

3. EVIDENCE (§ 596*)—SUFFICIENCY.

Plaintiff must establish his cause of action by evidence which does more than support a mere guess as to the existence of the facts establishing liability.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 2446-2448; Dec. Dig. § 596.*]

Appeal from Circuit Court, Henry County.
Action by Richard Thomas' administrator against the Eminence Distilling Company.

From a judgment for defendant, plaintiff appeals. Affirmed.

W. O. Jackson, of New Castle, and Clore, Dickerson & Clayton, of Cincinnati, Ohio, for appellant. Turner & Turner, of New Castle, Chas. H. Sheld, of Louisville, Moody & Barbour, of New Castle, and Willis, Todd & Bond, of Shelbyville, for appellee.

CLAY, C. Richard Thomas, at the time of his death, was an infant eight years of age. On May 25, 1911, he fell into Fox Run creek. He died on September 15, 1911. Charging that the defendants, the Eminence Distilling Company, Simon Well, and Charles Bright, unlawfully and negligently polluted and poisoned the waters of Fox Run creek, and thereby caused the death of the decedent, A. W. Thomas, his administrator, brought this action to recover damages. At the conclusion of all the evidence, the court directed a verdict in favor of the defendants. Judgment was entered accordingly, and plaintiff appeals.

During the years 1910 and 1911, the Eminence Distilling Company was engaged in operating a large distillery near the town of Eminence in Henry county. Charles Bright was its general superintendent. Simon Well was feeding and slopping a large number of cattle on the premises. In the inclosure in which the cattle were confined, the Distilling Company constructed a concrete dam. The dirty water and excrement on the surface of the pen were permitted to flow and accumulate in a pool. There the solid matter would settle to the bottom. There was a sluice gate near the bottom, and in the center of the dam. Across this gate was a wire screen with 12 meshes to the inch. When solid matters would settle in the bottom, the sluice gate was opened, and the water and such parts of the solid matter as would pass through the screen were permitted to flow into Fox Run creek. On the 4th day of April, 1911, there was a cloudburst at the headwaters of Fox Run, and the concrete dam was washed away. A cypress dam was then installed. In May the cypress dam gave way. When these dams gave way, the accumulated filth ran into the creek and polluted it.

A. W. Thomas, the administrator of the decedent, lived in the years 1910 and 1911 on a farm situated about two miles south of the distillery on Fox Run creek, which flows through the farm. On May 25, 1911, the decedent, Richard Thomas, fell into the creek and swallowed some of the water. He became sick and vomited more or less. The boy's condition improved for a few days, but about two weeks later he became quite sick. A physician was then called and diagnosed the case as intermittent fever, and treated the boy for this disease. About the 2d of July, the physician pronounced the case one of typhoid fever. This disease continued

for several weeks; and, when the boy had practically recovered from typhoid fever, he was taken ill with spinal meningitis. On September 15th he died.

The evidence for plaintiffs tends to show that an enormous quantity of decaying and fermenting animal and vegetable matter passed from the pool at the distillery into the creek. As it descended the valley and the stream widened, the polluted waters spread out into shallow pools, depositing on the farm of plaintiff and near his house a large amount of putrid matter, some of which appeared as a foul scum, and some as a rotting sediment, and the odor emitted therefrom was very noisome. Three or four physicians testified that typhoid and meningitis were germ diseases, and that, while those germs apparently originated with the human, the liberated germs were carried by the wind, on the bodies, feet, and wings of fowls, birds, and insects to, and deposited into, such pools. That such stagnant and polluted water was a most fertile field and hotbed for breeding large and malignant colonies of disease germs. While such germs are present in almost all localities, they are generally present in limited numbers, and in such emaciated condition that they are not likely to produce diseases unless the small and weakened colonies are placed in some nutritious and suitable breeding ground, in which event they will multiply and develop into large and malignant colonies, capable of infecting strong and healthy persons. Two or three physicians gave it as their opinion that decedent was infected by germs which came from the polluted water of the creek. It developed, however, on cross-examination that they had made no examination of the waters of the creek, and could not say from personal knowledge that any typhoid or meningitis germs, or, in fact, any disease germs, were present in the creek, or in any of the pools referred to. While giving it as their opinion that the boy died from disease germs coming from the waters of the creek, they admitted that such germs could be carried by insects, flies, bugs, chickens, and turkeys, and that it was a pure guess as to where a patient took typhoid fever.

It is unnecessary to give the evidence adduced by the defendant. The rule is that when the plaintiff introduces his evidence, and at its conclusion the defendant moves the court to instruct the jury peremptorily to find for it, whether the motion is then determined by the court or not, it must be decided, on the plaintiff's evidence, without reference to any fact shown by the evidence introduced on behalf of the defendant, unless that evidence tends to make out a case for plaintiff; for, in so far as there is a conflict in the evidence, the question, if material, is for the jury. *Goins v. North Jellico Coal Co.*, 140 Ky. 323, 181 S. W. 28.

The question is, Did plaintiff succeed in making out a case? Counsel for plaintiff

insist that the evidence clearly establishes the following propositions: "(1) That the Distillery Company, Charles Bright, and Simon Well produced the putrid and infectious matter. (2) That they placed it in a position to be concentrated in a cesspool. (3) That the cesspool did arrest the flow and hold the water in a stagnant pool for longer and shorter periods, during which time continued decomposition and decay progressed. (4) That a stagnant pool containing decaying animal and vegetable matter creates a nutritious and fertile field for the multiplication and development of malignant typhoid and meningeal germs, and other matter deleterious to health and life. (5) That such matter was put by the appellees in a place where it could be released into Fox Run, and that they made preparation by constructing a sluice gate for the express purpose of flowing this putrid matter into the stream at intervals, and after it had been detained long enough to become infected with these pathological germs. (6) That the appellees did, in pursuance of said intention and preparation, liberate this polluted matter into Fox Run, and deliberately caused it to flow into and upon the premises occupied by the appellant and his intestate. (7) That, when the water was so turned loose, it was emitting a foul odor, and was known as a matter of common knowledge to be so infected. (8) That much of this putrid matter was deposited in the pools of the stream, and in the valley on the premises of the appellant and near to his residence. (9) That this playful and innocent child fell into a pool of this contaminated water, and swallowed a large portion of it, and his clothes were saturated. (10) That during the night thereafter he became quite ill, and continued ill from that date until his death. (11) That large numbers of flies were gathered upon the fetid matter and continued to bear this noxious and poisonous material from the creek to the residence and surroundings where the child lived. (12) And show by the attending physician that such stagnant and putrifying flow was filled with these typhoid and meningeal germs, and that they could be carried to the patient by drinking the water, by coming in contact with abraded surfaces, and by being conveyed on the feet and bodies of the fowls and flies. (13) That infection is commonly produced by this means. (14) The attending physician emphatically testified that this stream was so infected, and that the boy was infected

by that stream, and that the infection caused his illness and his death."

[1] While it is true that several of the above propositions are established by the evidence, it is clear that the main propositions—that is, the ones upon which plaintiff's case depends—are not established.

[2] In order for plaintiff to recover, it was necessary to show that the pollution of the creek by defendant was the proximate cause of decedent's death. A possibility, or a bare probability, that his death was so caused is not sufficient. Plaintiff should have shown the actual presence of disease germs in the creek; that the boy drank water from the creek; and that, within the usual period of incubation after drinking the water, the boy became ill therefrom and died. Physicians who testified for plaintiff admit that they made no examination of the waters for the purpose of detecting the presence of disease germs. Without evidence to this effect, the cause of the boy's death is mere speculation. They admit that he might have taken the typhoid fever or spinal meningitis from germs that came from other sources. They made no examination of the water in the well on plaintiff's farm, or of the water of the spring from which plaintiff and his family drank after the well went dry. These waters may have contained the germs which produced the disease from which the boy died. They admit that the disease might have been transmitted by flies, bugs, or other animals that had visited privies or other infected places. As there was no positive evidence of the presence of disease germs in the creek, and as the boy's death occurred nearly four months after falling in the creek, it is just as probable that his death resulted from germs transmitted in some other way as from germs taken from the creek.

[3] Had the case been submitted to the jury, they could have done nothing more than guess at the cause of the boy's death; and it is a well-settled rule that a defendant's rights should not be guessed away for one upon whom the burden rests of establishing a cause of action. *L. & N. R. R. Co. v. Wathen*, 49 S. W. 185, 22 Ky. Law Rep. 82; *Hurt v. L. & N. R. R. Co.*, 116 Ky. 545, 76 S. W. 502, 25 Ky. Law Rep. 755; *Wintuska's Adm'r, v. L. & N. R. R. Co.*, 20 S. W. 819, 14 Ky. Law Rep. 579; *Louisville Gas Co. v. Kaufman*, 105 Ky. 131, 48 S. W. 434, 20 Ky. Law Rep. 1069.

Judgment affirmed.

DENTON et al. v. MILLER et al.

(Supreme Court of Tennessee. Nov. 30, 1912.)

COURTS (§ 246*) — APPEAL — JURISDICTION — CONSTITUTIONAL QUESTIONS.

Though the bill charged unconstitutionality of the statute under which defendant was created, such question, not being referred to in the brief of complainants on their appeal, and appearing to be abandoned, and there being nothing to justify the court in taking it up on its own motion, does not take the appeal out of the jurisdiction of the Court of Civil Appeals.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 743-748; Dec. Dig. § 246.*]

Appeal from Chancery Court, Rhea County; T. M. McConnell and V. C. Allen, Chancellors.

Suit by J. J. Denton and others against R. C. Miller and others. From an adverse decree, complainants appeal. Transferred to Court of Civil Appeals.

W. L. Givens, of Dayton, for appellants. Miller & Swafford, of Dayton, for appellees.

PER CURIAM. This cause presents a controversy wholly within the jurisdiction of the Court of Civil Appeals, but for the fact that the bill charges the unconstitutionality of chapter 236 of the Acts of 1907, under which the defendant county board of education was created. But this question seems to have been abandoned. It is not referred to in the brief of complainant's counsel, and we see nothing in the act which would justify the court in taking up the question on its own motion. Under such circumstances there is no constitutional question before the court, and the case is entirely with the Court of Civil Appeals. The cause is therefore ordered to be transferred to that court.

A copy of this opinion will be attached to the record and accompany the transfer.

BROWN et al. v. SULLIVAN COUNTY.

(Supreme Court of Tennessee. Nov. 23, 1912.)

1. COUNTIES (§ 18*) — DISTRICTS — CONSTITUTIONAL PROVISIONS.

Const. art. 6, § 15, provides that the different counties of the state shall be laid off as the General Assembly directs into districts of convenient size, so that the whole number in each county shall not be more than 25, or 4 for every 100 square miles. Const. 1796, art. 5, § 12, provided for the division of districts according to a population basis. Held that, in view of the act of 1835 found in Shannon's Code, § 97, enacted under a constitutional provision identical with the present one, providing for the division of counties into districts on the basis of the population, the instant constitutional provision must be taken as giving the Legislature power, either to divide the counties on a population basis, into districts of not more than 25 in number, or according to territory, into districts not in excess of 4 in 100 square miles, and hence Priv. Laws 1911, c.

620, dividing a county of 430 square miles into 22 districts, is not invalid.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 17, 18; Dec. Dig. § 18.*]

2. CONSTITUTIONAL LAW (§ 19*)—CONSTRUCTION OF CONSTITUTIONAL PROVISIONS—CONTEMPORANEOUS CONSTRUCTION.

The act of 1835 (Shannon's Code, § 97), must be regarded as a contemporaneous construction of the constitutional provision, and that construction, having been acquiesced in since 1835, will be adhered to.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 14, 15; Dec. Dig. § 19.*]

Appeal from Circuit Court, Sullivan County; Dana Harmon, Judge.

Suit by J. C. Brown and others against Sullivan County. From a judgment dismissing the suit, plaintiffs appeal. Affirmed.

Phlegar, Powell, Price & Shelton, of Bristol, for appellants. C. J. St. John, of Bristol, for appellee.

GREEN, J. This suit was brought by certain citizens and taxpayers of Sullivan county to enjoin the issuance of \$200,000 of the county's bonds for road purposes.

It was alleged that chapter 620 of the Acts of 1911, which authorize these bonds, was unconstitutional and void, and it was also alleged that the county court of Sullivan county, which, pursuant to the said act of the Legislature, directed the issuance of said bonds, was organized in an illegal manner, and was therefore without power to effect this bond issue.

The act of the Legislature is attacked as being in violation of section 17 of article 2 of the Constitution; it being insisted that it contains several matters not covered by the caption and incongruous therewith. This contention has been disposed of orally, and will not be considered in this opinion. It is sufficient to say that we do not find the act of the Legislature subject to the objections urged against it.

[1] It is insisted, however, that Sullivan county is entitled to have but 17 civil districts under the Constitution, whereas, as a matter of fact, it has 22. These 22 districts are represented by justices of the peace in the county court, and it is urged that the county court of this county is therefore organized in violation of the Constitution and is accordingly an illegal body.

In section 15 of article 6 of the Constitution it is provided that "the different counties of this state shall be laid off as the General Assembly may direct, into districts of convenient size, so that the whole number in each county shall not be more than 25, or 4 for every 100 square miles. There shall be two justices of the peace and one constable elected in each district by the qualified voters therein," etc.

The plaintiffs' contention is that no county can have more than 4 civil districts for

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

every 100 square miles, and that, in no event, can the number exceed 25. They allege that Sullivan county has but 430 square miles, and that, in the ratio of 4 districts to every 100 square miles, this county would not be entitled to have more than 17 civil districts; that the division of the county into 22 civil districts is unconstitutional. This is the plaintiffs' construction of the constitutional provision quoted.

We do not think this is the true meaning of this portion of the Constitution. The language, inserting in parentheses the omitted words, which are plainly implied, reads as follows:

"The different counties of this state shall be laid off as the General Assembly may direct, into districts of convenient size, so that the whole number in each county shall not be more than 25, or (so that the whole number in each county shall not be more than) 4 for every 100 square miles."

We think it was intended by the Constitution to intrust the manner of districting the counties to the Legislature, according to a population basis or a territorial basis, as the Legislature should think best. Within limitations, the counties were to be laid off as the Legislature might direct.

Under the Constitution of 1796, justices were selected not exceeding two for each captain's company, on a population basis. Article 5, § 12. Under the present Constitution, and that of 1834, the regulation of this matter was committed to legislative discretion, with a proviso limiting the entire number of districts in each county. If the counties were divided on a population basis, then the entire number of civil districts was limited to 25. The Legislature was authorized to create any number of civil districts, not exceeding 25, in each county. On the other hand, if the Legislature divided the counties into districts in proportion to the area of each county, then the Constitution limited the number of districts to not more than 4 for each 100 square miles. It was not intended by this provision to declare that 25 districts should be created only in counties covering 625 square miles.

The section quoted appears alike in the Constitutions of 1834 and 1870. In 1835 the Legislature enacted the following law, contained in Shannon's Code, § 97, and section 79 of the Code of 1858:

"The number of districts shall be proportioned to the voting population of the county, as follows: For every 3,000 qualified voters, and upwards, there shall be twenty-five districts; for every 2,500 qualified voters, and under 3,000, there shall be twenty districts; for every 2,000 qualified voters, and under 2,500, there shall be seventeen districts; for every 1,500 qualified voters, and under 2,000, there shall be fifteen districts; for every 1,000 qualified voters, and under

1,500, there shall be twelve districts; for every 700 qualified voters, and under 1,000, there shall be ten districts; for less than 700 qualified voters, there shall be eight districts."

[2] This act, as stated, has been on our statute books since 1835. It is a contemporary legislative construction of the language of the Constitution in question here, as it appeared in the Constitution of 1834. It shows that at that time this provision of the Constitution was construed as authorizing the Legislature to divide the counties of the state into civil districts on a population basis. We think this was an authorized construction. At any rate, this construction has been acquiesced in and accepted as correct since 1835, and all the counties of the state have been divided into districts in this manner. Even, therefore, if we were of opinion that the original act of 1835 was based on a misinterpretation of the Constitution (which we are not), we would refuse, at this late date, to hold such legislation unconstitutional.

We are of opinion, therefore, that the county court of Sullivan county was not illegally organized, and inasmuch as the majority of that body voted for the issuance of these bonds, in pursuance of the legislative act, the plaintiffs can make no question upon the regularity of the action of the county court in this respect.

The circuit judge dismissed the suits of the plaintiffs, and his judgment will be affirmed.

LOGAN & MAPHET LUMBER CO. v. CROSS et al.

(Supreme Court of Tennessee. Nov. 30, 1912.)

1. JUDGMENT (§ 572*)—CONCLUSIVENESS— JUDGMENT ON DEMURRER TO BILL— GROUNDS.

A decree overruling or sustaining a demurrer is *res judicata*; and when a single ground of relief is well stated in the bill the overruling of a demurrer thereto is conclusive as to facts subsequently proven in substance as alleged; and where the demurrer is sustained, and the bill dismissed, the decision is an adjudication on the facts as stated in the bill; and when the bill presents several grounds of relief, and the court acts upon each ground, the decree is *res judicata*; but a general judgment overruling a demurrer to a bill setting up several grounds of relief, without an opinion showing the ground of the court's action, amounts only to a decision that there is enough in the bill to require an answer.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1047-1049; Dec. Dig. § 572.*]

2. JUDGMENT (§ 572*)—CONCLUSIVENESS— JUDGMENT ON DEMURRER TO BILL.

Where a bill was demurred to on the grounds that complainant was not entitled to relief for want of equity in the bill, and because he participated in the fraud therein alleged, that complainant was not entitled to the relief sought, or any relief, because the fraud alleged was not one of which it had the right to complain, and because the bill showed on its face that the cause of action accrued more

than one year after the reversal of the judgment for error before the bill was filed, this court's judgment that in every respect the demurrer was not well taken, and affirming the decree overruling it, and remanding the cause for answer and further proceedings, is *res judicata* as to a new bill containing the same matters.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1047-1049; Dec. Dig. § 572.*]

Bill by the Logan & Maphet Lumber Company against C. C. & C. Cross. Plea of *res judicata* sustained.

J. F. Baker, of Huntsville, and Shields, Cates & Mountcastle, of Knoxville, for complainant. E. G. Foster, of Huntsville, for defendants.

NEIL, J. The first and fundamental question to be determined is whether the matters contained in the present bill must be considered as settled between the parties, in so far as they are the same as those contained in the bill immediately preceding it, filed by the present complainants against the present defendants, and determined by this court in 1910, on bill and demurrer.

To the extent that the two bills are the same, we are of the opinion that the matters involved must be considered settled, as hereinafter more particularly stated.

This conclusion is resisted by defendants on the ground that the judgment of this court overruling the demurrer was general, unaccompanied by a written opinion showing the grounds of the court's action and therefore that, under the authority of *Battle v. Street*, 85 Tenn. 291, 2 S. W. 384, *Jourolmon v. Massingill*, 86 Tenn. 90, 5 S. W. 719, *Clark v. Pence*, 111 Tenn. 20, 26, 27, 76 S. W. 885, and other cases cited therein, it must be true that the judgment amounted to a decision only that there was enough equity in the bill to require an answer, thus leaving undetermined all of the points made in the demurrer.

The basis of the doctrine referred to is that where there are several grounds of relief set up in the bill, and the decision is simply that the demurrer be overruled, it cannot be known whether the court considered each ground separately, and so determined them all, or considered merely that there was enough in the bill on some one or more points to require an answer, even though others might not present sufficient grounds of relief. The present case, however, cannot be decided on the principle stated, because the judgment entered in the former cause shows that each ground of the demurrer was separately acted on and overruled.

This is rendered manifest by the following statement. The grounds of demurrer filed to the former bill were these:

"1. The complainant is not entitled to the relief it prays, nor to any relief, for

want of equity on the face of the bill, and because complainant participated in the fraud therein alleged, in that the bill shows that the complainant failed and refused to appeal from the decree fully and finally adjudicating the rights of the complainant and defendants as to the lumber and the value thereof it now seeks to recover, and that it thereby willingly, knowingly, and actively participated in the fraud of which it complains.

"2. The complainant is not entitled to the relief it prays, nor to any relief, because the error and fraud complained of, if it exists as complainant avers, is not one of which it has the right to complain.

"3. The complainant is not entitled to the relief it prays, nor to any relief, because the bill shows on its face that the cause of the action accrued more than one year after the reversal of the judgment for error, before the bill in this cause was filed, and because the cause of action accrued more than one year after the time the decree was entered, in which the right to file a proper bill by complainant was not prejudiced by the decree therein before the bill in this cause was filed."

The judgment of this court on the foregoing grounds of demurrer was:

"This court being of opinion that the demurrer in said cause in the court below is in every respect and on every ground not well taken, the decree of the chancellor overruling same is in all respects affirmed, and said cause is accordingly remanded to the chancery court of Scott county for answer and further proceedings."

It is thus perceived that this court determined in the former case, against defendants, each of the points now insisted upon as matters of defense arising out of the proceedings contained in that litigation between these parties, to which Joe Wright was a party, viz.: The court, in overruling said grounds of demurrer, adjudged on the facts stated in the bill that complainants did not participate in the fraud alleged as having been committed by Joe Wright, and the present defendants, by failing and refusing to appeal from the decree referred to in the bill in that behalf, that the fraud complained of was not one as to which complainants were debarred seeking relief, that the former adjudication was not a bar to the present action, and that the complainants were not precluded by the one-year statute of limitations; that is, that complainants were not precluded by the fact that the cause of action set up in the bill accrued more than one year after the time the decree was entered which gave them the right to file a new bill without prejudice.

[1, 2] It may be properly remarked at this place that the court, while continuing to recognize the general doctrine laid down in

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

the three cases referred to, has in recent years, when it intended that the overruling of a demurrer should have merely the effect of deciding there was enough in the bill to require an answer, generally, if not invariably, so stated in terms in its decree. This sometimes occurs when the court is of the opinion that the bill is defectively drawn, not fully stating the equities of the complainant, and that justice requires the facts should be examined by the court as displayed at large in the evidence that may be adduced. It was never intended, by the rule referred to, to deny that when a single ground of relief is well stated in the bill, and directly assailed by demurrer, and the demurrer is overruled applicable to that particular point, such decision is binding on all parties, and not subject to further question on the same facts, if the facts are subsequently proven in substance as alleged in the bill. If it were not intended that such adjudication, when precisely ascertained, should be binding, it would be idle to permit a discretionary appeal on overruling a demurrer, under section 4889 of Shannon's Code. Indeed, it was held in *Groomes & Uhrick v. Thelme*, 13 Lea, 320, that a decision overruling a demurrer is res adjudicata. It has been generally stated in our cases that a decree either overruling or sustaining a demurrer is res adjudicata. *Murdock v. Gaskill*, 8 Baxt. 22, and cases cited in headnote. It was said of these cases in *Rodgers v. Dibrell*, 6 Lea, 69, 74, and also in *Battle v. Street*, supra, that all that is decided in overruling a demurrer is that the bill contains sufficient equity to require an answer. The two classes of cases, we think, may be harmonized on this principle. Where a demurrer is sustained, and the bill dismissed, that is a clear adjudication on the facts of the case stated in the bill. Where the demurrer is overruled when filed to a bill stating a single ground of relief, and it thus can be seen precisely on what the court acted, that state of facts must be treated in that litigation as sufficient to furnish ground of relief, if substantially proven in the evidence. So, where a bill presents several grounds of relief, and it can be seen that each one of these was acted upon by the court, the same result follows. Where the bill presents several grounds of relief, and the decree overruling the demurrer is general, of course, it cannot be known on what ground the judgment of the court was entered, and hence this results only in the decision that there is enough equity in the bill to require an answer. Where there is an opinion filed stating the grounds on which the court acted in overruling the demurrer, the matters so decided must be treated as settled between the parties, and not subject to be subsequently controverted in that case, and must be considered as entitling the

complainant to relief if the grounds are subsequently maintained in the evidence. In the present case the bill to which the demurrer was overruled was, after a remand of the cause, dismissed on the complainant's own motion, and a new bill prepared containing the same matter, filed within a year thereafter; the dismissal having occurred because the complainant could not get his case ready for trial at the term of the court during which it was called. Under such a state of facts the decision overruling the demurrer would be binding on the parties, and not subject to question on proof of the facts alleged. The evidence fully sustains the allegations of the two bills, wherein they are the same.

SOUTHERN RY. CO. v. MICHAELS et al.
(Supreme Court of Tennessee. Nov. 26, 1912.)

1. EMINENT DOMAIN (§ 124*)—COMPENSATION—TIME OF ASSESSMENT.

In proceedings to assess compensation for lands taken by condemnation, the valuation must be made as of the date of the actual taking, so that, where defendants, in a proceeding to condemn mill property, closed its plant after the filing of the petition, but before the taking of possession by the plaintiffs, that matter was proper to be considered in assessing damages.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. §§ 332-344; Dec. Dig. § 124.*]

2. EMINENT DOMAIN (§ 134*)—COMPENSATION—ASSESSMENT—POTENTIAL VALUE OF PROPERTY.

In assessing compensation for land taken by eminent domain, the potential value of a pocket in the river in which defendant had stored logs when the property was used for mill purposes could only be estimated as a part of a going business, and where, before the taking of the property, the mill was closed, with little likelihood of its ever being reopened, its value as for a future use of the property for a mill site was too speculative to be considered.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. § 356; Dec. Dig. § 134.*]

Certiorari from Court of Civil Appeals.

Proceedings in eminent domain by the Southern Railway Company against T. M. Michaels and others. From a judgment assessing damages for defendants, all parties bring certiorari. Reversed and remanded.

Jourolmon, Welcker & Smith, of Knoxville, for plaintiff. A. C. Grimm and Lucky, Andrews & Fowler, all of Knoxville, for defendants.

LANDSEN, J. The Southern Railway Company filed its petition in the circuit court of Knox county for the purpose of condemning a right of way for the use of its road through the property of the defendant Michaels. The defendant's property has a frontage on the north bank of the Tennessee river of about 1,150 feet and a like frontage on the south side of McCannon street. It is about 85 feet wide at the western end, and

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

about 400 feet wide at the eastern end, and contains about 6 acres. The right of way condemned extends through the property its full length east and west. The defendant had a sawmill located on his property at the time the petition was filed, which he has operated for a number of years. His mill had a capacity of about 1,250,000 feet per annum. The north bank of the river adjacent to the mill site formed a pocket in the river on the south side of the mill, which was used by the defendant as a harbor in which to hold logs for the supply of his mill. The harbor has a capacity of about 1,000,000 feet, or practically enough to supply the mill for one year. The course of the defendant's business operations was to purchase logs adjacent to the tributaries of the Tennessee river many miles above Knoxville, and float them down to Knoxville, and harbor them in the pocket adjacent to his mill. In this way he kept his mill supplied with logs.

There is proof tending to show that the construction of the petitioner's road through the defendant's property had the effect to destroy the value of the harbor in connection with the operation of the mill on defendant's land.

The original petition was filed August 15, 1906, containing the usual averments in condemnation proceedings, and especially the averment of power in the petitioner to appropriate the defendant's property under the law of eminent domain. On September 6, 1906, the defendants answered the petition, and denied the power of the petitioner to condemn and appropriate a right of way across their premises. On February 21, 1907, the petitioner filed an amended petition, which is here mentioned only for the purpose of stating that the defendants in their answer to this pleading again denied the right of the petitioner to take and appropriate a right of way through their property.

Soon after the original petition was filed, the defendants sawed up what logs were anchored in the harbor above referred to and suspended the operation of their mill. The case was pending in the circuit court until April 8, 1911, a period of almost five years. There is no explanation of the cause of this long delay in the preparation and trial of the case, except what appears to be conceded by counsel to the effect that there was an understanding that the trial of this case should await the determination by this court of the similar case of Southern Railway Company v. E. T. Sanford et al. At all events, on April 8, 1911, the defendants moved the court to dismiss the petition for want of prosecution, whereupon it appears that a writ of inquisition was awarded, and a jury of view appointed, and the case proceeded to final determination without further delay. The first jury of view valued the land sought to be appropriated by petitioner at \$3,000, the incidental damage at \$500, and the incidental benefits at \$500. Upon exception, this report

was set aside and a new jury of view was appointed. The second jury estimated the value of the land at \$3,000, the incidental damages at \$3,800 and the incidental benefits at \$800, making a total of \$6,000. Both sides appealed from the report of this jury of view, and there was a trial before the circuit judge and a jury in the regular way, and the value of the property taken was fixed at \$3,000, the incidental damages at \$9,000, with no incidental benefits, and a judgment was entered upon this verdict in favor of the defendants for \$12,000, together with interest from the day of the filing of the original petition, making all together \$15,988.

The trial judge instructed the jury in substance that they should estimate the value of the land taken as of the day upon which it was taken, "which is the day on which defendants were served with a legal notice of the institution of the proceedings in this case." The Court of Civil Appeals held that the trial judge was in error in instructing the jury to assess the value of the property as of the day of the filing of the original petition, and held that the property should be valued as of the day when it was actually appropriated by the petitioner; but that court was of opinion that the error of the trial judge was harmless, for the reason that the right of way of the petitioner as located through the defendant's property destroyed the value of the defendant's mill, and also its future use for a mill site, to be operated after the manner that defendant had theretofore operated the mill in question. They modified the judgment of the circuit judge on the question of interest, and allowed interest only from the day of the actual appropriation of the property by the petitioner.

The Southern Railway Company filed its petition for writs of certiorari, and assigned the action of the Court of Civil Appeals in holding that the action of the circuit judge was harmless for error. The defendants filed a petition for writs of certiorari, and assigned the action of the Court of Civil Appeals in disallowing interest from the day of the filing of the petition in the court below for error.

[1] That the charge of the circuit judge to the effect that the land sought to be taken should be valued as of the day of the filing of the original petition was error there can be no doubt, upon the authority of Railroad Co. v. Moggridge, 116 Tenn. 445, 92 S. W. 1114, and Cunningham v. Railroad Co., 126 Tenn. —, 149 S. W. 103.

[2] The petitioner introduced proof tending to show the value of the property at the time it was appropriated by the railway company, and this line of testimony fixes the value at far less than the amount found by the jury. The defendant introduced testimony tending to show the value of the property on the day of the filing of the original petition, at which time the defendant's mill

was in full operation as a going business concern. This line of testimony fixes the value of the property at a much larger figure than the testimony offered by the petitioner, and a great many of the witnesses fix its value far above the verdict of the jury. There is proof tending to show that after the defendant abandoned its mill, and before the railway company took possession of its right of way, the plant depreciated materially in its building and machinery. It can be clearly gathered from the testimony that the mill itself was abandoned indefinitely by the defendant, and that it would probably never again be used as it had been before the filing of the original petition of condemnation. At all events, this is a question that should have been submitted to the jury for their consideration in fixing the value of the defendant's property under the testimony of the witnesses.

It was held in *Woodfolk v. Railroad*, 2 Swan, 437, that the proper rule for the valuation of property taken under the law of eminent domain is the fair cash value of the land as if the owner were willing to sell and the appropriator were willing to buy that particular quantity at that place and in that form—that is, at the place where the land is taken and in the form in which it exists at the time it is taken. That case establishes the principle that the property is to be offered at its fair cash value and taken in statu quo. It was held in *Alloway v. Nashville*, 88 Tenn. 514, 13 S. W. 123, 8 L. R. A. 123, that the rule of just compensation required by our Constitution includes an appraisement of every element of usefulness and advantage in the property. But this does not mean that all of its capabilities of value are to be estimated separately, and the aggregate put down as the true value, for the reason that they do not exist independently of each other, and cannot all be realized at the same time. Likewise its value is not to be restricted to any particular capability, for the reason that that would not include the other elements of value, and would also tend to make the degree of benefit to the party appropriating the land for particular purposes the real measure of value.

In *Southern Railway v. Memphis*, 148 S. W. 662, April term, 1912, it was held that if property taken for public use possess a particular value to the owner, because of the actual use to which he is devoting it at the time it is taken, the rule of just compensation requires that the owner be paid for the fair cash value of the property in the form in which it is taken. So that, if property appropriated for public use has potential values merely, which are undeveloped by the owner at the time of the taking, every element of usefulness and advantage which the property possesses is to be taken into view in arriving at its fair cash value. But if the property possess a special value for a

particular use, and that value is being utilized by the owner, he is entitled to be compensated for the value of the property to him at the time it is taken.

Therefore, if the defendant's mill was being actually used in connection with the harbor at the time the mill was destroyed by the location of the railway line upon his property, he would be entitled to be compensated for the fair cash value of his mill as a going concern, and in this view the value of the harbor might be singled out in the testimony, and its use to his mill and mill operations could be estimated as a part of the value of the property taken. But if the mill had been abandoned, and the defendant was no longer using the harbor in connection with his mill, it would possess a potential value only, which could not be singled out by the witnesses, and a price placed upon it separate from the other elements of usefulness which the property might possess. In that event, the rule as stated in *Alloway v. Nashville* would apply, and in the first event the rule stated in *Railway v. Memphis* would apply.

With these cases in mind, it is impossible to say that the error of the trial judge was harmless. As previously stated, the testimony of the petitioner tended to show the value of the property after the mill had been abandoned, and at the time the land was appropriated by the railway company. The testimony of the defendant tended to show the value of the property when the mill was a going concern, and witnesses sought to state the value of the harbor to the mill while running, in dollars and cents. It needs no argument to show that the value of the harbor as a distinct element of usefulness in the property cannot be singled out and valued separately, when the owner is not devoting it to any particular use. In the first place, any opinion of its value would be merely speculative, and, in the second place, such a rule would require one appropriating the property to pay for a value which exists only potentially, and not actually.

The justice of this holding is well illustrated when the holding of the court in *Cunningham v. Railroad*, supra, is considered. In that case it was held that the petitioner might dismiss its petition for condemnation at any time before it executes the bond required by statute, or pays the money into court. In this case there was a delay of nearly five years from the filing of the petition until the execution of the bond, and in that time the defendant's mill was abandoned and ceased to be a going concern. If the petitioner had dismissed its petition, as it clearly had the right to do, and had abandoned its purpose to appropriate defendant's property, it is manifest that the difference between the value of a going mill and an abandoned one would have fallen upon the defendant. Nor is this an inequitable

result, especially under the facts of this case. The petitioner averred its right to take the defendant's property under the law of eminent domain, and this right was denied by the defendant, thereby staying the hand of the petitioner until the question was adjudged. Almost immediately after the filing of the original petition, the defendant abandoned his mill. This loss rightfully and properly should fall upon him. The result is that the judgments of the Court of Civil Appeals and of the circuit court are reversed, and the case remanded for a new trial.

WEIDNER et al. v. FRIEDMAN et al.

(Supreme Court of Tennessee. Nov. 23, 1912.)

1. DISORDERLY HOUSE (§ 2*)—NATURE OF OFFENSE—"NUISANCE."

The keeping of a disorderly house is a nuisance, both at common law and under the statute, and the offense is a misdemeanor, for which the ordinary remedy is by criminal proceedings.

[Ed. Note.—For other cases, see Disorderly House, Cent. Dig. §§ 1, 2, 9; Dec. Dig. § 2.*]

For other definitions, see Words and Phrases, vol. 5, pp. 4855-4864; vol. 8, p. 7734.]

2. INJUNCTION (§ 232*)—CONTEMPT—FINE AND IMPRISONMENT.

The chancery court, in punishing a disobedience of its injunction as contempt, may impose only \$50 fine and 10 days' imprisonment.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 519-528; Dec. Dig. § 232.*]

3. NUISANCE (§ 75*)—INJUNCTION—DISORDERLY HOUSES—CHANCERY JURISDICTION.

The chancery court has only a limited jurisdiction to grant relief from the maintenance of a disorderly house at the suit of a private person, who must prove special injury to himself, different in kind from that suffered by the general public; and hence it has no jurisdiction of bills by private property owners to enjoin the owners, proprietors, and inmates of disorderly houses in a red light district, where it is practically impossible to apportion the blame or to ascertain from the evidence the jurisdictional facts as to how much each house is responsible for the special injury alleged.

[Ed. Note.—For other cases, see Nuisance, Cent. Dig. §§ 176-184; Dec. Dig. § 75.*]

4. DISORDERLY HOUSE (§ 2*)—NATURE OF OFFENSE.

Renting a house for use as a disorderly house and conducting or being an inmate of such house constitutes a criminal offense, subject to fine and imprisonment.

[Ed. Note.—For other cases, see Disorderly House, Cent. Dig. §§ 1, 2, 9; Dec. Dig. § 2.*]

5. NUISANCE (§ 75*)—INJUNCTION AGAINST DISORDERLY HOUSE—LACHES.

A bill to enjoin the maintenance of a number of disorderly houses in a red light district, which have existed there for more than 25 years, should be dismissed for laches.

[Ed. Note.—For other cases, see Nuisance, Cent. Dig. §§ 176-184; Dec. Dig. § 75.*]

6. INJUNCTION (§ 219*)—JUDGMENT OR ORDER—EFFECT OF APPEAL.

Where the chancery court is without jurisdiction of bills against the owners, proprietors, and inmates of disorderly houses to enjoin their maintenance, the dismissal of such bills on certiorari does not affect its contempt pro-

ceedings for disobedience of the injunctions granted, although, as the injunction orders were such as would have been superseded if timely application had been made therefor, because decided in advance of a hearing upon the merits, the imprisonment orders should be remitted.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 441; Dec. Dig. § 219.*]

Appeal from Chancery Court, Hamilton County; T. M. McConnell, Chancellor.

Bills by M. G. Weldner and others against Irene Friedman and others for an injunction to suppress disorderly houses as nuisances. From a judgment of the Court of Civil Appeals, confirming a decree for complainants and adjudging defendants in contempt for disobedience of injunctions, defendants bring certiorari. Judgment and decree reversed, with directions to dismiss the bill, and orders in contempt proceedings modified and affirmed.

Cook & Swaney, Meachan & McGaughy, and Spears & Lynch, all of Chattanooga, for complainants. T. Pope Shepherd and Murray & Latimore, all of Chattanooga, for defendants.

NEIL, J. Bills, original, amended, and supplemental, filed against certain proprietors of disorderly houses and their inmates, and the owners of some of the houses wherein the illegal business is carried on, in Chattanooga, to suppress all of the houses as nuisances by permanent injunction, and to perpetually enjoin the owners from leasing the houses for such unlawful purpose. These houses are located in what is known as the "red light district" of Chattanooga, covering parts of Florence and Helen streets, most of them adjoining each other, and all near together. The bill was filed by private citizens owning property in the neighborhood—that is, within a block, or two or three blocks—on the ground of special and peculiar injury to them, in marring the comfort of their homes, and injuring the rental and sale value of their property. Originally there were very many complainants, but as to most of them the bills were dismissed on their own motion, and they were taxed with all of the costs accrued to that time, by the chancellor. Others entered no formal dismissal, and, while remaining nominally complainants, have really abandoned the case, so that there are now left only five active complainants. Their names are H. A. Weldner, H. Fritts, Joseph Josephs, H. Koblentz, and F. E. Tyler. A decree according to the prayer of the bill was rendered against all of the defendants, but only the following of them appealed to the Court of Civil Appeals, viz.: J. C. C. Garner, O. E. Pooler, Laura Hines, Bessie McBee, Ada Culver, Lucile Martin, Pauline Miller, Nellie Gray, Sallie Smith, Lillian Sterling, and Annie Bouley. The two first were proceeded against as own-

ers of the property, or some of it. Laura Hines, Ada Culver, Lillian Sterling, and Annie Bouley were proceeded against as madames, or proprietors of houses, and the others as inmates.

The Court of Civil Appeals affirmed the decree of the chancellor, and thereupon the case was brought to this court by the writ of certiorari. It is insisted in behalf of petitioners, defendants below, that the evidence is insufficient to support the decree, that the evidence does not sustain the charge that complainants suffered any injury in person or property different in kind from that suffered by the general public, and that, in any event, the evidence does not point particularly to any one of the several defendants sued as proprietors and inmates, but only in a general way to all of the "red light district."

It is claimed by defendants, as matter of law, that no judgment of abatement as to the individual houses can be rested on such general and indefinite evidence. On the other hand, it is averred by complainants that there is evidence in terms implicating all, at least in a general way, and that this must be held to include each. Likewise complainants put forward the proposition of law that all can be proceeded against as being jointly engaged in the commission of a nuisance, and held liable, even though no conspiracy between them be proven, on the ground that they are so near together locally, and their operations are so synchronous, that they must be treated as together creating the nuisance complained of. The rule is also invoked that, where there is a concurrence between the chancellor and the Court of Civil Appeals, this court will not reverse, if there is any evidence to support such concurrence. It is claimed by complainants that there is evidence to support such concurrence on the point of special damage peculiar to the complainants, as distinguished from the general public; and they point to the fact that defendants do not deny that they, respectively, are proprietors and inmates of disorderly houses on the streets mentioned.

[1-3] There is no doubt that the keeping of a disorderly house is a nuisance. It was so at common law, and is so under our statute. It is a misdemeanor, and the ordinary remedy is in the criminal court, which court can act most effectively by fine and imprisonment, and judgment of abatement. The chancery court has only a limited jurisdiction, which is defined in *Weakley v. Page*, 102 Tenn. 179, 53 S. W. 551, 46 L. R. A. 552, as the power to grant relief at the suit of a private person only when he can prove special and peculiar injury to himself, different in kind from that suffered by the general public. That case is in accord with the weight of authority in other jurisdictions. Everywhere the powers of the court are confined within the narrow limits there laid down, and some cases take even a more restricted

view. We are not disposed to expand and extend the doctrine further by construction. There would, by such course of decision, result extreme danger to the usefulness of the chancery court, the danger of overwhelming the court with a mass of litigation which would occupy its time to the exclusion of the vast range of its ordinary duties. The danger is well illustrated by the history of the present case as disclosed by this record. A preliminary injunction of a very drastic character was issued against defendants. They obeyed for a time, and left the district, that is, the "red light district," but afterwards returned, and renewed their former way of living. Then ensued two proceedings for contempt, preserved and presented here in four large volumes, in addition to the two large volumes embracing the main case. These contempt proceedings were brought to punish defendants for resuming their unlawful business in violation of the injunction. Fines and imprisonment were imposed. These proceedings are not distinguishable from ordinary prosecutions against such offenders in the criminal court, except in the form of them, and the charge that they violated an injunction, instead of the criminal law. It is easy to see how the offense could be, and would be, again and again repeated, after receiving the punishment of \$50 fine, and 10 days' imprisonment, all that the chancery court can impose for a contempt. It is true that this may be said of any case in which the chancery court undertakes to suppress a nuisance, particularly any nuisance of the kind involved in the case now before us. This should be a warning to the court to be extremely careful in assuming jurisdiction of such cases, confining the exercise of its powers in this regard within the narrowest limits consistent with duty.

[4] Should it assume jurisdiction in one bill to suppress a whole settlement of such people? We think not. The task should be left to the criminal court, where it most properly belongs. It is one thing to bring before the court a single house of the kind, with its inmates, and quite another to hale before the court a congeries of such houses, and troops of women occupying them. In the first case the court can carefully and adequately examine into and decide the question whether the single house in question has been instrumental in causing damage to nearby owners of a kind special and peculiar to them as distinguished from that done to the public at large. But where a large number of such persons are brought before the court for several such houses, it is practically impossible to apportion the blame, or to ascertain from the evidence how much each house is responsible for the special injury claimed to have been inflicted; so that it must result, as in the present case, in a contention that all must be held equally guilty, because of the fact that the number of such houses so congregated causes crowds

of men and boys to gather on the streets and go in and out of these resorts, the use of profane and vulgar language in the streets by men who gather there, the traipsing of the women, denizens of such houses, from one house to the other, or along the street, in pursuit of a man or men, the occasional exposure of person on the part of some woman in a house or houses not identified or distinguished from the mass of houses; in short, a jumbled aggregation of general evidence to no house in particular, but to all of the houses as an assemblage of illegal resorts. Relief in such a case must necessarily rest upon the postulate that the chancery court has power to break up and destroy such a nest of vice, although it is unable to see from the evidence from what special house the injury proceeded which is the necessary prerequisite to give the court jurisdiction. The task is too much for the chancery court. It cannot accomplish it. On the other hand, it can be accomplished by the criminal court. There no special damage to private persons need be proven. The crime of conducting a disorderly house, or of acting as inmates of one, or of renting a house to be used for such purpose, is all that need be proven. All persons so offending can be punished, not merely by a small fine and short imprisonment, but by heavy fines, and imprisonment for any term less than 12 months, and the houses can be broken up.

[6] We have proceeded thus far without mentioning another objection to complainants' claim to relief in the chancery court, if the other objections mentioned were out of the way. That is laches. This "red light district" has been in operation in Chattanooga 25 or 26 years, according to the witnesses for complainants themselves; some witnesses say, from 30 to 40 years. Parties who apply to a court of chancery for injunctive relief must apply promptly, on the penalty of a refusal to entertain the bill because of laches. In *Caldwell v. Knott*, 10 Yerg. 210, 212, where the nuisance complained of was a milldam, the court held that a delay of 10 years, without more, was too much, and the court referred with approval to the case of *Weller v. Smeaton*, 1 Cox, 103, and *Reid v. Gifford*, 6 Johns. Ch. (N. Y.) 19, wherein it was held that 3 years' delay was too long. These cases were referred to and approved in the case of *Madison v. Copper Co.*, 113 Tenn. 331, 351-355, 83 S. W. 658, in which many other cases were cited showing that even a much shorter time would serve to bar relief in equity under peculiar facts; and it was said in that case that, although the defense of laches had not been raised in the lower court by the parties, this court could itself raise it when it appeared on the record. In the present case there was a delay of, not 3 years, or of 10 years merely, but for more than a quarter of a century.

[6] The result is that the original, amended, and supplemental bills must be dismissed as to the complainants still remaining before the court. The dismissal of the said bills will have no effect upon the contempt proceedings. It was the duty of defendants to obey the injunction, and their failure to do so was a contempt of court for which they should be punished. We are of the opinion, however, that the imprisonment should be remitted, because the injunction order was such as would have been superseded, if timely application had been made therefor, since by this order the chancellor decided on the application for a temporary injunction the merits of the cause in advance of a hearing thereon.

The cause will be remanded to the chancery court of Hamilton county for the enforcement of the judgment for contempt, as herein modified, and with directions to dismiss the bills when these matters are finally disposed of.

The defendants found guilty under the respective contempt proceedings will pay the costs of these proceedings in the chancery court in so far as they are unadjudged. Defendants to the respective contempt proceedings in this court will pay the costs of this court and the Court of Civil Appeals.

The complainants still remaining such in the record will pay all of the unadjudged costs of the chancery court. The five active complainants, who have prosecuted the original cause in this court and in the Court of Civil Appeals, will pay the costs of said original cause in both courts.

It follows that the decrees of the Court of Civil Appeals and of the chancellor in the main case are reversed, while the judgments of both of these courts in respect of the contempt proceedings are modified and affirmed.

KING et al. v. COX et al.

(Supreme Court of Tennessee. Nov. 23, 1912.)

1. TRIAL (§ 177*) — DIRECTED VERDICT—EFFECT OF MOTION—WAIVER OF JURY TRIAL.

Concurring motions by both parties for peremptory instructions will not operate as an agreement that the controversy shall be determined by the trial judge, so as to take the case from the jury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 400; Dec. Dig. § 177.*]

2. TRIAL (§ 176*)—DIRECTED VERDICT — EFFECT OF MOTION—WAIVER OF OBJECTION TO EVIDENCE.

By moving for peremptory instructions a party does not waive objection to the rejection or admission of evidence, as he does by demurring to the evidence.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 399; Dec. Dig. § 176.*]

3. TRIAL (§ 155*)—DEMURRER TO EVIDENCE.

A demurrer to the evidence withdraws the case from the jury and submits it to the court, to apply the law to the admitted facts; and where the evidence is written, or, though parol.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

is certain, the other party must join, or waive such evidence.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 352, 353; Dec. Dig. § 155.*]

4. APPEAL AND ERROR (§ 548*)—BILL OF EXCEPTIONS—DEMURRER TO EVIDENCE.

A demurrer to the evidence is complete in itself, and need not be preserved by bill of exceptions to review a ruling thereon.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2433-2440; Dec. Dig. § 548.*]

5. TRIAL (§ 156*)—DEMURRER TO EVIDENCE—CONFLICTING EVIDENCE.

That evidence is conflicting does not prevent the case from being submitted on demurrer to the evidence; all reasonable inference therefrom being drawn in plaintiff's favor in such case.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 354-356; Dec. Dig. § 156.*]

6. TRIAL (§§ 156, 178*)—DIRECTION OF VERDICT—ASSESSMENT OF DAMAGES.

Upon sustaining a motion for peremptory instructions, the case may be remanded to the jury for assessment of damages, while, on demurrer to the evidence, all of the evidence on damages must be found in the demurrer, and the amount fixed by the court.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 354-356, 401-403; Dec. Dig. §§ 156, 178.*]

7. INJUNCTION (§ 241*) — ENFORCEMENT OF BOND.

Under Shannon's Code, § 6259, providing that the damages resulting from an injunction may be ascertained by the court upon reference to the master, or upon an issue of fact tried as other issues of fact, if the parties elect to have a jury, defendant either may have reference to the master for assessment of damages, or bring independent suit on the injunction bond.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 544-552; Dec. Dig. § 241.*]

8. EVIDENCE (§ 162*)—BEST EVIDENCE.

The fact of a dissolution of an injunction must be shown in an action on an injunction bond by the best evidence, which is the record of the injunction suit; Shannon's Code, § 5579, providing that a judicial record is proved by production of the original, or by copy thereof certified by the clerk.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 536-545; Dec. Dig. § 162.*]

9. EVIDENCE (§ 366*)—DOCUMENTS — ENTIRE RECORD.

In order to prove the dissolution of an injunction in an action on an injunction bond by a copy of the record in the injunction suit, a copy of the whole record must be produced.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1521-1539; Dec. Dig. § 366.*]

10. EVIDENCE (§ 183*) — BEST EVIDENCE—COPIES OF JUDICIAL RECORD.

In an action on an injunction bond, in which it is sought to prove dissolution by copies of the pleadings, a writ, and bond, evidence held not to show that the pleadings, writ, and bond were lost, so as to admit in evidence certified copies thereof.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 605-637; Dec. Dig. § 183.*]

Certiorari to Court of Civil Appeals.

Action by Sam. L. King and others against W. H. Cox and others. The judgment of the Court of Civil Appeals affirmed a judgment in the circuit court for plaintiffs, except as to one of them, and both parties bring certi-

orari. Reversed and remanded for further proceedings.

Harr & Burrow and A. C. Keebler, all of Bristol, and O. A. Brown and H. H. Smith, both of Blountville, for plaintiffs. Mullenix & St. John, of Bristol, for defendants.

NEIL, J. The present action was brought in the circuit court of Sullivan county on an injunction bond, which the plaintiffs in error had executed in a case formerly brought by them in the chancery court of that county. Numerous objections to evidence were offered in the trial court by the plaintiff in error, and overruled by the trial judge. Both sides moved for peremptory instructions. The court thereupon overruled the motion of plaintiffs in error, but sustained that of defendants in error, and directed a verdict in favor of the defendants in error for the sum of \$1,460. From this judgment, after a motion for new trial had been made and overruled, an appeal was prosecuted to the Court of Civil Appeals. In that court the judgment was affirmed as to all of the defendants in error except J. F. Yoakly. Both sides filed a petition for certiorari in this court, and both were granted, and the case was set down for argument.

The Court of Civil Appeals held that, inasmuch as both parties had moved for peremptory instructions, this was a mutual agreement to take the case from the jury, and to permit it to be decided wholly by the trial judge, and that each side, by such motions, waived all objections to evidence. That court, in support of the first proposition, relied upon two cases decided by it: *Railway Co. v. Crutcher*, 1 Tenn. C. O. A. 231, and *Aizenshtatt v. Mayor*, Id. 805. For the proposition that such motions waived all objections to evidence, reliance was had upon the rule that a demurrer to the evidence has that effect, and it was held that a motion for peremptory instructions was substantially the same as a demurrer to the evidence, and therefore must operate in the same manner upon such objections.

This view lies at the threshold of the present controversy, and must be disposed of before other questions can be considered.

[1] As to the first proposition, this court has taken a different view, from the two cases cited from 1 Tenn. C. C. A., in a recent case, decided at the present term, *Virginia-Tennessee Hardware Co. v. Ollie Sue Hodges*, 149 S. W. 1056. It was held in that case that such concurrent motions did not have the effect of an agreement by the parties that the whole controversy should be determined by the trial judge. After discussing the grounds on which this court thought the decision of the question must rest, it was said, in conclusion:

"We are of the opinion that, under the true practice, the motion of each party should

be treated for what it is, a matter wholly distinct from and adverse to that of his adversary; that neither is put in a worse position, so far as concerns his ultimate right of review, by his adversary's making a similar motion; that such motion should stand as if made and remaining alone, and should be disposed of on its own merits; that the only question submitted to the trial judge is the question of law above indicated; that as a necessary preliminary to responding to this question he must determine whether there is any substantial conflict in the evidence; that if he find such conflict, or undisputed evidence from which conflicting inferences may reasonably be drawn, on material points, he should submit the case to the jury; that if he is of opinion there is no such conflict he should sustain the motion of one party or of the other, according to his view of the facts and the law; that the party whose motion has been overruled may have the action of the trial judge reviewed on appeal, without the necessity of asking the submission of any special question or questions to the jury; that on such appeal he may attack the action of the trial judge, in overruling his motion and in sustaining that of his adversary, and may put forward his contention of the facts and assail that of his adversary; and the appellate court will for itself ascertain the facts, and will determine whether the trial judge should have sustained the one motion or the other, or should have submitted the case to the jury."

The question, then, as to whether a motion for peremptory instructions is a waiver of the right to assign errors in the appellate court on the rulings of the trial judge on points of evidence, must be determined without regard to whether both parties made motions or only one of them.

[2] The question, therefore, is reduced to the inquiry whether the making of a motion for peremptory instructions waives objections made to the rejection or admission of evidence on the part of the person making the motion. Aside from the fact of concurrent motions, it is insisted that, if either plaintiff or defendant below make such motion, he waives all such errors. The argument in support of the contention seems to be that a motion for peremptory instructions is practically identical with a demurrer to the evidence. It is held in this state, and others, that where a demurrer to the evidence is filed, this does waive such errors, regardless of whether the motion was successful or unsuccessful. *Southern Railway Co. v. Leinart*, 107 Tenn. 635, 64 S. W. 899; *Coleman v. Bennett*, 111 Tenn. 705, 711, 69 S. W. 734.

[3-5] The two motions have points of similarity, but also material points of difference. In the demurrer to the evidence the defendant sets out all of the evidence admitted by the trial judge in behalf of the

plaintiff, and confesses its truth. This is clinched by the joinder of the plaintiff. It is absolutely binding on the demurring party with all legal and reasonable inferences that may be deduced therefrom, and is equivalent to a special verdict. It withdraws the case from the jury, and submits to the court the application of the law to the facts. Where the evidence is written, and without the aid of parol, it is certain, the party offering it must join in the demurrer, or waive the testimony. If the plaintiff refuse to do so, except in terms which the court disapproves, his evidence is considered as withdrawn, and the jury must find a verdict for the defendant. The party who prevails on the demurrer is entitled to final judgment in his favor. The demurrer is complete in itself, and no bill of exceptions is needed for its preservation. *Hopkins v. Railroad*, 96 Tenn. 409, 34 S. W. 1029, 32 L. R. A. 354; *Smithers v. Railroad*, 96 Tenn. 459, 35 S. W. 560; *Railroad v. Brown*, 96 Tenn. 559, 35 S. W. 560; *Thane v. Douglass*, 102 Tenn. 307, 5 S. W. 155; *Artenberry v. Railroad*, 103 Tenn. 266, 52 S. W. 878; *Barr v. Railroad*, 103 Tenn. 544, 58 S. W. 849; *Mitchell v. Railroad*, 100 Tenn. 329, 45 S. W. 337, 40 L. R. A. 426; *Manufacturing Co. v. Morris*, 100 Tenn. 654, 58 S. W. 651; *Coleman v. Leinart*, 111 Tenn. 705, 714, 69 S. W. 734; *Road v. Sansom*, 113 Tenn. 683, 84 S. W. 694. "The office and function of a demurrer to evidence is to test the strength of plaintiff's case upon his own testimony, and not upon the testimony of both parties, nor upon facts agreed to by both parties." *Bridgeport Co. v. Railroads*, 103 Tenn. 490, 495, 53 S. W. 739, 740. Even if the evidence is conflicting this does not prevent the case from being submitted under a demurrer to the evidence. "It is said, if the evidence is conflicting, that must be looked to which is most favorable to plaintiff on demurrer to evidence. This is not a correct statement. The evidence must be looked to as a whole, and reasonable inferences drawn from it in plaintiff's favor; but none of it must be excluded simply because unfavorable, but only shown by other evidence to be incorrect." *Corbett v. Smith*, 101 Tenn. 368, 374, 47 S. W. 694, 695.

On a motion for peremptory instructions no joinder is necessary. It may be made to the close of the plaintiff's evidence, or to the close of all of the evidence. If the evidence is conflicting on material points, if diverse inferences as to material facts can be drawn from evidence not conflicting, the case must go to the jury, and cannot be decided by the court. The motion for peremptory instructions does not necessarily dispose of the whole case. Although there may be no conflict as to the right of action, there may be as to the amount of the recovery, and that event the latter question will be tried by the jury. The party making the motion is not required to formulate the

dence and sign a statement thereof as under a demurrer; but the motion is made orally on the evidence as delivered before the court. Likewise, if there be a question as to the credibility of witnesses, the case must go to the jury. While a party who files a demurrer to the evidence must sustain it at his peril, the penalty being a judgment against him if he fail, such is not the result on failure to sustain a motion for peremptory instructions. The effect simply is that the case goes to the jury for trial. The party who files a demurrer to the evidence says, in effect, by his written submission, that there is no doubt as to any of the facts, and purports to set them all out, and, if there is any apparent conflict in the evidence so set forth, this by the act itself of filing the demurrer submits the decision and determination of this question of fact to the court, for the harmonizing of all the evidence in respect thereof; while one who files a motion to instruct, although he asserts that the evidence is without conflict, yet he does so in submission to the rule of law that if there be any conflict on any material or determinative question of evidence it is the duty of the court to overrule such motion and submit the case to the jury. When a demurrer to the evidence is filed, the case as already stated is absolutely at once withdrawn from the jury, on a joinder of the plaintiff; while on a motion to instruct the question is submitted to the court whether the case shall be withdrawn. The opinion of the court is merely invoked as to whether it is a case proper for the jury, or one for the court alone, and the motion includes in effect a request of the court for appropriate action in the event of his decision one way or the other. Under the former practice no verdict of the jury is necessary, proper, or permissible; in the latter case the jury must render a verdict, albeit under the direction of the court. The trial judge may instruct the jury of his own motion without any application by either party, and neither party can compel the other; in a demurrer to the evidence it is necessary that the defendant make the application, and when he does so the plaintiff must enter his joinder. A motion for new trial is necessary as a preliminary to test, in the appellate court, the correctness of the action of the trial judge in giving or refusing to give a peremptory instruction, and the whole matter, including the evidence, must be incorporated in a bill of exceptions. No such motion is necessary to test the disposition of a demurrer to the evidence, nor, as we have previously stated, is it necessary that a bill of exceptions should be used in connection therewith. *Tyrus v. Railroad*, 114 Tenn. 579, 86 S. W. 1074; *Traction Co. v. Brown*, 115 Tenn. 323, 89 S. W. 319; *Kinney v. Railroad Co.*, 116 Tenn. 450, 92 S. W. 1116; *Railroad v. Williford*, 115 Tenn. 108, 124, 88 S. W. 178; *Seymour v.*

Railroad, 117 Tenn. 98, 98 S. W. 174; *Norman v. Railroad*, 119 Tenn. 401, 104 S. W. 1088. Of course, the purpose of both methods is to expedite the trial of causes, and the rule is that a peremptory instruction, sustained in the trial court and affirmed in the appellate court, will end the case; and a peremptory instruction, offered and refused in the trial court, but adjudged good in the appellate court, will have the same effect. So on the sustainment of a demurrer to the evidence, either in the trial court or in an appellate court, the case will likewise be at an end.

[8] The exception must be stated, however, that upon sustaining a motion for peremptory instructions there may be a remand for the assessment of damages on evidence to be heard before the jury, while in the latter all of the evidence as to damages must be found in the demurrer itself and the amount of damages fixed by the court. Authorities *supra*, and also *Railroad v. Hayes*, 117 Tenn. 680, 697, 99 S. W. 362; *Railroad v. Roe*, 118 Tenn. 601, 625, 626, 102 S. W. 343; *Box Co. v. Gregory*, 119 Tenn. 537, 105 S. W. 350.

It is perceived that, although the results attained by the two methods are in most aspects the same, yet they have material differences in the practice and administration thereof; that the demurrer to the evidence is in the nature of a pleading, and belongs to the precedents that control that class of subjects, while the motion to instruct belongs to the class of subjects necessary to be incorporated in a bill of exceptions along with other matters not of record, and necessary to be made a part of the record in order that the action of the trial judge in respect thereof may be tested on appeal.

We perceive no reason arising out of the nature of the subjects involved why a party who asks a peremptory instruction should be held thereby to waive any error committed against him in the matter of admission or rejection of evidence. During the progress of the trial he offers evidence which he believes to be competent and this is rejected. He saves his exception to be used on appeal; in like manner when evidence is admitted over his objection. After the court, by his rulings on testimony, has eliminated all evidence he deems improper, and has thus caused to be left a residuum, one or the other of these parties desires to raise a question of law that, even on this residuum, the case is with him. When the party comes to make his motion for new trial, we can see no incompatibility in assigning as grounds both that his honor improperly granted or refused a peremptory instruction, and improperly admitted or disallowed evidence offered. The contrary view deprives a litigant of a part of his case; or, to put the matter differently, it imposes a

penalty on him for endeavoring to shorten the litigation. It says to him, in effect: You must condone the errors the judge has committed against you in his rulings on the admission and rejection of evidence as the price of the privilege of making a motion for a peremptory instruction. We repeat there is no incongruity between a party insisting on having corrected errors against him of the kind just mentioned, and those committed against him in overruling his motion for peremptory instructions, and the law imposes no estoppel. It is perfectly reasonable for him to say in the appellate court that the trial judge erred in admitting or rejecting evidence, and also, in addition thereto, he erred in ruling against him the motion for peremptory instructions. There is not only no conflict between the two grounds of relief, but they are homogeneous, and both arise naturally under a bill of exceptions. The opposite view seems to be based on what we deem an imperfect analogy between the motion for peremptory instructions and the demurrer to the evidence. It does seem, we grant, inappropriate for a defendant, at the close of the plaintiff's evidence, to incorporate all of that evidence in a demurrer, admitting it all as true, along with all legitimate inferences to be drawn therefrom, and thereby compel the plaintiff to a joinder, and then, when the demurrer is overruled, to assign error on the ground that he objected to some of the evidence, and that the objection was erroneously decided against him. The answer is: After the ruling was made against you, you deliberately wrote out the evidence and signed it, and said it was true. On a motion for peremptory instructions, however, not only may there be evidence wrongly admitted against the party making the motion, but he may have offered competent evidence which was refused, and this would not appear under the motion at all, and he would not get the benefit of it. Such a situation could not occur under a demurrer to the evidence, because, as stated, that is only offered at the close of the plaintiff's evidence, and it embodies only that evidence. It is true that, where the person who makes the motion for peremptory instructions seeks, on appeal, to assign errors upon evidence admitted over his objection, his case is, in a general way, similar to that of one who demurs, in so far as both invoke the decision of the trial judge as matter of law on all of the evidence introduced.

Still, we think the rule should be different in the two cases on grounds already stated, arising out of the difference between matters based on pleadings and those falling within bills of exceptions. The difference is rested in part on a technical distinction, but the rules covering the whole subject are technical. Moreover, the practice of directing verdicts, or giving peremptory instructions to juries, is recognized as a distinct advance

upon the old system of demurring to the evidence, and we deem it unwise to hamper this practice with the rules which restricted that system, and made it so unwieldy in use, and so dangerous to parties who sought to employ it. Besides this, it is certainly true that no good reason, technical or otherwise, could be offered for refusing to permit a party to assign error on the refusal of the trial judge to admit competent evidence, which, because refused, could not enter at all into the motion for instructions. This being granted, it would be a useless refinement to make a distinction between evidence of that kind and evidence admitted over objection.

For the reasons stated, we are of the opinion that a party, by making a motion for peremptory instructions, does not waive any exceptions he may have reserved against the action of the trial judge in his rulings against him on questions of evidence; and that he, on his motion for new trial, may assign such errors, along with the action of the trial judge in granting to his adversary, or in refusing to himself a motion for peremptory instructions.

This view was intimated in *Tyrus v. Railroad*, supra, wherein it was said, in substance, that on motion properly made in the court below for a peremptory instruction, and an improper refusal of it by the trial judge, this court would be enabled to dispose of the case finally, and thereby save to the parties and the state the delay and expense of an additional trial, "in the absence of any reversible error in rulings upon evidence or otherwise." Perhaps the matter in quotation marks was not necessary to the decision of the case, but it clearly indicates the view this court entertained at that time of the question now before us.

It is urged that the practice above indicated would permit counsel to experiment with the court. It is no experiment to object to incompetent evidence, and to the action of the trial court in excluding competent evidence, but a right which belongs to every litigant. It is no experiment, when all the evidence is in which the court permits to go in, then to take the judgment of the court as to whether on uncontroverted evidence the plaintiff is entitled to a verdict, or the defendant, by appropriate motions made by either or both of the parties. The practice by which a party making a motion for peremptory instructions is held to forfeit exceptions reserved to the admission of incompetent evidence, or the exclusion of competent evidence, shortens the litigation, it is true; but it also shortens the rights of litigants.

On the trial of this case in the court below, many objections were offered by the defendant to evidence which were overruled by the trial judge. The only ones which we need consider, however, may be thus stated: Plaintiffs offered in the trial court certain parts of the record in the injunction suit, in

order to get before the court and jury the essential point of evidence that in the suit referred to, out of which the bond sued on arose, the injunction had been dissolved and held wrongfully issued. Plaintiffs below did not offer the whole record, but only the following, viz.: A paper purporting to be a copy of the bill issued out of the master's office, when it was filed; carbon copies of the demurrers of the defendants and of their answers (these were presented by the attorney for plaintiffs in the present suit, as office copies preserved by him as attorney for defendants in the former suit); a certified copy of the decree of the court; a certified copy of the injunction bond; a certified copy of injunction writ; and a certified copy of the rule docket. These various papers were objected to, first, on the ground that a certified copy of the whole record was necessary; and, secondly, that the copies of the papers referred to—that is, the pleadings and the injunction writ and bond—could not be supplied in the manner attempted without evidence that the office of the master had been diligently searched and they could not be found. The trial judge overruled these objections, and his action thereon is assigned as error.

[7-9] On dissolution of an injunction, defendant may have either a reference to the master for the assessment of damages, or bring an independent suit on the bond. Shannon's Code, § 6259; *Terrell v. Ingersoll*, 10 Lea, 77, 80, 84. This follows as a matter of course upon dismissal of the bill. *Ragan & Buffett v. Aiken*, 9 Lea, 623. But the fact of such dissolution must be shown by the best evidence; that is, the record of the injunction suit. "A judicial record of this state is proved by a production of the original, or by copy thereof, certified by the clerk or the person having the legal custody thereof under his seal of office, if he have one." Shannon's Code, § 5579. A copy of the whole record must be produced. *Duncan v. Gibbs*, 1 Yerg. 256; *Garrick v. Armstrong*, 2 Cold. 267; *Willis v. Louderback*, 5 Lea, 561; *Phipps v. Caldwell*, 1 Heisk. 350; *Railway Co. v. Seymour*, 113 Tenn. 523, 83 S. W. 674; *Smith v. Hutchison*, 104 Tenn. 394, 58 S. W. 226. A modification of this rule is found in *Russell v. Houston*, 115 Tenn. 536, 91 S. W. 192, to the effect that it may be dispensed with, in case of the records of courts of general jurisdiction, where it appears that a part of the record is lost and cannot be produced, and the party seeking to use the record as evidence produces all of it that is accessible.

[10] It is insisted for the plaintiffs that this was done; that they produced and offered in evidence all of the record of the injunction suit that could be found. The defendants insist that there is not sufficient evidence in the record to show that any part of the former record was lost.

The testimony upon this subject is as fol-

lows: N. J. Phillips, the clerk and master of the chancery court, testified thus:

"I will ask you if you have the original bond—injunction bond—executed by Samuel L. King and others in the cause of Samuel L. King and others against W. H. Cox? A. I reckon not. The file is not in my office. I suppose they are in Bristol. I haven't the papers now at all; some of the lawyers must have them. Q. I show you what purports to be a certified copy. (Witness examined the paper handed him.) A. Yes; I made that. Q. Did you make search for the bond? A. Let me see if I did. I don't remember just now what I did say about it. (Reads the certified copy, and replied that it so states; that he made search for the bond.) Q. I will ask you if this is a correct copy of the injunction writ that was served upon the parties? (Hands witness paper.) Q. Have you made search for the original papers in this case? A. Yes, sir. Q. Have you been able to find them? A. No, sir. Q. Do you know where they are? A. No, sir; I made that certified copy last October. Some of the lawyers may have them, but I can't tell where they are. I let C. A. Brown have them, and he took them to Bristol, and gave them to A. G. Keebler. (Mr. Keebler here states that he brought them back to Blountville, and gave them either to the clerk and master, or some attorney in the case.) Q. Is that a copy of the injunction? A. Yes; that is a copy of the injunction and the sheriff's return on it."

The witness was examined on December 19, 1911. The certificate to the bond on which he bases his answer as to the search was made on the 22d day of May, 1911. He does not testify that he made any search in his office after that time. This certificate of the 22d of May, 1911, states "that the original bond is lost or unintentionally mislaid, and cannot be found on diligent search." The certificate to the copy of the injunction writ on which he bases his statement as to that matter was made on the 31st of October, 1911.

C. J. St. John testified: "I find in my file a copy of the bill that was delivered to my client when the service was made." This copy was thereupon offered and objected to as stated. Accompanying this were filed uncertified copies of papers purporting to be the demurrers and answers of the defendants in that suit. The witness testified that these papers were prepared by him at his office, and that the carbon copies were copies of the originals which were filed in the court; that the copy of the original bill was a copy made out by the clerk at the time that the summons was issued, and delivered to his client with the summons.

We do not think that a sufficient ground was laid for the introduction of these irregular copies, or for using only a part of the record as the only part accessible. It does

not appear that the clerk and master had made any recent search in his office, or that any inquiry had been made among the attorneys of the parties in that former litigation, or who the attorneys were. Judge St. John, the witness whose testimony has just been referred to, and who testified that he was counsel in that case, made no statement upon the subject as to whether he had examined or looked in his office for the file. It appears that Mr. Keebler was an attorney in the cause, and his statement appears to the effect that he had the papers and returned them, either to the clerk and master, or gave them to some other counsel in the case, and so the question is left wholly at large. It does not appear that the master had made search in his office during the months intervening between May and October, or between October and December. It ought to appear that all available sources of knowledge had been exhausted by diligent and recent search. Among these available sources indicated by the present evidence were the clerk and master's office at Blountville and the offices of the various attorneys who had been engaged in that cause. For all that we can see, the whole record may have been in the clerk and master's office at the time he testified, or may have been in the office of one of the attorneys. Under these circumstances, we are of the opinion that the trial judge committed error in admitting these detached papers. *Rhea v. McCorkle*, 11 Heisk. 415; *Whiteside v. Watkins* (Tenn. Ch.) 58 S. W. 1107; *Vaulx v. Merriwether*, 2 Sneed, 686; *Pharis v. Lambert*, 1 Sneed, 228; *Girdner v. Walker*, 1 Heisk. 191; 17 Cyc. 543 and 548; 1 Greenleaf on Ev. § 558.

It results that the judgment of the Court of Civil Appeals must be reversed, also the judgment of the circuit court, and the cause remanded for further proceedings.

The Court of Civil Appeals reversed the judgment as to Yoakly on a special ground stated in the opinion of that court. It is unnecessary and improper that we should consider that ground in the present attitude of the case, and the reversal of the Court of Civil Appeals as to that matter is based upon the necessary reversal of the judgment of the circuit court.

The costs of the appeal will be paid by the plaintiffs.

In re CAMERON.

(Supreme Court of Tennessee. Nov. 23, 1912.)

1. JUDGES (§ 47*)—DISQUALIFICATION—STATUTORY PROVISIONS.

A judge is not disqualified to act in a case merely because he will be a witness on the trial, in view of Shannon's Code, § 5594, expressly providing that the judge is a competent

witness for either party in any case tried before him.

[Ed. Note.—For other cases, see Judges, Cent. Dig. §§ 214-219, 222, 223; Dec. Dig. § 47.*]

2. JUDGES (§ 49*)—DISQUALIFICATION—BIAS AND PREJUDICE.

A judge is not absolutely disqualified to hear and determine a case merely because he is personally prejudiced against a party; it being left to his personal discretion whether he will act.

[Ed. Note.—For other cases, see Judges, Cent. Dig. §§ 187, 188; Dec. Dig. § 49.*]

3. ATTORNEY AND CLIENT (§ 51*)—DISBARMENT—PRELIMINARY PROCEEDINGS.

Under Shannon's Code, § 5781, authorizing courts to strike from their rolls any practicing attorney or counsel upon satisfactory evidence that he has been guilty of misconduct, section 5782, requiring the charges against an attorney or counsel to be reduced to writing and a copy furnished the party accused, section 5783, prohibiting persons stricken from the rolls to practice in any court, and section 5784, giving such an attorney the right to appeal, the trial judge has the right, and it is his duty, to formulate charges against attorneys, where the matters are wholly or largely within his knowledge, without waiting for any motion by any member of the bar.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. § 67; Dec. Dig. § 51.*]

4. JUDGES (§ 47*)—DISQUALIFICATION—BIAS AND PREJUDICE.

A trial judge, who, before making charges against an attorney, based on matters within his knowledge, tested his recollection of the matter by consulting others having knowledge thereof, was not thereby disqualified to hear and determine the disbarment proceeding on the ground that he had become the prosecutor; it being necessary for the protection of the bar that judges shall make some preliminary investigation before making such charges.

[Ed. Note.—For other cases, see Judges, Cent. Dig. §§ 214-219, 222, 223; Dec. Dig. § 47.*]

5. CONSTITUTIONAL LAW (§§ 306, 821*)—JUDGES (§ 49*)—DISQUALIFICATION—BIAS AND PREJUDICE.

Where charges of misconduct against an attorney, presented by a trial judge, recited that it appeared from facts within the court's knowledge that the attorney had been guilty of acts of immorality and impropriety inconsistent with the character and incompatible with the faithful performance of the duties of his profession, that he had been guilty of a studied and matured purpose to commit a fraud upon the court, and that he was therefore ordered to show cause why he should not be disbarred, and it was contradicted that the trial judge had stated openly and publicly that it did not matter whether the attorney confessed the charges or not, as he could prove his guilt, the judge was disqualified upon due objection being made, since a trial judge who decides the case before hearing the evidence is disqualified, under Const. art. 6, § 11, and Shannon's Code, § 5706, both of which provide that no judge shall be competent, except by consent, where he has presided in any inferior court or has been of counsel, especially in view of Const. art. 1, § 17, providing that every man, for injuries done him in his lands, goods, person, or reputation, shall have a remedy by due course of law, and right and justice administered without sale, denial, or delay; to compel a man, over his protest, to try his case before a judge who has already de-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

cided, it not constituting due course of law, but being a denial of justice.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 928, 936, 939, 942-946, 948, 949, 950, 952-955; Dec. Dig. §§ 306, 321; * Judges, Cent. Dig. §§ 187, 188; Dec. Dig. § 49.*]

6. JUDGES (§ 49*)—DISQUALIFICATION—BIAS AND PREJUDICE.

A trial judge is not disqualified, on the ground that he has decided the case in advance, unless it appears beyond any doubt that such is the fact; his denial, although made under no oath except his oath of office, being conclusive on this point.

[Ed. Note.—For other cases, see Judges, Cent. Dig. §§ 187, 188; Dec. Dig. § 49.*]

7. CONSTITUTIONAL LAW (§ 316*)—DUE PROCESS OF LAW.

Under Pub. Acts 1911, c. 32, providing that no verdict or judgment shall be set aside or new trial granted for error in the charge, in the admission or rejection of evidence, in acting on any pleading, or for any error in any procedure in the case, unless in the opinion of the appellate court, after an examination of the entire record, it shall affirmatively appear that the error complained of affected the results of the trial, the Supreme Court cannot try a case de novo, and render the judgment which should have been rendered below, where the trial judge was incompetent, and due objection was made on that ground; the judgment in such case being void, and a trial by the Supreme Court an exercise of original jurisdiction, contrary to Const. art. 1, § 17, providing for a remedy in all cases by due course of law.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 938; Dec. Dig. § 316.*]

Certiorari to Court of Civil Appeals.

Proceedings for the disbarment of Robert T. Cameron, an attorney. Judgment disbarring respondent was reversed by the Court of Civil Appeals, and the cause remanded, and the proceeding is brought to the Supreme Court by certiorari. Judgment remanding the case affirmed.

Littleton, Littleton & Littleton, of Chattanooga, for plaintiff in error. M. N. Whitaker, Dist. Atty. Gen., and T. Pope Shepherd, Asst. Dist. Atty. Gen., both of Chattanooga, for the State. Frank Spurlock, Frank M. Thompson, and S. Bartow Strang, all of Chattanooga, opposed.

NEIL, J. In the criminal court of Hamilton county, on January 13, 1912, plaintiff in error was served with the following citation:

"It appearing to the court that Robert T. Cameron is a practicing attorney at this bar, and it further appearing to the court from such facts in the possession of and within the knowledge of the court that said Robert T. Cameron has been guilty of such acts of immorality and impropriety as are inconsistent with the character and incompatible with the faithful discharge of the duties of his profession, that he has been guilty of a studied and matured purpose to commit a fraud upon the court, to wit:

"(1) That said Robert T. Cameron was at-

torney for and represented one J. E. White in this court at the September term on the charge of unlawfully selling whisky within four miles of a schoolhouse; that said White was convicted of said offense and was fined \$250 and sentenced to four months' imprisonment in the workhouse; that a motion for a new trial was made by said Cameron for said White, which was overruled by the court and appeal was granted to the Supreme Court, and defendant given 30 days to file his bill of exceptions. All of the proceedings of said trial were taken in shorthand by M. O. Cates, an experienced and reputable stenographer, and a transcript of his stenographic notes was made by the said Cates and presented to the said Cameron. A bill of exceptions was presented by the said Cameron to Attorney General Whitaker for his approval, with the representation that it was the stenographer's report of said trial. The Attorney General, having confidence in Attorney Cameron, and believing his statement to be true, made a casual examination and approved said bill of exceptions as presented by the said Cameron. The court, understanding that said bill of exceptions was the stenographer's report of said proceedings, made only a slight examination thereof, but discovered that there was no proof in the record showing that the sale of whisky in question was made within four miles of a schoolhouse.

"The court, remembering that such fact was proven and should be in the record, inserted and interlined in the paper presented by Mr. Cameron the words 'within four miles of a schoolhouse where a school was kept,' signed said bill of exceptions, and had it filed.

"During this term of court, on the 9th day of January, 1912, said Robert T. Cameron appeared before the court and asked that said interlineation as aforesaid be stricken out, and stated that such facts were not proven on the trial of said case; that he especially remembered it, and would make affidavit to that effect. The court promised to strike out said interlineation if it should appear that the statements of said Cameron in this respect were true. The said R. T. Cameron knew when he made said statement to the court that it was absolutely false, and he made it for the purpose of deceiving and practicing a fraud upon the court, and for the purpose of fraudulently procuring a new trial for his client before the Supreme Court.

"(2) Said Robert T. Cameron is charged with willfully, knowingly, corruptly, and fraudulently changing and altering the first seven pages of the transcript of the stenographic report furnished him by the said M. O. Cates, which transcript as furnished by said Cates was a correct report of the testimony produced and the proceedings on

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes 151 S.W.—5

the trial. The said Cameron inserted five pages of his own composition, which did not correctly state the testimony, and correctly show the proceedings on said trial, and the said Cameron knew that his said statements as shown in said transcript were not correct, but were false and fraudulent. After altering and changing the transcript as aforesaid, the said Robert Cameron presented said paper to the court, with the representation that it was the stenographer's report of the proceedings of said trial. All of this was done by the said Cameron for the purpose of deceiving and defrauding the court, and procuring the court to certify a false and fraudulent bill of exceptions in said case.

"(3) That the said R. T. Cameron further undertook to deceive the court by attempting to have the stenographer, M. O. Cates, who reported the case, to make a statement to the court which was false and misleading in respect to the stenographic report of said case, so as to procure the court to strike out of the bill of exceptions what the court had interlined, to wit, 'within four miles of a schoolhouse where school is kept.'

"It is therefore ordered and adjudged by the court that said Robert T. Cameron be ordered to appear before the court on Saturday, January 20, 1912, at 10 o'clock a. m., and show cause why he should not be disbarred from the further practice of law in the courts of this state, and his name stricken from the roll of attorneys.

"It is further ordered by the court that the Attorney General, M. N. Whitaker, and the Assistant Attorney General, T. P. Shepherd, are directed by the court to conduct these proceedings in behalf of the state of Tennessee.

"The clerk is hereby directed to issue citation to said Robert T. Cameron in accordance to this order and furnish him a copy of this order."

On February 13th plaintiff in error appeared by counsel, and moved the court to permit the cause to be heard by some other judge of concurrent jurisdiction, on the ground that Hon. Samuel D. McReynolds was interested in the event of the suit; and in this behalf he invoked article 6, § 11, of the Constitution of the state, which provides as follows: "No judge of the Supreme or any inferior courts shall preside in the trial of any cause in the event of which he may be interested."

In support of this motion he filed the following affidavit:

"In this case Robert T. Cameron makes oath that by and through his counsel he has moved the court to grant him a hearing before some judge who has no interest in the event of this suit. And to that end he has asked, and he now asks, that this honorable court interchange with Hon. T. M. McConnell, chancellor, residing here and now in the city, or Hon. Charles R. Evans, circuit judge,

residing here and now in the city, or any circuit judge, chancellor or criminal judge in the state of Tennessee, having concurrent jurisdiction with your honor, Hon. S. D. McReynolds, in matters of this character.

"Protesting all the while his respect for and his confidence in the uprightness and integrity of this honorable court, affiant does not believe that he can get a fair and impartial hearing of the issues before this honorable court for the following reasons, which he humbly begs to respectfully submit:

"First. Your honor, affiant is informed and believes, entered the order against affiant, citing him to appear and show cause why he should not be disbarred; and this order was entered on your honor's own motion, and is in substance a recitation that affiant is guilty of the things with which he is charged. Therefore your honor stands in relation of prosecutor in this case, and to that extent is a party to the suit or proceedings.

"Second. Your honor, affiant is informed and believes, is a witness in the case about a most material matter of fact, and your honor is the only witness against affiant as to the matter of fact; and your honor has on divers occasions and in divers places stated to divers people your honor's version of the conversation between your honor and affiant as to that matter of fact which caused your honor to enter this order, and which is the gist of this action against affiant; and your honor is naturally interested in the event of the suit and in having your honor's version of the controversy sustained and accepted.

"Third. Your honor has, as your affiant is informed, on several occasions expressed feelings of prejudice against affiant, and on one occasion used substantially this language:

"It does not make any difference whether Cameron confesses or not. I can prove his guilt."

"Affiant, protesting his high regard for your honor's position, and yet feeling no more keen resentment than what is human and possible at what your honor may have said in a moment of sudden exasperation, because of some real or reckoned sin of affiant, respectfully and humbly insists that, with this opinion formed and expressed about affiant, your honor, in the nature of things, is bound to have some interest in the event of the suit.

"Affiant avers that your honor is prosecutor and witness, and has, by virtue of your honor's position, selected counsel to represent your honor in the prosecution of affiant; that your honor has expressed the opinion that affiant is guilty of the charges, has caused an order to be entered solemnly declaring and reciting that affiant is guilty, and affiant respectfully and most earnestly insists that your honor is interested in the suit.

"All the time protesting that he means no

disrespect to your honor, or your honor's high office, but that he may be tried according to the forms of law, and in the manner prescribed by law, and under the Constitution of his country, affiant makes this affidavit in support of the motion filed, that he may be tried by a court having no strong feeling against him, no fixed opinion as to what the facts of this case are, and no interest in the result."

The court overruled this motion, to which action the plaintiff in error excepted.

Thereupon the cause came on for trial on the merits, and the plaintiff in error introduced his sworn answer, which was treated as his deposition. It was as follows:

"That he is 35 years of age, and has been a practicing member of the Chattanooga bar for a period of 9 years. That he has had, and now has, a remunerative practice, and that his business has been and is in the federal, chancery, circuit, and criminal courts; the greater volume of it being in the circuit courts.

"That he has some criminal practice, and that soon after the May, 1911, term of the criminal court of Hamilton county, he was engaged to defend one J. E. White, indicted at that term for selling intoxicating liquors within four miles of a schoolhouse where school was kept, and for selling liquor without a license."

The presentment was then set out, but it is not necessary to reproduce it here.

"That at the September term, 1911, the case of the state against J. E. White was regularly called on the docket for trial, and that respondent, Cameron, appeared in court as of counsel for White, and applied to the court for a continuance of the case on the grounds and for the reasons that two material witnesses for the defendant White were absent. A subpoena had been issued for one of these witnesses, Sam Johnson, but had not been returned, and on learning of this the day before the trial the defendant White had attempted to locate Johnson in the city and had failed. And said respondent stated to the court that the witness was not absent by the consent or procurement of defendant White, and that he expected to have him present at the next term if a continuance should be granted, and that he expected to prove, and would prove by said Johnson, that Johnson was in the place of business of defendant White when the only witness for the prosecution, one Red Gordon, was alleged to have purchased the liquor, the sale of which the indictment was founded upon, and that Johnson would prove that Gordon did not buy the liquor from the defendant White. That if any whisky had been sold or delivered to Gordon by defendant White, he would have seen it, and that he, Johnson, would prove that said state witness, Gordon, had since the date of the alleged sale of whisky by defendant White confessed

to him, Johnson, that he purchased no whisky from defendant White.

"Respondent, on behalf of his client, White, further insisted on a continuance of the case because of the absence of a witness, named Stocks, who would testify that he was in the defendant White's place of business with Johnson when Red Gordon was alleged to have purchased the whisky from White, and that Stocks would testify that Gordon did not make the purchase, that he, Stocks, would have seen it if he had made it, and that no whisky was delivered to Gordon by White.

"Gordon, a negro, was the only witness for the prosecution.

"With these statements treated by agreement as sworn to, the application was overruled by the court, and the defendant put to trial.

"This application for a continuance was made at the morning session of the court, when there was no stenographer present. Court then adjourned, and at the afternoon session respondent renewed his application for a continuance, but did not state his grounds as fully as on the original application.

"Under this state of affairs, the feelings of respondent were considerably wrought upon by the action of the honorable court in what the respondent then considered an arbitrary action in putting his client, whom respondent believed innocent, to trial without his witnesses, and affiant was doubtless more or less ugly, offensive, and unpleasant in the trial of the case, all of which he now deeply regrets. And finally, when the judge, Hon. S. D. McReynolds, called the Attorney General to the judge's stand and carried on a whispered conversation with him for a minute, and the Attorney General turned directly to the witness then in the chair and began to ask questions, respondent supposed and believed the judge had been directing the Attorney General what questions to propound to the witness, and the respondent almost involuntarily and with great feeling exclaimed, substantially:

"I except to the court's action in assisting the Attorney General in this prosecution."

"Whereupon the court fined respondent for contempt of court, and the trial of the case proceeded with increased and increasing bitterness between the respondent and the court.

"Respondent here and now admits that his conduct and bearing toward the court was improper, and he deeply regrets it.

"The case proceeded to a verdict, and the defendant J. E. White was convicted. Respondent made a motion for a new trial, and set out all the grounds hereinbefore named in his application for a continuance, and procured the affidavit of the defendant J. E. White."

The answer then reproduced the several

affidavits which were made on the motion for new trial by White and his two witnesses, or persons whom he had desired to use as witnesses on the trial of the said case of *State v. White*; but they need not be set forth here, as they have no bearing on the controversy as it now stands in this court.

"If respondent's recollection is correct, and he thinks it is, the motion for a new trial was filed on Friday. The following day was motion day in the criminal court, and in the natural course of events the motion for a new trial in the *White* case was called the following day. When it was called, respondent was engaged in the trial of a criminal case for one of his best clients before a committing magistrate, and, when the clerk of the criminal court called respondent over the telephone and told him that the motion for a new trial in the *White* case was about to be disposed of by the court, respondent requested the clerk to inform the court of his situation; that is, that he was in the midst of a trial and could not get away, and to ask the court that the motion be heard on another day.

"In response to this the clerk informed respondent that the court would not grant the request. Then the respondent asked the clerk to get the Attorney General to come to the telephone. In response to this the clerk replied that the Attorney General declined to come.

"The court disposed of the motion for a new trial in this way, in the absence of respondent and his client, and overruled the motion, fined respondent's client \$250, and sentenced him to four months' imprisonment.

"Respondent went to the clerk to file his affidavits, and was informed by the clerk that his honor, Hon. S. D. McReynolds, had directed that the respondent be not permitted to file the affidavits.

"Respondent honestly believed that his client was innocent, and the court's failure to grant a continuance, and subsequently a new trial on the affidavits, and the action of the court in passing upon the motion for a new trial in the absence of the defendant *White* and his counsel, and in refusing to continue said motion to another day, was arbitrary, and that it indicates an unfriendly personal feeling, if not a distinct animus, toward respondent, and he was, therefore, thereafter particularly careful to not offend the court or to appear to violate any of its rules.

"In the trial of the *White* case respondent had a stenographer employed to report the case, and when the proceedings above referred to were had, and the last act in the unpleasant trial before his honor, Judge McReynolds, was over, he requested the stenographer to furnish a transcript of his notes, so that a bill of exceptions might be presented to the court. The stenographer, Mr. M. O. Cates, had this done, and gave to respondent a report. Respondent took said report,

and changed the form of application for continuance as may be seen on inspection, getting the application in entirely good form, as he believed, and now believes, stating exactly what occurred, and how it occurred, protecting his client's interest, and making the record he was preparing speak the truth. Respondent changed the form of expression, but it comported exactly with what occurred, and with no view of deceiving the court, or practicing a fraud on the court.

"Respondent put in the report what occurred on the first application for a continuance, because the stenographer was not present at that time.

"On page — of the report furnished respondent by the stenographer, Cates, there was a declaration of the distinguished Attorney General, which was marked 'Question No. 15,' and which was in the following words:

"The place where he sold the liquor was in four miles of a schoolhouse?"

"And the reported response of the witness, Red Gordon, to this declaration on the part of the Attorney General, was: 'Yes, sir.'

"Respondent did not remember that such proof was made, did not believe it was made, does not remember it now, and does not believe it now.

"The alleged question is, and was, in the nature of a declaration by the distinguished Attorney General, and not in the form of a question, and affiant was impressed, when he saw it in the record, that if he had heard it on the trial he certainly would have objected to it as being leading, and suggestive, and unknown to the forms of law, and he did not remember hearing the Attorney General make this alleged question by cutting it out of the report.

"With these changes in the report he took it to Hon. M. N. Whitaker, Attorney General, who is careful and painstaking in matters of this kind, told him it was the stenographer's report, with some changes made by him, respondent, and began to point out in the report the application for a continuance, where he had changed its form to state the true facts, and yet put it in better form. The Attorney General replied substantially as follows:

"I am not going to examine it now, Bob. I have not time. It may be filed as of this date, and you may leave it here. I want to examine it."

"Respondent then left it with the Attorney General for two or three days, until the Attorney General told respondent over the telephone that he could go to his, the Attorney General's, private office and get the record, that he had left it on his desk or table, and that it was all right.

"Respondent then filed it with the court, or the clerk of the court, and it was in the possession of, or at least accessible to, Hon. S. D. McReynolds from that period up until

the time that respondent was cited to appear, on having called the judge's attention to the condition of the record.

"Respondent discovered that the said honorable court, S. D. McReynolds, had interlined with a pen, at question 15, these words:

"And within four miles of a schoolhouse where school was kept."

"Respondent knew that said proof was not made, at least he did not believe that it was made, he does not now believe it was made, and he did not then believe it was made, and he, therefore, took the record, and went to Hon. S. D. McReynolds, and complained of this interlineation, and asked that it be stricken out.

"His honor inquired as to what stenographer reported the case, and respondent, after some study, said it was Cates, M. O. Cates. The judge then told respondent to go to the said Cates and have his notes examined, and if that proof was not shown in the note of the stenographer he would strike it out. Respondent did go to Cates, and he here and now expressly and earnestly denies that he attempted to get Cates to deceive the court, or to practice fraud on the court.

"Respondent told Cates what the judge had inserted in the record, and asked Cates to telephone the judge that what he had inserted was not in his notes. Respondent knew that it was not, knows it was not, in the notes, and he did not then believe, and does not now believe, that the proof interlined was made, and he believes that the stenographer will verify his statement.

"Respondent says this in no disrespect to his honor, S. D. McReynolds, and respondent in no way intimates that Judge McReynolds was not acting in good faith when he made the interlineation.

"Respondent is aware that any arbitrary action on the part of the court, or the Attorney General, or action that respondent may have imagined was arbitrary (and he here and now avers that he has no object to reflect on the honor, dignity, or integrity of either of these distinguished officials), would warrant or justify him in deliberately changing a record, whether it was a correct or incorrect record; but he solemnly avers that he had no purpose to change the record, or fraudulently alter it in any way, but he was making the record which he verily believed, and which he now believes, speak the truth. He submitted it to the Attorney General, and left it with him for two days before it became a record authorized to be filed, and he then took it to the court for final inspection before it should become a part of the record. When Hon. S. D. McReynolds entered an order citing him to appear and show cause why he should not be disbarred, respondent was greatly troubled in mind and pained and mortified. The order in itself is a declaration of respondent's guilt. It recites that Robert T. Cam-

eron made an absolutely false statement to the court.

"It recites that he did it for the purpose of practicing fraud on the court.

"It adjudges respondent guilty, and recites that the facts are in the possession of and in the knowledge of the court.

"Respondent was shocked and mortified when he was cited to appear and show cause why he should not be disbarred. He consulted several lawyers, friends of his, and members of the Chattanooga bar, and to a number of them he confided his troubles; and in that state of mind which this great sorrow naturally put him, he said things and did things which in a manner reflected on this honorable court. He has since realized, and he now more fully realizes, that this character of talk and this conduct on his part was highly reprehensible; that it was an unjust and an unwarranted reflection on this honorable court, and he deeply and greatly regrets it, and whatever may be your honor's course in this case, respondent profoundly apologizes for this mark of disrespect to the court, and asks that this honorable court consider the great sorrow that had suddenly come upon him, involving his character, the happiness of his family, and everything that was and is near and dear to him.

"And having fully answered, respondent prays to be hence dismissed."

The next witness was his honor, Judge S. D. McReynolds, who was presiding on the trial which we now have under examination. He testified as follows:

"I can make that statement first, and give you gentlemen the right to ask me any question you may desire.

"The White bill of exceptions was in the hands of the Attorney General, so I was informed. When I saw it, as I remember it, it was presented to me by the clerk. In going over it—although it had been O. K'd by the Attorney General, the court generally looks over these matters—and in looking over this bill of exceptions, I found that 'within four miles of a schoolhouse, where school was kept,' was not in there. The court was of opinion that that was asked, but did not take his own opinion about it, but also inquired of the Attorney General, and perhaps of the assistant clerk, or deputy clerk, who stated he thought it was proven, or words to that effect. And, after the bill of exceptions was on my desk for some time—and by the way, I will say that the bill of exceptions did not reach me within the time—within the time given, but I was informed by the Attorney General that Mr. Cameron had presented the bill of exceptions to him within the time, so the bill of exceptions did not reach me until after the time expired, but I did not want Mr. Cameron to lose his rights in the court by not getting in the hands of the court, so finally

I took up the bill of exceptions. And finally it gets here, and I directed the clerk to mark the bill of exceptions filed within the time, so Mr. Cameron would not lose his rights of appeal, because it had been in the hands of the Attorney General and did not reach the court. I presumed the clerk had marked it. I never thought anything more about it until about the 9th of January. I was in the office, and Mr. Cameron appeared and said he wanted to see me. The court was busy. Just a minute or two afterwards I stepped to the door and called Mr. Cameron. He came into the office and said: 'You have inserted something here which ought not to be here.' He was standing up with the bill of exceptions laid on the arm of the desk turning over to find it. I said: 'In reference to four miles of a school-house?' He said, 'Yes,' knowing that was the correction I remembered having made. He showed it to me, and I said: 'From the best information I can get, that was in there. I asked the Attorney General, and he said it was in there, or said it was proven.' I then asked Mr. Cameron did he have any special knowledge about this matter not being proven. He said he did. He said he would swear to it, and he mentioned it to Mr. Tatum before the trial—before the motion. I said: 'Of course, Mr. Cameron, if this does not belong to the bill of exceptions, and it was not proven, and you can satisfy the court that that is correct, the court will strike it out of the record. While, of course, that means a reversal of the lawsuit, that is neither here nor there; if that was not proven, the court will strike it out.' I then said to him, 'What stenographer was in this case?' I understood him to answer rather this way, 'Marsh.' He said, 'Marsh,' and went on to describe the stenographer that takes notes here sometimes, and that I can mention if you desire. I said to him I would not put much credibility in his reports, because I had had some little experience here with him in another case. He then said, 'Morrison.' I said, 'Do you mean Charlie Morrison?' He said, 'Yes.' The court said to him: 'If it is Charlie Morrison, Buchanan, or Cates, they are all reputable stenographers, and you can see them, and can see about it. If they state to you that it was not in there, I will strike it out'—and asked him to see them. He went out of the office, and left the bill of exceptions. I don't know whether he left it with me, or carried it back to the clerk's office. The court immediately went around to the other court, and found Mr. Morrison, and asked him about it. Mr. Morrison said he was satisfied he was not the man that reported it; that he did not think he reported but one case here. The next morning I was called by Mr. Cates—Gentlemen, I realize this is not competent right here, unless you show that Mr. Cates

was instructed or had some authority to speak from Mr. Cameron, but I can give you this statement if you desire that.

"Mr. Jesse Littleton: We do not make any objection, your honor.

"Court (continuing): Mr. Cates then brought me the copy of the transcript which he claimed to have furnished to Mr. Cameron, and I went over it, and I found—

"Mr. Jesse Littleton: Now, if your honor please, it has not been proven to be a copy of the transcript.

"Mr. Whitaker: We will prove that.

"Court: I will stop there. That is all the court can state now, unless you make the others things competent.

"Mr. Jesse Littleton: I will ask your honor this: Will your honor allow me to ask you—after examining Mr. Cates, to ask you two or three questions?

"Court: Yes, sir; any time."

The next witness called was the stenographer, M. O. Cates. This witness testified that he was the stenographer who took the case of State v. White, and that he made a correct record of the proceedings, and that he offered upon the trial of the present case a correct copy of his report, fully compared with his notes.

He further testified that, after his notes were written up, he took the original and carbon copies both to Mr. Cameron, with a bill for both; that he never saw the original copy again until after Judge McReynolds ordered him to bring the carbon to his office. He identified the original copy which he handed to Mr. Cameron.

In making out the identification the witness was asked:

"Look at this copy, and say whether or not that, as a whole, is the document you handed to Mr. Cameron. A. To the best of my knowledge and belief, the first page is, the second page is not, neither is the next, neither is the next. The balance of it is my work, to the best of my knowledge and belief. Q. State whether or not you had the pages numbered when you presented it? A. Yes, sir. Q. There is five pages substituted for seven of your own pages; did you count them? A. I think that is right.

"Mr. Shepherd: Now, if your honor please, without reading these two pages, I will just treat them as read, showing the difference in the two records.

"Court: All right.

"Q. Now, Mr. Cates, the carbon copy that has been introduced is the carbon copy of your notes? A. Yes, sir; that is the carbon copy of the original transcript I delivered to Mr. Cameron."

"Mr. Shepherd: Q. Now, Mr. Cates, did Mr. Cameron come to your office some time after the 9th of January, and make any statement to you with reference to this transcript? A. He came to my office some time during January; I don't know what part of the month. Q. State what he said

to you. A. I cannot state the exact words, the language of Mr. Cameron; I can give the substance. Mr. Cameron came to my office and told me what Judge McReynolds inserted in the record, and he said he did not think it was in there. Q. Did he have that record with him? A. He did not. Q. What else did he say? A. He told me that when he went to see the judge about it—now this is the substance of it—the judge insisted that he was not absolutely sure it was in there, neither was Mr. Whitaker sure it was in there. He told me he had changed the form of the application for a continuance to a certain extent, and had called their attention to it, and that it was all right, and then he said that Judge McReynolds told him that, if I would call him up and state that what he had added was not in the record, he would strike it out, and then Mr. Cameron asked me to look at my notes, and [I] looked at them and told Mr. Cameron what was there. Then Mr. Cameron insisted that what the judge had added to the transcript was not in there, and I told him that it was not, and then he asked me to call him up and state that the thing that he had inserted in the transcript was not in my notes. Q. State whether or not you got your carbon copy and showed Mr. Cameron what the carbon copy showed? A. I did not at the time Mr. Cameron was talking about it; I had forgotten that I had a carbon copy. Q. Did you get your notes? A. I did. Q. Read your notes to Mr. Cameron? A. Yes, sir. Q. You read your notes in accordance with that carbon copy, did you not? A. Yes, sir. Q. And then he asked you to call up Judge McReynolds and say to him that the thing was not in your notes?

"Mr. Jesse Littleton: We object, your honor, to Mr. Shepherd stating that.

"A. Yes, sir. He asked me to call up Judge McReynolds and say that what he had inserted, the language, was not in my notes.

"Mr. Jesse Littleton: Was that after you had read the notes to him? A. Yes, sir.

"Mr. Shepherd: Did he ask you to say anything else? A. Did not. Q. Well, did he say anything about the judge doing that, or what was said? A. Well, after I had read the—what my notes showed, why he stated that the way it was, he had left out just a little, and that judge had added a little, and that is the sum and substance of it. Q. Did he state whether or not he still wanted you to call up the judge and make that statement to him? A. I think that was the last thing he said to me as he left the office. Q. Did you call up Judge McReynolds? A. I did. Q. Then later you came to Judge McReynolds' office? A. Yes, sir. Q. And then found the discrepancies? A. Yes, sir; I did not compare the application for continuance. I compared the page to my testimony. Q. What else did Mr. Cameron say about this White case? A. Why, he

stated that he had gone to Judge McReynolds and told him he did not believe that was in there, and Judge McReynolds thought it was in there, and thought that another stenographer named Norris had reported the case, and he told him, 'No,' that Cates had reported the case, and that he had done his reporting in that case, and then that Judge McReynolds told him to have me call Judge McReynolds up, and if I would state that was not in there, he would strike it out, and he also made the remark that he would not miss reversing the case for \$500."

On cross-examination:

"Q. When he came to you about this matter, he did not offer you any inducement to deceive the court, did he? A. He did not. Q. He did not offer you any inducement, or any reward of any kind, to say anything to the court? A. He did not. Q. He did not intimate that he wanted you to deceive the court, did he? A. He merely asked me to call the court up and say that the language he had added was not in my record. Q. Do you remember what was in that record, Mr. Cates, what part was changed—do you remember what was in there? A. I think so. I have my shorthand notes with me. Q. Look at that question 15, 'The place where he sold that liquor was without [within] four miles of a schoolhouse?' A. That is correct according to my notes. Q. Is that a correct copy? A. Yes, sir. Q. Now, look here, where Judge McReynolds interlines, and compare that: 'In Chattanooga, Hamilton county, and within four miles of a schoolhouse where school is kept.' Is that in your notes? No, sir; not the exact language. Q. It is not in your notes anywhere, 'where school was kept?' A. No, sir. Q. That is not in your notes? A. No, sir. Q. Mr. Cates, did Mr. Cameron ever talk with you about this since that time? A. He never has. Q. He never has mentioned it to you? A. No, sir. Q. He has not sent for you? A. He has not. Q. You have talked with the judge about it and compared notes? A. Yes; when I brought the record over here we talked about it, and we compared the two. Q. And you gave the judge all the information you had relating to it? A. I think I did; yes, sir, all that he asked me to."

Then comes the following in the record:

"Judge S. D. McReynolds, being cross-examined by Mr. Jesse Littleton, testified as follows:

"Q. Has your honor any special recollection of it being proven, 'where school was kept?' A. No; as I stated to Mr. Cameron, that I only had a general recollection now that that was really proven. No; no special recollection that it was proven. Mr. Littleton, I thought it was proven, in reference to 'within four miles of a schoolhouse.' I never considered it very material 'where school was kept.' I inquired about it—asked the Attorney General if he had any recol-

lection of it, and the Attorney General said it was, and he would make affidavit it was, and I inserted it. Q. You not only discussed it with the Attorney General, but with the clerk, or the deputy clerk? A. I think I did mention it to him. Q. Now, then, Judge, the clerk and the Attorney General and you agreed that it was proven? A. Yes, sir; we thought that it was. I do not know that I mentioned 'within four miles of a schoolhouse where school was kept,' because I never thought that was material. Q. Well, did your honor just insert that 'where school was kept' without any recollection? A. General recollection only. Q. And you did not discuss that with the Attorney General? A. I don't think I did—I don't know whether I mentioned 'where school was kept' or not. Q. But you did discuss whether 'within four miles of a schoolhouse' was proven? A. Oh, yes; and he told me he would make affidavit that it was proven. Q. That 'within four miles of a schoolhouse' was proven? A. Yes, sir. Q. The Attorney General did? A. Yes, sir. Q. Now, did the clerk agree with the Attorney General? A. I think he did. Q. Now, then, Judge, after you had discussed this with the Attorney General, you added this, 'within four miles of a schoolhouse where school was kept'? A. Yes, sir. Q. And you have no independent recollection now that it was proven, 'where school was kept'? A. I certainly have not. Q. Did your honor add this in here: 'It was a White Oak whisky bottle'—did your honor add this, 'He said it was'? A. That was made after comparing this—after I got the carbon, merely to show the difference in this page and the page that was furnished him.

"Court: I will state this for you. Mr. Cates called me up, he said at the direction of Mr. Cameron—

"Mr. Jesse Littleton: If your honor please, we object to anything Mr. Cates said.

"Court: Well, Mr. Cates has been on the stand. He said this, and I might tell you what he said Mr. Cameron told him.

"Mr. Jesse Littleton: If your honor please, he had no authority to speak for Mr. Cameron. The only way in which you could make that competent would be to contradict this gentleman. And if your honor please, we do not want to impeach him, and we think it is incompetent.

"Court: What Mr. Cates told me?

"Mr. Jesse Littleton: Yes, sir; we do. We insist that is incompetent in any phase of the lawsuit. That is not a part of the res gestæ; it is hearsay."

The next witness was M. N. Whitaker, the District Attorney General. He testified as follows:

"Q. You are the Attorney General of this circuit, are you, Mr. Whitaker? A. Yes, sir. Q. Did you try the case—represent the state in the trial of State v. J. E. White? A. Yes, sir. Q. At the last term of court?

A. Yes, sir. Q. State whether or not you remember whether in the trial of that case it was proved that the sale of whisky in question occurred in four miles of a schoolhouse? A. Yes, sir. Q. You remember that proven? A. Yes, sir. Q. Did Mr. Cameron present to you a transcript of the record in that case? A. The stenographer's report. Q. This transcript of the report? A. Yes, sir. Q. Did you O. K. that paper? A. Yes, sir; that is my O. K. on the back of it. Q. State what Mr. Cameron said to you at the time he presented it with reference as to whether or not it was a stenographic record. A. Mr. Cameron came to my office with this bill of exceptions in this case, and, if I remember correctly, it was the last day in which he had to present it under the law, and for that reason he wanted me to pass on it at once. I said to him that I was busy, and did not have time to do it then, but that I would agree that the bill of exceptions be filed as of that date. That was satisfactory to him, and he either indorsed that then on the bill of exceptions or later, and left it there with me, but before leaving I asked him if he had presented me the stenographer's report of the case, and he said he did. So I examined it, either the next day or the day following, I am not sure which, made a very superficial examination of it, because of it being a stenographer's report, and I O. K'd the bill of exceptions without discovering that it did not contain the statement that the whisky was sold within four miles of a schoolhouse. Q. Did Mr. Cameron say anything to you with reference to his having changed it to some extent? A. I am sure he did not, but I am conscious that human memory is frail at the best. If he had stated that to me I would have examined it—examined it carefully. I have no recollection of his telling me that he had changed it in any way, and if he had told me that, I don't believe I would have O. K'd the bill of exceptions without a more careful examination. Q. State whether or not you O. K'd the bill of exceptions under the impression that it was the stenographer's report? A. Yes, sir; I did. Q. State whether or not you knew that the paper had been changed in any way when you presented it to Judge McReynolds? A. I did not. Now, I want to state this: That at the same time I had a bill of exceptions on my desk in another case, I forget what case it was, from Mr. Schoolfield, and I passed up both bills of exceptions at the same time. Mr. Schoolfield's was one of his characteristic bills of exceptions, gotten up according to his own recollections of the case, and I had a lot of trouble trying to correct it, and make it state anything like what I believed the occurrences were, as is usual, and I know I thought at the time that I wished he had presented me a stenographer's report like Mr. Cameron did.

"Mr. Jesse Littleton: We object to what the Attorney General thought.

"Mr. Shepherd: It shows the direction of the Attorney General's—

"Mr. Jesse Littleton: Direction of what he thought; but we object to that, and we move to strike that out.

"Court: Overrule the objection."

On cross-examination:

"Questions by Mr. Jesse Littleton:

"General Whitaker, you say you had two bills of exceptions, one for Mr. Cameron, and one for Mr. Schoolfield? A. Yes, sir; I think Mr. Schoolfield's had been there for several days. Q. How long had this bill of exceptions Mr. Cameron left with you stayed there? A. I am not clear in my mind. I believe about two days. Q. Two days? A. Yes, sir; I think so. Q. And from the day he left it there with you it remained in the same room until you glanced over it and O. K'd it, and then telephoned him to come and get it? A. Yes; after I passed on it, and O. K'd it, I called him up over the telephone, and told him where it was in my office, and told him, if I was not there when he came, he would find it at a certain place, and, if my recollection serves me correctly, he came in my absence and got it. Q. You have tried a great many cases that have been appealed? A. Sir? Q. You have tried a great many cases that have been appealed recently? A. Oh, yes. Q. And so bills of exceptions are being constantly presented to you for your O. K. and approval? A. Oh, yes. Q. You say human memory is frail at best—you do not pretend to recollect, Mr. Whitaker, what conversation occurred between you and the attorney in any particular case in every particular? A. I do not in every case; but I do in this particular case. Q. You remember what occurred between you and Mr. Cameron? A. No; I only— Q. You do not pretend to say that your memory has been impressed with this or that remark? A. How is that? Q. You do not pretend to say that your memory has been impressed with what occurred in this particular case more than in any other? A. No; no; I don't. Q. Now, Mr. Whitaker, in this bill of exceptions that was filed, in which his honor inserted this, have you any recollection of it being proven in the trial that it was 'without four miles of a schoolhouse, where school was kept?' A. I have no recollection on the proposition of where school was kept; I have no recollection of that.

"Mr. Whitaker: That is all for the state.

"Mr. Whitaker: I think the court ought to state whether or not Mr. Cameron disclosed whether or not it was a stenographic report.

"Court: The court has stated the first conversation between Mr. Cameron and himself. And it was on the proposition to strike this out that the court wanted the evidence. And shortly after that Mr. Cameron came up to

the court while he was on the bench, and asked me what I was going to do about that White case, and I said to him, 'Things don't look regular about that Mr. Cameron, and you will likely get an opportunity to explain it,' and I asked him—

"Mr. Jesse Littleton: Now, if your honor please, with all due deference to your honor, that does not throw any light on the issues of the case, and is simply a colloquy between your honor and the defendant, and I think it is an injustice to him.

"Court: It was in reference, Mr. Littleton, to this bill of exceptions.

"Mr. Jesse Littleton: Now, your honor has testified as to what occurred between your honor and the defendant at different times.

"Court: That is, as to what occurred in the office. I was going to tell you what occurred at the bench.

"Gen. Whitaker: If it was in relation to the bill of exceptions, if it was what your honor told the defendant—

"Court: After I got it.

"Mr. Jesse Littleton: We object.

"Court (continuing): I said to Mr. Cameron that he would likely get a chance to explain this matter, and he made some remark, and I told him that I found that a question had been substituted in the first witness' examination, and another question left out, and the question left out was, 'Was that within four miles of a schoolhouse?' and he said something about his stenographer copying it, and he told me her name, and then made some remarks about the court not allowing him to file some affidavits. That is as far as the conversation went. I believe he said—I don't know, but I believe he said, a young lady by the name of Miss O'Rear; I don't know whether there is any such young woman or not, but I believe that is what he said."

The defendant then introduced some 14 witnesses, who testified, in substance, that defendant was a person of good repute and of good character. No evidence was introduced in behalf of the state to controvert this.

There was no other evidence introduced upon the trial of the cause.

The trial judge thereupon rendered a judgment holding the defendant guilty on all of the charges made against him, and adjudged him disbarred. From this judgment an appeal was prayed to the Court of Civil Appeals. In that court a decision was rendered to the effect that under the facts appearing in the record Judge McReynolds was disqualified to try the case, and on this ground his judgment was reversed, and the cause remanded for a new trial.

From the foregoing decision a certiorari was prosecuted to this court, and the case is now here for examination and decision.

[1] The first question to be determined is whether Judge McReynolds was disqualified.

Much is said in the brief of counsel for

Mr. Cameron, based on the fact that the trial judge was a witness in the cause. Our statute settles this matter in a few words. It is laid down in Shannon's Code, § 5594: "The judge of a court is a competent witness, for either party, in any case tried before him, either of a civil or criminal nature." This was taken from chapter 13 of the Acts of 1824, and has ever since remained the law of this state, unrepealed and unmodified. However inconvenient or embarrassing it may be for the trial judge to be cross-examined by the attorneys for one side or the other, or for him to pass upon objections to the competency of questions and answers, or whatever may be said as to the policy of the statute, it is the law of this state, and must be obeyed. Questions of policy are for the Legislature.

[2] It is also insisted that the trial judge was personally prejudiced against defendant because of the facts which had transpired during the trial of the case of *State v. J. E. White*; also on the motion for continuance, and the motion for new trial. Several of the states of the Union have statutes upon this subject, laying down the rule that this will make a judge incompetent. We have no such statute; moreover, we doubt the policy of such legislation. It is entirely conceivable that an upright and honest judge may decide justly and impartially as between his bitter personal enemy and his warm personal friend, administering the rules of law without fear or favor. Such a situation should be left to the personal delicacy of the judge, and not be a matter of absolute law. It is easy to conceive that under the opposite rule an upright and impartial judge would often be recused by affidavits as to his personal prejudices against one party or the other, to the great detriment, embarrassment, and delay of the administration of justice. It is exceedingly easy for litigants and counsel to imagine that a judge is prejudiced against a party, or against his counsel, who has failed to successfully prosecute, or successfully defend, any one or more cases. It is an infirmity of human nature that counsel, whose feelings and personal interests are deeply enlisted in every important case they try, are frequently unable to attribute want of success to the inherent weakness of the case, or to their own shortcomings in the management of it. It is a matter of general knowledge among lawyers that the refuge of defeated counsel is far too often abuse of the court, referred to pithily by lawyers as "cussin' the court." When the tide turns, and success crowns the effort of previously disappointed counsel, his opinion of the intelligence, learning, and probity of the court experiences a high, upward tendency. To allow personal feelings like these on the part of counsel to determine what judge shall try a case, it seems to us, would be disastrous. The new judge selected might not meet the

approval of the counsel of the other side, and he would also have to be recused, and so on, resulting in a scramble, undignified and humiliating.

[3] It is also urged that the trial judge acted improperly in making an order on his minutes, formulating charges against the defendant. There is nothing in this. Where the trial judge has information of improper conduct on the part of any member of his bar, it is not only his right, but his duty, to formulate charges, and to appoint counsel to represent the state in the prosecution of such charges. In the present case Judge McReynolds appointed the District Attorney General and his assistant. This was entirely proper. There is no other way authorized by law to initiate such charges, when the matters involved are in the knowledge of the court alone. Of course, it is true that any member of the bar may bring to the knowledge of the court improper conduct on the part of any other attorney, and ask for a rule on such attorney to show cause why he should not be disbarred. However, where the matter on which the disbarment is predicated is wholly or largely within the cognizance of the judge, there is no impropriety in his making the rule himself, without any motion on the part of any member of the bar. Such was the course of this court in the case of *In re S. J. Henderson*, 88 Tenn. 531, 13 S. W. 413.

The provisions of the Code upon this subject are as follows:

Section 5781: "The several courts of this state may strike from their rolls any person not authorized to practice in such courts, and also any practicing attorney or counsel, upon evidence satisfactory to the court that he has been guilty of such misdemeanor, or acts of immorality or impropriety, as are inconsistent with the character, or incompatible with the faithful discharge, of the duties of his profession."

Section 5782: "If charges are preferred against an attorney or counsel to any court, they shall be reduced to writing, and a copy furnished the party accused, who may appear and show cause against the charges."

Section 5783: "The person stricken from the rolls under either of the foregoing sections, or for other good cause, shall not be permitted to practice the profession in any court of record in this state."

Section 5784: "When any inferior court shall order any attorney thereof to be stricken from its roll of attorneys, or prohibit any attorney from practicing therein, such attorney shall have the right to appeal from such order or refusal to the Supreme Court, as in other cases, and, for that purpose, shall have his bill of exceptions, as in actions at law, and the Supreme Court shall render such judgment as is meet and proper in the premises."

The first three of these sections were taken from the acts of 1815, 1817, and 1821.

As shown in *Smith v. State*, 1 Yerg. 228, the origin of the practice above outlined is to be found in an old English statute passed in the reign of Henry IV. This statute first provides for placing attorneys upon the roll after examination as to their character and attainments, and as to their taking the oath, and then provides: "And if any such attorney be hereafter notoriously found in any default of record, or otherwise, he shall forswear the court, and never after be received to make any suit in any court of the king. They that be good and virtuous, and of good fame, shall be received and sworn at the discretion of the justice; and if they are notoriously in default or misdemeanor may be removed upon evidence either of record or not of record." It is remarked in the case referred to that this statute has received the sanction of four centuries, and that there is nothing in any provision in any act of assembly of this state which is not in strict affirmance of this old act. The case then proceeds to outline the practice where the charges are initiated by some one other than the judge. It is said that a charge may be exhibited to a judge, in or out of court, alleging the default or misdemeanor complained of, and, if the judge deem the charge sufficient to warrant disbarment, he shall cause the attorney to be furnished with a copy, and cite him to appear in open court, when the proceedings are conducted in all respects as under the British statute. This information, it seems, need not be made to the judge in the form of affidavits filed in open court, but he may take knowledge from any source that may seem to him reliable. On this subject the court said, in the case referred to: "Pleas and demurrers never entered the mind of the Legislature, when prescribing the mode of proceedings by the act of 1815. They only meant that the plain man, ignorant of law, should have a plain remedy against a man of a profession possessing many advantages in skill over him; that his statement should be taken as *prima facie* true, the same as the affidavits upon which the rule was grounded by the previous practice, requiring legal skill, not always and in all situations to be easily obtained against another lawyer. The practice is a correct one, from which innocence has nothing to fear." From this it appears that the judge of a court may consider information given him by any reputable person in respect of the conduct of the members of his bar, and if he deem this information reliable he may make a rule upon the attorney to show cause why he should not be disbarred.

[4] There can be no sound objection that, before making the rule, the trial judge conducted such investigations on his part as would enable him to ascertain whether there was any probable foundation for the charges. This power in the judge is not only a nec-

essary one to enable him to perform his duty correctly, but it is in its nature highly beneficial to the bar, and has a strong tendency to protect its members against frivolous charges of disappointed litigants. It would, without doubt, be seriously embarrassing, and very unjust to the bar, if it should be held the duty of the judges of this state to make a rule upon an attorney to show cause, upon the mere fact that information of improper conduct had been conveyed to them, without more. It would be equally unfortunate for the proper discipline of the bar, and the purging of unworthy members from its body, if the judge were bound to await formal application in open court by some other member of the bar. We all know how loath are members of the bar to assail another member in this manner, even though he may be guilty, or charged with being guilty, of very bad, disreputable conduct. Under the law the members of the bar are appointed to office by the body of judges, and the power that appoints can likewise remove. As to the method of the exercise of that power, this is to be determined by the court, in the absence of legislative direction.

Now, recurring to the duty of the judge before he causes to be entered a rule against a member of the bar to show cause, we have seen how necessary for the protection of the bar it is that he shall make some investigation in order to ascertain whether the charge is one merely frivolous. In this view we do not think the strictures upon Judge McReynolds contained in the brief of defendant's counsel are well based, wherein they discuss his action in conferring with the District Attorney General and the clerk as to whether the testimony in question had been given in court on the trial of the White Case; that is to say, it was proper for the judge to test his own recollection of the matter by the recollection of others who were present at the trial and heard it. It is not just to characterize such investigation as the preparation of a case by opposing counsel, nor on such facts to charge that the judge was both prosecutor and judge.

[5] We come now to a matter which is of graver import.

It was set forth in the answer of defendant, taken as his deposition, that Judge McReynolds said openly and publicly, in effect, that it did not matter whether defendant confessed the charges or not; that he, the judge, would prove his guilt. It is argued from this that his honor had already decided the case before hearing the defense. There is no contradiction in the record that the judge did make this statement.

It is likewise objected that Judge McReynolds, also in the language of the rule which he caused to be entered, decided the case before it was heard. The rule contains the following preamble and conclusion:

"It appearing to the court that Robert T. Cameron is a practicing attorney at the bar.

and it further appearing to the court, from such facts in the possession of and within the knowledge of the court that said Robert T. Cameron has been guilty of such acts of immorality and impropriety as are inconsistent with the character and incompatible with the faithful discharge of the duties of his profession, that he has been guilty of a studied and matured purpose to commit a fraud upon the court, to wit: [Specifications.] It is therefore ordered and adjudged by the court that said Robert T. Cameron be ordered to appear before the court on Saturday, January 20, 1912, at 10 o'clock a. m., and show cause why he should not be disbarred from the further practice of law in the courts of this state, and his name stricken from the roll of attorneys."

The language used indicates that the judge had already decided the matters involved in the citation.

Now the question to be determined is whether a judge is competent to try a case, where he has already decided it against the defendant before the latter has been heard in his defense.

It is provided in article 6, § 11, of the Constitution of 1870:

"No judge of the Supreme or inferior courts shall preside on the trial of any cause in the event of which he may be interested, or where either of the parties shall be connected with him by affinity or consanguinity within such degrees as may be prescribed by law, or in which he may have been of counsel, or in which he may have presided in any inferior court, except by consent of all the parties."

In Shannon's Code, § 5706, it is provided:

"No judge or chancellor shall be competent except by consent of all parties to sit in the following cases: (1) Where he is interested in the event of any cause; (2) or connected with either party by affinity or consanguinity within the sixth degree, computing by the civil law; (3) or has been of counsel in the cause; (4) or has presided on the trial in the inferior court; (5) or in criminal cases for felony where the person upon whom, or upon whose property the felony has been committed is connected with him by affinity or consanguinity within the sixth degree, computing by the civil law."

Neither the Constitution nor the statutory provision covers in terms the case of a judge who has already decided the controversy before he has heard it. We are of the opinion, however, that such a case falls within the meaning of both; that is, of the provision in each that no judge shall preside in any case in which he may have been of counsel, or in which he may have presided in any inferior court. The purpose of these two provisions was to guard against prejudgment of the controversy. It was necessarily supposed, as the basis of these provisions, that where a judge had been of counsel he had already made up his mind as to the merits of the case; equal-

ly where he had presided in the trial of the case in the inferior court, and had decided it, or had taken part in the decision of it. Now, it seems idle to assume that it was the intention of the people who made the Constitution, and of the representatives of the people who passed the act reproduced in section 5706, that the mere fact of a judge's having been of counsel, or of his having presided on the trial of a cause in an inferior court, should render him incompetent, when he would be competent to hear a particular controversy which he had already decided before hearing. The fundamental principle is that parties litigant are entitled to an impartial judge. It is only when the people are satisfied that impartial judges decide their controversies that they entertain feelings of reverence for the judgments of the courts of the land. We say the people. We mean the people at large. There are always discontented, unhappy, and morose spirits who will question the good intentions of judges, though they be men of spotless honor and blameless life. Such men have no criterion of praise or blame, except in so far as they can see personal profit or personal loss to themselves, measured by the results of the cases which they conduct before the courts. The views of such persons count for nothing. But it is of immense importance, not only that justice shall be administered to men, but that they shall have no sound reason for supposing that it is not administered. It is of lasting importance that the body of the public should have confidence in the fairness and uprightness of the judges created to serve as dispensers of justice. The continuance of this belief, so long entertained by the people of this country, and so well warranted by the history of the judiciary as a body, is largely essential to the future existence of our institutions in their integrity. We say it is a fundamental principle that the judge shall be impartial. We are aware that there may be a difference of opinion as to the true test, in the absence of constitutional or statutory provisions. The history of English law shows this. Therefore we deem it important that we should stand by the Constitution and the statutes; but, in construing these, they should not be subjected, as we believe, to a mere dry and literal rendering, but should be applied according to the spirit, instead of the mere letter. The reason of the law is the law. Moreover, in addition to the section of the Constitution above referred to, we believe the case falls also within article 1, § 17, which provides: "That all courts shall be open; and every man, for an injury done him in his lands, goods, person, or reputation, shall have remedy by due course of law, and right and justice administered without sale, denial, or delay."

Beyond question it is not according to due course of law to compel a man over his protest to try his case before a judge who has

already decided it, and has announced that decision in advance of the hearing. It is equally true that such compulsion is a denial of justice.

[6] In what has been said we are not to be understood as holding that a judge can be recused on the ground that he has already decided the case, merely by motion supported by affidavits so stating. It must appear, as in the present case, beyond any doubt that such decision has been made. If the judge deny such to be the fact, that ends the controversy; and it cannot be pursued further, or re-examined on that point in this court. This is the rule established in cases of mandamus upon judges to incorporate into bills of exceptions matters of evidence alleged by the petition to have been wrongly excluded. If the judge returns there was no such evidence, that ends the matter. *State ex rel. v. L. P. Cooper*, 107 Tenn. 202, 64 S. W. 50; *State ex rel. v. Maiden*, 110 Tenn. 487, 75 S. W. 710. By referring to these cases it is not meant that a judge must, in the kind of case before us, make denial on special oath when so charged. Any statement by him on the subject must be regarded as made under his official oath.

In what we have said we do not desire to be understood as indulging in harsh criticism of Judge McReynolds. The record of this case shows that he was sorely tried by the very bad conduct which defendant confesses to in his answer, and for which he furnished a very late apology. It was very natural that Judge McReynolds, after having been subjected to such disrespectful treatment at the hands of Mr. Cameron during the trial of the case of *State v. White*, should have felt some resentment therefor, and thus have been hurried into a hasty determination of the matters involved in the present case. Of course, it was his duty, sitting as a judge on the bench, to suppress every feeling of personal resentment, and to forbear the decision of the case, even in his own mind, until he should hear the evidence and the arguments of counsel, and it was entirely possible to do so. It would have been far safer, however, and more in accordance with the proprieties of the situation, after having formulated the charges (in the form of charges, and not of decision), to have interchanged with some other judge to try the case, in view of the personal feeling which he entertained by reason of the gross discourtesy to which he had been subjected by counsel in the matters leading up to the present controversy. He did not, however, do this, nor was he bound to do so; but he was bound not to decide the case in advance, either orally or by a decision put upon the record, as shown by his language copied into this opinion. Having so decided the matter, he immediately became incompetent to try it. It was then his duty to interchange with some other judge for the trial of this particular case, or to call

some other judge to sit for him in his court and hear the case.

[7] It is insisted in behalf of the state that, notwithstanding the incompetency of Judge McReynolds, this court should proceed to try the case *de novo*, and render such judgment as he ought to have rendered, according to the rule laid down in chapter 32 of the Public Acts of 1911. But the mere statement of the rule shows the unsoundness of the suggestion, since the trial judge should not have entered any judgment at all, being incompetent as he was. Chapter 32 has no bearing upon such situation. That chapter presupposes a competent judge, and the duty of this court to re-examine his proceedings for error. It is provided in that act that no verdict or judgment shall be set aside, or a new trial granted, on the ground of error in the charge of the judge to the jury, or on account of the improper admission or rejection of evidence, or for error in acting on any pleading, or for any error in procedure—all of which things presuppose a competent judge in charge of the case, passing on questions of pleading, evidence, and procedure, and giving instructions to the jury. It is provided in the statute referred to that the appellate courts of this state shall not reverse on any of the grounds stated, unless it shall affirmatively appear that the error complained of has affected the results of the trial. Whose error? Manifestly the error of a competent judge in charge of the case in the court below. To apply this statute to a case where the judge is incompetent, and his incompetency not only not waived, but openly objected to, would be not only to deprive the litigant of his right to his trial in a court of first instance, but would require this court to exercise original jurisdiction, since there is no doubt that under such circumstances the judgment of the court below is simply void. *Reams v. Kearns*, 5 Cold. 217; *Smith v. Pearce*, 6 Baxt. 72; *Mathis v. State*, 3 Helsk. 127. These cases are subsequently qualified on another point in *Holmes v. Eason*, 8 Lea, 754, and *Posey v. Eaton*, 9 Lea, 500, and *Crozier v. Goodwin*, 1 Lea, 125. It was held that they were erroneously determined in so far as they decided that the judgment was void when rendered by an incompetent judge; *no objection to his competency appearing to have been made at the time by either of the parties*. It was held that in such case the incompetency was waived. In *Holmes v. Eason* the court said: "At common law, it was well settled that, although no judge ought to act where, from interest or from any other cause, he is supposed to be partial to one of the suitors, yet his action in such case was regarded as an error or irregularity not affecting his jurisdiction, and to be corrected by a vacation or reversal of his judgment, except in the case of those inferior tribunals from which no appeal or writ of error lies.

Dimes v. Grand Junction Canal Co., 16 Eng. L. & Eq. 63; *Washington Ins. Co. v. Price*, 1 Hopk. Ch. (N. Y.) 1. And, generally, if the facts are known to the party recusing, he is bound to make his objection before issue joined, and before the trial is commenced; otherwise he will be deemed to have waived the objection in cases where the statute does not make the proceedings void. *Moses v. Julian*, 45 N. H. 52, 84 Am. Dec. 114; *Shropshire v. State*, 7 Eng. (12 Ark.) 190. The decisions of this court first above cited are in accord with these conclusions. If the objection be raised of record, and the court undertake to proceed notwithstanding, the judgment might be held void under these principles, as was done in *Reams v. Kearns*. But if no objection be made, and the court is permitted to go to a trial of the case on the merits, the judgment is clearly not void on its face, and something more than the mere existence of the fact on which the incompetency rests should be required to authorize a resort to another tribunal. The terms of the statute are sufficiently met by holding the proceedings invalid if the objections be made, unless the incompetency be waived in the mode prescribed by the statute. In this view, the judgment would be voidable, not void, in all cases in which the record failed to show the preliminary objection." In the present case, as we have already noted, due objection was made in the trial court.

It was held in *Wroe v. Greer*, 2 Swan, 172, that where a case was tried before a justice of the peace, who was incompetent, and then appealed to the circuit court, the trial might proceed, regardless of the incompetency of the justice of the peace, because, it was said, the appeal vacated his judgment, and that the trial in the circuit court was de novo. We have no case in this state that follows *Wroe v. Greer* on this special point. Under all of the other cases the rule appears to have been to reverse and remand. In *Holmes v. Eason*, supra, such is stated to have been the rule at common law, citing *Dimes v. Grand Junction Canal Co.*, 16 Eng. L. & Eq. 63. This case is also cited with approval in *Harrison v. Wisdom*, 7 Heisk. 99, 111. And see *Arnold v. Embree*, Peck, 134; *Witt v. Russey*, 10 Humph. 208, 51 Am. Dec. 701, *Mason v. Westmoreland*, 1 Head, 555, and *Reams v. Kearns*, supra, in which the practice seems to have been used, or stated as the proper course, without discussion or doubt. It is true that all of these cases, except *Reams v. Kearns*, arose on a want of jurisdiction of the subject-matter in the justice of the peace; the amounts sued for being beyond that jurisdiction, though within that of the circuit court. The principle is the same, however, as where a judgment has been rendered by a judge in the lower court who was personally incompetent—that is, without jurisdiction or power to try the case

—where that incompetency was not waived, but expressly objected to before him. An appeal from such a judgment in the circuit or chancery court could not confer power upon the Supreme Court to dispose of the merits of the controversy; nor could the transfer of the cause to this court by the writ of certiorari have that effect. All that this court ought to do, or could do, in such a case, would be, in the exercise of its supervisory power over all inferior tribunals, to reverse and remand for a lawful trial. Having discovered this first and cardinal error, it will go no further. It was so held in *Reams v. Kearns*. Parties have the right to have their cases tried before the regularly constituted tribunals of the state, and neither the judges of this court, nor the judges of any inferior courts, can deprive them of it. A court is not lawfully constituted, as to the special case, if the judge is incompetent to try it, and his incompetency is objected to at the time. As to that case it is the same as no court if the judge be incompetent. It is not only the right of a party under the distribution of judiciary powers directed by the Constitution, and ascertained and formulated by legislative acts, to have his case first tried in the lower court; but it is important that he should have the benefit of those proceedings, not only for the aid they may furnish on a subsequent trial in this court, or the Court of Civil Appeals, but also because of the possibility of a termination of the controversy in that court without the expense and delay of a trial in an appellate court. A denial of such preliminary trial is a deprivation of the right guaranteed to every citizen to have his case tried according to due course of law, and is a violation of article 1, § 17, of the Constitution, supra. There is one case, however, *Bolling v. Anderson*, 4 Baxt. 550, where, among many other objections taken to the decree of the chancellor, one was that he was incompetent to try the case. Without discussing the question of practice, the court, after considering all the points, reversed the decree and discharged the garnishment. It was shown in that case that the judgment nisi was pronounced against one Turley, as garnishee, by Chancellor Harrison, who, it appeared on the record, was incompetent. The court said that the decree must fall on that ground, and also on the ground that no notice of the garnishment had been served on the garnishee, Turley; that sci. fa. was ordered issued returnable to the first Monday in December, but was made returnable to the first Monday in February. On these grounds the court considered the case and reversed the decree. The question of practice was not discussed.

The case of *Wroe v. Greer* was decided upon two points: First, that the incompetency of the justice of the peace was waived, because the party failed to make the objection

before him; secondly, in the alternative, that, even if it had not been waived, it would cease to have any application to the case, because the appeal to the circuit court had the effect to supersede the judgment of the justice of the peace, and the case was tried de novo upon its merits before a competent court. The court said it was the same as if the case had been originally instituted, as it might have been, in the circuit court. "The question" (said the court) "whether the competency of the justice had been waived while the case was before him had ceased to be of any utility or effect in the case, now that it was no longer before him, and was again to be tried upon its original facts in the same manner as if there had been no former trial." It is also true that in disbarment proceedings, on appeal to this court, the case is tried de novo. *Ralph Davis v. State*, 92 Tenn. 684, 23 S. W. 59. So far the analogy between the two cases holds. But it fails in one essential point. After an appeal to the circuit court from a judgment rendered by a justice of the peace, the witnesses are introduced in the circuit court just as if there never had been any trial before the justice. The case comes before the circuit court simply upon the warrant, and the return of the officer showing service. In the case now under examination, however, the evidence was taken in open court, and objections were offered to testimony, and rulings thereon made by the disqualified judge—all preserved by a bill of exceptions. In other words, he presided at the trial, which we are to review for the purpose of discover-

ing whether there were any errors committed. While a trial de novo in this court on appeal from a decree of the chancery court must be had without giving any weight whatever to the findings of the trial judge, yet there are various orders which can and do very materially limit at times the scope of the relief that can be granted by this court. The same is true, of course, on appeals of the same nature from a circuit or criminal court, with the added disadvantage that the disqualified judge has to pass upon the report of the evidence contained in the bill of exceptions, and authenticate that instrument, and make it a part of that record of the cause. On the contrary, on an appeal from a justice of the peace's judgment the case is absolutely open, on new evidence, just as if there had never been a trial before him. We are of the opinion, therefore, that *Wroe v. Greer* must stand upon its own facts, and that it is not an authority for such a case as we have before us.

It results that we affirm the judgment of the Court of Civil Appeals in remanding the case for new trial before a competent judge. We do not, however, agree with that court in all the reasons which it gave for its decision, or further than that, on disqualification of the judge appearing, the case should be reversed and remanded. We do not express any opinion whatever on the facts of the case, deeming it improper to do so, inasmuch as the facts must come before a trial judge, and be heard and first passed on by him.

NELSON et al. v. JONES et al.

(Supreme Court of Missouri. Dec. 14, 1912.)

1. JUDGMENT (§ 948*)—PLEADING—RES JUDICATA.

In the absence of a plea, the question of res judicata need not be considered.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1787-1794; Dec. Dig. § 948.*]

2. EVIDENCE (§ 67*)—PRESUMPTIONS—CONTINUANCE OF STATUS.

A status once established is presumed to continue until the contrary is shown by evidence.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 87, 88, 103; Dec. Dig. § 67.*]

3. MARRIAGE (§ 40*)—PRESUMPTION OF CONTINUANCE—MARRIAGE.

A marriage once shown to exist is, as a rule, presumed to continue until the contrary is shown.

[Ed. Note.—For other cases, see Marriage, Cent. Dig. §§ 58-69; 79; Dec. Dig. § 40.*]

4. EVIDENCE (§ 60*)—PRESUMPTIONS.

All things are presumed in favor of life, liberty, and innocence.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 81; Dec. Dig. § 60.*]

5. BASTARDS (§ 3*)—PRESUMPTION.

Since a wrong is never presumed in absence of proof to the contrary, it is presumed that a child is legitimate.

[Ed. Note.—For other cases, see Bastards, Cent. Dig. §§ 4, 5; Dec. Dig. § 3.*]

6. BASTARDS (§ 3*)—CONFLICTING PRESUMPTIONS.

The presumption that a marriage once established continues must give way to the presumption in favor of the legitimacy of children born to one of the parties while thereafter living with another person in such manner as to constitute a common-law marriage.

[Ed. Note.—For other cases, see Bastards, Cent. Dig. §§ 4, 5; Dec. Dig. § 3.*]

7. MARRIAGE (§ 50*)—COMMON-LAW MARRIAGE—EVIDENCE.

Evidence in an action to try title *held* to show a common-law marriage between the persons named.

[Ed. Note.—For other cases, see Marriage, Cent. Dig. §§ 79-89; Dec. Dig. § 50.*]

8. MARRIAGE (§ 50*)—COMMON-LAW MARRIAGE—PROOF.

Strong proof is necessary to establish a common-law marriage.

[Ed. Note.—For other cases, see Marriage, Cent. Dig. §§ 79-89; Dec. Dig. § 50.*]

9. EVIDENCE (§ 159*)—BEST EVIDENCE.

While the law requires the best proof the case is susceptible of, it does not require impossibilities such as the production of records of the courts of another state, and, where the nonexistence of a divorce decree in another state was in issue, the best evidence of its nonexistence would be the evidence of the custodian of the divorce records of the courts of such state or other person familiar with such records, and evidence by a judge of the county court, justice of the peace, and notary public of a county in Missouri that he searched the records of a certain county in another state and found no divorce decree was not the best evidence of the fact that no divorce had been granted in that county.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 471, 474; Dec. Dig. § 159.*]

10. EVIDENCE (§ 586*)—WRIGHT—NEGATIVE TESTIMONY.

Evidence in an action to establish title *held* not to show that a divorce was not granted to certain persons in a certain county in Arkansas.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2432-2435; Dec. Dig. § 586.*]

11. BASTARDS (§ 6*)—PRESUMPTION OF LEGITIMACY.

At common law a child was considered legitimate if the husband was shown to have been within the four seas within a certain period, and was capable of issue, and at the present time a child will not be adjudged illegitimate unless it cannot be prevented.

[Ed. Note.—For other cases, see Bastards, Cent. Dig. §§ 9, 10; Dec. Dig. § 6.*]

12. BASTARDS (§ 1*)—PRESUMPTION OF LEGITIMACY—"DECREED"—"DEEMED."

The father of the child in question by his alleged second marriage had previously married, and he and his wife parted and lived apart. It was not shown that either of them procured a divorce, but he afterwards ran away with another woman, and they subsequently came back to the neighborhood where his former wife resided and to her knowledge lived together openly and notoriously as man and wife and discharged all of the duties of that relation toward each other until he died. Rev. St. 1909, § 342, provides that the issue of all marriages "decreed null in law or dissolved by divorce shall be legitimate." *Held*, that the word "decreed" was substantially equivalent to the word "deemed," which was used in the statute as it formerly stood, and, under the statute as construed, the children begotten by the husband of his alleged second wife were legitimate.

[Ed. Note.—For other cases, see Bastards, Cent. Dig. §§ 1-3; Dec. Dig. § 1.*]

For other definitions, see Words and Phrases, vol. 2, pp. 1905-1908, 1924-1926.]

Graves and Woodson, JJ., dissenting.

In Banc. Appeal from Circuit Court, Pemiscot County; Henry C. Riley, Judge.

Action by Addie Nelson and another against Talitha Jones and others. From a judgment for plaintiffs, defendants appeal. Reversed and remanded for decree as directed.

Ward & Collins, of Caruthersville, for appellants. Arthur L. Oliver, of Caruthersville, for respondents.

LAMM, J. In November, 1906, plaintiffs sued to try and to determine title to 77.15 acres of land in Pemiscot county, described by metes and bounds in the petition, and lying on the state line. From a judgment for plaintiffs, defendants appeal.

John Jones was the common source of title. His first wife was Emma Perry. By her he had a daughter, Addie, now intermarried with Nelson, her coplaintiff. Some two years after the birth of Addie, John and Emma separated, and Emma (while John was yet alive) married Luther Brown, a minister of the gospel. Afterward she died. John (it is claimed by defendants and denied by plaintiffs) married Lizzie C. Harrington during the life of his first spouse. Afterwards John was killed. Defendants

Talitha, Josie, and George Jones are his infant children by her. After John's death, Lizzie C. intermarried with her codefendant, William Chism. All parties live in Arkansas.

The main issues threshed out below were divorce, marriage, and bastardy. The pleadings, proofs, and admissions are such that (unless Addie is estopped to claim an exclusive title) she inherits the land if she be the only legitimate child and sole heir of John Jones. Contra, if the infant defendants are his legitimate children, then Addie inherits only an undivided one-fourth and they the remaining three-fourths. So, if Lizzie C. was lawfully married to John Jones, she is endowed. If, however, she was not, then she is not. There was another issue, viz.: It is alleged in the answer that Addie and the defendants (as joint plaintiffs) brought a suit against one Briggance (the source or character of Briggance's title does not appear) to determine title in 1906 to the same land in the Pemiscot circuit court; that such proceeding ripened into a decree vesting the title out of Briggance and into them; and that defendants, at the instance and by the procurement and acquiescence of plaintiff Addie, were put to such efforts, trouble, outlays, and expense in and about that proceeding as raised an estoppel, wherefrom they plead estoppel in aid of their title. By replication Addie admits such Briggance suit, but pleads her minority by way of avoiding the force of the estoppel.

The cause was tried to the court, and, though instructions were asked for defendants, yet the nature of the relief sought, together with the issue of estoppel raised by the answer and the form of the judgment, put the case, we think, in equity. We have been inclined to view suits to determine and decree title as of equitable cognizance except where the issues are so framed by the pleadings as to make the proceeding a lawsuit. There is nothing in the pleadings in this case showing either party entitled to a jury. In this view of it, we shall review the facts and determine the case on our own estimate of them, giving to the court below the proper advantage of position in weighing oral testimony. The facts are these: Mississippi county, Ark., is just across the line from Pemiscot county, Mo. About 1886 there lived on the North Chickasawba in said Mississippi county John Jones and Emma Perry. About 1886 or 1887 they were married by a justice of the peace. Their families lived not a great ways apart, and both the Perrys and the Joneses were farmers. After his marriage John cropped in the neighborhood for four or five years. As said, some two years after Addie was born John and Emma separated. There lived not far away one Harrington. Harrington had a daughter, Lizzie C. Emma Jones and Lizzie Harrington were "girls to-

gether," and, though Harrington moved about a good deal, yet the young women knew each other pretty well. Whether it was John or Emma at fault in the separation does not appear. The best we can make out is that their ways parted about 1891. They never lived together as husband and wife thereafter, or in any wise recognized any conjugal duty to each other. She returned to her father's house with her baby, and John raised a crop and stayed in the neighborhood with his acquaintances for a time variously estimated at from four to eight months, when, to use the phrase of the witnesses, he "ran away" with Lizzie Harrington.

Miss Harrington's sister "ran away" at the same time with one Reece. They one and all floated in a dugout or canoe from North Chickasawba to a place or creek called "Marked Tree," there took a train to West Memphis, there crossed the Mississippi river, and went on to Bolivar county in the state of Mississippi. On the way to Bolivar county, they stopped at a way station, according to Lizzie's account, and both these runaway couples there hastily married; a man officiating who "looked like" a minister, and there is faint evidence of a "license." Reece did not testify, and his whereabouts are unknown. Lizzie's sister did not testify. She seems to have afterwards married a man named Scallion, but, whether she is living or 'dead, Lizzie said she did not know. After several months Jones and she come back to Yarbro, Mississippi county, Ark., hard by North Chickasawba, and there, all the testimony shows, they lived together and held each other out as man and wife in the face of all men and to the knowledge of their old acquaintances and kinsfolk. She was thenceforward known as Mrs. Jones. Not far away at the time lived Emma, the first wife, and the testimony tends to show she knew they were consorting publicly together as man and wife and holding themselves out as such. After one or two years they moved a little ways north just over the state line into Missouri, about 10 miles from Yarbro and North Chickasawba, and settled on the farm in question which Jones then bought. While at Yarbro he got his child, Addie, and kept her in his family. While not quite clear, yet we gather, when Jones made that move, he took Addie with him and kept her there at his new home with his putative new wife until he was killed on June 2, 1896. At their new home in Pemiscot county, as in their old in Mississippi county, Ark., John Jones and Lizzie lived continuously, openly, and habitually as man and wife, the neighborhood recognized and treated them as such, and this recognized and reputed relation continued down, as said, to the day of his death. There is no countervailing testimony on this phase of the case. In the meantime there was born to the twain three children, the infant

defendants, and these three with Addie, supervised and mothered by Lizzie C., made up his household. During all this time, as said, his first wife lived a few miles away in Arkansas. While the testimony on behalf of plaintiff leaves the matter in doubt, yet it sufficiently appears from other testimony that the first wife intermarried with Luther Brown, a preacher, during the lifetime of John Jones, as said, and had a child by him. Straightway on the death of John Jones the first wife claimed Addie and took her away. There was no record of a divorce by either John or Emma from the other introduced in evidence. The records of Mississippi county, Ark., were searched for such record by Mr. Ballard, one of plaintiffs' attorneys, but he found no such record. Lizzie testified that before she ran away with Jones, when he asked her to marry him, he told her he had a divorce; that she believed him without making further inquiry, and married him in good faith as a single man. She lived some distance from Osceola, the county seat (30 miles, with no railroad), and had never been there. We take it the road there at that time lay through swamps and was not an inviting line of travel. She explained her elopement by saying that her father objected to Jones as a suitor for her hand because he (Jones) was a "widower" and "kind of rough." On behalf of plaintiff, the brother of the first wife was allowed to testify, over the objections of defendants' counsel, that Emma Jones was never divorced from John, and that John Jones was never divorced from Emma. He testified further that, if they had been divorced, he would have known of it "by the report." He was allowed to testify that the community of North Chickasawba, his home region, would have known of such divorce by "neighborhood rumor," if there had been one; also that once when he called at the house of John Jones in 1895 John and Lizzie "got in a racket" and he heard John say to her they were not married. This she denied. Elsewhere in his testimony he said Jones told him so three or four times. One Hicks was also allowed to testify, over objection, that Reece told him on the return from Bolivar county that "they were not married."

At the time of the trial, the land was not occupied. Most of it was not cleared. The little bit that had been under the plow had again run wild, and we infer the total value was small. Questions hinging on challenges to some of plaintiffs' testimony and adverse rulings below are in the case, and, if it is necessary to determine those questions, the facts will appear further along, as well as any other facts vital to the justice of the case.

As to the issue of estoppel, it is out of the case on appeal. When Mrs. Nelson was on the stand, she testified she became of age October 18, 1906. This was after all four children brought a suit through their joint

guardian and curator against Briggance to reinvest themselves with title. The Briggance suit was determined on the 8th of August, 1906. The record shows that on that day it was adjudged in that suit that "the plaintiffs [the four children] are the owners of the property, and the defendants have no interest in the property." When Mr. Ballard, one of plaintiffs' counsel in this suit, and plaintiffs' counsel in the Briggance suit, was on the stand, a question was asked him, on cross-examination, intended to elicit facts creating an estoppel. On objection, evidence of that character was ruled out. That ruling was put upon the foot that Addie Nelson was a minor at the time. We do not read the briefs of appellants' counsel as predicated error of that ruling, or that they claim title through the judgment in the Briggance suit. Indeed, counsel treat the whole matter as of little or no appellate value.

[1] There is no plea of *res adjudicata* in the case, and we need not look into that matter or estoppel. Accordingly those questions are put to one side.

A foreword to the opinion may not be amiss, viz.: In the presence of blameless and innocent children, and in the presence of a situation made sordid and squalid by ignorance and poverty, all of which appear in the lines and between the lines of this record, the facts (read through judicial blushes) bespeak judicial charity and mercy to the very verge of the law to work out a just result. In our opinion the judgment is wrong and should be reversed. This because:

[2] (a) Of divorce, marriage, and bastardy. There is a presumption that, when a status is once established, it is generally presumed to continue until the contrary is made manifest by the proof. That sensible presumption (subject to exceptions) is of everyday use in the affairs of man, and such presumption is a legal one constantly applied by courts.

[3] Under it a status of marriage once shown might be presumed to continue until he who asserts the contrary establishes its discontinuance by divorce. But in all enlightened systems of jurisprudence it has been found necessary to make exceptions to general rules, which by reason of their universality are sometimes found deficient to attain the full ends of justice in a given case. Such exceptions, when well established as grounded on principle, are as potent as the general rule itself.

[4] There is a primary maxim of the law that, in favor of life, liberty, and innocence, all things are to be presumed. (*In favorem vitæ*, etc.)

[5] There is another: A wrong is not to be presumed. There are presumptions springing from the loins of those noble maxims which are the crowning glory of our law, viz., that the law presumes innocence, not guilt; morality, not immorality; marriage, not concubinage; legitimacy, not bastardy.

[6] Accordingly, when the presumption that a marriage once established continues to exist is confronted, under proper proof, by presumptions in favor of innocence rather than crime, in favor of morality instead of vice, the former presumption gives way and the latter obtain. So that the settled law in this jurisdiction is that if A. and B. are married, and afterward A. and C., by virtue of a common-law or ceremonial marriage, consort together as husband and wife during B.'s life, under the circumstances disclosed in this record, the burden of proof that A. and B. were not divorced (and that consequently the relations between A. and C. are meretricious and criminal) is upon the party asserting the fact, though it is a negative fact and hard to prove. On plaintiffs, then, was the burden to prove the negative fact that there was no divorce between John Jones and Emma Jones. We have been so lately and fully over this matter, speaking through our Brother Graves, in the Johnson Case, *infra*, that it would be unseemly and smacking of vanity in the writer to attempt to further expound the law. *Johnson v. Railways*, 203 Mo. loc. cit. 401, 101 S. W. 641, et seq. and cases cited. That case was followed in the later case of *Maler v. Brock*, 222 Mo. 74, 120 S. W. 1167, 133 Am. St. Rep. 513, 17 Ann. Cas. 673. *Vide*, *Plattner v. Plattner*, 116 Mo. App. loc. cit. 412, 91 S. W. 457; *Bishop v. Brittain Inv. Co.*, 229 Mo. loc. cit. 729, 129 S. W. 668, Ann. Cas. 1912A, 568, et seq.

[7] That there was at least a common-law marriage between Harrington and Jones is sufficiently established. For several years they openly held themselves forth to the world in the neighborhood of their old acquaintances and kinsfolk by the manner of their daily life, by conduct, demeanor, and habit, as man and wife. They assumed that mutual relation apparently in good faith. The community accepted it. Children were born to them. They established a home to which Jones took his child by his first wife and reared her. They seem to have been treated as husband and wife by the relatives of both women. It is unthinkable that in a Christian community, however primitive, the first wife and her relatives would have permitted Addle to remain in the Jones' household if they thought him hatching a brood of bastards in a wanton nest. Did they knowingly subject her to the domination and teaching of an immoral woman? On what decent theory did the first Mrs. Jones remarry except on the assumption she was divorced? The main witness for plaintiff, the brother of the first Mrs. Jones, puts himself in the attitude of eating salt at Jones' table in a house desecrated and dishonored by flaunted lust, if his theory as a witness be accepted.

[8] This court has put itself on record as in favor of stringent proof of common-law

marriages. *Bishop v. Brittain Inv. Co.*, *supra*. We think the proof in this case meets the rigid and wholesome requirement of that case. It comes within the facts and doctrine of a line of Missouri cases cited in appellants' brief (q. v.). Deeming a common-law marriage established, plaintiffs did not successfully carry the burden of showing no divorce. Two or three witnesses who knew the parties spoke of never hearing any one speak of a divorce. They were allowed to tell there was no neighborhood rumor of one. But that character of proof, if of any value at all, is not the cogent proof required by them to overcome the strong presumption of innocence.

Mr. Ballard, as said, one of plaintiffs' attorneys, described himself on the witness stand as judge of the county court, justice of the peace, and notary public in Pemiscot county. Assuming he has the astuteness and learning appurtenant and appertaining to that aggregation of offices, yet we cannot assume that his investigation of the court records of the courts of another state furnishes the best evidence of their contents. He went to Osceola, in Mississippi county, Ark., a few days before the trial, searched the records there, and was allowed to testify that he found no decree of divorce between John Jones and Emma Jones.

[9] The law requires the best proof the case is susceptible of. It does not require impossibilities, and therefore did not require the production in our courts of the records of the courts of a sister state. Where there is a mass of records to examine, the law does not require the production of certified copies of all of them to prove the negative fact that a certain decree cannot be found. Such proof may rest in *parol ex necessitate rel.* But there should and could have been furnished the testimony of the custodian of those records, or of other persons who qualified as familiar with them and all of them, in order that the negative fact might be clearly shown. Mr. Ballard testified he examined certain books and indexes. How did the trial court know they were all of the minute books, record books, and indexes? All the trial court knew in that behalf he knew from what Ballard testified. How could a stranger to these records like Ballard know? As figs do not grow on thorns, neither does certainty grow on uncertainty. In *Chilton v. Metcalf*, 234 Mo. 27, 136 S. W. 701, where evidence of the same character was elicited from the clerk of the court himself, comment is made upon the fact that the clerk's evidence did not satisfactorily account for all the records.

[10] While creating suspicion and doubt, yet we hold the testimony too loose and insufficient to clearly prove there was no divorce at Osceola. Moreover, why should we assume the doubtful fact that Emma Jones may not have acquired a residence elsewhere

than in Mississippi county, where she herself could have procured a divorce?

[11] It is common learning that under the old common law, in aid of legitimacy of children, if the husband be shown to have been "within the four seas" within a stated period, and was capable of begetting issue, the wife's child was allowed to be legitimate. That liberal rule bespeaks an ancient and rooted judicial tenderness toward children. Neither in old nor in modern times has it ever been allowed just to hold a child a bastard unless there is no judicial escape from that dire conclusion. The premises considered, the Scotch form of verdict, "not proved," must be our judicial finding on the negative issue of no divorce and on the issue of bastardy.

[12] (b) There is another view of the case equally conclusive, viz.: In our statute of descents and distribution is the following: "The issue of all marriages decreed null in law, or dissolved by divorce, shall be legitimate." R. S. 1909, § 342. That statute once read: " * * * And the issue of all marriages deemed null in law or dissolved by divorce shall nevertheless be legitimate." R. S. 1825, p. 328, § 8. For the first time in Gen. St. 1865, p. 519, § 11, the statute uses the word "decreed" instead of the former word "deemed"; and, as there changed, it has been handed down as live written law to this very day. When that change in the statute was first brought to the attention of the courts, the notion was indulged that probably the change was a clerical error. Pratt v. Pratt, 5 Mo. App. loc. cit. 544. However, in Green v. Green, 126 Mo. 17, 28 S. W. 752, 1008, it was held that, if the change had only appeared in one revision, it could justly be held an inadvertence. But since it appeared continuously in subsequent revisions, this court would assume it was intentionally used. On that assumption we held the word "decreed," in a technical sense, is almost meaningless in practical effect; further that the Legislature did not intend its meaning should be materially different from the word "deemed" in the original act. 126 Mo. at page 24, 28 S. W. 752, 1008. Adopting that view of it on the reasoning of the Green Case, then we fall back upon the exposition of the act as it originally read. There is a wealth of such exposition in our reports. The student in jurisprudence, curious to follow the stream of law interpretation up to its original source, is referred, for the philosophy and application of that statute, to Lincecum v. Lincecum, 3 Mo. 441; Johnson v. Johnson, 30 Mo. 72, 77 Am. Dec. 598; Buchanan v. Harvey, 35 Mo. 276; Dyer v. Brannock, 66 Mo. loc. cit. 418, 27 Am. Rep. 359, et seq.; Boyer v. Dively, 58 Mo. 510; Green v. Green, supra; Gates v. Seibert, 157 Mo. loc. cit. 272, 57 S. W. 1065, 80 Am. St. Rep. 625, et seq.

In the Lincecum Case a man had a second wife in Missouri and a first wife in South

Carolina. The children of the second marriage were allowed to share in the estate with those of the first. In the Johnson Case there was a common-law marriage with an Indian woman, a daughter of Keokuk, and children were born thereof. Afterwards Johnson sent Keokuk's daughter back to her tribe, thereby exercising a tribal law right so to do. Afterwards, on the eve of his marriage to a white woman, he declared himself a bachelor. Afterwards he reared his Indian children as his own, educated them, and gave them a place in his social circle. We held them legitimate. In the Buchanan Case, Harvey, while residing with a band of the Blackfeet tribe of Indians on the upper Missouri, where under Indian custom polygamy was lawful, married two squaws and died in the Indian country leaving a daughter by each, Susan and Adeline. In the distribution under an administration in St. Louis, Susan and Adeline were declared legitimate under the doctrine of the Johnson Case. In the Dyer Case, Wilson contracted a common-law marriage with Jane Collins, and from that union sprang a daughter Cynthia. Five years afterwards, during Jane's lifetime, he married Sarah Ann Adams, by whom he had a child who survived its mother and died. Afterwards he sent for Jane Collins and Cynthia, lived with them until his death, and treated Cynthia as his daughter. Sarah Ann Adams owned real estate which was inherited at her death by her child by Wilson. We held that he inherited the property from his child by Sarah Ann Adams, and that the descendants of Cynthia (the latter marrying one Dyer) were the offspring of a legitimate child of Wilson and were entitled to recover the property in ejectment. In the Green Case, William Green married in Ireland, abandoned his wife, was never divorced, and during her lifetime married in this country, reporting himself a single man. The children of the last wife were held legitimate.

In construing that beneficent and remedial statute, we ought not to apply the discredited and bitter proverb that the fathers have eaten sour grapes and the children's teeth are set on edge. That proverb was held unjust by noble authority at a very early day. Ezek. 18: 2-3; Jer. 32: 29-30. We are bound to construe the statute so as to advance the interest of innocent children for whose benefit the statute was passed and who, for no fault of their own, up to that time were in hard lines. The plain language of the statute, as illuminated by the construction given it by this court, makes children in the fix of the infant defendants legitimate. We confess to an indisposition to bastardize them by implication or construction. Says Napton, J., in the Dyer Case: "We have no authority, upon grounds of public policy or for the promotion of private morals, to make restrictions or exceptions which the Legislature has not seen proper to make." 66 Mo. at page 419, 77 Am. Dec.

598. Attending to that language, it must be steadily borne in mind, as said that the reason of the existence—the essential object—of the law was to help blameless children and spare them penury and infamy. We are not unmindful of the precept that the greatest incitement to guilt is the hope of sinning with impunity, but the force of that statute, as indicated by the above quotation, is not spent on promoting the morals of parents. In the Green Case, some stress is laid on the good faith of at least one of the parties contracting the second marriage. It may well be that, in order to constitute a marriage at all, there should be an element of good faith, a bona fide intention to marry, as over against an intention to indulge a mere prank, or mere casual sexual commerce, etc. But, even on that view of the law, we think the good faith of Miss Harrington sufficiently appears in this case. She is not to be judged by dainty speculative refinements. Ignorant, immature, and taking color from a lowly and primitive environment, we must allow some value to those factors on the question of good faith. Her faith must be seen through her works. Her actions speak louder than any words in showing her good faith when she lived, for half a decade after her elopement, fearlessly and openly among her neighbors and acquaintances filling the office of a wife and a mother with the man she then took as her husband. Those officers, courts, and grand juries charged with law enforcement in the region seem to have acquiesced in the status she established for herself until Jones died. Neither they nor her neighbors cast any stones at her. Is that not some little evidence they thought her honest?

The views expressed make appellants' assignments of error relating to the admission of testimony fill no office worth while.

For the reasons set forth, the judgment should be reversed, and the cause remanded, with directions to enter a decree in accordance with this opinion. Let that be done.

LAMM, J. Coming into banc from Division 1 on a dissent, the foregoing opinion is adopted by the court in banc as its opinion. All the Judges concurring, except GRAVES and WOODSON, JJ., who dissent.

STATE ex rel. FEDERAL LEAD CO. v.
REYNOLDS et al., Judges.

(Supreme Court of Missouri. Nov. 14, 1912.)

1. REFERENCE (§ 8*)—COMPULSORY REFERENCE—PROPRIETY.

Under Rev. St. 1909, § 1906, providing that, where the parties do not consent to reference, the court may direct a reference where the trial of an issue of fact shall require the examination of a long account, a compulsory reference is proper in a suit on contracts in-

volving lengthy accounts, credits, and counter-claims.

[Ed. Note.—For other cases, see Reference, Cent. Dig. §§ 18-23; Dec. Dig. § 8.*]

2. REFERENCE (§ 103*)—APPEAL AND ERROR (§ 1017*)—REPORT OF REFEREE—EXCEPTIONS—REVIEW.

In case of reference in equity or compulsory reference in an action at law, the trial court may not only sustain exceptions to the referee's report and set aside his findings, supplanting them with findings of its own, but such rulings and acts are subject to review by the appellate court.

[Ed. Note.—For other cases, see Reference, Cent. Dig. §§ 188-206; Dec. Dig. § 103; Appeal and Error, Cent. Dig. §§ 3996-4005; Dec. Dig. § 1017.*]

3. COURTS (§ 231*)—STATE COURTS—JURISDICTION OF MISSOURI SUPREME COURT.

The amount in dispute by which the jurisdiction of the Supreme Court is fixed is not necessarily determined by the amount of the judgment appealed from, nor by the amount claimed in the petition or counterclaims, but should be determined by the amount that actually remains in dispute between the parties on the appeal, the court having the right to look into the record to determine the amount in dispute; and hence an appeal from a judgment sustaining objections to the referee's report giving defendant judgment over for \$2,500 on its counterclaim, and disallowing all defendant's counterclaims and allowing plaintiff a judgment of over \$6,500, falls within the jurisdiction of the Supreme Court.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 487, 491, 644-661; Dec. Dig. § 231.*]

4. PROHIBITION (§ 35*)—COSTS.

Where a writ of prohibition is issued against the judges of an intermediate appellate court, it should go at the relator's costs, for judges should not be mulcted in costs for errors of judgment.

[Ed. Note.—For other cases, see Prohibition, Cent. Dig. § 84; Dec. Dig. § 35.*]

En Banc. Original application by the State, on the relation of the Federal Lead Company, for writ of prohibition against George D. Reynolds and others, as judges of the St. Louis Court of Appeals. Writ issued.

Robert & Robert, of St. Louis, for relator. Seneca N. Taylor, of St. Louis, for respondents.

LAMM, J. The Federal Lead Company, complaining of the St. Louis Court of Appeals for that it was exercising jurisdiction of an appeal from a judgment of the St. Francois circuit court in favor of Abbot-Gamble Company against said Lead Company, moved for a preliminary rule here in prohibition. Such rule was issued and served, citing respondents, the judges of that court, to show cause. By their return and by a demurrer thereto an issue at law is sprung, to wit, whether on that return and on the record lodged in the Court of Appeals in the original cause (and presented here for our consideration) the rule should be made absolute and a writ go. At a certain time the Abbot-Gamble Company sued

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

the Lead Company in three counts, the subject-matter of all of them relating to a contract by which the former undertook to furnish the labor, machinery, and material (barring certain exceptions) to construct the foundations and ground floors for the latter's mill and reduction works near Flat river. In the first count judgment was asked for \$11,882.29 (on a quantum meruit), by the second, for \$1,011.45 (additional labor and work), by the third \$9,300 (loss of profits).

For its first defense in that cause, Lead Company relied on a general denial. For its second, by way of affirmative allegations of matter constituting a counterclaim, and further by way of specific denials and admissions, its answer worked out the result that plaintiff had earned under the contract a surplus over payments in the sum of \$3,768.54, but that there was due from plaintiff to defendant (by reason of averments of fact made in the answer) a much larger sum than that. As to the second count, the amount claimed thereon by plaintiff stood confessed, but it was averred that plaintiff owed defendant, by reason of certain facts, a much larger sum. The answer then goes on to set up counterclaims arising out of the contract and transaction pleaded as the foundation of plaintiff's claim; one counterclaim aggregating \$15,688.26 and another \$788.70. A reply coming into this answer (and defendant also replying to the new matter set up in plaintiff's replication) on motion of plaintiff the cause was ordered referred to Julian Paul Cayce, Esq., as referee, who qualified and assumed the burden. After a year and four months spent in taking a great volume of testimony, the referee reported the amount due defendant on the counterclaims to be \$17,209.83, and the amount due plaintiff on the causes of action stated in its petition to be \$14,553.15, leaving due defendant, on striking a balance, the sum of \$2,656.68. For that balance the referee recommended a judgment in favor of defendant.

(Note.—While the matter was in fieri, plaintiff became a bankrupt and Mr. Folks, its trustee in bankruptcy, was allowed to appear as a party and carry on the suit.)

At the proper stage, plaintiff filed exceptions to the report of the referee, but defendant was content, and filed none. Presently plaintiff's exceptions were sustained, all defendant's counterclaims were disallowed, and judgment went in plaintiff's favor on the first and second counts in the aggregate sum of \$6,817.48. From that judgment defendant alone appealed, having in apt form and due time preserved alive its exceptions to the court's action in sustaining plaintiff's exceptions to the referee's report, in disallowing its counterclaims, and in giving judgment for plaintiff. The appeal was allowed to the St. Louis Court of Appeals. There defendant filed a motion to transfer

the cause here, grounding its motion on the theory that the amount in dispute on appeal exceeded the jurisdiction of the Court of Appeals. That court having overruled that motion, defendant came here with its suggestions for prohibition, with the result stated at the outset. Having summarized enough of the record for our purposes, we are of opinion that on such summary an absolute rule should be entered and a writ go.

[1] This, because:

(a) While the original action was at law, yet the reference in hand was not by "the written consent of parties." R. S. 1909, § 1995. The long and intricate accounts involved, together with a multiplicity of refined details arising on charges and counter charges at issue for alleged breaches of the contract, all set forth in the pleadings and exhibits in 50 pages of solid print, made the cause eminently one for compulsory reference within the purview of our statute. R. S. 1909, § 1996. Indeed, defendant seems to have acquiesced in the order of reference, and, we take it, thereby impliedly admitted that the case belonged to a class subject to compulsory reference, and in which defendant had no constitutional right to a jury.

[2] (b) Whatever be the rule in cases that could only be sent to a referee by agreement of parties, yet, where a cause in equity is sent to a referee or where a case at law (subject to a compulsory reference) is sent to a referee, the settled rule is that trial courts may not only sustain exceptions to the referee's report and set aside his findings, but may go on and make findings of its own and render judgment contrary to that recommended by the referee, and (which is closer home) all of such rulings and acts nisi are subject to review by an appellate court and to its revising judgment when (as here) exceptions are properly preserved below and brought up for disposition above. *Caruth-Brynes Co. v. Walter*, 91 Mo. loc. cit. 488, 3 S. W. 865; *State ex rel. v. Hurlstone*, 92 Mo. loc. cit. 332 et seq., 5 S. W. 38; *Wentzville Tobacco Co. v. Walker*, 123 Mo. loc. cit. 671, 27 S. W. 639; *Small v. Hatch*, 151 Mo. loc. cit. 306, 52 S. W. 190; *Williams v. Railway Co.*, 153 Mo. loc. cit. 495, 54 S. W. 689; *Smith v. Baer*, 166 Mo. 392, 66 S. W. 166. Vide *State ex rel. v. Woods*, 234 Mo. loc. cit. 26, 136 S. W. 337, and *Star Bottling Co. v. Exposition Co.*, 240 Mo. loc. cit. 639 et seq., 144 S. W. 776, *arguendo*, on the scope and character of the issue below on exceptions filed to a referee's report.

[3] (c) The question in judgment being the amount in dispute on appeal, not only propositions ruled in paragraphs "a" and "b" are of help in marking the road the court must travel in reaching the amount in dispute, but there is another proposition of kin thereto, to wit: The amount in dispute by which the jurisdiction of the appellate court is fixed (in some cases maybe, but) in all cases

is not necessarily determined by the amount of the judgment appealed from, nor by the amount claimed in the petition or counterclaims, but is determined by the amount that actually remains in dispute between the parties on the appeal, and subject to the determination by the appellate court of the legal question raised by the record. *State ex rel. v. Lewis*, 96 Mo. loc. cit. 148, 8 S. W. 770; *Douglas v. Kansas City*, 147 Mo. loc. cit. 432, 48 S. W. 851; *Bridge Co. v. Transit Co.*, 205 Mo. loc. cit. 179 et seq., 103 S. W. 546; *Vanderberg v. Gas Co.*, 199 Mo. loc. cit. 458 et seq., 97 S. W. 908.

(d) Accordingly, it is accepted doctrine that, to get at the amount in dispute for appellate purposes and preserve the constitutional integrity of this court on the matter of its jurisdiction, we may look within the mere shell of the judgment and far enough into the record to see that our proper jurisdiction is not cut away, or that jurisdiction is not foisted upon us by design, inadvertence, or by mere colorable amounts. So we may eliminate amounts set at rest by the pleadings, or determined below and not appealed from by the losing party, or consider counterclaims (where the case cries out for it on appeal). *Conrad v. De Montcourt*, 138 Mo. loc. cit. 321, 39 S. W. 805; *Wilson v. Russler*, 162 Mo. 565, 63 S. W. 370; *State ex rel. v. Lewis*, supra; *In re Burke's Estate*, 169 Mo. 212, 69 S. W. 277; and cases cited supra in paragraph "c."

(e) The premises all considered, it seems plain this court has jurisdiction of the case of *Folks, Trustee of Abbot-Gamble, v. Federal Lead Co.*; for at bottom the issue on appeal is: Did the court err in setting aside the findings of the referee whereby by balancing claims and accounts a net balance is found in favor of defendant on its counterclaims in the sum of \$2,656.68, and commit further error by rendering judgment in favor of plaintiff, after disallowing all such counterclaims, in the sum of \$6,817.48? That the amount in dispute, subject to the judgment of the appellate court on review, is the sum of those two items, seems clear. Take an a, b, c, case to illustrate: If Roe claim \$1 of Doe, and the court not only takes that dollar from him, but \$2 more, and gives them to Doe, evidently he is out of pocket and injured in the sum of \$3, and, on Roe's appeal, the amount in dispute would be those \$3. In this case defendant was content to abide the finding of the referee awarding it \$2,656.68; but the trial court not only took away its right to the sum so found, but mulcted it in the further sum of \$6,817.48. Defendant appealed to correct that situation, and the amount in dispute, as said, is the sum of the two items. Under the authorities cited, supra, the appellate court has power, if the justice of the case demands it, to give judgment (or direct a

judgment) that shall cut away plaintiff's recovery in whole or part, or re-establish the finding of the referee in whole or part—that is, it can undo what was done below, and do rightly what was done wrongly.

(f) There are cases where, on defendant's appeal, we have used general language to the effect that the amount of the judgment appealed from determines appellate jurisdiction. *Jackson v. Binnicker*, 179 Mo. 139, 77 S. W. 740, *McGregor v. Pollard*, 130 Mo. 332, 32 S. W. 640, and *Hensler v. Stix*, 185 Mo. 238, 84 S. W. 894, are samples of such cases. When applied to record facts held in judgment in those cases, the general language in which the rule is put is well enough, for that is the general rule. But that general language must be understood as referable to the facts and issues of those cases, and not as an unvarying legal pronouncement or formula to be mechanically and always applied to a different state of facts and different issues. The court, having an eye to the case in hand, was not called on to state all the qualifications and limitations of the rule and deliver a charge on the whole body of the law. The writing of opinions would be an intolerable task and the reading of them even worse if that were good doctrine. A court can write sound law without writing all there is of it at one time. *State ex rel. Bixby v. St. Louis*, 145 S. W. 801. The rule in prohibition is therefore made absolute, and the St. Louis Court of Appeals is ordered to transfer the cause to this court.

[4] Let the writ go—at relator's costs, however. Judges should not be mulcted in costs or other damages for errors of judgment in judicial matters. All concur.

WADDLE et al. v. FRAZIER.

(Supreme Court of Missouri, Division No. 2.
Nov. 13, 1912.)

1. CURTESY (§ 1*)—NATURE OF ESTATE—"HEIRS."

Rev. St. 1909, § 350, providing that when a wife dies without any child or other descendants in being capable of inheriting, her widower shall be entitled to one-half of the property belonging to her at her death, absolutely, subject to payment of her debts, does not make the husband the wife's "heir" with respect to any of her property, but gives him an estate in the nature of dower; the word "heirs" meaning kindred who take an interest in real estate by the law of descent.

[Ed. Note.—For other cases, see *Curtsey*, Cent. Dig. §§ 1, 2; Dec. Dig. § 1.*

For other definitions, see *Words and Phrases*, vol. 4, pp. 3241-3265; vol. 8, pp. 7677-7678.]

2. PARTITION (§ 83*)—ADVERSE CLAIM.

The rule that partition cannot be had, where one claims adversely to those seeking partition, without first determining the right of possession in ejectment does not apply where the adverse claimant voluntarily comes into

the partition suit and sets up an equitable claim to the land.

[Ed. Note.—For other cases, see Partition, Cent. Dig. §§ 228, 229; Dec. Dig. § 83.*]

3. EQUIT (§ 39*)—JURISDICTION.

As a rule, a court of equity, upon acquiring jurisdiction for one purpose, will do complete justice between the parties, even though required to adjudicate matters of law in order to do so.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 104-114; Dec. Dig. § 89.*]

4. LIFE ESTATES (§ 8*)—ADVERSE POSSESSION—PERSONS CLAIMING.

Neither a life tenant nor her grantee could claim adversely to the remainderman, so that limitations would not begin to run in favor of one holding adversely through the life tenant until the death of the life tenant.

[Ed. Note.—For other cases, see Life Estates, Cent. Dig. §§ 24-28; Dec. Dig. § 8.*]

5. TRUSTS (§ 89*)—PURCHASE-MONEY TRUSTS—EVIDENCE.

A purchase-money trust can only be established by clear, strong, and unequivocal parol evidence.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 134-137; Dec. Dig. § 89.*]

6. APPEAL AND ERROR (§ 1009*)—FINDINGS—CONCLUSIVENESS—EQUITY CASES.

While the Supreme Court is not bound by the chancellor's findings, it may properly defer in some degree thereto, in view of his superior opportunities for weighing the evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3970-3978; Dec. Dig. § 1009.*]

Appeal from Circuit Court, Sullivan County; Jno. P. Butler, Judge.

Action by Mollie Waddle and others against William Frazier. From a judgment for plaintiffs, defendant appeals. Affirmed.

This is a suit to partition 40 acres of land. The original parties are the collateral heirs of Malinda Frazier, who died in 1907. This 40 acres was conveyed to said Malinda by her father in 1860—to her “and to the heirs of her body.” She died without issue. The record shows that in April, 1860, James Lee and wife, by general warranty deed, conveyed to William Frazier, the appellant, the S. W. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of section 20, township 62, range 19, in Sullivan county, for a recited consideration of \$300. In May, 1860, the said James Lee and wife, by general warranty deed, conveyed the adjoining 40, namely, the S. E. $\frac{1}{4}$ of the said N. E. $\frac{1}{4}$, the same being the land in controversy, to their daughter, Malinda Frazier, wife of said William, “and to the heirs of her body,” for a recited consideration of \$400. In February, 1862, William Frazier and wife, by general warranty deed, conveyed the above-described two tracts, 80 acres in all, to James M. Frazier, brother of said William. In July, 1866, said William Frazier purchased the aforesaid 80 acres from the estate and widow of said James M. Frazier, and received proper conveyance thereof. William Frazier went into possession of this 80 acres in 1866, and occupied same as a home for himself

and wife until her death in 1907. After her death William Frazier continued in the possession of the land, and held such possession until this present suit for partition of the 40 acres conveyed by James Lee to Malinda was instituted by the brothers and sisters of Malinda Frazier, in February, 1908; the said Malinda having died without issue.

The petition in this case is based upon the theory that the deed from James Lee to Malinda Frazier and the heirs of her body, made in 1860, gave her, under the statute then in force, a life estate, with remainder to her heirs, in default of bodily issue; that the persons seeking partition were her heirs; that the sale of the land by William and Malinda Frazier, in 1862, to James M. Frazier, and the subsequent conveyance from his estate to William Frazier, carried only the life estate of Malinda; and that consequently, upon her death in 1907, the title passed to her heirs. William Frazier, upon his request, was made a party defendant in this partition suit. He filed an answer, in which he claims to be the owner of the land; that he bought and paid for it with his own money; and that his wife held the title as his trustee. He also pleads adverse possession, under the deeds from the estate of James M. Frazier, since July, 1866. He further says in his answer that if the said Malinda had any right or interest in the land he, as her husband, would, under the statute, be entitled to “one-half of all real estate which her heirs would inherit.” He prays that all rights which the parties seeking partition may seem to have, “if any they have,” be divested out of them and vested in him, that he be declared the absolute owner, that plaintiffs’ petition be dismissed, and for “such other and further orders, judgments, and decrees herein as to the court may seem right and proper.” A reply was filed, alleging that William Frazier took the deeds from James M. Frazier’s estate with full knowledge of the condition of the title.

When the case came to trial, plaintiffs proved the conveyances as alleged, the death of Malinda Frazier without issue, and the relationship of the parties asking partition. Several witnesses were examined orally upon the issue raised by the defendant as to his having bought the land with his own money, and as to his having claimed it as his.

The court rendered judgment, which, in part, is as follows: “Now, to wit, on this 9th day of January, 1909, this cause, having been heretofore heard by the court, comes on for final determination; and the court, having been fully advised in the premises, and as to the evidence adduced on the part of the defendants, as well as on the part of plaintiffs, being duly advised as to such evidence and the facts, finds that the impleading de-

pendant, William Frazier, has no right, title, claim, or interest in and to the S. E. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of section twenty (20), township sixty-two (62), of range nineteen (19), Sullivan county, Missouri, sought to be partitioned herein; and the court finds that said land was conveyed to Malinda Frazier, wife of said William Frazier, and her bodily heirs, and, although subsequently conveyed to one James M. Frazier by warranty deed, the effect thereof was to vest in the grantee a life estate only in the land in controversy; that, although the defendant, William Frazier, subsequently purchased said land from the administratrix of the estate of James M. Frazier, deceased, he made such purchase with full knowledge and notice of the condition of the title, that a life estate only could be sold or purchased; and that, although he remained in the rightful possession of such land, as a purchaser of his wife's life estate, until the time of her death, to wit, on the 15th day of September, 1907, he is not now entitled to the possession and control thereof, but, on the contrary, the said Malinda Frazier having died without issue of her body, the plaintiffs and defendants, other than said William Frazier, as her collateral heirs, are the owners of the legal title, and entitled to the possession of said land, which is hereby declared to be vested in them."

The judgment further finds that the original parties to the partition suit own the land in fee, finds their respective interests, that the land is not susceptible of division in kind, and orders it sold for cash, and the proceeds divided among the parties entitled thereto. William Frazier appeals.

D. M. Wilson and J. W. Clapp, both of Milan, for appellant. Jno. W. Bingham and W. H. Childers, both of Milan, for respondents.

FERRISS, J. (after stating the facts as above). 1. It is conceded by appellant that, by its terms, the deed from James Lee to Malinda Frazier and the heirs of her body gave her a life estate, with remainder to her heirs in the event she should die without issue, and this by virtue of section 5, c. 32, R. S. 1855, which reads as follows: "Sec. 5. That from and after the passage of this act, where any conveyance or devise shall be made whereby the grantee or devisee shall become seised, in law or equity, of such estate, in any lands or tenements as, under the statute of the thirteenth Edward the First, (called the Statute of Entails,) would have been held an estate in fee tail, every such conveyance or devise shall vest an estate for life only in such grantee or devisee, who shall possess and have the same power over, and right in, such premises, and no other, as a tenant for life thereof would have by law; and, upon the death of such grantee or devisee, the said lands and tene-

ments shall go, and be vested in the children of such grantee or devisee, equally to be divided between them as tenants in common, in fee; and if there be only one child, then to that one, in fee; and if any child be dead, the part which would have come to him or her, shall go to his or her issue; and if there be no issue, then to his or her heirs."

[1] It is further conceded in the answer of the appellant that Malinda died without issue of her body, and that the parties seeking partition are her heirs. Appellant contends, however, that as her husband he is entitled, as heir of his wife, to one-half of the land, under section 350, R. S. 1900, which reads thus: "Sec. 350. When a wife shall die without any child or other descendants in being capable of inheriting, her widower shall be entitled to one-half of the real and personal estate belonging to the wife at the time of her death, absolutely, subject to the payment of the wife's debts."

Obviously the husband could take no interest directly, under this section, in land in which his wife owned a life estate only. Nor could he claim heirship under the law of descent (section 332, R. S. 1909); his wife having left brothers and sisters surviving her. The claim of heirship on the part of appellant must therefore rest on the proposition that section 350, supra, constitutes him an heir of his wife, so as to bring him within the final clause of the law in force in 1855, and quoted above. We think this proposition unsound. Section 350, giving the husband an interest in his wife's real estate, was enacted to equalize the rights of widows and widowers. That which the husband takes under this section is in the nature of dower. His claims are limited to property belonging to her at her death. It does not make him his wife's heir in the full sense of that term. The term "heirs," in its accepted legal signification, means kindred who, by the law of descent, are entitled to an interest in real estate (*Ruggles v. Randall*, 70 Conn. 44, 38 Atl. 885; *Dodge's Appeal*, 106 Pa. 216, 51 Am. Rep. 519; *Jarboe v. Hey*, 122 Mo. loc. cit. 354, 26 S. W. 968), and, under the authorities, excludes the husband or wife, where there is nothing in the connection in which it is used to indicate otherwise. *Dodge's Appeal*, supra; *Fabens v. Fabens*, 141 Mass. 395, 5 N. E. 650; *Jarboe v. Hey*, supra; *Clarkson v. Clarkson*, 125 Mo. 381, 28 S. W. 446; *Am. and Eng. Ency. Law* (2d Ed.) vol. 15, p. 329. The word "heir" has been construed in many cases to include the wife or husband, where personal property was involved and the intent was manifest, particularly in provisions in benefit certificates; but with regard to real estate the rule stated above is uniform. There is certainly nothing in the law quoted above from the Revision of 1855 to indicate that this rule does not apply; and

there is nothing in section 350, R. S. 1909, to extend the rights of the husband beyond the plain limitations and purposes of that section.

2. Appellant asserts this proposition in his brief: "To maintain partition, the parties seeking it must have either actual or constructive possession. Partition is not a suit to try the title, or to settle the right to a disputed possession. If the defendant, Wm. Frazier, was in the actual possession, claiming the land sought to be partitioned adversely to plaintiffs and his codefendants, partition cannot be maintained."

[2] Appellant cites several cases to the effect that partition cannot be rendered in a cause where a party claims adversely to all those seeking partition, and that in such case the right to possession must be first determined by an action in ejectment. *Chamberlain v. Waples*, 193 Mo. 96, 91 S. W. 934, and cases cited. The above rule is based upon the proposition that in partition the court does not try title and right to possession, and, further, upon the practical difficulty in enforcing a decree of partition against one in adverse, exclusive possession. Does this rule apply when the adverse outside claimant voluntarily comes into the partition suit as a party, sets up an equitable title to the land, and prays an adjudication thereon, and prays for such other and further orders and decrees as to the court may seem proper? In this case the appellant asserted equitable ownership of the land, and asked a court of equity to decide between his rights and those of the parties asking partition. The court tried the issue thus presented, and decided it against appellant, and adjudged the title and right to possession to be in the claimants seeking partition. The court, as a court of equity, took jurisdiction, as requested by appellant, of the issue presented by him.

[3] The general rule applicable to such a situation is this: When a court of equity has acquired jurisdiction of a cause for one purpose, it will proceed to do complete justice between the parties, and determine all matters in issue, even if this involves adjudicating matters of law. *Dameron v. Jameson*, 71 Mo. 97; *Real Estate Savings Inst. v. Collonious*, 63 Mo. 290; *Paris v. Haley*, 61 Mo. loc. cit. 462; *Hagan v. Bank*, 182 Mo. loc. cit. 342, 81 S. W. 171. This doctrine has been applied by this court in modification of the rule, above stated, applicable to partition. In *Rozler v. Griffith*, 31 Mo. 171, this court said: "The fact that the defendant is in possession of the premises, claiming to hold them adversely to the plaintiff, is, in general, a sufficient ground for denying a partition in a court of law; but when the question arises upon an equitable title set up by either of the parties the reason of the rule fails. When the questions are such as

belong to a court of equity, there can be no reason for suspending the proceedings short of complete justice between the parties. *Cox v. Smith*, 4 [Johns.] Ch. [N. Y.] 275; *Hosford v. Merwin*, 5 Barb. [N. Y.] 62."

In *Dameron v. Jameson*, supra, this court says: "It is urged by defendant that partition will not lie when defendant is in adverse possession of the premises of which partition is asked. This doctrine, in cases to which it is applicable, is well settled; but no case can be found in our reports where the principle was applied in a proceeding to establish an equitable title, and also for partition. When the plaintiff asks for partition, and the defendant is in the adverse possession of the property, the courts refuse to partition the land between them until plaintiff establishes his title, and a suit in ejectment is the proper proceeding for that purpose; but where, as here, the plaintiff has an equitable title, and asks the aid of the court of equity to establish it, if the court ascertain that he has an interest, and what that interest is, the doctrine that partition cannot be had when the defendant is in the adverse possession of the premises does not apply. The decree establishes plaintiff's title, and under it the court may put him in possession, and a suit in ejectment becomes necessary [unnecessary]. The court, having acquired jurisdiction of the cause, may proceed to determine the whole controversy by decreeing a partition of the premises. *Rozler v. Griffith*, 31 Mo. 171." To the same effect is *Holloway v. Holloway*, 97 Mo. loc. cit. 643, 644, 11 S. W. 233, 10 Am. St. Rep. 339.

Appellant invoked the judgment of the court upon his claim to equitable ownership of the land. The judgment decreed the title to be in the other parties, and that they were entitled to possession.

[4] It is obvious that appellant's claim of title by adverse possession is without foundation. The deed to him from the administratrix of James M. Frazier conveyed only the life estate of Malinda Frazier, as that was the only estate conveyed to James M. Frazier by the deed from Malinda and William Frazier. Neither Malinda, nor any grantee of her life estate, could claim adversely to the remaindermen; hence the statute could not begin to run in favor of appellant until the death of Malinda, in 1907. It follows that appellant, at the time of the institution of this suit, had neither title nor the right to possession. *Charles v. Pickens*, 214 Mo. loc. cit. 215, 112 S. W. 551, 24 L. R. A. (N. S.) 1054, 127 Am. St. Rep. 687; *Dugan v. Follett*, 100 Ill. 589; *Colvin v. Hauenstein*, 110 Mo. 575, 19 S. W. 948; *Scott v. Colson*, 156 Ala. 450, 47 South. 60. The court below, having acquired jurisdiction of all the issues in the cause, rendered judgment on this issue of adverse possession, and decreed the title and right to possession to be in the collateral heirs of Malinda Frazier, parties to

the partition suit. It thus became unnecessary to resort to ejectment to try the question of title by adverse possession. *Coberly v. Coberly*, 189 Mo. 1, 87 S. W. 957.

[5] 3. Appellant, in his answer, alleged that he bought and paid for the land conveyed to his wife, Malinda, and that she held the title in trust for him. Evidence was introduced upon this issue by both sides. Upon the testimony the court found against appellant. James Lee, the father of Malinda, conveyed 40 acres to William Frazier, April 13, 1860. In May following James Lee conveyed the 40 acres in controversy to Malinda Frazier. The two tracts are adjoining, and together make the 80 acres which William Frazier and his wife occupied as a home, except during the interval from 1862 to 1866, when the 80 acres was in possession of James M. Frazier under deed from William and wife. Appellant claims that he bought the 80 acres at one time from James Lee. No explanation is given for the conveyance of one 40 to his wife. One witness stated that he understood that the 40 was given to her by her father for a home. The language of the deed to her "and to the heirs of her body" is consistent with this, and tends to negative the claim to a resulting trust. We deem it unnecessary to detail the oral testimony. It came from friends and neighbors, who testified, pro and con, to fragments of conversations, and to remarks by James Lee, Malinda and William Frazier, some of them as far back as 50 years. One witness, 59 years old, testified to a conversation heard by him in 1859, before he was 10 years old. The evidence at best is vague and fragmentary. It fails to measure up to the rule declared by this court in *King v. Isley*, 116 Mo. 155, 22 S. W. 634, where, speaking of the quantum of evidence essential to establish a resulting trust, we say: "The rule in this court is settled by a uniform line of decisions that parol testimony, in order to accomplish such an object and secure such an end, must be clear, strong, and unequivocal; so definite and positive as to leave no room for doubt in the mind of the chancellor as to the existence of such a trust." *Allen v. Logan*, 96 Mo. 591 [10 S. W. 149]. "These resulting trusts must not be declared upon doubtful evidence, or even upon a mere preponderance of evidence. * * * There should be no room for a reasonable doubt as to the facts relied upon to establish the trust." *Adams v. Burns*, 96 Mo. 361 [10 S. W. 261]."

[6] We are not bound by the finding of the chancellor; but we properly may defer in some degree to his superior opportunity to weigh the testimony. Our views upon testimony of this character in such a case as this are expressed at length in *Williams v. Keef*, 145 S. W. 425, and need not be further extended here.

We think the judgment is sustained by the

record. We find no reversible error. The judgment, therefore, is affirmed.

BROWN, P. J., and KENNISH, J., concur.

BENJAMIN v. METROPOLITAN ST. RY. CO.

(Supreme Court of Missouri. Nov. 14, 1912.)

1. CARRIERS (§ 320*)—ACTION FOR INJURIES—QUESTION FOR JURY—"SUDDEN" STARTING OF CAR.

On evidence in an action against a street railroad for injuries from negligently and suddenly starting a car, as plaintiff was entering, construing the word "sudden" to mean happening without notice, coming unexpectedly, *held*, that the question whether the car was negligently started was for the jury.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1118, 1126, 1149, 1153, 1160, 1167, 1179, 1190, 1217, 1233, 1244, 1248, 1315-1325; Dec. Dig. § 320.*]

2. CARRIERS (§ 247*)—CARRIAGE OF PASSENGERS—WHO ARE PASSENGERS—PERSON ENTERING CAR.

A person in the act of getting upon a street car is a passenger.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 984-993; Dec. Dig. § 247.*]

For other definitions, see *Words and Phrases*, vol. 6, pp. 5218-5227; vol. 8, p. 7748.]

3. CARRIERS (§ 280*)—CARRIAGE OF PASSENGERS—CARE REQUIRED.

A carrier owes to a passenger the exercise of the highest degree of care that a prudent person experienced in that business can practically exercise.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1085-1092, 1098-1103, 1105, 1106, 1109, 1117; Dec. Dig. § 280.*]

4. CARRIERS (§ 320*)—CARRIAGE OF PASSENGERS—QUESTION FOR JURY—CARE TOWARD PERSON ENTERING.

The mere fact of starting a street car before a passenger has taken his seat is not negligence per se, and whether it is negligence to do so in a particular case is a question for the jury.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1118, 1126, 1149, 1153, 1160, 1167, 1179, 1190, 1217, 1233, 1244, 1248, 1315-1325; Dec. Dig. § 320.*]

5. CARRIERS (§ 320*)—ACTION FOR INJURIES—QUESTION FOR JURY.

On evidence in an action against a street railroad for personal injuries, *held*, that the question whether the plaintiff, a woman of 57 years, weighing nearly 200 pounds, facing forward while entering the car from the platform, could have been thrown forward by its start, was for the jury.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1118, 1126, 1149, 1153, 1160, 1167, 1179, 1190, 1217, 1233, 1244, 1248, 1315-1325; Dec. Dig. § 320.*]

6. APPEAL AND ERROR (§ 854*)—MOTION FOR NEW TRIAL—GROUND.

Where a motion for a new trial is sustained, and the court states in its order a ground on which it bases its ruling, the appellate court, if it concludes that on the ground stated the new trial should not have been granted, will reverse the order, unless its attention is called to some other ruling of the trial court which justified the order, as it is not bound to search the record to find grounds other than

those assigned by the trial court, but, if respondent brings to its notice any other point sustaining the ruling, it will be considered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3403, 3404, 3408-3424, 3427-3430; Dec. Dig. § 854.*]

7. CARRIERS (§ 320*)—ACTION FOR INJURIES—QUESTION FOR JURY—NEGLIGENCE IN STARTING CAR.

On evidence in an action against a street railroad for personal injuries, the question whether defendant was negligent in starting the car and throwing and injuring plaintiff, a woman of 57, weighing nearly 200 pounds, as she was entering and making her way toward a seat, was for the jury.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1118, 1126, 1149, 1153, 1160, 1167, 1179, 1190, 1217, 1233, 1244, 1248, 1315-1325; Dec. Dig. § 320.*]

8. CARRIERS (§ 287*)—CARRIAGE OF PASSENGERS—CARE REQUIRED—TAKING UP PASSENGER.

Where the conductor of a street car took up a woman of 57 years, weighing nearly 200 pounds, and while she was exercising due care in entering the car from the platform, in the exercise of the high degree of care devolving on the carrier would have seen her position and realized her peril, he was negligent in starting the car in such way as to throw her down and injure her.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1154-1159, 1161-1166; Dec. Dig. § 287.*]

9. CARRIERS (§ 320*)—CARRIAGE OF PASSENGERS—CARE REQUIRED—TAKING UP PASSENGERS.

It is not negligence per se to start a street car while passengers are standing up in it, nor is it negligence per se to start it while passengers are standing on the platform, or in the vestibule.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1118, 1126, 1149, 1153, 1160, 1167, 1179, 1190, 1217, 1233, 1244, 1248, 1315-1325; Dec. Dig. § 320.*]

10. CARRIERS (§ 314*)—PLEADING (§ 367*)—ACTION FOR INJURIES—PLEADING—ALLEGATIONS AS TO NEGLIGENCE—MOTION TO MAKE DEFINITE.

Facts constituting a carrier's negligence towards a passenger must be pleaded. The pleader may charge specific negligence, or general negligence which will be sufficient in the absence of a motion to make more definite and certain, and such a motion may be denied when the facts are of a character beyond the knowledge of the pleader or particularly within the knowledge of the carrier, as when a train is derailed. In the pleading of general negligence, the facts must be stated with sufficient certainty to point the adversary to the event or the occurrence in the happening of which negligence is charged.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1260, 1270, 1273-1280; Dec. Dig. § 314.* Pleading, Cent. Dig. §§ 1173-1193; Dec. Dig. § 367.*]

11. NEGLIGENCE (§ 117*)—PLEADING (§ 8*)—CONTRIBUTORY NEGLIGENCE AS GROUND OF DEFENSE.

Contributory negligence is an affirmative defense and must be pleaded to be available, and, to be sufficient, the facts constituting contributory negligence must be pleaded; but, where the plaintiff in making out his own case shows that he was guilty of negligence that contributed to his injuries, no plea of contributory negligence is necessary, and a plea that, if the plaintiff received any injuries at the time mentioned in his petition, they were caused

by his own fault and negligence, is insufficient.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 195-197; Dec. Dig. § 117.* Pleading, Cent. Dig. §§ 12-28½; Dec. Dig. § 8.*]

12. NEGLIGENCE (§ 141*)—CONTRIBUTORY NEGLIGENCE—INSTRUCTIONS.

An instruction that, if the plaintiff was guilty of negligence of any character which directly contributed to her injuries, she could not recover, was erroneous, in that it did not specify the facts constituting such negligence.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 382-399; Dec. Dig. § 141.*]

13. CARRIERS (§ 321*)—CARRIAGE OF PASSENGERS—ACTION FOR INJURIES—INSTRUCTIONS—DEGREE OF CARE "PRACTICABLE."

An instruction in an action against a street railroad for personal injuries that, if defendant exercised all the care and prudence that were reasonably practicable, it was not negligent, was erroneous, in that the word "practicable" means "capable of being done or accomplished with available means or resources," and includes the element of reasonableness, what is unreasonable not being practicable, and the qualifying word "reasonably" renders the construction confusing and liable to misconception.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1247, 1326-1336, 1343; Dec. Dig. § 321.*]

For other definitions, see Words and Phrases, vol. 6, pp. 5483, 5484.]

14. TRIAL (§ 236*)—INSTRUCTIONS—CREDIBILITY OF WITNESSES.

An instruction that, while the plaintiff was a competent witness in her action for personal injuries, yet, in determining the weight to be given her testimony, her interest in the result of the trial and the fact that she was testifying on her own behalf should be considered, that whatever she said against her own interest was presumed to be true because against her interest, but that what she said in her own behalf might be regarded as true or false when considered with all the evidence in the case—was bad, in that it pointed out plaintiff, and especially called attention to the fact of her interest as an inducement to swearing falsely, and in that it declared all her testimony against interest to be true, and required all said in her interest to be scrutinized with care.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 531-533; Dec. Dig. § 236.*]

15. APPEAL AND ERROR (§ 978*)—REVIEW—DISCRETION OF TRIAL COURT—MISCONDUCT OF PARTY.

The trial judge while taking dinner at the same tavern saw three jurors and two of defendant's claim agents at the same table, and on reopening court called the attention of attorneys thereto, and said to plaintiff's attorney that he would discharge the jury, and was assured by defendant's counsel that he would caution the agent, and on the following day the three jurors asked the claim agent to join them in a game of pool which they lost, and for which they paid, and then accepted cigars from the claim agent. Their meeting at dinner was accidental, and nothing was there said about the trial, nor did the agent pay for their dinners. Held, that the granting of a new trial for the misconduct of defendant's claim agent was not an abuse of the trial court's discretion.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3866-3870; Dec. Dig. § 978.*]

Graves, J., dissenting, and Ferris, J., dissenting in part.

In Banc. Appeal from Circuit Court, Jackson County; Walter B. Powell, Judge.

Action by Elizabeth A. Benjamin against the Metropolitan Street Railway Company. From an order granting plaintiff's motion for a new trial after verdict for defendant, defendant appeals. Affirmed.

John H. Lucas and Chas. N. Sadler, both of Kansas City, for appellant. A. F. Smith, Boyle & Howell and Guthrie, Gamble & Street, all of Kansas City, for respondent.

VALLIANT, C. J. Plaintiff sues for damages for personal injuries alleged to have been sustained by her through the negligence of the defendant while she as a passenger was attempting to board one of defendant's street cars. The amount of damages claimed is \$10,000. The negligence charged in the petition is: "While the plaintiff was in the act of getting upon said car, and while she was in a position of peril, all of which was known, or by the exercise of due care should have been known, to the defendant, it negligently started said car and negligently suddenly started said car, and the plaintiff, by reason of the said negligent acts of the defendant, was thrown and caused to fall against parts of said car." The answer was a general denial and what was probably intended as a plea of contributory negligence. It was in these words: "And, for further answer, defendant says that, if plaintiff received any injuries at the time mentioned in said petition, the same was caused by plaintiff's own fault and negligence." The trial resulted in a verdict for the defendant, but the court sustained the plaintiff's motion for a new trial, and from that order the defendant appealed.

The testimony on the part of the plaintiff tended to prove as follows: Plaintiff is a woman 57 years of age, and at the time of the accident weighed about 190 pounds. She and a woman companion stood at a crossing, waiting for the street car. When the car reached the crossing, it stopped as to receive passengers, and while it was standing still plaintiff proceeded to go aboard of it. She got on the step, and, with one foot on the step and the other on the platform, she was in the act of getting on the platform with both feet, when the car started to move, and she fell on her knee, striking it on the step that leads from the platform (or vestibule) into the car. She arose, and went into the car and sat down, not realizing at the time any severe injury, but such injury developed afterwards. Plaintiff's companion followed her, stepping on the step just after plaintiff, and just as plaintiff stepped on the platform. She did not see plaintiff fall, but saw her rise, and the two went into the car and sat down together, and when the car reached their destination, the two walked out of the car, and walked home. On the part of the defendant the evidence tended to

show that, when the car stopped at the crossing where the two women got on, they were both standing near the curb, talking, and gave no indication of intention to get on the car; therefore the conductor gave the signal to start. He was at the time inside the car. When the bell rang and the car started, the two women ran and jumped on the car, and neither of them fell. They said something to the conductor about running off and leaving them, and, when they were getting off the car at the point of their destination, the plaintiff said something to the conductor about her knee hurting her. There was evidence for and against the plaintiff's claim of injury and the degree thereof. There was no evidence as to the manner of the starting of the car as the plaintiff was getting on; that is, whether it was sudden or fast or slow. Her testimony was that it started to move after she got on the step. The testimony of defendant was that she ran and got on the step after the car was in motion. That was the main issue of fact in the case. At the close of plaintiff's evidence, the defendant asked an instruction in the nature of a demurrer to the evidence, which was overruled and exception taken. The cause was submitted to the jury on instructions for plaintiff and for defendant, some of which will be discussed in the course of this opinion.

[1] 1. Appellant insists that its instruction in the nature of demurrer to the evidence should have been given because there was no evidence that the car was "suddenly started," and also because the starting of the car could not have had the effect to throw the plaintiff forward to fall on her knee.

(a) The charge in the petition is that the defendant "negligently started said car, and negligently suddenly started said car." The word "sudden" is sometimes used to signify quick or rapid, and, if that is the sense in which it is used in the petition, there was no evidence to sustain the allegation. But the idea ordinarily conveyed by the word "sudden" is a happening without notice, a coming unexpectedly (Webster), and that is doubtless the sense in which the pleader used it in this instance, and, if so, the determination of whether or not the movement was sudden—that is, unexpected, unlooked for—is a conclusion to be drawn from the facts, rather than the opinion of a witness. When an occurrence is expected, one who may be affected by it will ordinarily take care to meet it; but, if it is not to be expected, no such care will be taken. For the jury to decide whether or not this car, in respect of the plaintiff, was suddenly started, it was only necessary for them to know whether or not under the circumstances the plaintiff had reason to expect it would start as and when it did; that would be a conclusion for the jury to draw from the circumstances, although no witness said the start was sud-

den. The question then is, supposing the woman's story to be true, and the conductor saw her, as it was his duty to do, could reasonable men say that under the circumstances she should have expected the car to start as it did and have guarded against the consequence? We do not attach a great deal of importance to the word "suddenly" as there used and in its connection. The petition states that the defendant negligently started the car to move while she was in the attitude of passing from the step to the platform or to the door of the car. The charges are that it was negligently started, and that it was negligently suddenly started. Whether or not the act of starting the car as and when it was started was negligence depends on the circumstances, and whether or not the start was sudden in the sense that it came without warning and unexpected also depends on the circumstances.

[2, 3] When the plaintiff was in the act of getting on the car, she was a passenger, and the defendant owed her the exercise of the highest degree of care practicable that a prudent person experienced in that business could exercise to secure her safety. When the conductor saw the plaintiff, a woman 57 years old, weighing nearly 200 pounds, with her one foot on the step and her other on the platform, or raised to get on the platform, and he started the car to move, even though it moved in the usual way, can it be said that his act was so clearly within the scope of his duty that the court should as a matter of law have so declared and have taken the case from the jury?

[4] The mere fact of starting a car before a passenger has taken his seat is not negligence per se. Common experience shows that it is the general custom to start street cars before passengers are seated, and the progress of a car in a great city would be slow, indeed, if the law absolutely forbade that practice. But, whilst it is not positively unlawful to do so under any circumstances, yet it is not lawful to do so under all circumstances, and whether or not it is negligence to do so in a particular case is a question of fact in the light of the circumstances. If for example a passenger attempting to get on a car in the position the plaintiff says she was were a cripple on crutches, could any one say that the conductor would be justified in starting the car until the passenger had reached a place of reasonable safety? The condition of the man on crutches, and that of an old woman of unwieldy size as calling on the conductor for caution, may differ in degree, but not in kind. If the plaintiff's story is true, the question of whether the conductor in starting the car, as and when he did, exercised that high degree of care that devolved on him to secure the safety of his passenger, was one which should have been submitted to the jury under proper instructions.

[5] (b) It is argued that, if the car was started as the plaintiff says it was, it would be a physical impossibility for the motion to have thrown the body of the plaintiff forward to fall on her knee. The argument invokes the physical fact that when a person is standing erect on a moveable platform, facing in the direction the movement is to be made, when the movement comes, it will carry the feet forward quicker than the rest of the body, and cause the body to incline backward. That is so, but to draw the conclusion that the learned counsel draw from that law of physics they do not take into account the natural or involuntary resistance the person whose equilibrium is disturbed offers to the motion, especially if it is a sudden movement. In resisting the force that would throw the body backward, and in the struggle to recover an upright position, the result would depend upon the force exerted either way, and on which would be the greater. The court in this case could not as a matter of law decide what the result would be. The action of the trial court in refusing to take the case from the jury was not error.

[6] 2. When a motion for a new trial is sustained, and the court states in the order the ground on which it bases its ruling, if the appellate court should conclude that for the ground stated the new trial should not have been granted, it will reverse the order granting the new trial, unless its attention is called to some other ruling of the trial court which justified the order. In an appeal from an order granting a new trial the appellate court is not bound to search the record to find some other point than that assigned by the trial court, but respondent has the right to bring to the notice of the court any other point in the record that will sustain the ruling, and, when the point is so brought to the notice of the appellate court, it will be considered. *Millar v. Madison Car Co.*, 130 Mo. 517, 31 S. W. 574; *Emmons v. Quade*, 176 Mo. 22, 76 S. W. 103. In the case at bar, the trial court specified in its order granting a new trial the ground on which the order was based. The respondent, although contending that the ground specified was sufficient to justify the order, nevertheless contends that, even if that ground should be adjudged insufficient, there were other grounds that justified it, and has proceeded in her brief to point out those grounds, and those we will now consider before taking up the ground specified in the order. They relate to certain instructions given at the request of the defendant.

[7] (a) The third instruction so given was: "The court instructs the jury that if you find and believe from the evidence that the plaintiff got upon the car while the same was standing still, and that the car was not started until after the plaintiff got upon the platform of said car, then your verdict will be

for the defendant." Under that instruction, if the car was standing still when the plaintiff started to get on it, and it so stood until she had got on the platform on her way into the car, then although the car was then given a motion by which she was thrown forward and fell on her knee and injured, the defendant was not liable. That instruction absolved the defendant from all liability for failure to care for the safety of the plaintiff in her further progress towards a seat in the car after she got on the platform, and, although she may have been thrown down and hurt by the motion of the car, still, if the motion did not come until after she had reached the platform, the defendant is not liable, no matter what circumstances or whose fault. Defendant says that there was no evidence of any unusual starting of the car, and that is so, but there was evidence that that starting, whether usual or unusual, caused the plaintiff to fall. If, therefore, a start in the usual way results in the throwing down and injuring of a passenger who happens to be an unusually large woman 57 years old, while she is on the platform, without fault herself trying to make her way into the car, the court would have no right to tell the jury as a conclusion of law that the defendant had exercised that high degree of care for the safety of its passengers which the law requires. On the contrary, it should be left to the jury under proper instructions to say whether under the circumstances due care was exercised. Common sense dictates the difference in the care that is demanded of a carrier of passengers in reference to a woman 57 years old of nearly 200 pounds weight and that required in reference to a man or woman young and lithe. That instruction was erroneous.

(b) "(4) The court instructs the jury that there is no evidence that the car was started with any unusual jerk or motion, and on that issue your finding will be for the defendant." There was no such issue as that in the case. The plaintiff's testimony did not tend to show that the car started with an unusual jerk, and the defendant's testimony was to the effect that it started in the usual way. The only charge of negligence which the plaintiff's testimony tended to prove was the starting of the car before the plaintiff had time to safely enter.

[8] It makes no difference whether the motion was usual or unusual, if it came in such a way as to throw the plaintiff down when she was exercising the care for her own safety that a person of ordinary prudence in her condition and position would have exercised, and, if the conductor by the exercise of the high degree of care that devolves on the carrier could have seen her condition and position and realized her peril, he was negligent in starting the car as and when he did. Therefore that instruction should not have been given.

[9] (c) "(5) The court instructs the jury that it is not negligence to start a street car when passengers are standing up in the car, and if you find that plaintiff was in the vestibule of said car, standing up in a reasonably safe position, when the car started, and that the car was not started in a negligent manner, but was started without any unusual jerk or jar, then defendant was not guilty of any negligence, and plaintiff cannot recover." What we have above said in commenting on instruction 3 applies to this instruction. It cannot be declared negligence per se to start a car while passengers are standing up in the car, nor can it be said that it is negligence per se to start the car while passengers are standing on the platform or in the vestibule; but, under some circumstances, it would be negligence, and, when those circumstances are present, the question of negligence is one of fact. It was error to have given that instruction.

[10] (d) "(6) The court instructs the jury that, if you find and believe from the evidence that the plaintiff was guilty of negligence of any character which directly contributed to the injuries complained of, then there can be no recovery in this case, and your verdict will be for the defendant." That instruction was as inappropriate to the charge of the plaintiff's negligence contributing to the injuries complained of as a like instruction would have been to the charge of defendant's negligence causing the injuries. Facts constituting the negligence must be pleaded and specified in the instructions. It has been held that the pleader may charge general negligence or special negligence, and the former will be sufficient in the absence of a motion to make more definite and certain. And it is not always that such a motion will be sustained, because the facts may be of a character beyond the knowledge of the party pleading and peculiarly within the knowledge of the other party, as, for example, when a train is derailed. But even in the pleading of general negligence the facts must be stated with sufficient certainty to point the adversary to the event or the occurrence in the happening of which, or in the suffering of which to happen, negligence is charged. For example, if a street car in which a plaintiff is riding is suffered to come in violent collision with some object which causes the car to be turned over and the passenger injured, it will be sufficient to charge that the defendant negligently suffered the collision to occur. In such case the passenger is not presumed to know just what the cause of the collision was, and therefore he is not bound to state it in his pleading. But even in such case it would not be sufficient for the passenger to say in his petition that on a certain day he was injured through the negligence of the defendant, nor would the court be justified in giving the jury an instruction that, if they

should find from the evidence that the defendant was guilty of negligence of any character that resulted in injury to the plaintiff, the verdict should be for the plaintiff. The pleadings should state the issue to the court. The instructions should state the issue to the jury.

[11] Contributory negligence is an affirmative defense, and must be pleaded to be available. *Donovan v. Railroad*, 89 Mo. 147, 1 S. W. 232; *Stone v. Hunt*, 94 Mo. 475, 7 S. W. 431. And the facts constituting the contributory negligence must be pleaded. *Harrison v. Ry. Co.*, 74 Mo. 364, loc. cit. 369, 41 Am. Rep. 318. If, however, the plaintiff in his effort to make out his own case shows that he was guilty of negligence that contributed to his injuries, he cannot recover, even if there was no plea of contributory negligence. But there is no such fact in this case.

In the case at bar the attempted plea of contributory negligence is: "If the plaintiff received any injuries at the time mentioned in said petition, the same were caused by the plaintiff's own fault and negligence." That was not sufficient.

[12] But the instruction was even more general than the plea. It called for a verdict for the defendant if the jury should find that the "plaintiff was guilty of negligence of any character which directly contributed," etc. Suppose the court had given an instruction for the plaintiff authorizing a verdict for her if the jury should find that the defendant had been guilty of negligence of any character whatever which caused the injuries complained of; what would be thought of such an instruction? The giving of that instruction was error.

[13] (e) In defendant's instruction 8 the jury were told that, "if defendant's servants in charge of the car in controversy exercised all the care and prudence that were reasonably practicable, then there was no negligence." The complaint of that instruction is the employment of the word "reasonably." The court in an instruction at the request of plaintiff had already told the jury that it was "the duty of a carrier of passengers to exercise the highest degree of care that can be reasonably expected of prudent men engaged in that line of business to carry its passengers safely, and a failure of such carrier to use such care is negligence on its part. And in the same instruction the degree of care devolving on the passenger was defined to be ordinary. The adverb "reasonably" used in the instruction to qualify the adjective "practicable" introduces an element of uncertainty into the sentence. The duty of the carrier is to exercise the highest degree of care practicable. The word "practicable" means "capable of being done or accomplished with available means or resources." Webster. The element of reasonableness is in that definition. What is unreason-

able is not practicable. But, when the word "reasonably" is used to qualify the word "practicable," it is confusing, and is liable to misconstruction. The law is always reasonable, and it considers it reasonable to require of the carriers a high degree of care, but that fact would not justify an instruction to the jury that the law requires the carrier to exercise a reasonably high degree of care. In that connection the word "reasonably" would so qualify the word "high" as to reduce the phrase to "reasonable care." We do not approve the word "reasonably" as used in this instruction, but, if that were the only error in the case, we would not say the error was sufficient to justify the granting of a new trial.

[14] (f) Defendant's instruction 10 is as follows: "The court instructs the jury that, while the plaintiff is a competent witness in this case, yet in determining what weight and credit you will give to her testimony you should consider her interest in the result of the trial, and that she is the plaintiff testifying in her own behalf. Whatever she may have said against her own interest, the law presumes to be true, because against her interest; but what she may have said in her own behalf you are not bound to believe, but you may treat the same as true or false, just as you may believe the same to be true or false, when considered in connection with all the evidence in the case." That instruction is bad for two reasons: First, it points out the plaintiff especially, calls attention to the fact of her interest as an inducement to her to swear falsely; and, second, in effect, it says that every word that she may have uttered that militates against her interest, whether deliberately or thoughtlessly, is to be set down as truth, while everything she may have said in her own interest is to be scrutinized with care. For those reasons, an instruction to the like effect and in nearly the same words was condemned in *Stetzler v. Railway*, 210 Mo. 704, loc. cit. 713, 714, 109 S. W. 666. To the same effect also, are the following cases: *Conner v. Railroad*, 181 Mo. loc. cit. 415, 81 S. W. 145; *Montgomery v. Railroad*, 181 Mo. 477, 79 S. W. 930; *Shepard v. Railroad*, 189 Mo. 362, 87 S. W. 1007; *Zander v. Railroad*, 206 Mo. 445, 103 S. W. 1006. For the errors in those instructions the court would have been justified in granting a new trial, even if the cause assigned in the order was not sufficient.

[15] 3. We come now to a consideration of the cause assigned by the court for sustaining the motion for a new trial, the alleged misconduct of one of the men connected with the claim department of the defendant corporation. The trial occurred in Independence, which is not a very large city, and which contains but one principal tavern, where, during the sessions of the circuit court, it is usual for persons attending,

judge, lawyers, litigants, jurors, etc., to go for their midday meal. During the second day of the trial of this cause, the judge, having gone to that tavern for his dinner, noticed at another table five men sitting, three of whom he recognized as jurors in the case on trial, and the two others were attending court in the interest of the defendant, and were connected with the defendant's claim department. The attendance of those two men on the court was in the regular and legitimate course of their duties. At the time these five men were eating dinner at the same table the dining room contained other tables, and all of them were occupied. When the judge saw the men at the table, he immediately arose from the table at which he was sitting, and went to another table at which one of the attorneys for the defendant was seated taking his meal, and called the attorney's attention to the fact that those two men were taking dinner at the same table with the three jurors, and told him it was not proper. The attorney soon after left the dining room, and beckoned to one of the two men, the claim agent, who came out, and asked him if he had invited those jurors to take dinner with him, or if he was to pay for their meal, to which he replied in substance that he had not invited the jurors, was not at all responsible for their action in taking seats at that table, and was not to pay for their meal, that their sitting down at the public table was a matter that he had no control of, and nothing to do with. Before going on the bench in the afternoon, the judge called the defendant's attorney and one of the plaintiff's attorneys into his chambers, and mentioned the circumstances to them, and said to the attorney for the plaintiff that, if he so desired, the court would discharge the jury and continue the case. The attorney said that he did not so desire, but suggested that the judge have the claim agent called and caution him against intercourse with the jurors. To that suggestion the attorney for defendant objected, and said that he himself would caution him. The next day, the trial still in progress, at the noon recess, after dinner, the claim agent was standing at the door of the tavern. The three jurors above mentioned passed, and one of them said to the claim agent that they were just going to play a game of pool, and asked him to join them in the game, to which he consented, accompanying them to the poolroom. The four played several games of pool together, in which the claim agent, not being the loser, did not pay for the games, but they were paid for by the others. There were other pool tables in the room at which a number of men were playing. The game being over, the claim agent invited the three men with whom he had been playing to take cigars. They accepted, each took a cigar and the claim

agent paid for them, total 20 cents. Neither during the dinner the day before nor during the games of pool was anything said about the case on trial. The three jurors were reputable business men, and the claim agent was a reputable young attorney of the bar. The evidence shows that there was nothing criminal in word or deed committed. Whether the social intercourse between the claim agent and the three jurors had any influence on their minds to warp their judgment is left alone to conjecture. The court sustained the motion for a new trial for this conduct of the claim agent and the three jurors.

The meeting of the men at the public dinner table is shown to have been entirely accidental and innocent. We gather from the testimony that the claim agent and his assistant were already seated at the table when two of the jurors came in, and, the other tables in that part of the dining room being occupied, they, seeing seats at this table vacant, took them, and soon the third juror came in and joined the two others. The judge came in afterwards, and passed down to the other end of the dining room, and took a seat at a table there, and after he was seated, seeing the five men at the other table, probably thought they had come in together by invitation or design and he thought it looked badly, so he brought it to the notice of defendant's attorney. If the social intercourse between these men had ceased there, it is probable the judge would have taken no further notice of it. But, after the conversation between the judge and the two attorneys in his chambers, he had a right to presume that the attorney for the defendant had cautioned the claim agent to cease holding social intercourse with the jurors, and therefore when on the next day he was informed that they were playing pool together he had cause to think that his admonition had been disregarded, and that the claim agent was acting in disobedience to the order given. For that reason he granted the new trial. The trial judge has more power to direct the course of justice in the trial of a cause than any tribunal that may have charge of the case after him. Not everything that occurs during the trial with its full influence as discerned by the trial judge can be shown in the record that is sent to the appellate court. He not only hears and sees what is said and done, but he discerns its influence, and is far better able to judge whether the trial has been fair than is the court that reviews the record. For that reason, great deference should be given to his judgment when he grants a new trial. In the trial of a cause in a court of justice not only should influences that actually work evil be guarded against, but also acts that have the appearance of evil, and these the trial judge has authority to forbid. Not only should courts rightly decide causes, but the trials

should be conducted in such a manner that suspicion of wrong will not arise. Confidence in the integrity of the courts is absolutely essential to the maintaining of the state government.

Although in this case no wrong was done by the social intercourse of the claim agent with the jurors, yet the judge had a right to forbid it, and, if he had cause to believe that his order was being disobeyed, we cannot say that he abused his discretion in granting a new trial on that account. The judgment is affirmed.

LAMM, WOODSON, KENNISH, and BROWN, JJ., concur. FERRIS, J., concurs in paragraphs 1 and 2, and in the result, dissents from paragraph 3.

GRAVES, J. (dissenting). Paragraph 3 of this opinion is wrong. Grant it that the trial courts should protect the good names of the courts in all ways possible, yet there is nothing in the facts of this case to call for the action taken by this trial court. Whilst courts should protect their dignity and even see that the parties to a cause shun the appearance of evil, yet the good names of jurors and other parties should not be ruthlessly reflected upon by hasty action of an oversuspicious judge. The facts of this case did not warrant the aspersions cast upon the jurors and this claim agent by the trial court, and the reason assigned by the trial court for setting aside the verdict should not be sustained, as it is in our opinion. This was the matter I had more fully in mind when the case was up in division.

2. The part of the opinion which discusses the instructions given by the court upon the part of the defendant does not meet with my entire approval. Upon re-reading the record and the opinion by Judge VALLIANT, I am inclined to the view that there was error in the giving of some of those instructions, but perhaps not to the full extent in the opinion stated. I do not concur in some of the reasoning under this branch of the opinion. However, there is enough error in instructions to justify a new trial, and for that reason the order granting it should not be disturbed.

3. I suggest, further, that it is an extremely close question, under the pleadings, whether the evidence for plaintiff justified the submission of the case to the jury at all. It is quite evident, when all facts are considered, that were it a case between man and man, and not a case of an old lady against a railway company, the verdict of any average jury would have been just as this verdict was—for the defendant. It may be that plaintiff's evidence spells a case for a jury, but, as the case must be tried, I reserve my further views for such time as it may be necessary to more closely scrutinize

the record. Her case may be strengthened upon a retrial, or on the other hand it may be weakened. I dissent from the present opinion for the reason aforesaid.

WINN v. KANSAS CITY BELT RY. CO.
(Supreme Court of Missouri, Division No. 2.
Nov. 13, 1912.)

1. PLEADING (§ 433*)—PETITION—SUFFICIENCY AFTER VERDICT.

Under Rev. St. 1909, § 2119, forbidding the reversal of a judgment for want of any allegation on account of which omission a demurrer could have been maintained, a petition alleging that defendant operated a train, that, while plaintiff was standing in a position of safety on the train, defendant caused his removal therefrom and permitted him to fall under the train, is sufficient after verdict in the absence of any demurrer.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1451-1477; Dec. Dig. § 433.*]

2. JUDGMENT (§ 239*)—JOINT TORT—RECOVERY—ISSUES, PROOF, AND VARIANCE.

A plaintiff suing two or more persons as joint tort-feasors may recover against one alone, and this rule is not modified by Rev. St. 1909, § 1734, relating to actions in which a joint liability exists.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 417; Dec. Dig. § 239.*]

3. RAILROADS (§ 282*)—INJURIES TO PERSONS ON TRAINS—NEGLIGENCE—QUESTION FOR JURY.

Where a flagman at a crossing, required to prevent boys from getting on trains at his crossing, forcibly jerked a boy from a car ladder supporting him, and permitted him to fall on the track, causing injury, the question of his guilt of actionable negligence was for the jury.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 910-923; Dec. Dig. § 282.*]

4. RAILROADS (§ 281*)—INJURY TO THIRD PERSONS—NEGLIGENCE OF SERVANT—LIABILITY OF MASTER.

Where a flagman, who was required to prevent boys from getting on trains at his crossing, saw a boy get on a car ladder and almost immediately seized him, pulled him from the car, and caused him to fall on the track under the train, his act was within the scope of his employment, and the railroad company was liable for the resulting injuries.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 902-909; Dec. Dig. § 281.*]

Appeal from Circuit Court, Jackson County; Walter A. Powell, Judge.

Action by Rupert Winn, by Clara M. Lamont, his next friend, against the Kansas City Belt Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Sebree, Conrad & Wendorff, of Kansas City, M. A. Low and Paul B. Walker, both of Topeka, Kan., W. F. Evans, of St. Louis, and Lathrop, Morrow, Fox & Moore, of Kansas City, for appellant. A. F. Smith, Boyle & Howell, Jos. S. Brooks, and Guthrie, Gamble & Street, all of Kansas City, for respondent.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

BLAIR, C. This action was instituted in the circuit court of Jackson county by Rupert Winn, by next friend, against the Kansas City Belt Railway Company and the Kansas City Terminal Railway Company to recover damages for the loss of an arm and other injuries alleged to have resulted from defendants' negligence. At the close of his evidence, plaintiff dismissed as to the Kansas City Terminal Railway Company, and subsequent proceedings resulted in a judgment against the Kansas City Belt Railway Company, from which judgment this appeal is prosecuted.

The count of the petition on which recovery was had charges, among other things, that "defendants and some other railway company were operating a moving train on the tracks and road of the defendants under and by virtue of a license, permit, lease, or running arrangement, with or from said defendants," and "while plaintiff was riding on said moving train, which was running on the tracks and road of the defendants, * * * and, while he was standing in a position of safety on said train, the defendants and said lessee railway company caused the plaintiff to be removed therefrom in such a manner that plaintiff fell or was thrown under said moving train and his right arm, etc. * * * Plaintiff says that the conduct of the defendants and said lessee railway company in removing and causing to be removed the plaintiff from said train under the circumstances was negligent. Wherefore," etc. Appellant's answer was a general denial.

The injury occurred at Twentieth and Campbell streets in Kansas City, at which point appellant's road crosses Campbell street, where a flagman or watchman was and long had been stationed. A freight train was proceeding westward along appellant's tracks and across Campbell street when respondent, a 13 year old boy, in the flagman's presence, got upon the ladder at the side and near the end of one of the cars, and took a position with his feet in the stirrup and his hands grasping one of the rounds of the ladder. As this car passed over the crossing, the evidence tends to show the flagman stepped up behind respondent, seized hold of the belt of his trousers at the back, and pulled him from the car. At this juncture the flagman released his hold on respondent and the latter fell between the cars and upon or beside the rail, and his right arm was caught and crushed beneath the wheels. The evidence tends to show the flagman was old and weak. The evidence showed it was the flagman's duty to keep boys from getting on trains at his crossing, and that for years and in many instances he had exercised this authority. His own testimony is to this effect and is clearly susceptible of the further interpretation that his instructions

were to see to it, generally, that no accidents happened at the crossing, and that he did whatever in his judgment would "protect the situation better." Appellant's superintendent testified it was the flagman's duty to "warn and prevent boys getting on trains, if he could," and that the same instructions were given all flagmen. For respondent one of appellant's former flagmen, in service in 1906, had testified the instructions were not to permit persons to get on trains at crossings.

[1] 1. It is said no negligence is charged. In view of the failure to demur and the statutory provision (section 2119, R. S. 1906) that after verdict the judgment thereon shall not be reversed "for the want of any allegation or averment on account of which omission a demurrer could have been maintained," nor "for omitting any allegation or averment without proving which the triers of the issue ought not to have given such a verdict," the objection comes too late. In the circumstances, appellant cannot now complain of a defective statement of the cause of action.

[2] 2. The petition charges joint negligence, but the evidence has no tendency to connect any save appellant with the injury, and appellant's counsel earnestly insist this constitutes a total failure of proof. The argument is, in substance, that, under a petition charging a joint tort, proof of a tort committed by one alone is insufficient to authorize judgment against even the guilty defendant.

In Winslow et al. v. Newlan et al., 45 Ill. loc. cit. 148, it was said that in actions of tort "it is a rule of practice, coeval with our system of jurisprudence, that a plaintiff may recover against as many, and only such, defendants as he proves to be guilty," and in *Railway v. Laird*, 164 U. S. loc. cit. 400, 17 Sup. Ct. 123, 41 L. Ed. 485, it was said that, since "in an action against joint tort-feasors recovery may be had against one, it follows that allegations alleging a joint relationship and the doing of negligent acts jointly are divisible, and that a recovery may be had where the proof establishes the connection of but one defendant with the acts averred." At common law, "in actions ex delicto a joint liability need not be proved, and consequently a misjoinder of defendants will not defeat a recovery." Volume 15, Ency. Pl. & Prac. p. 583, and cases cited. To these authorities may be added: *Tompkins v. Railway*, 66 Cal. 163, 4 Pac. 1165; *Rome R. R. v. Thompson*, 101 Ga. 26, 28 S. E. 429; *Railway v. Duvall*, 40 Ind. 246; *Matthews v. Railway*, 56 N. J. Law, 34, 27 Atl. 919, 22 L. R. A. 261; *Railway v. Treadway*, 143 Ind. loc. cit. 703, 40 N. E. 807, 41 N. E. 794; *Krebs Hop Co. v. Taylor*, 52 Or. 627, 97 Pac. 44, 98 Pac. 494; *Railway v. Sheftall et al.*, 133 Fed. 722, 66 C. C. A. 552; *Linquist v. Hodges*, 248 Ill. loc. cit. 497, 94 N. E. 94;

Firor v. Taylor, 116 Md. 69, 81 Atl. 389; *Railway v. Laird*, 58 Fed. 760, 7 C. C. A. 789; *Black on Judgments*, § 207; *Dacey on Parties to Actions*, pp. 431, 432; *Cooley on Torts*, 227 (156); *Pomeroy's Code Remedies*, p. 278 (section 192, p. 291). That this rule has always been accepted in this state is evidenced by many decisions. *Noble v. Kansas City*, 95 Mo. App. loc. cit. 172, 68 S. W. 969; *Hunt v. Railway*, 89 Mo. 607, 1 S. W. 127; *Killeber v. Railway et al.*, 107 Mo. 240, 17 S. W. 946, 14 L. R. A. 613; *Wahl v. Transit Co.*, 203 Mo. 261, 101 S. W. 1; *Wiggin v. St. Louis*, 135 Mo. 558, 37 S. W. 528; *Moudy v. Provision Co.*, 149 Mo. App. 413, 130 S. W. 476; *Wills v. Railway et al.*, 133 Mo. App. 625, 113 S. W. 713; *Stotler v. Railway*, 200 Mo. loc. cit. 149, 150, 98 S. W. 509. Certainly the statutes have not affected the principle, and section 1734, R. S. 1909, which is relied upon, relates to actions in which a joint liability exists, not to actions in which joint liability is merely charged and does not exist. Besides, its provisions are enabling and not restrictive. The cases announcing the rule in actions on joint contracts are not in point; the common law in such cases being wholly different from that applicable in actions of torts. Further those cases have been overruled. *Bagnell Tie & Timber Co. v. Railway*, 145 S. W. 469. In the other Missouri cases cited (*Otrich v. Railways*, 154 Mo. App. 420, 134 S. W. 685, and *Barton v. Barton*, 119 Mo. App. 507, 94 S. W. 574) there had been a joint recovery, and the courts merely held that proof of a joint wrong was necessary to uphold the joint judgment.

It has been pointed out (*Cooley on Torts*, supra) that the rule in Pennsylvania is or was in some respects somewhat different from that commonly accepted, and it may be added that a like observation would seem to apply to certain decisions of the courts of Illinois. It appears now to be held, however, that if two or more are joined, and the proof shows but one to be guilty, a dismissal as to those not involved, ipso facto, no point being made at the trial, ordinarily amounts to an amendment eliminating all allegations save as to the remaining defendant, and a judgment against him alone will be sustained. *Sturzebecker v. Inland Co.*, 211 Pa. 156, 60 Atl. 583; *Lingvist v. Hodges*, 248 Ill. 491, 94 N. E. 94. It is true there might arise a case in which the admission of evidence against a defendant not liable on the facts might be harmful to the defendant found guilty, but no such question is in this case. The sole question is whether, under a general charge of the common negligence of three, recovery may be had against the one defendant guilty. The decisions in cases in which separate concurring acts, all necessary to constitute a cause of action, were charged, and those merely holding that a joint recovery cannot be had under al-

legations of joint wrong, on proof of separate unconnected torts by the several defendants, as well as those in cases in which concert of action is necessary to the existence of any cause of action, are not applicable. The authorities are practically unanimous, and the point is ruled against appellant.

[3] 3. In the case of *Brill v. Eddy*, 115 Mo. 596, 22 S. W. 488, this court had before it, so far as concerns the negligence involved, facts strikingly like those in the present case. It is unnecessary to say more than that, under the rule then announced the question of negligence was for the jury. The cases cited in support of the contrary contention (*Lillis v. Railway*, 64 Mo. 464, 27 Am. Rep. 255; *Randolph v. Railroad*, 129 Mo. App. 1, 107 S. W. 1029; *Bolin, Adm'r, v. Railway*, 108 Wla. 333, 84 N. W. 446, 81 Am. St. Rep. 911) are beside the question. The first two were actions to recover for injuries alleged to have been inflicted by the use of excessive force in ejecting from passenger trains persons who refused to pay fare, and the last discusses the rule applicable when a trespasser is ordered off a slowly moving train and, while in the possession of all his faculties and in control of his own movements, is injured by his own negligence.

In the case at bar the flagman forcibly jerked respondent from the ladder which supported him. He did not order respondent off the car and permit him to exercise his judgment and control his own movements in dismounting, but took the matter into his own hands. Having undertaken this and deprived respondent of the power of protecting himself, he permitted him to fall, dropped him upon or near the rail, and the injury followed. What was said in *Brill v. Eddy*, supra, as to the resistance offered by the boy when grasped is applicable here and is supported by authority elsewhere. In that case it appeared the boy had no warning; in this it cannot, as a matter of law, be said the boy knew he was suddenly to be grasped and pulled from the car. The difference, if any, can no more than affect the weight, not the legal effect, of the circumstance. It may be added there was no plea of contributory negligence, but the jury was instructed that, if respondent's resistance, if any, to the flagman, materially contributed to the injury, the verdict should be for defendant.

[4] 4. The flagman or watchman's act was clearly one for the results of which appellant is liable. His authority to prevent boys from getting on trains at his crossing was established by the superintendent, whose duty it was to promulgate instructions to flagmen. It is an established fact on this record. He was at his appointed station on the crossing engaged in the performance of his duty when respondent got upon the car ladder in his very presence and almost immediately was seized by him and pulled

from the car. There is no hint in the evidence that the flagman was actuated by any possible motive other than the performance of his duty as the servant of appellant. In this state of things the fact that the instructions on this phase of the case are not so clear as they might have been is not sufficient ground for reversal. *Haehl v. Railway*, 119 Mo. 325, 24 S. W. 737; *Railway v. Hunter*, 74 Miss. 444, 21 South. 304.

The judgment is affirmed.

ROY, C., concurs.

PER CURIAM. The foregoing opinion of BLAIR, C., is adopted as the opinion of the court. All the Judges concur.

STATE ex rel. KIMBRELL, Pros. Atty., v. PEOPLE'S ICE, STORAGE & FUEL CO. et al.

(Supreme Court of Missouri, Division No. 1. June 29, 1912. Rehearing Denied Nov. 30, 1912.)

1. EXCEPTIONS, BILL OF (§ 88*)—TIME FOR MAKING AND FILING—TERM OF COURT.

The referability of a proceeding was not open to review on appeal, where no bill of exceptions was filed at the term at which the referee was appointed, nor leave taken at that term to file such bill; the point not being saved by recital in a bill filed by leave given at a later term.

[Ed. Note.—For other cases, see *Exceptions, Bill of*, Cent. Dig. §§ 49-53; Dec. Dig. § 38.*]

2. REFERENCE (§ 34*)—ORDER OF REFERENCE—OBJECTIONS—EXCEPTIONS.

Objections to the reference of a proceeding should be made at the time the referee is appointed, and to the court itself; and hence objections on this point before the referee, and motions to set aside the appointment and strike out the testimony because the case was not referable, filed after the report was made, were properly overruled.

[Ed. Note.—For other cases, see *Reference*, Cent. Dig. §§ 61, 62; Dec. Dig. § 34.*]

3. REFERENCE (§ 41*)—AUTHORITY OF REFEREE.

A referee has no power to set aside his own appointment, on the ground that the cause is not referable.

[Ed. Note.—For other cases, see *Reference*, Cent. Dig. § 67; Dec. Dig. § 41.*]

4. JURY (§ 25*)—TRIAL BY JURY—DEMAND—TIME FOR MAKING.

A motion for a trial by jury after a referee has filed his report is too late.

[Ed. Note.—For other cases, see *Jury*, Cent. Dig. §§ 154-173; Dec. Dig. § 25.*]

5. VENUE (§ 77*)—CHANGE—TIME FOR APPLICATION.

Where, after an application for a change of venue was verified, the moving party filed several other motions and gave no notice of the intended presentation of the application for the change until such other motions were overruled, the change of venue was properly refused.

[Ed. Note.—For other cases, see *Venue*, Cent. Dig. §§ 59, 134, 188; Dec. Dig. § 77.*]

6. QUO WARRANTO (§ 1*)—FORM OF REMEDY.

Proceedings in the nature of quo warranto, not instituted under the statute, are of com-

mon-law origin; and, as a general rule, equitable rules are not applicable to them.

[Ed. Note.—For other cases, see *Quo Warranto*, Cent. Dig. §§ 1, 8, 23, 28; Dec. Dig. § 1.*]

7. ELECTION OF REMEDIES (§ 3*)—EXCLUSIVENESS OF REMEDY.

If any remedy by injunction to restrain unlawful combinations in restraint of trade by corporations exists, it is wholly inconsistent with the remedy by quo warranto; and the two cannot be prosecuted at the same time, even separately, since quo warranto goes to the life of the corporation informed against, while the injunction proceeding is necessarily predicated upon the continuance of its existence.

[Ed. Note.—For other cases, see *Election of Remedies*, Cent. Dig. §§ 3, 4; Dec. Dig. § 3.*]

8. APPEAL AND ERROR (§ 171*)—REVIEW—SCOPE AND THEORY OF CASE.

Where a proceeding was tried below and heard in the Supreme Court on the theory that it was a proceeding in the nature of quo warranto, it will be decided by the Supreme Court on the same theory.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 1053-1063, 1066, 1067, 1161-1165; Dec. Dig. § 171.*]

9. REFERENCE (§ 102*)—REPORT—OPERATION AND EFFECT.

Rev. St. 1909, § 2013, giving a referee's report, when confirmed by the court, the same effect as a special verdict, does not apply where the court does not confirm the report, but sustains exceptions thereto and makes independent findings.

[Ed. Note.—For other cases, see *Reference*, Cent. Dig. §§ 181-187; Dec. Dig. § 102.*]

10. APPEAL AND ERROR (§ 924*)—REVIEW—FINDINGS OF FACT.

In determining the conclusiveness of the trial court's findings, made after sustaining exceptions to those of the referee, the case will be treated as one compulsorily referable, where no exception to the reference was properly saved.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 2899, 3728, 3727; Dec. Dig. § 924.*]

11. REFERENCE (§ 99*)—REPORT—SETTING ASIDE.

In case of a compulsory reference, the trial court may act upon the referee's report and find therefrom different conclusions from those reported by the referee.

[Ed. Note.—For other cases, see *Reference*, Cent. Dig. §§ 148-156; Dec. Dig. § 99.*]

12. APPEAL AND ERROR (§ 1013*)—REVIEW—FINDINGS OF FACT.

A finding of fact, based on a mere mathematical computation, is reviewable on appeal, since any incorrect finding is without evidence to support it.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3993-3995; Dec. Dig. § 1013.*]

13. APPEAL AND ERROR (§ 1008*)—REVIEW—FINDINGS OF FACT.

The rule as to the conclusiveness of the trial court's findings is not inapplicable because the testimony was wholly by deposition, or because one judge heard the evidence and another decided the case on the transcript thereof.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3955-3960, 3963-3969; Dec. Dig. § 1008.*]

14. REFERENCE (§ 99*)—REPORT—OPERATION AND EFFECT.

In the case of a compulsory reference, the referee's power is limited to recommending

judgment; and the reference can aid, but not bind, the trial judge, upon whom rests the duty and responsibility as to the judgment.

[Ed. Note.—For other cases, see Reference, Cent. Dig. §§ 148-156; Dec. Dig. § 99.*]

15. APPEAL AND ERROR (§ 1022*)—REVIEW—FINDINGS OF FACT.

The findings of the trial court, after setting aside those made by the referee, are no more open for review on the mere weight of the evidence than any other findings, since the referee's findings are not judicially made until approved; and where they are set aside the only findings which are judicially made are those of the court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4015-4018; Dec. Dig. § 1022.*]

16. QUO WARRANTO (§ 48*)—PLEADING—INFORMATION.

An information in the nature of quo warranto, alleging that prior to a certain date certain companies and copartnerships were engaged in the manufacture and sale of ice in competition, and that on that date a new corporation was organized by them for the purpose of restricting competition, should not be construed after judgment as alleging that competitive conditions existed at all times prior to the specified date, so as to overthrow findings based in part on evidence of unlawful acts prior to such date.

[Ed. Note.—For other cases, see Quo Warranto, Cent. Dig. §§ 49-52, 59, 60; Dec. Dig. § 48.*]

17. MONOPOLIES (§ 24*) — PROCEEDINGS TO PREVENT UNLAWFUL COMBINATIONS — EVIDENCE.

In a proceeding against persons claimed to have formed an unlawful combination in restraint of trade, evidence of the preliminary steps in the formation of such combination, prior to the date on which the combination is alleged to exist, is admissible.

[Ed. Note.—For other case, see Monopolies, Cent. Dig. § 17; Dec. Dig. § 24.*]

18. MONOPOLIES (§ 20*) — PROCEEDINGS TO PREVENT UNLAWFUL COMBINATIONS — DEFENSES.

Competitors in the business of manufacturing and selling ice combined to restrict competition and, to carry out this purpose, organized a distributing company, with which they all contracted to sell their output of ice. Subsequently the distributing company was reorganized for the purpose of increasing its powers, and the reorganized company succeeded to the property, contracts, assets, and liabilities of the old company, and to its identity in the unlawful combination. *Held*, that the existence of the unlawful combination prior to the incorporation of such new company was not available to it as a defense against a charge of violating the anti-trust act.

[Ed. Note.—For other case, see Monopolies, Dec. Dig. § 20.*]

19. CONSPIRACY (§ 13*)—PERSONS LIABLE—ACTS OF CO-CONSPIRATORS.

As a general rule, if a conspiracy exists and another joins with the conspirators, he is deemed a party to all acts done by any of the conspirators, before or afterwards, in furtherance of the common design.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. § 14; Dec. Dig. § 13.*]

20. MONOPOLIES (§ 24*) — PROCEEDINGS TO PREVENT UNLAWFUL COMBINATIONS — EVIDENCE.

Certain corporations and copartnerships formed an unlawful combination to restrict

competition and organized the P. Company to carry out the purposes of the combination. The assets of the H. Company, one of the parties to the combination, and whose president participated in the organization and knew the purposes of the P. Company, were purchased by the K. Brewery Company thereafter organized, and the president of the H. Company became the president of the K. Company. *Held*, that it could not be said, as a matter of law, that the K. Company did not have knowledge of the unlawful character of the P. Company; and hence a judgment against defendant for violating the anti-trust act would not be disturbed.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 17; Dec. Dig. § 24.*]

21. EVIDENCE (§ 253*)—ACTS AND DECLARATIONS OF CO-CONSPIRATORS.

Where there was other evidence that a corporation entered into an agreement with another company to fix prices, the declarations of its president and active manager in furtherance of the purpose of the combination were admissible as declarations of a co-conspirator.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 994-1802; Dec. Dig. § 253.*]

22. CRIMINAL LAW (§ 422*)—EVIDENCE—ACTS AND DECLARATIONS OF CO-CONSPIRATORS.

It is not necessary that co-conspirators be indicted and tried together, in order to render the acts and declarations of one admissible against the others.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 984-988; Dec. Dig. § 422.*]

23. MONOPOLIES (§ 17*)—EVIDENCE—WEIGHT AND SUFFICIENCY.

The fact that parties charged with effecting an unlawful combination to restrict competition in the sale of ice, by forming a corporation to handle their output, sold small quantities of ice to others than such corporation during the spring and summer months, when the demand for ice was small, did not refute the charge, especially where such ice was sold in such quarters as to have no tendency to affect the rate made by such corporation.

[Ed. Note.—For other case, see Monopolies, Cent. Dig. § 13; Dec. Dig. § 17.*]

24. MONOPOLIES (§ 12*)—COMBINATIONS IN RESTRAINT OF TRADE—COMBINATIONS PROHIBITED.

The anti-trust law, in plain and unambiguous language, condemns every direct restraint of trade, great or small, without regard to what the courts may think as to the extent of the effect of the combination.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 10; Dec. Dig. § 12.*]

25. CONSTITUTIONAL LAW (§ 70*)—JUDICIAL POWERS—ENCROACHMENT ON LEGISLATURE.

The judgment of the Legislature, within its constitutional powers, is final; and the wisdom of its enactments cannot be questioned by the courts.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 129-132, 137; Dec. Dig. § 70.*]

26. APPEAL AND ERROR (§ 843*)—REVIEW—MOT QUESTIONS.

The question whether the court, in a proceeding to dissolve an unlawful combination in restraint of trade, erred in ordering the cancellation of certain contracts will not be determined where, by the expiration of the contracts by their own terms, the question has become a moot one.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3331-3341; Dec. Dig. § 843.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-Ne. Series & Rep'r Indexes

27. MONOPOLIES (§ 24*)—PROCEEDINGS TO PREVENT—SUFFICIENCY OF EVIDENCE.

In a proceeding against persons charged with effecting an unlawful combination to restrict competition, evidence held to support the trial court's findings that certain of the defendants had effected such an unlawful combination.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 17; Dec. Dig. § 24.*]

Appeal from Circuit Court, Jackson County; Walter B. Powell, Judge.

Information in the nature of quo warranto by the State, on the relation of I. B. Kimbrell, Prosecuting Attorney, against the People's Ice, Storage & Fuel Company and others. From the judgment, the defendant named and others appeal. Affirmed.

Cowherd, Ingraham, Durham & Morse, of Kansas City, for Kansas City Breweries Co. Warner, Dean, McLeoud & Timmonds, of Kansas City, for People's Ice, Storage & Fuel Co., Vanderslice-Lynds Mercantile Co., and Central Coal Co. Clinton A. Welch, of Kansas City, for Central Ice Co. I. B. Kimbrell and Clyde Taylor, both of Kansas City, for respondent.

BLAIR, C. This is a proceeding by information in the nature of quo warranto instituted by the prosecuting attorney of Jackson County, on his own relation and in his official capacity, against the People's Ice, Storage & Fuel Company, the Vanderslice-Lynds Mercantile Company, the Central Ice Company, the Western Ice & Cold Storage Company, the Kansas City Breweries Company, the Dold Packing Company, John J. Ruddy, and Thomas P. Ruddy. The Ruddys are alleged to be partners, doing business under the firm name of Ruddy Bros., and also under the name of the Inter-State Ice & Cold Storage Company. Excepting the Jacob Dold Packing Company, the other corporate defendants are Missouri corporations. The Jacob Dold Packing Company is a corporation, but it is not alleged in what state it was organized. The circuit court found for the defendants Jacob Dold Packing Company, the Western Ice & Cold Storage Company, John J. Ruddy, and Thomas P. Ruddy, but entered judgment against the other defendants assessing a fine of \$5,000 against the Central Ice Company, a fine of \$4,500 against the Vanderslice-Lynds Mercantile Company, a fine of \$5,000 against the Kansas City Breweries Company, a fine of \$15,000 against the People's Ice, Storage & Fuel Company, and also entered judgment forfeiting the charter of the last-named company. From that judgment, all four convicted defendants appealed.

The information alleged, in substance, that prior to July 1, 1905, the defendants, excepting the People's Ice, Storage & Fuel Company, manufactured and sold 90 per cent. of the ice used in Kansas City, Mo., and vicinity; that the People's Ice, Storage & Fuel

Company, a corporation with capital stock of \$170,000, was organized under the laws of Missouri by stockholders of the other defendants, the stock being held in trust for their respective corporations by the stockholders mentioned; that subsequently the other defendants, excepting the Central Ice Company, agreed with each other and the People's Ice, Storage & Fuel Company that for a period of three years each would sell to the latter for about cost the ice it manufactured, excepting such ice as it used in its own business, other than the ice business; that said contracts were in force and being complied with, together with further agreements that none of such defendants would sell to another than the People's Ice, Storage & Fuel Company, nor produce more ice in excess of its own needs than required by contract with the last-mentioned company, though the plants of the respective defendants had sufficient capacity to produce much more; that the Central Ice Company agreed with the other defendants to conform to a scale of prices to be agreed upon from time to time. It is further alleged that defendants were and had been complying with all these contracts and agreements; that the profits of the People's Ice, Storage & Fuel Company have been, and hereafter will be, divided among the other defendants having the beneficial interest in the stock of the company named.

It is then alleged that defendants and other unknown persons, corporations, and copartnerships constitute an unlawful trust and combination, for the purpose and with the effect of lessening and destroying competition in the manufacture and sale of ice, and of creating a monopoly in the ice business in Kansas City and vicinity.

The People's Ice, Storage & Fuel Company and the Vanderslice-Lynds Mercantile Company filed practically identical returns, denying specifically the several allegations of the information, except that each admitted the fact of its incorporation as charged, and the fact that it was engaged in the manufacture and sale of ice in Kansas City and vicinity. Each of these returns averred that there was full and free competition in the ice business in Kansas City, and each contained a paragraph challenging the authority of the prosecuting attorney to institute the proceeding.

The Kansas City Breweries Company, in its return, admitted its incorporation, but denied that it was incorporated prior to July 1, 1905, or engaged in the ice business prior to that time, and denied it was ever engaged in the ice business in Kansas City in competition with the other defendants named, or any of them; admitted its ownership of a portion of the capital stock of the People's Ice, Storage & Fuel Company, but denied it owned such stock July 1, 1905, or that it was directly interested or participated in the for-

mation of the last-mentioned corporation, and specifically denied all other allegations of the petition.

The Central Ice Company filed what it termed a motion to dismiss as to it, wherein it denied the allegations of the information affecting it and set forth several pages of correspondence and other evidence of its efforts to furnish ice for the Kansas City market, coupling with this a protest that the pendency of this proceeding will injure its credit. To this were added the affidavits of several officers and employees of the Central Ice Company as to the truth of the facts set up in the motion, and as to the company's having manufactured all the ice it could. This conglomeration was treated by the trial court as a return, and, shorn of its objectionable features, it will be so treated here.

The returns of the other defendants do not appear in the abstract, and are not important in view of the judgment entered.

The cause was referred to a commissioner, who heard evidence for several weeks, and in his report recommended judgment for all the defendants. On exception filed by the prosecuting attorney, the court set aside the referee's findings, and, on the evidence reported by the referee, rendered judgment as before indicated, and also requiring the cancellation of certain contracts, to which reference will be made hereafter. Motions for new trial and in arrest of judgment were filed and overruled, and the four defendants found guilty appealed.

The findings of the referee were based on that part of the evidence which remained after the exclusion of all evidence relating to transactions occurring prior to July 1, 1905, the date of the organization of the People's Ice, Storage & Fuel Company. The trial court, in making its findings, took this excluded evidence into consideration.

The evidence disclosed that the People's Ice, Storage & Fuel Company, capital stock \$170,000, was organized about July 1, 1905, and that it took over the assets and assumed the liabilities of the People's Ice & Fuel Company. This last-named company was incorporated in 1898. At that time (1898) the Armour Packing Company, the Ferd Helm Brewing Company, the Vanderslice-Lynds Mercantile Company, the Kansas City Ice & Cold Storage Company, the Grand Avenue Ice Company, the Woods Ice Company, the Yates Ice Company, the Fowler Packing Company, the Jacob Dold Packing Company, and the Standard Ice & Coal Company were in the ice business in Kansas City. The Woods Ice Company and the Yates Ice Company stored and sold natural ice. These seem to have been merely names under which R. W. Woods and James Yates, respectively, carried on the ice business. The Standard Ice & Coal Company was in the ice-distributing business. The others were manufacturers of ice; some of them also distributing ice with their own wagons

and teams, or selling to peddlers (persons operating one or more ice wagons of their own), who were engaged solely in the distributing or retail branch of the business. There may have been other manufacturers of ice and dealers in natural ice in the city at that time; but, if so, their output was insignificant compared with the total output of the companies named. At the time mentioned (1898) the competition in Kansas City in the ice business was so great that the wholesale price to peddlers had been cut to \$1 per ton—a sum scarcely sufficient to pay the expense of production of manufactured ice, which constituted the bulk of the supply on the Kansas City market. This, the evidence indicates, was due to competition among the packing and other companies, such as the brewing company and the Armour Packing Company, each of which consumed large quantities of ice in its own business, and ordinarily produced quantities much in excess of its daily needs by reason of the fact that its plant was equipped with ice-making machines of greater daily capacity than the needs of the company made necessary, in order to guard against the loss which would follow in its principal business in case its ice plant became temporarily or partially disabled. For this reason these companies, or some of them, maintained double plants and operated both, since to allow either part of the plant to lie idle was more expensive, on account of deterioration and loss of interest, than to operate the two and put the excess ice, thus produced, on the market.

In 1898 the Standard Ice & Coal Company, which produced no ice, but had contracted for the output of a plant on Grand avenue, and owned some natural ice, was, as stated, in the business of selling ice solely, operating about 30 wagons. N. H. Trask, Thomas Manville, George Manville, Hugo Clossen, or Claussen, and Kenneth Hudson owned all the stock of the Standard Ice & Coal Company. This company, having no other business during the warm months than the sale of ice, was among the first to feel the effects of the low prices which the competitive conditions mentioned produced. The gentlemen named conceived the idea of relieving (from their point of view) these conditions by the organization of a distributing company, the stock to be divided among the principal ice producing and selling companies in the city in proportion to the sales made by the respective companies during the preceding year. To accomplish this end, Trask "interviewed different ice men." Kirk Armour, of the Armour Packing Company, was the first man approached. W. D. Miles, then the manager of the Armour plant, was also present at a conversation with Trask and Thomas Manville in Mr. Armour's private office, and the statistics of the ice business the previous year were put before him. According to Trask, and the fact was not

denied by Miles, the latter was "invited into the room where we were and told to help form the organization and do all he could." Having proceeded thus far, the learned commissioner excluded the details of the conversations with Armour and Miles, because Armour was dead and Miles (the commissioner held) not in a position to bind any defendant in this case. It may be noted here that the Armour Packing Company is not a party to this proceeding. Joseph J. Helm, then of the Ferd Helm Brewing Company, and at the time of trial president of the Kansas City Breweries Company, was the next man before whom the plan was laid, and he, while doubting the feasibility of the plan, agreed to "enter that kind of a deal if the rest would do it." Trask next talked about the matter with O. W. Butt and A. Menny of the Kansas City Ice & Cold Storage Company; the commissioner excluding the details of the conversation. Mr. Vanderslice, of Vanderslice-Lynds Mercantile Company, was next interviewed and the plan presented to him.

The plan was to organize a central distributing company which should contract to buy the ice of the companies entering into the scheme at a price to be determined by subsequent agreement, an amount of stock to be taken by each participating company equal to the proportion the ice sold by such company the preceding year bore to the whole amount sold during that year by all the companies participating in the organization. The capital stock was to be \$20,000. The purposes were to stop the cutting of prices and lessen the expense of delivering ice, and "to eliminate unreasonable competition." Mr. Vanderslice said that the purpose of his company was to "get out of the distribution of ice," because it had proved unprofitable. Several meetings were held. One was attended by R. W. Woods, of the Woods Ice Company, James Yates, of the Yates Ice Company, Mr. Butt, of the Kansas City Ice & Cold Storage Company, W. D. Miles, representing the Armours, and Trask, Clossen, and Thomas Manville, of the Standard Ice & Coal Company. The witness also thought Mr. Helm was present. At other meetings Mr. Rittick, or Reddick, represented the Grand Avenue Ice Company, Vanderslice represented the Vanderslice-Lynds Mercantile Company, Yates, Woods, and Joseph Helm represented their respective companies, W. D. Miles represented Armours, and Mr. Butt and Mr. Menny represented the Kansas City Ice & Cold Storage Company. At the meetings mentioned there was a general discussion of the proposed plan and its purposes. It was finally agreed that a distributing company be organized for the purposes of putting an end to "unreasonable competition," stopping price cutting, and lessening the expense of distribution. The Vanderslice-Lynds Mercantile Company, the Ferd Helm Brewing Company, the Armour

Packing Company, the Kansas City Ice & Cold Storage Company, the Grand Avenue Ice Company, the Yates Ice Company, and the Woods Ice Company united in the formation of the new company. Whether others participated is not quite clear. The stock was not issued directly to the corporations entering into the arrangement, but to individuals, who held it for the several corporations. Joseph Helm, H. Vanderslice, A. Menny, O. W. Butt, W. D. Miles and J. S. Thayer, Mr. Rittick, or Reddick, Captain Woods, and James Yates were the principal stockholders and incorporators of the People's Ice & Fuel Company in 1898. Four or five of the companies participating in the organization distributed as well as manufactured and imported ice, and the wagons, teams, and other equipment used by these companies in distributing ice were turned over to the new company; about 75 per cent. of the stock being paid for in this fashion, according to Mr. Helm. By this means the companies engaged therein were taken out of the retail business, and the routes which had known them theretofore as competitors knew them no more. The company thus formed entered into contracts with the several companies which held its capital stock (owned the beneficial interest therein), whereby it agreed to take large quantities of ice from these companies. The price to be paid by the company to all was, after some discussion, fixed, by agreement of the representatives of the stockholders, at \$2 per ton. The name decided upon for the company was the People's Ice & Fuel Company. Other contracts were made with other persons and outside companies for ice, as it seemed to be needed and was obtainable.

There were some changes in the stockholdings as time progressed. The first one of importance was the sale of some stock to J. C. Dold, immediately followed by a contract for the most of the output of the Dold Packing Company ice plant at \$2 per ton, the price paid companies which originally took part in the organization. Yates sold part of his stock to A. Menny, then manager of the People's Company, a part, probably, to W. S. Pontius, connected with the same company, and part to O. W. Butt, and the stock of the Kansas City Ice & Cold Storage Company passed subsequently into the hands of the National Bank of Commerce and then to the Western Ice & Storage Company, organized by the bank mentioned to take over the Kansas City Ice & Cold Storage Company plant and its stock in the People's Ice & Fuel Company. The stock which had been held for the Armour Packing Company by J. S. Thayer was sold or transferred to W. D. Miles, who held, or had held, other shares for the same company.

In June, 1905, and for some time prior thereto, the stock of the People's Ice & Fuel Company stood in the names of H. Vander-

slice; of Vanderslice-Lynds Mercantile Company, J. J. Helm, of the Ferd Helm Brewing Company, W. H. Winants, of the Western Ice & Storage Company, R. W. Woods, of the Woods Ice Company, W. D. Miles, and A. Menny, manager of the People's Ice & Fuel Company. Some time previously these same gentlemen had acquired what was known as the Grand avenue plant, having purchased this plant for about \$30,000. Considerable improvements were made on that plant prior to July 1, 1905.

In June, 1905, the People's Ice & Fuel Company had in force several ice contracts of the kind already mentioned. Its contract of February 6, 1903, with the Vanderslice-Lynds Mercantile Company was for 29,700 tons of artificial ice at \$2 per ton, deliverable at the Mercantile Company's plant on board wagons or cars, 9,900 tons deliverable in 1903, 1904, and 1905, each. Of this annual quantity 600 tons were to be delivered in April, 750 tons in May, 1,500 tons in June, 1,800 tons in July and August, each, 1,500 tons in September, 1,050 tons in October, and 900 tons in November in each of the three years. The Armour Packing Company contract, dated February 6, 1903, covering three years, called for the delivery to the People's Ice & Fuel Company of 50,100 tons, one-third in each year for three years. The deliveries for each year by months to be as follows: January, 1,400 tons; February, 1,300 tons; March, 1,000 tons; April, 500 tons; May, 500 tons; June, 2,000 tons; July and August, 3,500 tons each; September, 2,000 tons; October, 1,000 tons. The February, 1903, contract between the Jacob Dold Packing Company and the People's Ice & Fuel Company called for the delivery in each of the three years of 14,000 tons, or a total during the three years of 42,000 tons, as follows: May, 1,750 tons; June, 3,000 tons; July, 3,250 tons; August, 3,500 tons; September, 2,500 tons. Contracts of like character, and covering about the same period, between the People's Ice & Fuel Company and other companies represented on its directorate were also entered into. Like contracts had covered the whole period from the organization of the People's Ice & Fuel Company. Among other things, these 1903 contracts provided that the failure of the People's Ice & Fuel Company to take the full annual amount contracted for subjected that company to a forfeiture of 50 cents per ton on the deficiency; and, in case that company bought ice from any company with "*which it has not a contract at this date,*" the obligation to take the full amount contracted for became absolute, and the deficiency clause did not apply. Another clause provided that, in case the People's Ice & Fuel Company made "a contract with any one to buy artificial ice at a higher price than two dollars a ton during the life of this contract, then such additional price shall be paid by said second party to said

first party for all ice *delivered or to be delivered* under this contract." These provisions did not appear in the 1906 contracts hereafter mentioned.

As stated, prior to June, 1905, the stockholders of the People's Ice & Fuel Company, which was purely a selling company, had purchased and owned the stock of the Grand Avenue Ice Company, and July 1, 1905, the defendant People's Ice, Storage & Fuel Company was organized with a capital of \$170,000. The new company took over the plant and equipment of the People's Ice & Fuel Company and the plant of the Grand Avenue Ice Company; the stock in the new company being issued to the stockholders in the old company (People's Ice & Fuel Company) in proportion to the sum of the stock held by each in the old company and the Grand Avenue Ice Company. The only important change in the charter was the addition of authority to do a storage business; the change being made necessary by the fact that Mr. Winants, of the National Bank of Commerce, a stockholder in the old company representing the bank mentioned, required that change before his bank would make loans on warehouse or storage certificates issued by the company. The new company took over all the assets, including leases on plants of other companies, and assumed all the liabilities of the old, including the ice contracts theretofore entered into by the old company, most of which had until the following February to run. There was no change in the officers or management, the same books were used, and the methods of business were identical with those theretofore employed. The employees and equipment were the same. The stockholders, organizers, and directors of the new company were those who had just previously been the nominal stockholders of the old company, except that one share each was issued to Burk, the secretary of the old and new companies, one to Marlon L. Dean, and one to A. J. Menny to qualify them for the directorate, and except that J. C. Dold, president of the J. C. Dold Packing Company, of Buffalo, N. Y., who was a stockholder in the old company, did not appear in the articles of incorporation as one of the original incorporators of the new, though he was in fact so. H. Vanderslice held 245 shares, J. J. Helm 266 shares, W. H. Winants 250 shares, R. W. Woods 259 shares, W. D. Miles 281 shares, and A. Menny 396 shares; total, 1,697 shares, which, with the 3 shares previously mentioned, totaled 1,700 shares, representing the capital stock of \$170,000. Helm held his shares for the Kansas City Breweries Company, Winants for the Bank of Commerce, Vanderslice (and subsequently Lynds) for the Vanderslice-Lynds Company. The assets of the People's Ice & Fuel Company were taken over at a valuation of \$100,000 and the Grand Avenue plant at a valuation of

\$70,000. Immediately after the incorporation of the new company, Winants transferred 240 shares to the National Bank of Commerce; A. Menny transferred all of his shares, except 164; Vanderslice transferred 128 shares to J. H. Lynds, of the Vanderslice-Lynds Mercantile Company; 227 shares were transferred to J. C. Dold; H. L. Burk, manager of the company, some time prior to July, 1906, acquired 7 more shares. Dean disappeared as a stockholder, and Wood and Miles retained their original holdings. In February, 1906, at the expiration of the several 1903 contracts of the People's Ice & Fuel Company (the old company), which had been assumed and carried out by the People's Ice, Storage & Fuel Company (the new company), new contracts were entered into.

The Kansas City Breweries Company, which, in the fall of 1905, had succeeded and carried out the contract of the Ferd Heim Brewing Company, as well as purchased the stock the latter had held (in the name of Mr. Heim), first in the People's Ice & Fuel Company, and then in the People's Ice, Storage & Fuel Company, entered into a contract with the last-named company, dated February 26, 1906, whereby it agreed to furnish that company 11,330 tons per annum for three years at \$2 per ton, 500 tons in February, March, and April, each, 680 tons in May, 1,150 tons in June, 2,250 tons in each of the months of July and August, 1,500 tons in September, and 1,000 tons in October and November, each, amounting to 11,330 tons each year of the three years, or a total of 33,990 tons, all artificial ice. The Vanderslice-Lynds Mercantile Company entered into a like three-year contract, dated February 16, 1906, whereby it obligated itself to furnish a total of 83,000 tons, 11,000 tons per annum, 500 tons in March, 600 tons in April, 850 tons in May, 1,500 tons in June, 1,800 tons in each of the months of July and August, 1,500 tons in September, 1,050 tons in October, 900 tons in November, and 500 tons in December, of each year. The Jacob Dold Packing Company entered into a like contract, dated February 9, 1906, contracting to deliver 16,300 tons in 1906 and 15,000 tons in 1907 and 1908, each, 2,500 tons in May, 1906, and 2,000 tons in May, 1907 and 1908, 3,300 tons in June, 1906, and 3,000 tons in June, 1907, and June, 1908, 3,500 tons in each of the months of July and August in all three years, 3,500 tons in September, 1906, and 3,000 tons in September, 1907 and 1908; total, 46,300 tons.

The Consolidated Light, Power & Ice Company of Joplin also entered into a contract, dated March 20, 1906, to deliver to the People's Ice, Storage & Fuel Company, between the date of the contract and September 1, 1906, time of delivery at the option of the latter, 2,500 tons of ice at \$4 per ton f. o. b. Kansas City.

The Interstate Ice & Cold Storage Company, of which Thomas P. Ruddy was president, contracted, under date of February 28,

1906, to deliver f. o. b. wagon or cars at its plant in Kansas City, Kan., 5,520 tons of ice at \$3.25 per ton, 900 tons in the last half of June, 1,860 tons in July and a like amount in August, and 900 tons in the first half of September, all to be delivered in 1906. The deliveries under this contract had not commenced July 15, 1906, the plant of the Interstate Company having been undergoing enlargement which the contract contemplated, and which had not been completed.

The Santa Fé Car Icing Company was also under contract, dated June 29, 1906, to deliver 7,000 tons of ice f. o. b. cars at its plant in Argentine, Kan., at \$3.50 per ton, the whole amount to be delivered by September 15, 1906, not more than 3,500 tons in any one month.

The People's Ice & Fuel Company had, in 1905, acquired a 10-year lease on the plant of the Western Ice & Cold Storage Company plant, which lease was, July 3, 1905, assigned by it to the People's Ice, Storage & Fuel Company. The latter, in January, 1906, secured a lease for five years on the plant of the Westport Crystal Ice Company, of Kansas City.

In 1905, and at the time of the trial, the capacity of the Ferd Heim Brewing Company's ice plant was about 110 tons per day, when run at full capacity, and the brewing company itself on some days, as early as 1898, required as much as 50 tons, and on others practically none; Mr. Heim stating that there was no method by which he could arrive at the average daily requirements of the brewery company.

The capacity of the Vanderslice-Lynds Mercantile Company's ice plant at the same times was somewhat less than 75 tons per day in hot weather. The amount of this output required for that company's own needs, if any, does not appear.

The capacity of the Jacob Dold Packing Company's plant was nearly 125 tons per day, when in running order. The entire actual output during May, June, and in July to the time of the hearing (except 28 tons sold to the National Packing Company) was sold and delivered to the People's Ice, Storage & Fuel Company; the deliveries in May exceeding the requirements of the contract by more than 100 tons.

The Grand Avenue plant, owned by the People's Ice, Storage & Fuel Company, had a capacity of 60 or 65 tons per day. The plant of the Western Ice & Storage Company, leased to the People's Ice, Storage & Fuel Company, had a capacity of 100 tons per day, and new machinery, about ready for use at the time of the hearing, increased that to 175 tons per day. Taking into consideration all the ice sold by the People's Ice, Storage & Fuel Company, the average per day for the entire year was about 197 tons, the daily average from June 15th to September 15th was about 578 tons, and the daily average during July and August some

what more than that figure. Of the total the People's Ice, Storage & Fuel Company owned or leased plants with sufficient capacity to produce about 180 tons per day, exclusive of the 100-ton addition to the plant of the Western Ice & Storage Company.

Excepting the original respondents in this case, the companies making ice in Kansas City and vicinity were the Crystal Springs Ice Company, Kansas City, Kan., capacity 50 tons per day; the Leeds Ice plant, capacity 30 tons per day; the Armour Packing Company, 150 tons per day; the Santa Fe Car Icing Company, 140 tons per day, located at Argentine, Kan., the Independence plant, Independence, Mo., capacity 50 tons. The first-named company also handled about two cars (40 tons) of ice from Galena, Kan.; and the Leeds Company handled a car per day from Paola, Kan. The Swift Packing Company was installing a 200-ton plant, and the Morris Packing Company made about 100 tons per day; but neither was selling ice on the Kansas City market at the time of the hearing.

The evidence also disclosed that what was called "the ice season" extended from about June 15th to September 15th of each year, during which time the demand for ice was enormous. The natural ice crop in the vicinity of Kansas City in the winter of 1905 and 1906 was a failure. The Armour Packing Company, which usually stored 80,000 tons or more of natural ice, was unable to store any, and, consequently, for use in its own business, was relying upon the artificial ice from its plant. Neither that company nor R. W. Woods, one of the stockholders of the People's Ice, Storage & Fuel Company, and a dealer in natural ice, entered into any contract with the People's Company in 1906. As Mr. Woods testified, he "had nothing to sell." None of the respondents, save the People's Ice, Storage & Fuel Company and the Central Ice Company, delivered ice by wagons on regular routes, though Vander-slice-Lynds sold ice to three or four peddlers, who operated their own wagons, and who had bought from that company from the time it began the manufacture of ice. The only other companies operating wagons on the streets were the Crystal Springs Company of Argentine, Kan., which appears to have operated wagons in Kansas City, Kan., the Standard Ice Company, under which name the Leeds plant, some three to five miles out of the city, was operated, and possibly the Interstate Ice & Cold Storage Company had operated some wagons a while. Some other companies sold ice to peddlers at times; but it is not made clear what amount of ice reached the daily market by this channel.

The Central Ice Company, one of the defendants, was shown to have a capacity of 350 tons per day at the time of the hearing, and it also shipped in ice from outside sources. It operated wagons of its own, and

also sold to peddlers, who ran their own wagons.

In March, 1906, the price of ice in Kansas City to peddlers and distributors, uniformly made by all producers and importers, was \$3 per ton. On the 1st day of April this price was raised by all to \$4 per ton, and on May 1st it was again uniformly raised by all to \$5 per ton. On the 23d of June this proceeding was instituted. The retail prices were raised to conform to the increase in the price made the peddlers. Notices of uniform increases on April 1st and May 1st were mailed out some days in advance by the People's Ice, Storage & Fuel Company and the Central Ice Company to their respective customers; the peddlers or drivers for each company getting their notice of the increase in the wholesale and retail prices from the company direct, or from the weighmaster at the plant at which they obtained ice, and the peddlers operating their own wagons getting their information, often, when the increased price was exacted of them. These last conformed their retail prices to those of the People's and Central Companies, which were identical and conformed to the notices sent out. There had been no scarcity of ice in 1906 to explain the increase in prices; and some of the plants of the companies named had not been, prior to the hearing in July, run at their full capacity all the time. The officers of defendants explained the increase as due to the failure of the natural ice crop and the consequent change in the ratio of the demand to the supply of artificial ice.

The Central Ice Company and the People's Ice, Storage & Fuel Company furnished about 75 to 90 per cent. of the ice used in the Kansas City market, excepting that consumed by large plants, which, in the main, made their own ice.

The Central Ice Company was organized about 1902 or 1903 by W. F. Lyons, who became its president, principal owner, and, it seems, manager. He had full control and charge of the company's business, as his own testimony clearly indicates. This company furnished no ice to the People's Ice, Storage & Fuel Company, but had 27 or 28 wagons of its own, which it used in delivering ice. It also sold ice to about 30 or 35 peddlers, who used their own wagons in delivering. The People's Ice, Storage & Fuel Company operated 57 or 58 ice wagons of its own, and also sold to about 65 or 70 peddlers, who delivered in their own wagons. Some of these peddlers operated more than one wagon. Most of them—nearly all of them—procured their ice supply from the People's Ice, Storage & Fuel Company or the Central Ice Company. All of them conformed to the retail prices made by the People's and the Central Companies, except in a few isolated sales. O. W. Butt, formerly of the Kansas City Ice & Cold

Storage Company and one of the organizers of the first distributing company, the old People's Ice & Fuel Company in 1898, testified that the People's Ice & Fuel Company and the Central Ice Company, after it was organized, entered into "a gentlemen's agreement to be good to each other." The representatives of the People's Ice, Storage & Fuel Company, "had several talks with Mr. Lyons, representing his company, and it was agreed" that "each should respect the others customers;" and it was also agreed that "a usual and uniform price" should be maintained and the two sell at the same price. Butt further testified that in the fall of 1905 or spring of 1906 he contemplated buying into the Central Ice Company, and that Lyons, its president, during the pendency of their negotiations, made a general statement of the financial condition of the company. During the discussion Butt asked Lyons how he "was going to conduct the general business now," and whether he was still "maintaining those prices." The witness testified "he said 'Yes,' they were still working along under the same arrangement."

O. P. Street was engaged in the ice business in Kansas City in 1905, dealing principally in natural ice. A. J. Morris and H. R. Clauss were associated with him, and the business was done under the name of the Consumers' Ice Company. This company procured a small supply of artificial ice from Galena, Kan. (Street being interested in an ice company there), and Pittsburg, Kan. The principal part of their ice was natural ice from Moline, Ill. The Consumers' Ice Company began their 1905 business in May, 1905, and made a price to peddlers of \$3 per ton. At this time the People's Ice & Fuel Company (the old distributing company), the Central Ice Company, and practically all, if not all, other ice companies, except the Imperial Brewing Company, were maintaining a price of \$3.50 per ton to peddlers. In the early part of May, 1905, Street had a conversation with A. Menny, the manager of the People's Ice & Fuel Company, at his office, concerning the price of ice in Kansas City for 1905; but the details of this conversation were excluded by the learned commissioner. Street testified that in June Lyons, president of the Central Ice Company, visited the office of the Consumers' Ice Company and took up the question of the prices of ice. He made inquiries of Street, Clauss, and Morris as to whether it "would be agreeable to" them to advance prices to \$3.50 for natural ice and \$4 for artificial ice. Lyons stated that he had been in consultation with the People's Company. Street's company deferred giving a definite answer, and Lyons visited them again, and was told the Consumers' Ice Company had decided not to advance prices. Later, about June 20th, or 25th, Lyons again approached the members of the Consumers' Ice Company and told them

they "had one more opportunity to advance prices." He was very anxious to secure an agreement to make the advance, but was told that the Consumers' Company did not look upon the proposal with favor; but a final conclusion would be reached in a few days. That answer was a refusal to enter into the agreement for the advance. Lyons took the matter up with Street thereafter, deploring the fact that prices were not *higher*, and finally stated that if the Consumers' Ice Company did not agree to the advance "there certainly would be *lower* prices for ice." A few days thereafter, and about June 25th or 28th, the Central Ice Company and the People's Ice & Fuel Company did cut the price to \$2 per ton for natural ice and to \$2.85 per ton for artificial ice, and these prices were maintained until the Consumers' Ice Company failed, about 60 days later. The evidence showed that the Consumers' Ice Company's natural ice cost it \$2.25 to \$2.50 per ton f. o. b. Kansas City, and that the artificial ice it handled was almost a negligible quantity. These facts were testified to by Street, and Lyons, recalled, admitted having frequent conversations with Street and his associates, admitted stating that they were selling ice too *low*, denied endeavoring to arrange any advance on the part of the Central, the People's, and the Consumers' Companies, but did not deny cutting the prices as Street testified.

Dr. Henry Croskey testified to a conversation with W. F. Lyons, president of the Central Ice Company, in April, 1906, in which he asked Lyons what effect the hot weather would have on ice. In the language of the witness: "He says: 'Well, it is going to raise the price.' I says: 'Why, you can manufacture it for 90 cents or \$1.25.' 'Yes,' he says, 'but there is no money in that.' He says: 'You can't buy any natural ice, and you have to depend on artificial ice. Of course, we are going to make something out of it.' I said: 'Well, it will not affect me much. I have been buying my ice from Murphy for eight years. I have only been paying him 30 cents a hundred, and, of course, Murphy will not raise it on me.' He says: 'Yes, indeed, he will, because I have already raised it on him—the price of ice. We will raise it again, and we will have to charge him more for it.' I says: 'If Murphy is going to charge me more than that, I am going to look around for somebody to buy ice from.' He says: 'That will not do you any good either, because *we all intend* to raise the price of ice, and you cannot get it any cheaper.'"

Lyons admitted having a conversation with Dr. Croskey at the place Croskey named, but said it occurred in May of 1906. Lyons detailed the conversation as follows: "He called across the corner to me, and said, 'Have you raised the price of ice, too?' I said: 'Yes; I have.' 'Well,' he says, 'what is your

reason for raising the price of ice?" I told him on account of the hot winter and scarcity of the product. He says: 'I don't believe Murphy will raise on me. I have been buying from him a great many years,' or a 'good long time.' I don't remember that he stated eight years or any definite period. He told me he had been buying from him for some time, and that he didn't believe Murphy would raise his price. He said his price was 30 cents a hundred. I said to him: 'Neither he nor any one else can furnish you that ice at that price this year, if we should have a hot season—if we get a warm season. On account of the conditions of the ice market to-day, men who are now manufacturing ice will be glad to get it at 30 cents a hundred in car load lots. I have already raised my price on Mr. Murphy, and expect to have to do it again.' He commenced talking to me about everybody going in and raising the price, and I just finished my dinner and got up and left."

Mr. Joseph Helm testified that the Kansas City Breweries Company had no agreement with any one as to the amount of ice it should make, nor any agreement as to the price at which it should sell. Mr. Vanderslice gave like testimony as to the Vanderslice-Lynds Mercantile Company. Neither of these gentlemen, nor any other, however, though both of them and Mr. Miles seem to have been present at the time, denied the testimony as to the original purposes of the formation of the People's Ice & Fuel Company as detailed by Butt and Trask. There was evidence that the Breweries Company and the Vanderslice Company sold ice to others than the People's Ice, Storage & Fuel Company, but not to peddlers, except as already stated. The quantity of ice sold at retail and to retailers by these companies was practically negligible. H. L. Burk was the secretary of the People's Ice, Storage & Fuel Company, and, according to his own uncontradicted testimony, the whole power to fix prices of ice was in his hands. He consulted no one, in or out of the company, but made prices as he pleased. He originally (July 1, 1905) had one share of stock, but before the hearing had acquired seven more, he testified. The testimony of the officers and directors of the company tended to corroborate Burk as to his control of prices. Lyons testified he generally conformed his (Central Ice Company's) prices to those made by the People's Ice, Storage & Fuel Company; that he watched their prices, and when they advanced the price he did likewise. He said that on one occasion he made price "downtown \$7 a ton and collected the money for the ice"; that he "thought was going to be the regular price," but found it was not, but that "it was \$6 instead of \$7," and had to refund the difference. It also appeared that as the price to peddlers was advanced the prices to consumers were also advanced; these prices being graduated on a scale depending

upon the daily requirements of the customer. The price (after May 1, 1906), delivered in wagon load lots (5,000 pounds), was \$5.50 per ton; less than 5,000 pounds, and a cake (300 pounds) or more, \$6 per ton; less than a cake, to business houses, at the rate of \$7 per ton; to families, \$10 per ton. These prices, prior to May 1, 1906, had been, respectively, at the rate of \$4.50, \$5, \$6, and \$8, per ton. The prices of the People's and the Central Companies were identical in point of time and amount.

[1-3] 1. The action of the circuit court in referring the case is assigned for error. It is not necessary for us to follow counsel through the authorities cited upon the question of the referability of this proceeding, for the reason that the referee was appointed at the June, 1906, term of court, and no term bill of exceptions was filed; nor was leave taken at that term to file such a bill for the purpose of preserving exceptions to the court's action. The recital in the bill filed by leave given at a later term cannot avail to save the point. *Smith v. Baer*, 166 Mo. loc. cit. 401, 66 S. W. 166; *Dean v. Railroad Co.*, 229 Mo. loc. cit. 439, 440, 129 S. W. 953; *State v. Bonner*, 5 Mo. App. loc. cit. 16. Neither do the objections made before the referee at the beginning of the taking of testimony before him furnish any support for this assignment. Objections on this head must be made at the time of the appointment, and made to the court itself. The referee, or commissioner, as he was dubbed in this case (*Peabody v. Munson*, 211 Ill. loc. cit. 326, 71 N. E. 1006), has no more power to set aside his appointment, on the ground that the cause he is about to hear is not referable, than he has to appoint himself referee in the first place.

It may also be observed here that the action of the trial court in overruling the motion to set aside the appointing order and the motion to strike out the testimony, on the ground that the case was not referable and consent had not been given, all of which motions were filed after the report was in, is in full harmony with principles heretofore laid down. *Young v. Powell*, 87 Mo. loc. cit. 130; *Conley et al. v. Horner et al.*, 10 Okl. loc. cit. 278, 62 Pac. 307.

[4] 2. An exception not properly preserved is no exception at all. Consequently this record presents a case in which the trial court referred the issues, at the relator's instance, without exception being taken. It was too late after the report was filed to move for trial by jury (*Smith v. Baer*, supra, 166 Mo. loc. cit. 402, 66 S. W. 166; *Grant v. Hughes*, 96 N. C. loc. cit. 189, 2 S. E. 339); and consequently the right to such trial in a case of this kind is not presented by this record.

[5] 3. After the report of the referee and relator's exceptions thereto had been on file some six months, and the exceptions had

been argued, submitted, taken under advisement, and sustained, and partial findings of fact and conclusions of law, so the record recites, had been filed by the court below, appellants, on May 14, 1907, the day the order sustaining the exceptions was finally made, filed seven separate motions to strike out all or certain parts of the evidence taken by the referee. Two of these motions were filed by the People's Ice, Storage & Fuel Company, one to strike out all the evidence, and one to strike out merely that part of the evidence relative to the organization of the People's Ice & Fuel Company, and to the objects and purposes of such organization. These motions were overruled and exceptions taken. Thereafter, and at "11 o'clock a. m." on the same day, the People's Ice, Storage & Fuel Company filed its application for change of venue, on the grounds of the bias and prejudice of the judge against it. The application was signed by the applicant's counsel, and was sworn to by its secretary, H. L. Burk, on May 13, 1907, the day before the application was presented, and before the several motions mentioned were filed and disposed of. No notice of the intended presentation of the application was given the prosecuting attorney until immediately at the time the application was filed. Under such circumstances the trial court's ruling refusing a change of venue could not be disturbed (*St. L. C. G. & Ft. S. Ry. Co. v. Holaday*, 131 Mo. loc. cit. 452, 453, 33 S. W. 49), even if it could be conceded (which it is not) that the general rule that a case cannot be cut in two by a change of venue after the filing of a referee's report (*Woodrow v. Younger*, 61 Mo. 395) is inapplicable, in view of the peculiar facts of this case.

4. Despite the fact that the circuit judge set aside the referee's report and made findings of fact of his own, it is insisted that the judgment, based on the court's findings, must be reversed if there is any substantial evidence in the record supporting the findings of the referee.

(1) This is not a reference by consent; and consequently the rule in such references with regard to the finality of the referee's findings of fact (*Caruth-Byrnes Hardware Co. v. Wolter*, 91 Mo. 484, 3 S. W. 865; *State ex rel. Walker v. Hurlstone*, 92 Mo. loc. cit. 332, 5 S. W. 38) is not applicable to this case.

[6] (2) Nor is the rule applicable in references in suits in equity applicable here. Proceedings by information in the nature of quo warranto, not instituted under the statute, owe their origin to the common law (*High on Extr. Legal Remedies*, § 593; *State ex inf. v. Standard Oil Co.*, 218 Mo. loc. cit. 345, 116 S. W. 902; *State ex rel. v. Rose*, 84 Mo. loc. cit. 202; *State ex rel. v. Miller*, 1 Mo. App. 57, 67, 68); and equitable rules, generally speaking, are not applicable to them. The information, rule issued thereon, and relief granted are not consistent with any contention that this proceeding is other than

an ordinary proceeding by information in the nature of quo warranto. The case was tried below on that theory, and in their briefs and arguments here appellant's counsel adhere to the trial theory. There is no contention that the proceeding is one in equity, but the contrary.

[7] We agree with the view of the trial court and counsel on both sides that this is a proceeding by information in the nature of quo warranto, despite the presence in the information of a prayer for an injunction. The remedy by injunction, if any exist, to restrain corporations from continuing unlawful combinations and that by quo warranto are wholly inconsistent and cannot be prosecuted to judgment at the same time, even separately (*Attorney General v. Railroad Companies*, 35 Wis. loc. cit. 595, 596) for obvious reasons. Quo warranto goes to the life of the corporation informed against; while a proceeding to enjoin is necessarily predicated upon an anticipation of the continuance of the defendant's corporate existence.

There are reasons, also, to question the right of a prosecuting attorney, in 1906, to institute injunction proceedings under the statute then in force (section 8979, R. S. 1899), except by direction of the Attorney General (of which there is no pretense in this case); and certainly he could not proceed outside the statute, in a case of this kind, by injunction against corporations whose business was not affected with a public interest. (*McCarter v. Insurance Co.*, 74 N. J. Eq. 372, 73 Atl. 80, 414, 29 L. R. A. (N. S.) 1194, 135 Am. St. Rep. 708, 18 Ann. Cas. 1048; *Cook on Corporations*, § 635.

[8] It is not necessary to elaborate these suggestions, however, since the case was tried below and heard here upon the theory that it was purely a proceeding by information in the nature of quo warranto, and on that theory it must be decided by us. The rule in equity, therefore, with respect to weighing evidence, is inapplicable.

[9] (3) Nor can we apply the rule laid down by the statute (section 2013, R. S. 1909) for the government of those cases in which the report of the referee was approved by the trial court, for the obvious reason that the report in this case was not approved, but exceptions thereto sustained and independent findings made by the court.

[10, 11] (4) The question which confronts us in this case really is as to what presumptions support the findings of the trial judge, made on the evidence after the referee's report has been set aside in the exercise of the court's unquestionable discretion so to do (*Utley v. Hill*, 155 Mo. loc. cit. 276, 55 S. W. 1091, 49 L. R. A. 323, 78 Am. St. Rep. 569) in a case referred by compulsion. For the purpose of determining this question, we must, since no exception to the reference was saved, so that it can be con-

sidered here (Smith v. Baer, 166 Mo. loc. cit. 401, 66 S. W. 166; Tinsley v. Kemery, 170 Mo. loc. cit. 318, 70 S. W. 691), treat the case as one compulsorily referable. In such cases it is the settled law of this state that the trial court "may act upon the report of the referee and find therefrom different conclusions of fact from those reported by the referee." Utley v. Hill, 155 Mo. loc. cit. 276, 55 S. W. 1104, 49 L. R. A. 323, 78 Am. St. Rep. 569.

Once, at least, this division has expressed itself directly upon the point. In the case of Utley v. Hill, 155 Mo. loc. cit. 258, 55 S. W. 1097, 49 L. R. A. 323, 78 Am. St. Rep. 569, it was said that the finding of the trial judge in sustaining exceptions on conflicting evidence, when assailed in this court as against the weight of the evidence, would not be reviewed, "because it is the settled practice of this court not to review conflicting evidence, nor to review the rulings or findings of the trial courts on such evidence."

It is true that the evidence was not before the court, and the point need not have been discussed. The fact that the remark quoted was obiter does not, however, deprive it of all its value.

In the case of Williams v. Railway Co., 153 Mo. loc. cit. 511, 54 S. W. 697, it was held by Division No. 2 of this court that in case of a conflict between the findings of the circuit court and the referee the presumption in this court was "in favor of the judicial action of the circuit court, whose duty and prerogative it was, in a case like this, to examine the report of the referee in the light of the evidence and affirm or reverse his action." The court declared that rule to be "in harmony with our practice in reviewing the granting or refusing of new trials," and held that "the presumption is in favor of the action of the trial court; and it is *only where we find it has abused its discretion do we interfere with its judgment.*"

In the case of Smith v. Baer, 166 Mo. loc. cit. 406, 407, 66 S. W. 170, it was said that, "under the Constitution, this court has a right to review the facts, as well as the law, in any case, however it may have been tried; but it has not been its practice to do so, except in extreme cases, in actions at law, for the reason that experience has shown that it was not necessary to do so to insure a proper administration of justice. * * * This court always looks into the record, when requested, and the point properly made in the lower court, far enough to see whether there is any substantial evidence to support a finding of fact, by *whosoever that finding is made*; and this is as far as experience shows that it is necessary, ordinarily, to go."

[12] In Caruth-Byrnes Hardware Co. v. Wolter, 91 Mo. 484, 3 S. W. 866, the reference was by consent, and the question presented there was wholly different from that appearing for solution here. Nevertheless the

court in that case, in discussing the finality of the referee's findings of facts, said: "Under the present statute, the constant practice in a large class of cases is for the courts to review the findings of the referee upon the evidence reported by him, and to correct the findings when erroneous. When the evidence is preserved, these findings may be reviewed and corrected on appeal to this court." The question presented in that case was as to the power of the circuit court to revise the referee's findings in a case referred by consent; and what is said with respect to findings in other classes of cases is not so authoritative as what is said on the point actually before the court for decision. The cases cited in support of the holding quoted do not support it, if it is to be interpreted as laying down a rule that this court will set aside the findings of the trial court in this sort of a case merely on the weight of the evidence. Two of the cases cited were equitable in their nature, and in the other the trial court had merely referred the report of a receiver, and the questions reviewed in this court in this last were rather of arithmetic and law than of fact in the ordinary sense. Certainly a finding of fact, based on a mere mathematical computation, is reviewable, since any other finding than a correct one has no evidence to support it.

But the question before the court in Caruth-Byrnes Hardware Co. v. Wolter was the right of the circuit court, in a case *referred by consent*, to make findings contrary to those of the referee and render judgment thereon. Nor did the court in that case lay down any rule that it would examine and pass upon conflicting evidence in a case like that now at bar and make its own findings in accordance with its own views of the weight of the evidence. It was merely held that findings of the trial court, contrary to those of the referee, might be "reviewed and corrected on appeal."

It is to be noted that the remark there made seems as applicable to the review of the findings of the referee, which have not been "corrected" by the trial court, as to those which have. The premises considered, we conclude that the Wolter Case is not an authority for the proposition that this court will weigh conflicting evidence in a case of this kind. That the language used in that case is not out of harmony with the rule laid down in Williams v. Santa Fé Ry. Co., *supra*, is shown by the fact that in the latter case the Wolter Case is cited in support of this court's power to review the court's findings of facts. 153 Mo. loc. cit. 495, 511, 54 S. W. 689.

In West v. Bank, 110 Mo. App. 496, 85 S. W. 603, the St. Louis Court of Appeals had before it the question whether the findings of fact by the trial court, after sustaining exceptions to the referee's findings, ought to be upheld, and Judge Goode, in concluding

an opinion in which the Court of Appeals gave its reasons for refusing to interfere, said (speaking of a contested item): "The evidence in regard to this item leaves a doubt in our minds as to what the truth is; hence we do not feel justified in interfering with the finding below."

[13, 14] In an action at law tried before the court, the rule which affirms the finality of the trial court's findings of facts is no less applicable to cases in which the testimony is wholly by deposition than to any other. Nor does the fact that one judge hears the evidence and another decides the case on the transcript thereof affect the rule. *Handlan v. McManus*, 100 Mo. loc. cit. 128, 129, 13 S. W. 207, 18 Am. St. Rep. 533. In case of a reference of the kind before us, "the referee's power is limited to recommending judgment. The duty and responsibility as to the judgment rest upon the court. The reference can aid, but not blind, the judge." *Utley v. Hill*, 155 Mo. loc. cit. 277, 55 S. W. 1104, 49 L. R. A. 323, 78 Am. St. Rep. 569. If this court is to weigh the evidence in a case of this kind merely because the trial court acted on written evidence alone, then, also, must we, to be consistent, pass upon the evidence in all actions at law tried to the court on depositions and overrule the cases holding that we will do no such thing. By establishing such a rule we can incur our reports with the consideration of matters which can have no possible value as precedents. We do not think it wise to encourage appeals to this court on mere questions of fact in actions at law, regardless of the method pursued in determining such questions below.

In discussing a question like that here presented, and which arose under a statute somewhat similar to our own, the Supreme Court of Oregon, in *Liebe v. Nicolai*, 30 Or. loc. cit. 372, 373, 48 Pac. 174, 175, said: "From this it would appear that the power of the court to set aside the findings of a referee is not limited to a question as to the sufficiency of the evidence to justify the conclusion reached by him, but, in our judgment, extends to all the causes prescribed by the statute for setting a verdict aside; and, if the referee's findings were, by statute, made special verdicts upon the issue, instead of being deemed and considered as such, the power of the court to set them aside could not be reviewed on appeal, except for an abuse of discretion; and hence the question is narrowed to a consideration of the legal effect of the court's modification of a referee's finding. If the court, upon setting aside such a report, took the evidence anew, and found therefrom the facts, and determined the law itself, a judgment given thereon, supported by any evidence, ought not, on principle, to be subject to review on the facts; but when the court, from a mere examination of the evidence taken

and reported by the referee, reaches a conclusion different from that officer, it may be conceded that the variance is not the result of superior advantages possessed by the court, for it does not possess the opportunity afforded the referee of seeing the witnesses as they appeared upon the stand, or of observing their tone, manner, and bearing while giving their testimony. It might appear to us, from the examination of a bill of exceptions, that the findings of fact made by the trial court were opposed by the great weight of evidence, yet by reason of its intimate knowledge of the parties, and its ability to note the peculiarities of the witnesses, which can never by any means be made a part of the record, its conclusions of fact must necessarily be presumed to have been carefully reached. It is the application of this rule that prompts the trial court to affirm the report of a referee, although it might have reached a different conclusion from an examination of the evidence reported; but to say that the findings of fact made by a referee are entitled to greater consideration than the conclusions reached by the trial court, after an examination of the evidence, is to concede that, while the court possesses power to set aside such report, its action in that respect is nugatory on appeal, unless its findings are supported by a preponderance of the evidence. Such seems to have been the rule adopted in *Merchants' Nat. Bank v. Pope*, 19 Or. 35, 26 Pac. 622, for the learned Chief Justice, in commenting upon the facts, says: 'I have examined the evidence as to the amount of commissions which the said firm was to receive upon the shipment and sales of the oil and fish, and am of the opinion that the circuit court very properly made the reduction in the amount found to be due by the referee.' The effect of such a rule, if applied to an appeal from a judgment in an action at law in which the court had set aside the findings of a referee and reached conclusions of its own from a mere inspection of the evidence reported, would be to deprive the findings of the court of all presumptions of regularity which may be invoked in their favor, and the cause would come here for trial *de novo*, as in equity cases."

And the court further said in the same case: "The trial court not only possesses the power to set aside the report of a referee, but upon doing so its findings of fact, although derived from an inspection of the evidence so reported by the referee, is, in our judgment, a new trial by the court, and, as such, the findings so made are entitled to every intendment and presumption that could be invoked in their favor, if made upon an original trial by the court. To reach a different conclusion would be equivalent to a holding that the trial court, on setting aside the findings of a referee, must

hear the testimony, and take the evidence anew, before it could reach a finding of fact of its own; and, as the statute has not prescribed such a mode, we cannot think a procedure of this kind necessary, in order to give to the findings and judgment that presumption of regularity to which it is entitled, and must therefore hold that the duty of the referee is to advise the court, when so ordered, but that the power appointing him may disregard his counsels, and make its own conclusions from the evidence submitted. Having reached this conclusion, it only remains to be said that, while the evidence is conflicting upon this subject, there is, nevertheless, some testimony that tends to support the court's findings."

This ruling was made on a statute which provided that the referee's report, when made, should, in the consideration of exceptions thereto, stand as the verdict of a jury; whereas, in this state, the statute gives the effect of a verdict to the report only when it has been *approved* by the trial court.

Judge Brewer, in the case of *Owen v. Owen*, 9 Kan. 91, took occasion to compare the positions of the trial and appellate courts, with respect to the matter of passing upon the report of a referee, as follows: "Counsel claims that, inasmuch as the judge of that court does not see the witnesses who appear before the referee, does not hear them testify, nor know in what manner their testimony is elicited, his judgment can be based only upon the record of that testimony. Hence the report of the referee should stand, unless a great preponderance of the evidence is against it. He further claims that this court has the same opportunity as the district court of weighing correctly the evidence; and that therefore, unless the great preponderance of the testimony seems to us against the report, we should reverse the order of the district court setting aside the report, and direct its confirmation. These rules, applied strictly, would make the approval or disapproval of the report of the referee by the district court a mere matter of form, purely a work of supererogation. We do not so understand the effect of the action of the district court. We think the district court should not set aside the report of a referee as against the evidence, unless it clearly appears to him that the referee has failed to give due consideration to some of the testimony, and that a strong preponderance of the testimony is against the report. He will presume that the referee has given due weight to all the evidence, and that his conclusions therefrom are correct. He will be slow to interfere with those conclusions. But if he is convinced of the error of that report, and orders it set aside, such judgment of the district judge should and will carry great weight with this court; for he is in a bet-

ter position than we are to determine as to the correctness of the referee's conclusions. The parties to the suit he may know; the witnesses may have been before him in other trials; or he may have heard their testimony on motions in this case. He may understand peculiarities in the mind of the referee which would cause certain kinds of testimony to have undue weight with him. He may be cognizant of personal friendships or antipathies between the referee and the parties, or counsel. He will probably be aware of any difference between counsel in the manner of eliciting testimony, in their adroitness in presenting and withholding evidence. In short, being nearer to the parties and the proceedings, he is more apt to know whether the report of the referee expresses the absolute truth. And when he has acted upon the report we shall not ignore that action, and consider the report as though made originally to this court."

These remarks were made in considering a question somewhat different from that under consideration here, but are valuable as indicating the views of a great jurist upon the reasoning which lies at the foundation of appellant's contention on the point being discussed.

In South Carolina it is held (*Gregory v. Cohen*, 50 S. C. loc. cit. 511, 27 S. E. 920) that the Supreme Court will not weigh the evidence in passing upon the correctness of the findings of the circuit court, made after exceptions to a referee's report have been sustained. The Constitution of that state, however, limits the Supreme Court to the correction of errors of law in appeals in actions at law.

In the case of *Merchants', etc., Nat. Bk. v. Kern*, 193 Pa. 67, 88, 44 Atl. 335, the Supreme Court of Pennsylvania held that the findings of the common pleas court, after setting aside the report of a referee, could be overturned by "nothing but a clear conviction that the court had erred." The findings of the referee in that case were out of accord with the verdict of a jury on a previous trial.

In North Carolina it is held, unhesitatingly, that the findings of the circuit court "reversing the findings of the referee" cannot be disturbed if there is any evidence to support them. *Baggett v. Wilson*, 152 N. C. 182, 67 S. E. 479.

Certain decisions under statutory provisions differing materially from ours, as in Wisconsin, New York, Iowa, and, in some instances, Pennsylvania, are not in point on either side of the question, and need not be discussed.

The rule laid down in *Utley v. Hill*, supra, is thus found to have the support of authority in and out of the state; and a careful investigation fails to disclose a well-considered decision in point which holds the contrary.

[15] Were there not express authority given the circuit court to hear, as a court, cases in which juries have been waived, its findings of law and fact, and judgments, could not, on appeal, be reviewed at all, since the judge would in that case act rather as an arbitrator. *Boogher v. Insurance Co.*, 103 U. S. loc. cit. 96, 97, 28 L. Ed. 310. Under the laws of Missouri the referee's findings of fact cannot be said to have been judicially made until approved by the trial court (103 U. S. 97, 28 L. Ed. 310; section 2013, R. S. 1909); and the findings of the court in cases in which the referee's findings have been set aside are the only findings in the case which have been *judicially* made. We are therefore of the opinion that they support a judgment to the same extent and in the same way, and are not more open to review on the mere weight of the evidence, than any other judgment at law, based on findings of the trial court.

At any rate, the contention of appellants' counsel that the trial court had no right to set aside the findings of the referee, if those findings were supported by any substantial evidence, cannot, in view of the authorities cited and the reasons given, be upheld. Whether there is a discernible difference between the rule laid down by this court that a trial court's action in setting aside a referee's report and making new findings of its own on the evidence reported by the referee is supported by the usual favorable presumption, and is not to be overturned, unless it appears that the court has abused its discretion (*Williams v. Railway*, 153 Mo. loc. cit. 511, 54 S. W. 689), and the rule announced by Judge Marshall (*Utley v. Hill*, supra) and in the cases cited, to the effect that the trial court's findings in such circumstances will not be reviewed at all on the weight of the evidence, need not be decided. In this case the conclusion, under both rules, must be the same.

(5) It may be added that the rule contended for, even if sound, could not be applied to this case, since the referee, after admitting evidence of all transactions from the beginning (1898), reached the conclusion, before making his report, that evidence of happenings prior to the formation of the People's Ice, Storage & Fuel Company was inadmissible, and excluded all such evidence from his consideration in reaching his conclusions of fact. The trial court, on the other hand, took this evidence into consideration, and based its findings of facts on the whole of the evidence reported. The bases of the two findings are entirely different, therefore, and that is an important fact in considering any apparent conflict between the findings of the referee and those of the court. It changes the situation to such an extent that it cannot be said that the record shows that the court and referee differed at all in their conclusions as to the effect of evidence considered. The real dif-

ference is as to the admissibility of certain evidence, and that is a question of law.

5. It is insisted that the evidence as to the purposes of the organization of the People's Ice & Fuel Company in 1898, and as to the relation between it and others prior to 1905, was not competent, should not have been considered by the court in making up its findings, and must be disregarded by us in determining whether the evidence supports those findings. It is contended that the allegations in the information that the People's Ice, Storage & Fuel Company was "organized under the laws of Missouri on July 1, 1905," and that "prior to the 1st day of July, 1905, all of the above-named companies and copartnerships, except the People's Ice, Storage & Fuel Company, were engaged in the manufacture and sale of ice in this [Kansas City] vicinity in competition with each other," precluded any investigation reaching back of July 1, 1905. It is also asserted that the same result follows from the fact that (so it is said) there is no direct charge of the existence of a combination prior to said date.

[16] With respect to the effect of the allegation that competitive conditions existed prior to 1905, it is unnecessary, at this stage of the proceedings, to say more than that the allegation is not that such conditions existed in the ice business in Kansas City at all times prior to July 1, 1905; and that we cannot, rightfully, give it such a construction after judgment, to overthrow findings based upon a construction which its language fully warrants.

[17, 18] The ultimate question in this case is whether or not such an illegal combination existed at any time covered by the charge in the information; and to prove this we may go back to the very first step in its concoction, and trace the mingling and manipulation of the ingredients which together produce the noxious result. It was held by the Supreme Court of the United States, in the late case of the *Standard Oil Co. v. United States*, 221 U. S. loc. cit. 46, 47, 31 Sup. Ct. 502, 55 L. Ed. 619, 34 L. R. A. (N. S.) 834, that the testimony going to acts done, even before the passage of the act which made the result to be attained unlawful, was admissible, in so far as it tended to throw light upon the acts done after the passage of the act, the results of which, it was charged, were being participated in and enjoyed by the alleged combination at the time of the filing of the bill. Such a combination may be changed in its ingredients by the elimination of some and the absorption of others which take their place; but we must follow it through these changes to ascertain its nature as it stood upon the day when it is charged to have been unlawful. It may have been renamed and relabeled, like the People's Ice, Storage & Fuel Company; but it is competent to show by the testimony that upon its organization it

immediately succeeded to the place formerly occupied by a corporation whose properties, contracts, assets, liabilities, and *tendencies* it took over, and whose identity it continued in the combination.

The reincorporation was, according to the testimony of W. H. Winants, the vice president of the People's Ice, Storage & Fuel Company, effected solely in order to add to the purposes of the old company—not to subtract therefrom. The new company took over and carried out the contracts of the old; contracts which tend, on their face, to show a purpose to restrict competition. The People's Ice & Fuel Company had been organized and employed as a mere *agency* by and through which the purposes of the original agreement among the several ice companies in business in Kansas City in 1898 might be carried out. It was not, nor could it have been, authorized by its charter to directly or indirectly monopolize the ice business; and, in so far as it proceeded to effectuate the plans of other corporations and individuals to do so, it was acting outside its charter powers and in defiance of law. The People's Ice, Storage & Fuel Company was not, nor could it have been, *chartered* to purchase from the People's Ice & Fuel Company any conspiracy to restrict competition in which the latter was engaged; but its subsequent participation in any such agreement cannot be defended on the ground that the agreement or conspiracy was in existence before the corporation was. To hold otherwise is to say that individuals and corporations may conspire to restrain trade and lessen competition, in violation of the statute, and then, by subsequently forming a corporation to carry out that conspiracy, put themselves and the corporation thus formed beyond the reach of the statute. That the statute can be thus evaded we decline to hold. The People's Ice, Storage & Fuel Company carried out the contracts of its predecessor, making no changes whatever in the methods employed by it, even maintaining, until the failure of the Consumers' Ice Company, the cut price put in force by the old company three or four days before July 1, 1905. Neither is charged with having purchased plants of other companies in order to restrain trade and lessen competition. The storage company is charged with having entered into certain contracts and agreements for those purposes, and it does not matter through what gate it entered.

In *State ex rel. v. Continental Tobacco Co.*, 177 Mo. 1, 75 S. W. 737, this court said: "The laws of this state are broad enough to reach individuals who undertake to organize a corporation that would create a trust in itself; but, where the corporation is alleged to be duly organized, then the condemnation of the statute as applicable to it is not in the method of its organization, but by its express terms it denounces and prohibits the

unlawful acts as a legal and existing corporation."

In this case both these elements of illegality are present in the person of the People's Ice, Storage & Fuel Company. It was organized with the intent that it should become the instrument by which the unlawful purpose of its promoters should be carried out, and its profits received and distributed to the conspirators. Such an instrument is, in itself, as is well said by this court in the language above quoted, a trust. Having been organized, its charter powers could, no doubt, have been devoted to honest enterprise; but instead it took up the work to which it had been devoted by its promoters, and became an active member, as well as agent and instrument, of the conspiracy to eliminate competition in the ice business.

In the case last cited the grounds on which the court rested its decision are stated in the opinion (177 Mo. loc. cit. 37, 75 S. W. 747) as follows: "It was a legitimate inquiry by the commissioner as to the integrity and good faith of the transfer by the American Tobacco Company of all its assets to the Continental Tobacco Company; and we have no hesitation in saying, considering the amount involved, the extent and far-reaching scope of the transaction, it was sufficient, in itself, to arouse in the mind of the Attorney General a strong suspicion—yes, even a strong probability—that a trust was being created, and warranted his prompt action in the interest of the public by filing the information herein. However, it must be remembered that this proceeding partakes of the nature of a criminal prosecution, and severe penalties are imposed; hence it is not sufficient to warrant a finding adverse to respondents that we may entertain strong suspicions, or even strong probabilities, of their guilt. Such conclusions should only be reached upon a clear showing by the testimony, fully satisfying the minds of the court that they were guilty of the violation of the law as charged in the information. The case of *Distilling Co. v. People*, 156 Ill. 448 [41 N. E. 188, 47 Am. St. Rep. 200], is distinguished from this case by reason of the facts. In that case there was a trust formed by a number of unincorporated associations, and, as was shown by the testimony, to evade the condemnation of the statute. This same trust of unincorporated associations incorporated and conducted the business along the same lines, and with a similar purpose. The court said: 'That corporation thus succeeds to the trust, and its operations are to be carried on in the same way, for the same purposes, and by the same agencies, as before.' The commissioner, in the case before us, finds the facts just the reverse of the *Illinois Distilling Case*. The commissioner, who is one of the circuit judges of this state, has heard the testimony, had the witnesses before him, and reports that from the evi-

dence adduced there was nothing unlawful in the sale and purchase of the assets of the corporations, as detailed in the report. We will not disturb the finding of the commissioner in that respect."

[19] That there was in existence July 1, 1905, a conspiracy to lessen competition the evidence tends strongly to show; and that there is much evidence that the People's Ice, Storage & Fuel Company, on that date, stepped into the shoes of one of the participants therein cannot be successfully denied. Under the general rule, if a conspiracy exist and another join with the conspirators, he "would be deemed a party to all acts done by any one of the conspirators, *before or afterwards*, in furtherance of the common design" (State v. Walker, 98 Mo. loc. cit. 105, 106, 9 S. W. 646, 11 S. W. 1133); and no reason appears why this rule is not applicable in this case.

It was held, in State ex inf. v. Standard Oil Co., 218 Mo. loc. cit. 458, 459, 116 S. W. 902, that it made no difference *where* an unlawful pool, trust, or conspiracy in restraint of trade was formed, if it was carried out in this state the participants were punishable under our laws. It is also true that it makes no difference *when* such conspiracy is formed, those who engage in it and are found in this state participating in it cannot exculpate themselves by asserting that the plan was not constructed by them in the first instance, and that they merely adopted it and joined in its execution. If this be true, and it is, there can be no reason justifying the exclusion of proof of the facts, circumstances, and agreements out of which the conspiracy thus entered into took its origin.

[20] 6. It is also insisted that the Kansas City Breweries Company, having been organized after the incorporation of the People's Ice, Storage & Fuel Company, cannot be held responsible in this proceeding. That company purchased the assets of the Ferd Heim Brewing Company, which company was one of the participants in the formation of the People's Ice & Fuel Company in 1898 and owned for years its quota of stock in the People's Ice & Fuel Company, and, after July 1, 1905, in the People's Ice, Storage & Fuel Company; that stock belonging to it, but being held for it by its president, Joseph J. Heim. Joseph J. Heim also became the president of the Kansas City Breweries Company, and then held the People's Ice, Storage & Fuel Company stock for the Kansas City Breweries Company; that company having purchased that stock from the Ferd Heim Brewing Company, and having assumed the contract the last-named company had entered into with the People's Ice & Fuel Company. At the expiration of that contract, which it carried out, the Kansas City Breweries Company, by its president, Joseph J. Heim (who held the People's Ice, Storage & Fuel Company stock for the Kansas City Breweries

Company), entered into another contract with the People's Ice, Storage & Fuel Company for a term of three years from February, 1906. That Mr. Heim knew the purposes of the People's Ice & Fuel Company and of the People's Ice, Storage & Fuel Company, and knew that they were formed and conducted to lessen competition, is a fact involved in the findings of the trial court, and one there was sufficient evidence to support. In these circumstances, in view of all the evidence, whether the Kansas City Breweries Company had knowledge of the unlawful character of the operation of the People's Ice, Storage & Fuel Company may have been a question of fact (Cook on Corporations, § 727), and, if so, there was sufficient evidence to warrant the finding that it had such knowledge. At any rate, it cannot, on the evidence, be said, as a matter of law, that it did not have such knowledge while it was carrying out the Ferd Heim Brewing Company's contract, and when it, by its president, Joseph J. Heim, who held for it its stock in the People's Company, executed the contract of 1906. It is therefore unnecessary to decide in this case whether Joseph J. Heim's knowledge was, as a matter of law, attributable to the Kansas City Breweries Company, though there would seem to be little doubt of that. State ex inf. v. Insurance Co., 152 Mo. loc. cit. 37, 52 S. W. 595, 45 L. R. A. 363, et seq.

[21] 7. On behalf of the Central Ice Company it is contended, among other things, that there is no evidence to connect it with the operations of any of the other companies, whether they were or were not acting in violation of law. The chief argument made under this head is that the statements of Lyons, president of the Central Ice Company, were not made as the agent of the company, and consequently were not admissible in evidence. Reliance is placed upon the familiar rule that the declarations of the agent of a corporation do not bind it, unless made "during the continuance of the agency in regard to the transaction then depending." The offense with which the defendants were charged was a continuing one. That the purpose in the formation of the People's Ice & Fuel Company in 1898 was violative of the anti-trust law of the state the evidence leaves no doubt, and that there was convincing evidence, circumstantial and direct, that the Central Ice Company was acting in accord with the People's Ice, Storage & Fuel Company, a reference to the statement of facts makes sufficiently clear; and that in a case of this kind circumstantial evidence must usually be the state's chief reliance is apparent. The existence of a conspiracy being sufficiently proved, and the Central Ice Company being charged with being a party thereto, together with other corporate and individual defendants, the declarations of Lyons were undoubtedly admissible to connect him individually with that conspiracy; and, under the rule usually applied, his declarations dur-

ing the existence of the conspiracy (as one of the conspirators), in furtherance of its objects, were admissible against those engaged with him in the common enterprise in the ice business in Kansas City.

[22] It is not necessary, even in a criminal case (*State v. Kennedy*, 177 Mo. loc. cit. 118, 75 S. W. 979; *State v. Sykes*, 191 Mo. loc. cit. 78, 89 S. W. 851; *State v. Boatright*, 182 Mo. loc. cit. 48, 81 S. W. 450), that coconspirators be indicted and tried together, in order to render the acts and declarations of one admissible against the other. The fact that the Central Ice Company entered into an agreement with the People's Ice & Fuel Company to fix prices was directly testified to by O. W. Butt, who was one of the organizers of the former company, and his testimony was not directly denied by any witness. Mr. Helm and Mr. Vanderslice denied that the companies of which they were, respectively, presidents (the Kansas City Breweries Company and the Vanderslice-Lynds Mercantile Company) had any agreement with any company to lessen competition or restrict output; but this was short of a denial that the People's Ice & Fuel Company and its successor, the People's Ice, Storage & Fuel Company, were organized for those purposes. In these circumstances, there being ample proof of a conspiracy such as the statute condemns, and ample proof, in addition, that the Central Ice Company, after its organization, became a party thereto, the declaration of Lyons, who was the last-mentioned company's president and active manager, in furtherance of the object of the combination were admissible and competent evidence in this case. 2 Wigmore on Ev. § 1079; *Hart v. Hicks*, 129 Mo. loc. cit. 105, 31 S. W. 351.

[23] 8. It is insisted that the several Kansas City companies which contracted to sell ice to the People's Ice & Fuel Company, and subsequently to the People's Ice, Storage & Fuel Company, did not contract their entire output, but, on the contrary, sold quantities of ice to others than the companies mentioned. An examination of the evidence discloses that these companies did sell ice to others; but such examination also discloses that these sales were chiefly made during the spring and fall months; the contracts practically calling for all their output, not required for their own uses, during what is called the ice season—June 15th to September 15th of each year. A monopoly in the ice business during the cold and cooler months is, from the nature of things, not very practicable, as the defendants in this case had sufficient sagacity to know. The control of the business during the warm season was that at which they seem to have aimed. The nature of the commodity is such that surplus artificial ice was not stored to any considerable extent; and there is no evidence that any of the defendants attempted to store their surplus to meet the community's requirements during the summer. There

being an insufficient demand in the local retail market during the cool weather, the defendants naturally attempted to dispose of the surplus from their plants to others than the People's Companies. They did not, however, go into the distributing business; nor did they sell to peddlers to any greater extent than indicated in the statement. The ice they sold was sold in such quarters that it had no tendency to affect the increased rate made by the People's Ice, Storage & Fuel Company April 1, 1905, and May 1, 1905, for instance. The facts upon which the argument under this head is based are not, in the circumstances, very impressive when relied upon as a refutation of the charge in the information.

9. It is urged that we should give the statute "a reasonable construction," and that it should not be construed to preclude appellants from contracting with each other for the purchase and sale of ice. It is, in effect, insisted that if it is held that the statute applies to this case practically no transactions between corporations in the same business can escape condemnation. The argument grows out of the separation by counsel of the arrangements and contracts in evidence, and a consideration of each independently of the others, without reference to the evidence indicating that these transactions were mere parts of a whole, which constituted a combination to control the manufacture and sale of ice and the price of it in Kansas City. The assumption that each contract was an independent transaction contradicts the allegations of the information, the weight of the evidence, and the findings of the court.

[24,25] The statute of this state leaves scant room for construction. We are not concerned in this case with any question as to a contract, otherwise lawful, which incidentally restrains trade. The rule applicable in such a case is not applicable in this. Nor is it within our province to give the statute any other meaning than its language imports. Our duty to apply the statute as it is written is as plain as the language of that statute, and in that language there is no ambiguity. The statute condemns every direct restraint of trade, great or small. It closes the only door through which doubts as to its construction could enter by positively prohibiting defined combinations, without regard to what the courts may think as to the extent of their effect. The Legislature saw fit to ordain "that competition and not combination" should obtain in business in the state. As long as it moves in its constitutional orbit, the judgment of the Legislature is final; and the wisdom of its enactments is not open to question in the courts.

The case of *Standard Oil Co. v. United States*, 221 U. S. 1, 31 Sup. Ct. 502, 55 L. Ed. 619, 34 L. R. A. (N. S.) 834, cannot be relied upon to elicit a different answer to the

contention now being considered. In that case it was said, in effect, that the act of July 2, 1890 (the federal anti-trust act [Act July 2, 1890, c. 647, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200)]), was inapplicable to combinations and conspiracies in restraint of trade which did not have the effect of restraining trade unreasonably. A considerable portion of the opinion is devoted to the discussion of the question. The court did, however, hold that the Standard Oil Company *unreasonably* monopolized and restrained trade; and consequently the reason for its discussion of the question as to what rule might apply when some defendant or combination which but *reasonably* restrained trade might appear at its bar is not apparent. Such discussions, under ordinary circumstances, are usually termed obiter dicta, and not regarded as authoritative beyond their intrinsic value as arguments. We need not enter into a discussion of the decision in that case, however, since the rule first stated is established in this state, and since our statute precludes all question on the subject.

[26] 10. It is not necessary to discuss the complaint that the action of the trial court in ordering the cancellation of certain specified contracts was erroneous. These contracts have expired by their own limitations. The question has become a moot one, and will not be considered.

[27] 11. It is unnecessary to indulge in an argument on the facts in this case. They are set forth in the statement with sufficient fullness to show the character of the proof made. Of the facts stated there was abundant evidence to warrant the findings made by the trial court; and it in no wise abused its discretion in finding as it did. Those findings support the judgment rendered, and that judgment ought to be affirmed.

BROWN, C., concurs.

PER CURIAM. The foregoing opinion of BLAIR, O., is adopted as the opinion of the court. All the Judges concur.

HONEA v. ST. LOUIS, I. M. & S. RY. CO.
(Supreme Court of Missouri. Nov. 14, 1912.
On Motion for Rehearing.)

1. MASTER AND SERVANT (§§ 278, 281*)—INJURIES TO SERVANT—ACTIONS—EVIDENCE.

In an action against a railroad company for the death of a servant, evidence *held* to establish the company's negligence and to show the deceased's freedom from contributory negligence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 954-972, 977, 987-996; Dec. Dig. §§ 278, 281.*]

2. MASTER AND SERVANT (§ 216*)—INJURIES TO SERVANT—ASSUMPTION OF RISK.

Where a section hand riding on a hand car under the direction of a railway company's

foreman, who was given a schedule of regular trains and required to keep a timepiece so that he might ditch the hand car 10 minutes before any train was due, was killed by a passenger train which, while on its regular schedule, ran down the hand car, there was no assumption of the risk of injury; a servant assuming only those risks incident to his employment after the master has exercised ordinary care.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 567-573; Dec. Dig. § 216.*]

3. MASTER AND SERVANT (§ 291*)—INJURIES TO SERVANT — INSTRUCTIONS—APPLICABILITY TO PLEADING.

In an action against a railroad company for the wrongful death of a section hand, the petition alleged that the passenger train which collided with the hand car on which deceased was riding, was on time; that it was the duty of the foreman to have caused deceased and his associates to take the hand car from the track before traintime, but failed to observe the time of the passenger train and negligently required deceased to remain on the hand car until too late to prevent a collision. This issue was presented in an instruction that the defendant was liable if it was the duty of its foreman to cause deceased and his associates to leave the track before the train could collide with them, and that he negligently caused deceased to remain on the car and track too long to prevent the collision. *Held*, that the instruction was not inapplicable to the pleading, though not submitting the question of whether the foreman negligently failed to observe the time of the train; the ultimate negligence being the failure of the foreman to cause deceased to leave the track in time to avoid the collision.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1133, 1134, 1136-1147; Dec. Dig. § 291.*]

4. APPEAL AND ERROR (§ 1066*) — REVIEW—HARMLESS ERROR.

In view of Rev. St. 1909, §§ 1850, 2082, providing that the court shall at every stage of the action disregard any error not affecting the substantial rights of the parties, and that the Supreme Court or Courts of Appeal shall not reverse the judgment of any court unless it shall believe that error was committed against the appellant, and materially affecting the merits of the action, the error, if any, in the above instruction was harmless where the evidence clearly showed that the accident was the result of the foreman's negligence in failing to note the time of the train and remove the car from the tracks in time to avoid it.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4220; Dec. Dig. § 1066; Payment, Cent. Dig. § 252.]

5. DEATH (§ 99*)—DAMAGES—EXCESSIVENESS.

In an action by a wife against a railroad company for damages for the wrongful killing of her husband, who was a section hand earning only \$1.25 a day, an award of \$10,000 damages will not be *held* excessive as a matter of law, in the absence of any evidence by the railroad company showing the excess; there being no presumption that decedent's earning power would never have been increased, or that the widow's damage was not equal to \$10,000.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 125-130; Dec. Dig. § 99.*]

On Motion for Rehearing.

6. APPEAL AND ERROR (§ 835*)—PRESENTATION OF GROUNDS OF REVIEW IN APPELLATE COURT—NECESSITY.

Under Supreme Court rule No. 15 (73 S. W. vi), providing that all briefs shall contain separate and apart from the argument and dis-

cussion of authorities a statement of the points relied on, together with the citation of authorities appropriate under each point, a railroad company whose motion for new trial in an action for wrongful death had been granted cannot, on the hearing in banc, attempt to sustain the granting of the motion on the ground of excessive award of damages, where that point was not made in its brief in its first hearing in the separate division of the court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3241-3246; Dec. Dig. § 835.*]

Graves, Woodson, and Ferriss, JJ., dissenting.

In Banc. Appeal from Circuit Court, Butler County; J. C. Sheppard, Judge.

Action by Mary Honea against the St. Louis, Iron Mountain & Southern Railway Company. From an order granting defendant a new trial after verdict for plaintiff, plaintiff appeals. Order reversed.

David W. Hill, of Poplar Bluff, for appellant. N. A. Mozley, of Bloomfield, J. F. Green and R. T. Railey, both of St. Louis, for respondent.

LAMM, J. Suing in the Butler circuit court for the alleged wrongful death of her husband, John Honea, plaintiff had judgment for \$10,000 on a jury's verdict. From an order granting a new trial on defendant's motion, she appealed.

The specific allegation of negligence put to the jury will be set forth in the words of the pleader in connection with a discussion of plaintiff's instruction No. 1. For the present, as a foreword, a mere outline of the petition will do, viz.: On the theory that Honea was a sectionman about his master's business on a hand car in charge of defendant's foreman and was run down and killed by a passenger train, the petition, in one specification, counted on the negligence of the operatives of the train and asked recovery under the humanity doctrine. This specification was not supported by proof, and hence, was not put to the jury. There was another which may be summed up in the charge of the petition thus: The train was on time, and it was the duty of the section foreman to clear the track by causing and permitting sectionmen to take the hand car from it in time to avoid a collision, but that the foreman, failing to observe the time of the train and its approach, negligently required and caused Honea to remain on the hand car and track too long to prevent a collision, whereby he was killed. Defendant answered as follows: It admitted its incorporation; it denied generally other allegations; and then set up two defenses—assumption of risks and contributory negligence. It may be as well said at this point as at any other that defendant, as to testimony, stood mute at the trial, making no effort to put in proof on its defenses or to cut down the damages.

In brief the case on the facts as developed

by plaintiff is this: Honea was an experienced sectionman in defendant's employ in Wayne county, say 35 years of age, and earning at the time \$1.25 a day. He was under a foreman named Joe Daniels, who, in turn, was in charge of the hand car presently mentioned. Defendant ran a regular south-bound passenger train, known as the "Mexican Special," on Tuesdays and Fridays of each week. Its name and days returning north are blind. Its time at Piedmont en route to the south is some after 1 o'clock p. m., but the exact schedule time is not disclosed. A bit after 1 o'clock of a winter's afternoon in 1908, John Honea and a fellow workman named Pearson were ordered on a hand car by Daniels, their foreman, in the railroad yards at Piedmont and they, including the foreman (and with him in charge), started south on the car on an inspection trip over the section. Besides the three men, the hand car was equipped with some iron and steel tools—a jack, lining bars, claw bar, shovels, spike mauls, and tamping bars—and the trip was partly because a place in the track needed fixing. At about two miles south of Piedmont, the hand car was overhauled by said Mexican Special running 50 or 60 miles an hour, and Honea was killed. In that region defendant's road runs on sharp curves in the hills, amid trees and through cuts, and the look ahead or back is not far. Under the proof, the train was on time. The men on the hand car faced south, away from the train; Honea working its rear and the foreman and Pearson its front lever. In running round a very sharp curve, Pearson got a premonition from what he thought was the echo of a whistle that a train was coming behind them. At the same instant the foreman and Pearson turned their heads and discovered the Mexican Special two telegraph poles, say 350 feet, bearing down on them from their rear. At that time the hand car was rolling about six or eight miles an hour. We have only a confused account, giving a somewhat blurred picture, of the scene; for the drama was played out in a moment. To use the vernacular of Pearson, he "hollered": "The car will kill us, Joe. My goodness!" The foreman "hollered": "She's got us, boys!" Thereat the foreman "jumped" on the brake, and witness saw Honea jump off at the rear, and the hand car then either rolled or slid seven or eight feet when the foreman and Pearson jumped off before it came to a dead stop. We gather that the first impulse of the foreman was to run, but, changing his mind in a flash and in great excitement, he and Pearson grabbed the handles of the hand car and got one end of it from the track, when the locomotive was on them, striking it a slanting blow, and tumbled it and the two men, or at least one of them, down the dump. The foreman was present at the trial as defendant's witness, but, as said, did not testify for defendant, and was not called to

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

testify for plaintiff, so that the case stands on material points on the testimony of Pearson, and he got (what we take as) merely a glimpse of Honea. As said, he saw him jump off the car after the brake was set; he remembers seeing him about the center of the track, apparently with his right side somewhat towards the train, stooped over and in the act, as witness thought, of taking a step towards the car as if to take hold of it, but the car had rolled on, and the next he saw of Honea, a moment afterwards, his lifeless body lay at the foot of the dump and 60 feet south of where he was struck. This bit of the record tells at one stroke enough of the story on that head: "Q. What was the last you saw him doing? A. When he stepped down off of the car was the last thing I saw him doing; and I realized the danger that I was in, and I stuck my head down to keep from realizing how close I was to my death. I was in a stooping position and couldn't see what anybody else was doing. Q. Did you see him stoop to get hold? A. Yes, sir; he stepped off straight back [indicates]. The last time I saw him he was going like this [indicates], and I was in a stooping position, and in a strain and in a hurry, and that was the condition I was in. Q. Was he stooping over towards the car? A. Yes, sir; the last time I saw Honea that was where he was at, in the center of the track."

Defendant had a rule to the effect that the section foreman should clear the track of hand cars 10 minutes before train time. The instructions to the sectionmen were to assist in taking hand cars from the track in emergencies. The uncontradicted testimony clearly shows that it was made the duty of the foreman to enforce that rule. To that end he was furnished with a time card and with a watch inspected by defendant's inspector. The sectionmen had no such watches or time cards. On this occasion Pearson had no watch at all, and Honea's was described by the witness this way: "Well, he had a little old—one of these dollar clock watches. It is called a watch. There is no allowance to be made on it." Speaking of the duty of the foreman, the rule, the time card, the watch, Pearson testified further as follows: "Q. Whose duty was it to keep track of the schedule of these trains and have the hand car put in the clear for them? A. Our section foreman's duty, because he was the man they gave the time card to, kept the time card in his pocket; and also they required him to have a timepiece—a watch, you know. Q. And keep it in good repair? A. Yes, sir; for I have seen him go to the watch man in the jewelry store and have his watch examined. Q. And did he have such a timepiece on that day? A. Yes, sir; he did. Q. That watch inspector was the inspector of this company, wasn't he? A. Yes, sir. * * * By the Court: The question is, Do you know what the rule was? A. Yes, sir. Q. Now tell

the jury. A. Supposed to be in the clear as much as 10 minutes. Q. Whose duty was it to get you in the clear? A. Our foreman's. Q. Did the foreman do it in that case? A. No, sir." Referring to the necessity of getting the hand car and tools out of the way of the train, the witness testified: "Q. Why were you getting this car off? A. In order to save the car; and also save having that there collision; them track tools—my intention was—on that sharp curve, there had been wrecks on that same curve, a little trouble, some; and my intention was to put them in the clear if I could." Further as to the duty of getting hand cars out of the way of trains, the witness made answer to questions as follows: "Q. I'll ask you if it was a part of your duties as sectionman, when a train was approaching, to get your hand car off? A. Yes, sir. Q. That is the only way you had getting the car off—was lifting it off? A. Yes, sir; drag it off; any way to get it off. Q. Those were your instructions from the company? A. From the foreman." Further along appears this: "Q. On whom did you and Honea rely to keep you posted on these trains, when they were due, and when to get in the clear for them? A. Well, on the foreman, I did. Q. And Honea did, too; didn't he? A. Yes, sir. By Judge Green: How do you know he did? A. Well, I know about one collision. We had been in a pretty tolerable close place before; and we kept pulling until he demanded us to take the car off; that's what I am going by. And we got in the clear that load of poles. Q. Was this that same foreman? A. Yes, sir." The court sustained the motion for a new trial on the ground of error in plaintiff's instruction No. 1—of which presently.

[1] It is argued at our bar in support of the order granting a new trial that there can be no recovery because of two bars put up by the law, to wit, contributory negligence and assumption of risks. On this record and on those contentions we make the following observations: Honea was in the line of his duty as a servant of defendant and was killed while about his master's business, and not his own, and in the unsafe field provided by the master for him to labor in. The master key unlocking the heart of the matter is that, without a particle of fault on his own part, he lost his life because the master negligently undertook to run a train and hand car on the same track, at the same time, in the same direction, at a speed as sure to result in the train's overtaking the hand car (if not taken off) as that ebb tide follows flood tide, or day follows night in nature. There could be no two ways about it that the thing that happened was bound to happen, namely, that the hand car would be caught. There are three things said by the answer to stand between the master and liability, viz., assumption of risks, the contributory negligence of Honea,

and the general denial. The general denial is brushed away by the proof. No contributory negligence was shown. This because: It is no overstatement to say there was no evidence of any probative force tending to show it in Pearson's narrative. The fact is that Honea and the hand car were under the supervision of the section foreman, who, *pro hac vice*, was the master's alter ego. The fact is that, when the alarm was given, the hand car, which could not run away from danger, was slowed down so that Honea jumped off at the rear. That he did jump off and was seen, in the mere flash of time that followed between his getting off and his death, partly turned, partly stooping, maybe, and partly taking a step towards the hand car that had moved on (if that be so), is to be utterly repudiated as evidence tending to show the contributory negligence of Honea. A man, in almost the twinkling of an eye, brought face to face with deadly peril, menacing, imminent, and about to fall, is not (by just men) after the event to have his acts weighed as by the scales of a goldsmith, or viewed through a microscope, or dissected as by a surgeon's knife, or analyzed by metaphysical splitting of hairs as by the subtle rules of a logician, or tested, as chemists do matter, by acid. The rule to go by in that plight is: Put yourself in his place. To my mind, in getting at defendant's liability, it matters not a whit whether Honea had, at the instant, an impulse to follow the hand car like a soldier to aid his comrades in removing it from the track to save the lives of the people on the train, or whether he was momentarily confused by excitement and had no definite object at all, or had not yet got his balance after leaving the moving hand car. A court of justice, moving on common sense lines, is not to quibble or niggle about his conduct and with speculative daintiness measure it by two or three pulse beats and construe it sourly and narrowly in order to relieve a defendant who negligently brought a situation about that would try the soul of any man. Nor is it worth while to speculate on whether Honea, hard beset by death, by great good luck (utterly forgetting the welfare of the train and its passengers) could have gathered his wits and muscles in the nick of time and jumped sideways out of danger. May A. wrongfully put B. in sudden peril of his life and then say to B.'s widow: "Madam, your husband was a slow coach? He was fat-witted or panicky? He lacked a chilled-steel nerve? His judgment was not cool and steady enough?" Nor do I care for the fortuitous circumstance that Honea's comrades were not killed. That some are saved, as though brands plucked from the burning, in such a flurry and riot of danger is no evidence that the one not saved died as the fool dies, to wit, by acts sounding to folly and negligence. As we have said on facts somewhat similar: "We may not be

allowed to review this transaction from the standpoint of the way it looks to us glancing back. We know; he did not know. It must be judged of by the way it would look to a reasonable man before the jump. Being suddenly called upon to consider a question of life and death in the face of a danger imperiously menacing him, he acted on appearances under a natural and allowable impulse of self-preservation, and the law will not concern itself overclosely in scrutinizing and gauging his judgment, because men facing confusing perils sprung on them quickly are not called on to act with coolness and precision. The impelling question is whether appellant's own skirts are clear of blame for the fire, rather than whether respondent acted with good judgment in escaping its flames; and, in our view, the contributory negligence of respondent may be considered out of the case under the facts presented for adjudication." *Root v. Railroad*, 195 Mo. loc. cit. 357, 92 S. W. 624, 6 L. R. A. (N. S.) 212. So we say here, under the facts, there was no contributory negligence on Honea's part. The domineering fact here is the negligence of defendant and that alone. *Boyd v. Railroad*, 236 Mo. 54, 139 S. W. 561, is in point, *arguendo*.

[2] Nor is the doctrine of assumption of risks in the case. Deceased could make no valid contract (and the law implies none) to assume the risk of his master's negligence. Running hand cars and trains on the same track and same time at the same point is not an ordinary risk incident to railroading. A risk raised by such combination of things (when the master is in charge of the hand car) is one springing from the master's want of care. Here there was a rule. But, rule or no rule, no master could run hand cars and trains that way without violating a duty to its servants. As put in *Charlton v. Railroad*, 200 Mo. loc. cit. 433, 98 S. W. 535: "So, too, in the assumption of risks by a servant it is well to consider a certain assumption by the master, and that is that the master impliedly contracts with the servant that he will exercise ordinary care to protect such servant from injury by providing a reasonably safe place for him to work. When these two assumptions are considered as proceeding hand in hand, it will be perceived that the risks assumed by the servant are those risks alone which remain after the master has exercised ordinary care." In *Curtis v. McNair*, 173 Mo. 270, 73 S. W. 167, the right doctrine is expounded in the light of our repeated adjudications. (q. v.)

At this point it is a little worth while to see what obstacles were planted in the way of the widow's suit for her to overleap. Although the questions of contributory negligence and assumption of risks had not a foot to stand on, and were wholly beside the case-made, yet her case was made to run the gauntlet of them both in a set of argumentative instructions. Not only so, but although

plaintiff abandoned the averment of her petition, based on the negligence of the train crew, put in no proof thereon, and did not in her instructions seek recovery under the humanity doctrine, yet by inadvertence those abandoned theories (with others not within the pleadings at all) were also formally instructed on, thereby confusing and littering up the minds of the jury with extraneous issues and notions to the detriment and hazard of her meritorious case. Witness six instructions given for defendant, to wit: "(4) The jury are instructed that, when John Honea accepted employment as a section laborer on defendant's line of railroad, it was a part of his duty to go to and from his work upon a hand car, and that, in so riding on said hand car, he assumed and took upon himself all of the risks incident to such employment, among which was the risk of being overtaken by trains on defendant's road. It was not the duty of defendant's section foreman to warn said Honea of the approach of such train, and you cannot find a verdict for the plaintiff in this case on account of the failure of defendant's section foreman to notify Honea of the approach of the train which struck deceased. (5) The court further instructs the jury that defendant's employes in charge of the train had the right to presume that Honea and the other section employes would look out for themselves and keep out of danger. It was not negligence on the part of said train employes to run the train at a high rate of speed, and you cannot find a verdict for plaintiff on account of the manner in which the passenger train was handled by defendant's employes. (6) The court further instructs the jury that it was not an act of negligence on the part of defendant's employes to run its passenger train over the portion of the road on which the hand car was being operated, and the plaintiff cannot complain of the character of the road at that place, nor of the conduct of the employes in the management of the passenger train, as defendant's employes had the right to run the train at such a rate of speed as they deemed proper; due regard being had to the safety of the passengers on said train. And you cannot find a verdict for plaintiff, unless you find from the evidence that defendant's employes in charge of the engine saw the deceased John Honea on the track in the act of removing the hand car in time to have prevented injury to him, and that they failed to exercise due care to avoid striking him after discovering his peril and danger. And you are further instructed that said train employes were not required to stop the train, after discovering the peril of said Honea, if the attempt to stop the train would have been attended with danger to the passengers riding thereon. (7) The court further instructs the jury that, if you find from the evidence that other section employes on the hand car got off the track in safety, and that

John Honea, by the exercise of due care and caution for his own safety, could also have gotten off of the hand car, or did get off the hand car in time to avoid being struck by the train, and that he was thereafter struck in consequence of his remaining on the track, then in that event the plaintiff is not entitled to recover in this case. (8) The court instructs the jury that, if you find from the evidence that the death of John Honea was the result of an accident in consequence of his being struck by a train, if you find that his death was caused in part by the negligence of the train employes as well as partly by his own negligence or want of care, then and in that event the plaintiff is not entitled to recover." (9) The court further instructs the jury that, although you may believe from the evidence that the foreman, Daniels, required plaintiff's husband to ride upon the hand car while said hand car was being moved upon defendant's track, yet that fact of itself does not entitle plaintiff to recover, for it was the duty of plaintiff's husband to keep a watch for his own safety; and, if you find that by listening he could have heard the train, or by looking he could have seen it, or if you find that he did see it, and got off of the hand car in time to save himself, and was struck by the train in consequence of his remaining on the track, then your verdict must be for defendant."

We shall not stop to analyze those instructions one by one. In his zeal learned counsel, by inadvertence, led the court into error. They could not well be more evenly misleading, more evenly argumentative and mischievous than they are, taken as a series or one at a time. One excuse for reproducing them is that they may serve as models of how not to instruct a jury in a case with facts like the one at bar. Every one of them was an arrow aimed at the right of the case, under the facts of this record, and on the theory on which plaintiff sought her recovery, viz., the negligence of the foreman. The master himself in the person of Daniels had charge of that hand car and of Honea. The question was: How did he acquit himself? It was error to give any of them, and, if plaintiff had lost her case, the verdict must have been set aside instanter.

[3] Thus undeservedly afflicted with troubles and tribulations, plaintiff "plucked the flower, safety, from the nettle, danger," and then lost it. This, it is said, on one of her own instructions. So her case (we borrow Moore's figure):

"That stood the storms when waves were rough,
Yet in a sunny hour fell off
Like ships that have gone down at sea
When heaven was all tranquillity."

(Nota bene, by way of a side-step: There be those who say that poetry has no place at all in jurisprudence or legal exposition. Quoad hoc, it may be said: The French have a saw: "He who excuses himself accuses himself." Not caring to fall foul of that adage, we

enter no excuse, but point to the venerable dictum of the mentor and master, Sir Edward Coke [Co. Litt. 264]: "The opinions of philosophers, physicians, and poets are to be received and alleged in causes." Quod erat demonstrandum.)

It is of judicial interest to see how that thing happened. It is argued that one of her instructions did not follow her petition in essential matter. Let us look to that:

The Petition.

"* * * That the said passenger train, which collided with John Honea and the hand car as aforesaid, was on time, and that it was the duty of Honea's foreman to have caused and permitted John Honea and his associates to take the hand car and leave the track before said train had time to collide with either of them, but that the defendant's foreman, in charge of John Honea and the other sectionmen with the hand car, carelessly and negligently failed to observe the time of said passenger train and the approaching thereof, and carelessly and negligently required, caused, and permitted the said John Honea to remain upon said hand car and railroad track too long to prevent collision with said passenger train, and as a result of said carelessness and negligence upon the part of the defendant's foreman in charge of John Honea, coupled with the carelessness and negligence of the officers, agents, servants, and employes of defendant in charge of defendant's passenger train and engine which struck and collided with John Honea and the hand car used by him, caused the death of the said John Honea. * * *

The Instruction.

"The court instructs the jury that if you believe and find from the evidence in this cause that it was the duty of defendant's foreman to have caused and permitted John Honea and his associates in the employ of the defendant to take the hand car and leave the track before train No. 11 could collide with the hand car and sectionmen, but that the defendant's foreman, in charge of Honea and other sectionmen, with the hand car, carelessly and negligently caused and permitted John Honea to remain upon the hand car and railroad track too long to prevent collision with said passenger train, and as a result of said carelessness and negligence upon the part of defendant's foreman, in charge of Honea, defendant's passenger train or engine thereof struck and killed Honea, about January 28, 1908, in Wayne county, Mo., and that the defendant's railroad runs through Butler county, Mo., and that plaintiff was Honea's lawful wife at the time of his death, and that he was killed without any negligence on his part, then your verdict will be for the plaintiff, Mary Honea."

The vice of the instruction is said to be in omitting all reference to the allegation in the petition that the foreman "carelessly and negligently failed to observe the time of said passenger train and the approaching thereof." On that omission we make some observations, viz.: That allegation is carried over in substance and necessarily implied in the allegation that followed, to wit, that the section foreman carelessly and negligently caused and permitted Honea to remain upon the hand car and track too long to prevent a collision. In legal effect the one includes the other in reasonably fair construction. The latter allegation is covered by the instruction, and, it seems to me, in final analysis it is the real, the ultimate, ground of

negligence that is complained of and put to the jury. In the proof of the charge made in the petition and thus incorporated in the instruction, the rule of defendant (testified to without objection) requiring the track to be cleared of hand cars 10 minutes before the time of the passenger train, the fact that the train was on time, that the section foreman had a time card and watch regulated by defendant, that part of his duty was to make the clearance, and that he failed to do so—we say the proof on one and all of those things is after all but evidence tending to prove the ultimate and justifiable fact that defendant, through its section foreman, negligently caused Honea to remain on the hand car and track and come to his death thereby. The unfortunate word "permitted" is used loosely in both petition and instruction, but it did no harm because it was coupled by the conjunctive conjunction "and" with the word "caused." The jury had to find both and that was well enough. We look on the word "caused" as the master word. That word carried the jury back to the whole body of the proof. Unless defendant through its foreman caused deceased to remain too long in peril, plaintiff ought to be cast; otherwise, then otherwise.

[4] But it is argued that the jury would conclude from the instruction that the failure of the section foreman, after the approach of the train was discovered, to stop the hand car and get it and his men out of the way of the train was within the purview of the language. That there was no such ground of recovery possible under the facts, and therefore the verdict of the jury must be referred to that erroneous theory. But are the men in the box not men of sense? Why speculate on whether they adopted such narrow and unlikely theory when under the evidence there was a plain, broad highway leading in another and a right direction, to wit, in the foreman negligently performing his duty to inspect his watch and his time card and clear the track according to rule? That was the obvious, open, and sensible view for the jury to take of what "caused" the accident. If defendant wanted the jury fenced off from taking some other fanciful view, why did it not ask an instruction of its own on that point? If we were once to adopt the rule of reversing cases where a word or a phrase, standing alone, admits of a double meaning, one of which is mischievous and the other is not, we would affirm but few judgments. Men, under oath in a box, taking a sober and vital part in the administration of justice, are presumed by the law to be reasoning men, apt in solving the problems of life by the aid of reason; i. e., everyday sense. There ought to be no presumption indulged that, unless fenced in by the court at every single step, they will leave the obvious path pointed out by the proof, and within the

fair meaning of the instructions, and wander off into a side path outside the proof.

Moreover, conceding the instruction was somewhat inartificially drawn, yet with the broad current of the case running in favor of plaintiff, with defendant putting in no proof at all, explaining nothing, denying no evidence, can we say that the "substantial rights of the adverse party were affected," or that the "merits of the action were materially affected"? The statutes hold out a steady lamp to guide appellate courts in administering justice in that particular. We read our duty in the light of those statutes, viz.: Section 1850, R. S. 1909, reads: "The court shall, in every stage of the action, disregard any error or defect in the pleadings or proceedings which shall not affect the substantial rights of the adverse party; and no judgment shall be reversed or affected by reason of such error or defect." Section 2082, R. S. 1909, reads: "The Supreme Court, or Courts of Appeals shall not reverse the judgment of any court, unless it shall believe that error was committed by such court against the appellant or plaintiff in error, and materially affecting the merits of the action." The verdict of the jury was so manifestly right, and was won by plaintiff so hobbled and handicapped by erroneous instructions given for defendant, that it ought to take more error than can be found in her instruction to upset her verdict.

It is argued the verdict is excessive, and that, as the point was made in the motion for a new trial, the order granting one may stand on that foot although the court did not put its action upon that ground. If this suit were under the penal statute, which it is not, then this contention would seek the statute, providing (R. S. 1909, § 5425) that railroad corporations causing injury to other persons, from which death ensues, "shall forfeit and pay as a penalty, for every such person, employé or passenger so dying, the sum of not less than \$2,000 and not exceeding \$10,000, in the discretion of the jury, which may be sued for and recovered. * * *"

[5] We think, on further deliberation, the case was not brought or tried under the penal statute, but under sections 5426 and 5427 that are not penal. It is sufficient to hold in this case that, if there were circumstances of mitigation or aggravation, the jury had the facts and all of them defendant cared to elicit, for defendant, as said, laid its hand on its mouth and put in no proof whatever. Some weight must be given that fact. The jury being entitled to deal with the statute as having compensatory features, this particular jury had all the facts this particular defendant thought necessary to submit to them on that phase of the case. It had also, on that theory, all the instructions defendant asked, and plaintiff's instruction on that score is well enough.

It seems clear on principle that the order granting a new trial cannot stand on the proposition that the verdict was excessive. Concede decedent was of humble rank, was employed humbly on a humble wage. The proof goes to that extent and means he was a poor man in pocket. Whether he had a family is left dark. Now, are we to hold, as a matter of law, that the mere humbleness of the dead man cuts down the value of his life to his widow below \$10,000? However humble, may we not presume, in the absence of testimony to the contrary, as here, that he came up to full measure in every quality of worth—worth as a man, worth as a father (if he was one), and worth as a husband? I think so, and take leave to say that I feel a certain pride (if a judge may have pride) in holding, under recognized legal precepts, that odious things are never presumed without proof. So, shall we assume that his present earning capacity (if that is to be taken as the guide) would always remain at \$1.25 per day? Moreover, is the law so deadly cold as to gauge the value of a life alone by the dollars and cents the dead man was earning? That is one standard, but that it is the only one known to the law I cannot agree to. Be that as it may, this defendant, who did not care to even try to whittle away decedent's value to his wife by evidence before the jury, ought not to be heard to do so by presumption or argument on appeal. It, silent below, left the jury to fix the value of the man's life on the proof adduced and the instructions given, and should abide the event. We do not mean to say that the jury's award of damages is beyond the power of the court to correct, if it should appear that the discretion given the jury under this statute has been abused. The discretion given the jury in such case is like the discretion given the trial court in other matters; it is a sound judicial discretion, and, when so exercised, is not subject to review in the appellate court, but, when it appears to have been abused, the court will give relief.

In view of the premises, the order granting a new trial was erroneous. It should be reversed, with directions to reinstate the verdict of the widow, as of its original date, and to enter judgment thereon. It is so ordered.

VALLIANT, C. J., and KENNISH and BROWN, JJ., concur. GRAVES, J., dissents in an opinion filed, in which WOODSON and FERRISS, JJ., concur.

On Motion for Rehearing.

BROWN, J. This case has been pending in this court since February 17, 1900, and much judicial energy has been expended in sundry efforts to dispose of it according to correct principles of law. It was first heard in Division 1 at our October term, 1911, and an opinion written by Commissioner Bond,

recommending that the cause be remanded for a new trial. That opinion was not adopted by a majority of the judges composing Division 1, so the case was transferred to the court in banc. It was heard in banc at our April term, 1912, and in an opinion filed by LAMM, J., it was reversed and remanded, with directions to the circuit court to enter judgment for plaintiff on the verdict of the jury. The cause now stands on a motion by respondent for a rehearing, in which motion we are strongly urged to affirm the judgment of the circuit court granting a new trial on the ground that the verdict of the jury is excessive.

I am of opinion that the verdict is excessive; but not to the extent indicated in the opinion of my learned Brother GRAVES, who figures the earning capacity of plaintiff's deceased husband at only \$1.25 per day. He has overlooked the evidence at pages 56 and 57 of the abstract, which shows that deceased knew how to perform other kinds of work besides that of a section hand; that he had worked as a lumber stacker, and received therefor from \$1.50 to \$2.40 per day. I do not understand that the earning capacity of a man can be measured exclusively by the wages he is receiving when killed. If so, there could be no recovery for killing or injuring a man who is temporarily out of employment. While the judgment may be, and I believe is, slightly excessive, I think the motion for rehearing should be overruled, for the reason that the issue of excessiveness of the verdict was not called to our attention by either of the briefs filed by learned counsel for respondent.

[6] It was certainly the duty of respondent to point out in its brief the excessiveness of the verdict and cite us to the law which designated the correct measure of damages. During the last 15 years our rule No. 15 (73 S. W. vi) has contained the following provision: "All briefs shall be printed and shall contain, separate and apart from the argument or discussion of authorities, a statement, in numerical order, of the points relied on, together with a citation of authorities appropriate under each point. And any brief failing to comply with this rule may be disregarded by the court." It seems that the Kansas City Court of Appeals has a similar rule, which it enforces. *Schwald v. Brunjes*, 139 Mo. App. 516, 123 S. W. 472. This rule is simple and reasonable. It is also necessary, because it compels litigants to marshal and bring forward in one brief all the points and authorities upon which they rely to secure favorable action of this court on their contentions. If we allow litigants who have urged many grounds against the validity of a verdict in the lower court to bring those grounds or issues forward one at a time, the business of this court will be needlessly congested and delayed. It is the settled policy of this court to require litigants to try their ap-

peals on the same theory they adopted in the trial court, and new issues cannot be raised for the first time on appeal. *Horgan v. Brady*, 155 Mo. 659, loc. cit. 668, 56 S. W. 294; *Brier v. Bank*, 225 Mo. 684, 125 S. W. 469.

In *Horgan v. Brady*, supra, we said: "The plaintiff is limited on appeal to the theory on which she tried her case in the lower court, for it would be manifestly unjust to convict that court of error in respect to matters upon which it never ruled, and upon claims or rights that were never called to its attention. This is axiomatic in appellate practice, and has been the accepted rule, certainly since 1868."

It would only be a just, reasonable, and necessary expansion of that doctrine to require litigants who secure more than one hearing of the same appeal to confine themselves to the issues they choose to present to us in the first hearing. If we are to refrain from "convicting" trial courts of errors not called to their attention, why should we not, as a court in banc, also refrain from "convicting" one division of this court of overlooking assignments of error not called to its attention in the briefs of litigants? It is a well-known fact that all lawyers incorporate in their motions for new trial and in arrest many points which upon mature reflection they abandon and do not present to the appellate courts at all. Our rule before quoted requires each litigant to present to us in his brief all the points upon which he relies; and I fail to see why that rule is not just as binding as the rule which requires a litigant by his motion for a new trial to call the lower court's attention to all the errors of which he complains.

The defendant (respondent) has had a fair trial in the circuit court and two hearings in this court. Several hundred other litigants who have never even been accorded one hearing have been patiently knocking at the door of this court for more than two years, humbly beseeching us to give them relief, therefore, as an act of justice to ourselves and other litigants, I think the motion for a rehearing in this cause should be overruled.

GRAVES, J. (dissenting). Upon the last day of our April term there was pending in this case a motion for rehearing, and upon that motion I had prepared my views, to the effect that a rehearing should be granted for the reason that the principal opinion then on file decided the case upon a theory not involved in the case at all. In other words, the opinion was written upon the theory that the case was under what is now section 5425, R. S. 1909, the penal section, when in truth and fact the case is under what are now sections 5426 and 5427, R. S. 1909, the compensatory section. Discovering his error, the writer of the principal opinion upon the last day of the

term presented a revised opinion, changing the theory of the opinion as first written, and I took time in which to reformulate my views of the case, and hence the motion for rehearing passed over for that purpose. In compliance with the leave granted me, I submit the following: In the trial of the case *nisi*, the humanitarian theory was abandoned by the plaintiff. That left in the petition the following: "Plaintiff further states that, as a result of the carelessness and negligence and unskillfulness of * * * the foreman in charge of said hand car, as aforesaid, she has been deprived of the support, comfort, and society of her said husband, all to her damage in the sum of \$10,000, for which sum defendant is liable to plaintiff by virtue of sections 2865 and 2866 of the Revised Statutes of the state of Missouri, of the revision of 1890, and by virtue of an amendment of the latter section by an act of the General Assembly in the year 1907 (Acts 1907, p. 252)."

The above sections are now sections 5426 and 5427, R. S. 1909. They authorized a recovery of compensatory damages only. They are not in any sense penal statutes, and have never been so construed. Not only did plaintiff's petition plant her cause upon the compensatory statutes, but such is the theory of her instructions. The material part of her principal instruction reads: "The court instructs the jury that, if they find for the plaintiff, they will assess her damages at such sum as in their judgment will be a fair and just compensation to her for the loss of her husband, not exceeding the sum of \$10,000, having due regard to any mitigating circumstances offered in evidence, and taking into consideration the age of the deceased, his capacity to labor, and probable earnings." This instruction is under R. S. 1909, § 5427, and not under the penal section, R. S. § 5425. Section 5427 reads: "Sec. 5427. Damages—By whom Recovered—Measure of. Damages accruing under the last preceding section shall be sued for and recovered by the same party and in the same manner as provided in section 5425; and in every such action the jury may give such damages, not exceeding ten thousand dollars, as they may deem fair and just, with reference to the necessary injury resulting from such death, to the surviving parties who may be entitled to sue, and having also regard to the mitigating and aggravating circumstances attending such wrongful act, neglect or default." Under this section the plaintiff must show her damages; on the other hand, the defendant may show the mitigating circumstances, if any there be.

Further, the action being one for compensatory damages, it devolved upon plaintiff to fully show the damages sustained. She has not shown damages to the exorbitant sum of \$10,000. The excessiveness of the verdict was a ground in the motion for new trial. Such ground was well taken, and the action

of the trial court in granting a new trial can be sustained for this reason if for no other. We believe the instruction condemned by the trial court in its order granting a new trial was properly condemned. The instruction is awkwardly worded, and, to say the least of it, is misleading. The action of the trial court in granting a new trial stands upon a different basis from that of an appellate court. Such court has wide discretion, and such discretion should not be disturbed here, unless it has been grossly misused. Our Brother LAMM, in *McCarty v. Transit Co.*, 192 Mo. loc. cit. 401, 402, 91 S. W. 133, has well stated the situation of the trial judge thus: "Considering the case from this point of view, it must not be lost sight of that a jury may not give any verdict it pleases. Its verdict is first subject to the trained judicial discretion of the trial judge, and his judicial discretion, so exercised upon the verdict, will not be interfered with on appeal except it be unmistakably unwisely exercised. *Bank v. Armstrong*, 92 Mo. loc. cit. 279 [4 S. W. 720], et seq.; *Bank v. Wood*, 124 Mo. loc. cit. 76, 77 [27 S. W. 554]; *Kuenzel v. Stevens*, 155 Mo. loc. cit. 285 [56 S. W. 1076]; *McCloskey v. Pulitzer Pub. Co.*, 163 Mo. loc. cit. 33 [63 S. W. 99], and cases cited. The wise exercise of this judicial discretion on the part of the circuit judge has always been encouraged by this court—a discretion exemplified by Justice Grier in his celebrated dictum that 'it takes 13 men in this court to steal a man's farm; 12 in the box and 1 on the bench.' The trial judge stands peculiarly close to the fountainhead of legal justice. He is the high priest presiding at the very altar of the temple. To him is given to hear the intonation of the voice of a witness, to see his manner, his cast of countenance, the glance of his eye, the behavior of the jury, their intelligence, their attention, and the whole network of small incidents creating an atmosphere about a case and tending possibly to a perverted result or otherwise, none of which can be preserved in the bill of exceptions and sent here, and in him, therefore, should exist the courage to prevent a miscarriage of right. His viewpoint is entirely different from that of an appellate court. See the animated language of Wagner, J., in *Reid v. Insurance Co.*, 58 Mo. loc. cit. 429 et seq."

In the earlier case of *Schmidt v. Railway Co.*, 149 Mo. 282, 50 S. W. 924, 73 Am. St. Rep. 380, our present Chief Justice thus tersely spoke: "The trial judge holds in his hands, more than any other tribune, the power to shape the trial of cases to accomplish the ends of justice. One of the chief means at his disposal is the power to grant new trials, and he ought to exercise it whenever in his judgment unfair advantage has been obtained at the expense of justice."

So we say in this case, the trial judge was at the very seat of justice. The verdict in

this case disturbed his idea of justice. He set it aside, and it should so remain. It matters not that he may have assigned a wrong reason for his action, if there be a good reason covered by the motion for a new trial. We insist that the exceedingly high verdict in this case is not sustained by the evidence for the plaintiff. Under the statute (section 5427, R. S. 1909), the damages assessed by the jury must be "with reference to the necessary injury resulting from such death, to the surviving parties who may be entitled to sue, and also having regard to the mitigating and aggravating circumstances attending such wrongful act, neglect, or default."

No aggravating circumstances were shown by the plaintiff, and hence the damages cannot be enhanced for that reason. The only thing upon which she can have damages is the earning capacity of the deceased and probable length of his life. He was earning \$1.25 per day, and yet on this proof she has recovered the highest amount which can be recovered in a case under these statutes. Had her husband been earning \$10 a day, she could not have recovered one whit more than she did in this case. I do not indorse the idea seemingly announced by our learned Brother that the widow of a man with an earning capacity of \$1.25 per day can or should recover, under these statutes, a sum equal to that which can or should be recovered by the widow of a man whose earning capacity was \$10 per day. The statute does not mean that. It has a sliding scale of damages, and was properly intended to cover all cases, but to cover them rightfully and justly under the facts of each case. The greatest recovery allowable is \$10,000. This includes the aggravating cases. When the Legislature fixed this sliding scale, and when it provided for aggravating circumstances as an element to enhance the damages, and when it further fixed the highest recoverable sum at \$10,000, it was never intended that the widow of a man with the limited earning capacity of \$1.25 per day should recover the full limit of the statute in a case without a single aggravating circumstance. The verdict in this case outrages the very statutes under which it was recovered. To permit it to stand would be to make mockery of the law, and enter upon the records one more travesty upon justice.

As stated before, the excessiveness of this verdict was properly urged in the motion for a new trial. It is vehemently urged here. The trial court has granted a new trial, and excessiveness of this verdict is a good ground for that action of the trial court. What reason the learned trial judge assigned for his ruling is immaterial here, so long as there is one good ground in the motion for a new trial.

The motion for rehearing in this court should be sustained to the end that we may,

upon another hearing, enter up a judgment sustaining the trial court in granting a new trial, nisi, and to the further end that, upon such new trial below, a right verdict in the case may be obtained, and not one bearing upon its face the evidence of poison and prejudice in the minds of the jury.

WOODSON and FERRISS, JJ., concur in these views.

SPRINGFIELD S. W. RY. CO. v. SCHWEITZER et al.

(Supreme Court of Missouri. Division No. 1.
Nov. 30, 1912.)

1. APPEAL AND ERROR (§ 23*)—JURISDICTION OF SUBJECT-MATTER—OBJECTION UNNECESSARY.

The Supreme Court will determine its jurisdiction of the subject-matter in condemnation proceedings, though no question thereon is raised by counsel.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 99; Dec. Dig. § 23.*]

2. COURTS (§§ 24, 37*)—JURISDICTION OF THE SUBJECT-MATTER—WAIVER.

Jurisdiction of the subject-matter can neither be waived nor conferred by consent of the parties.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 76-78, 147-149, 151, 156; Dec. Dig. §§ 24, 37.*]

3. COURTS (§ 231*)—SUPREME COURT—JURISDICTION.

A judgment appealed from must involve title to real estate directly, and not as a mere incident in order to confer jurisdiction on the Supreme Court under the constitutional provision giving such court appellate jurisdiction in cases involving title to real estate.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 487, 491, 644, 646, 647, 648, 650, 652-659, 661; Dec. Dig. § 231.*]

4. COURTS (§ 231*)—SUPREME COURT—JURISDICTION—CONDEMNATION PROCEEDINGS.

Under the constitutional provision giving the Supreme Court appellate jurisdiction in cases involving title to real estate such court may review judgments in condemnation proceedings which involve such title, but cannot review judgments in such proceedings where the amount involved does not confer jurisdiction, or the title to real estate is not involved.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 487, 491, 644, 646, 647, 648, 650, 652-659, 661; Dec. Dig. § 231.*]

5. COURTS (§ 231*)—SUPREME COURT—JURISDICTION—REAL ESTATE—"PERSONAL PROPERTY"—"REAL ESTATE."

An unexpired three-year lease on premises condemned was "personal property," and not "real estate," within the constitutional provision conferring appellate jurisdiction on the Supreme Court in cases involving title to real estate.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 487, 491, 644, 646-648, 650, 652-659, 661; Dec. Dig. § 231.*]

For other definitions, see Words and Phrases, vol. 6, pp. 5346-5358; vol. 8, p. 7753.]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

6. LANDLORD AND TENANT (§ 70*)—LEASE—"CHATTEL REAL."

At common law a term for years created by lease was a "chattel real."

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 215, 216; Dec. Dig. § 70.*

For other definitions, see *Words and Phrases*, vol. 2, p. 1107.]

7. LANDLORD AND TENANT (§ 20*)—LEASE—"REAL ESTATE."

At common law the term "real estate" did not include a lease.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 50, 51, 53, 54; Dec. Dig. § 20.*

For other definitions, see *Words and Phrases*, vol. 8, pp. 7778, 7779.]

Appeal from Circuit Court, Polk County; Argus Cox, Judge.

Action by the Springfield Southwestern Railway Company against Jacob C. Schweitzer and the New Phoenix Foundry & Machine Company. From a judgment for the Machine Company, plaintiff appeals. Cause ordered transferred to the Springfield Court of Appeals.

Robert T. Ralley, of St. Louis, and Barbour & McDavid, of Springfield, for appellant. John Schmook and T. J. Murray, both of Springfield, for respondents.

LAMM, J. Defendant Schweitzer was the same time owner of four parcels of real estate in the city of Springfield, for convenience numbered tracts 1, 2, 3, and 4, severally. Tract 3 alone concerns us. Defendant Machine Company was in possession of tract 3 as a tenant of Schweitzer. In the exercise of its delegated right of exercising the power of eminent domain, plaintiff Railway Company brought a condemnation proceeding in the Greene circuit court against Schweitzer, as owner, to condemn all four tracts for railway purposes, and made the Machine Company a party defendant. Such steps were ultimately taken in that case that, from a judgment in favor of Machine Company, plaintiff Railway Company appeals.

Schweitzer does not appeal from the final judgment; nor does the Machine Company appeal therefrom; nor does the Railway Company appeal from that part of the judgment relating to Schweitzer. The controversy therefore narrows itself, on appeal, to one between the Railway Company and the Machine Company.

On December 31, 1904, Schweitzer let tract 3 to the Machine Company for a one-year term. This lease was in writing, duly recorded, and gave an option to lessee for an extended term of three years, to begin, at the end of that reserved. On the day before the term ended, the Machine Company exercised its option to extend the term for the three additional years. A writing to that effect was signed up and put of record. There was testimony to the effect (and the court so found) that the Railway Company

had notified all the parties concerned, on the day this new lease was signed, that it proposed taking all four tracts by condemnation proceedings. There was testimony from which the fact might be inferred that the extending of the lease was taking time by the forelock by putting Machine Company on a better footing to claim damages; but none of that testimony seems material to the question we have in mind.

The Machine Company was put in possession under its original lease, and was running a foundry and machine shop in some ramshackle buildings on tract 3. This possession was continued into the new term, and, while so in possession, on January 22, 1906, plaintiff sued to condemn all four tracts. The petition is of no consequence on the question we have in mind. It appears the Machine Company lays no claim to any other tract, except No. 3; and as to that its only claim was as tenant for the unexpired part of the additional three-year term. Both defendants, on service of process, filed separate answers. Schweitzer admitted he owned all four tracts in fee simple, and went on to point out that his codefendant, the Machine Company, was in possession of tract 3 (describing it) as his tenant for a term of three years, beginning January 1, 1906. The case rode off below on that theory. To that end the Machine Company filed its answer, setting up its possession of tract 3 under the same lease, and, among other things, claiming damages in the sum of \$5,000, on the theory that "the breaking up, interference with, and interruption of, the business" it was conducting on the leased premises, including the injury to its business and loss of profits, amounted to that sum. On the day these answers were filed, the court made the conventional finding of facts, spreading of record conditions precedent to the right to condemn property for railway purposes, etc., and then went on to appoint and instruct three commissioners to assess damages. Presently they reported, assessing damages to the four tracts separately. When they came to tract 3, they reported an award of compensation in the sum of \$4,200 (quoting) "to Jacob C. Schweitzer, the owner of said tract, and the New Phoenix Foundry & Machine Company, lessee thereof, as set forth in said petition, and as their interests may appear. * * *". Presently, on notice given of this award and report, Schweitzer and the Machine Company excepted thereto, severally, through separate counsel. Following these exceptions, Schweitzer took down the whole award of \$18,200. Subsequently, on the Machine Company's motion, the court ordered him to return to the clerk the \$4,200 allowed as compensation and damages for tract 3. It appears he obeyed this order, in part, by returning \$2,000. Taken by a change of venue to the Polk circuit court, the cause was reached for trial in 1909. At

that time, on the motion of the Railway Company, the Machine Company was ordered to make its claim for damages more specific. This it did in the form of written amendments to its exceptions to the commissioners' report. Thereby it claimed damages, summarized as follows: For removing its business, foundry, and machine shops, comprising sand, iron, patterns, machinery, tools, stock and material, engines and implements, etc., \$634.31; damages consequent to said removal in breakage and destruction of articles and machinery so moved, \$850; in breaking up, interference with, and injury to, its business, loss of patronage and custom by change of location, \$1,000; loss of earnings during the time of removal, \$1,000; deprivation of the use and benefits of its leasehold interest during the unexpired term of its lease, \$900; loss of its established trade, patronage, and good will at its old stand, \$500.

On the filing of these amended exceptions by the Machine Company, Schweitzer formally withdrew his own exceptions by a pleading filed, and thereby he inferentially submitted to judgment in favor of plaintiff and directly asked the court to determine the respective interests of himself and the Machine Company in the award on tract 3, and to make an order distributing the same in accordance therewith. Thereupon the cause came on for trial on said motion of Schweitzer and the remaining live exceptions of the Machine Company.

The trial was to the court, without the aid of a jury, and exceptions were taken by appellant to the refusal to strike out the exceptions, to the introduction of certain testimony by the Machine Company, to the scope of the inquiry, to the giving and refusing of instructions, and to the findings and judgment; but none of them are material until such time as the question in mind is at rest.

Attending to the finding and judgment on tract 3, among other things, the court found that the lease was of no more value than the monthly rent reserved. Further, that the Machine Company, to continue its business during the unexpired term of its lease and preserve its machinery and material from loss and destruction, was obliged to remove said machinery and material to another building, thereby necessarily incurring expense in the sum of \$634.31, and suffered loss of fire brick to the amount of \$86, "and that" (quoting) "by reason of the fact that said lessee had its machinery so installed and in operation, as aforesaid, the leasehold was of special value to defendant company, in excess of the ordinary rental value of the premises, to the amount of \$720.31." Further, that Schweitzer had withdrawn his exceptions to the report of the commissioners, etc. It was adjudged, *inter alia*, that he take nothing; that the Machine Company take nothing from Schweitzer, "or" (quoting) "from the value of the land, independent of

the special value of the leasehold"; that Schweitzer take down the \$2,000 theretofore deposited with the clerk; and that the Machine Company recover said \$720.31 from plaintiff.

In the foregoing we have culled from the record the facts deemed necessary to an intelligent and self-explanatory disposition of a question we have in mind, namely, our jurisdiction. We think jurisdiction is challenged on the face of this record. In that view of it, the situation seeks its determination at the outset. Thereon we make these observations:

[1, 2] (a) The question of jurisdiction is not sprung by counsel. One of the ancient prerogatives of counsel is, within the boundaries of the record, to make or not make points for the decision of judges. They are at liberty, within the confines of good sense, to have play of free will and do as they choose in that regard. On the other hand, some of the ancient prerogatives of the courts of all enlightened peoples are to decide only such points sprung by counsel as are deemed vital and necessary, and, in turn, a court may, *ex mero motu*, spring points of its own, at least on the subject of jurisdiction; for jurisdiction of the subject-matter can neither be waived nor conferred by consent of parties. Whether it exists or not in a concrete case springs spontaneously for inquiry at any step or stage of a suit at any time, in any case, and will be considered *sua sponte*. *City of Tarkio v. Clark*, 186 Mo. loc. cit. 294, 85 S. W. 329.

[3] (b) We are of opinion we have no jurisdiction of this appeal. This because:

(1) The Constitution gives the Supreme Court appellate jurisdiction in cases involving title to real estate. By construction we have arrived at the conclusion, announced many times, that it is not sufficient to confer jurisdiction on this court that the title to real estate should be a subject of inquiry collaterally or by way of an incident in the suit. To confer jurisdiction, in a constitutional sense, the *judgment* appealed from must involve title to real estate, and such title must be directly affected thereby. *Jones v. Hogan*, 211 Mo. loc. cit. 47, 109 S. W. 641, and cases cited; *Turner v. Morris*, 222 Mo. 21, 121 S. W. 9; *Loewenstein v. Insurance Co.*, 227 Mo. loc. cit. 134 et seq., 127 S. W. 72; *Kennedy v. Duncan*, 224 Mo. loc. cit. 664, 123 S. W. 856; *Porter v. Railroad*, 175 Mo. 96, 74 S. W. 992.

[4] (2) Under the constitutional grant of power to hear and determine appeals in cases involving title to real estate, we have held that this court has jurisdiction in appeals from judgments in condemnation proceedings under the exercise of the right of eminent domain. The leading case on that head is *State ex rel. v. Rombauer*, 124 Mo. 598, 28 S. W. 75. In *Railroad v. Wyatt*, 223 Mo. loc. cit. 351, 352, 122 S. W. 688, a line of cases are cited following the *Rombauer*

Case. And that general doctrine may be accepted as settled.

(3) It would be loose and illogical construction, however, to hold we had jurisdiction in such cases, unless our jurisdiction be referable to the constitutional grant of power to hear causes involving title to real estate. It follows that when a judgment in a condemnation proceeding comes by appeal to the Supreme Court, and is of such sort that the amount involved does not confer jurisdiction, and the title to real estate is not involved, our jurisdiction fails. The question up for determination, therefore, is not merely whether this is a condemnation suit. It goes deeper, and is: Is the title to real estate involved as between the Railway Company and the Machine Company?

[6-7] (4) The Machine Company had a leasehold for that part of a term of three years that was unexpired when the Railway Company appropriated the premises, and no more. The question, then, can be put in a neater and more speaking form by stating it this way: Is a leasehold for a term of years *real estate*? If so, the title to real estate is involved; for unquestionably the term or leasehold of the Machine Company was sequestered. If not, the title to real estate is not involved in a constitutional sense.

Attending to the question thus put, it must be conceded that if a term for years is real estate it becomes such, either by force of common law, or by virtue of some statute. Now, at common law a term for years created by a lease was a chattel—a chattel real to be sure, but still a chattel. At the tenant's death such leasehold became an asset in the hands of his administrator, and did not go to his heirs. At common law the term "real estate" did not include a lease. *Lenow v. Fones*, 48 Ark. 557, 4 S. W. 56; *Grover v. Fox*, 36 Mich. loc. cit. 459; *Despard v. Churchill*, 53 N. Y. loc. cit. 199; *Buhl v. Kenyon*, 11 Mich. 249, 83 Am. Dec. 738, 2 Kent, Com. *342; *Gunn v. Sinclair*, 52 Mo. 331; *Orchard v. Store Co.*, 225 Mo. loc. cit. 433 et seq., 125 S. W. 486, 20 Ann. Cas. 1072.

Turning now to our statutes, we have a group of them defining the term "real estate" in connection with some particular subject-matter, and for some particular purpose, as, for example: Judgments (R. S. 1909, § 2161); Executions (Id. §§ 2193, 2194); Conveyances (Id. § 2822); Crimes and Punishments (Id. § 4928); Dower (Id. § 345); Construction of Statutes (Id. § 8057); and Taxation and Revenue (Id. § 11519).

A reproduction here of those statutes, with an analysis and interpretation thereof, would be waste of time and mere idle and ostentatious show of labor subserving no useful purpose. It is enough to say that in *Orchard v. Store Co.*, 225 Mo. 414, 125 S. W. 486, 20 Ann. Cas. 1072, supra, ruled in Division Two, they are exhaustively reviewed, expounded, and applied. The learning of

that case is of the order that leaves no stone unturned, no source of information explored, no pains omitted. It must be held, then, that further exposition of those statutes in that regard is set at rest, and should not be put on foot and on its legs as a going concern again. We stand by that case. It was there held, as the sum of the matter, that the foregoing statutes have not changed a chattel real from personal property into real estate for the general purposes of the law. In given particulars, and for certain defined purposes, as, for instance, in the chapter on conveyances, the term "real estate" is made to include a chattel real, but not for the general purposes of the administration of the law. Following the reasoning of the *Orchard Case*, and on its authority, we hold that chattels real are left, for the purposes of this case, as at common law, to wit, as personal property. Indeed, even a superficial reading of the exceptions of Machine Company, of the finding of the court, and of the judgment below points to the fact that the damages Machine Company suffered, if any, related to personal property. The title to real estate not being involved in that part of the omnibus judgment appealed from, we have no jurisdiction.

The cause must be transferred to the Springfield Court of Appeals. Let it be so ordered. All concur.

MARSHALL et al. v. HILL et al.

(Supreme Court of Missouri. Nov. 26, 1912.)

1. JUDGMENT (§ 335*)—PETITION FOR REVIEW—WHAT CONSTITUTES.

Where a verified petition states that a judgment quieting title has been entered against the petitioners without summons or appearance, and upon a petition which was untrue in some material matter, and to which the petitioners have, and then had, a good defense, setting out such defense, and closes with a prayer that the judgment quieting title be set aside, it is a petition for review, under Rev. St. 1899, §§ 777, 780, authorizing a petition for review to set aside a judgment entered without summons or appearance, and prescribing the facts which must be shown by such petition, though an additional party necessary to a complete defense was brought in, and one party was transferred to a different side from that which he occupied in the suit to quiet title.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 647-663; Dec. Dig. § 335.*]

2. JUDGMENT (§ 335*)—"PETITION FOR REVIEW."

The proceeding which is named a "petition for review" by the Legislature is highly remedial, and must necessarily accommodate itself to the needs and practices of every proceeding that comes within its scope.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 647-663; Dec. Dig. § 335.*]

3. TRUSTS (§ 94*)—DEFECTIVE PATENT—CORRECTION BY SUBSEQUENT PATENT—TITLE TO LAND.

Where the holder of a patent erroneously describing the land transferred his interests

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

by a warranty deed perpetuating the erroneous description, a subsequent patent, secured in lieu of the former one, merely conferred upon him the legal title in trust for his grantee or representatives, in whom rested the equitable title.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 143; Dec. Dig. § 94.*]

4. ADVERSE POSSESSION (§ 7*)—COMMENCEMENT OF PERIOD—ISSUANCE OF PATENT.

Limitations did not begin to run in favor of the parties in possession of public land until the issuance of a patent correctly describing it, though a patent intended to cover such land, but not correctly describing it, had been issued prior thereto.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 24-42; Dec. Dig. § 7.*]

5. EQUITY (§ 71*)—LACHES.

Where a patentee of public land, under a patent erroneously describing it, in 1874 transferred his interest by a warranty deed perpetuating the erroneous description, and thereafter the land remained vacant until 1889, when lead was discovered, and thereupon the patentee took possession and paid the back taxes, for which he was amply reimbursed for timber sold from the land, and where in 1894 he instituted proceedings to secure a corrected patent, and did not disclose the transfer to the land office until he could no longer conceal it, and then for the first time claimed that the deed had been procured by fraud, and where, after having obtained the correct patent, he challenged the representatives of his grantee to contest his title, such representatives are not guilty of laches in the bringing of a proceeding in 1905 to establish their title to the land.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 204-211; Dec. Dig. § 71.*]

6. PUBLIC LANDS (§ 127*)—CORRECTED PATENT—PARTY ENTITLED.

Where public land was patented under an erroneous description, and the patentee transferred same by a warranty deed perpetuating such description, and a controversy arose between the patentee and his grantee as to which was entitled to the land, the land department properly issued a corrected patent to the patentee; the matter in controversy between them being for the courts, and not for the department.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. § 343; Dec. Dig. § 127.*]

7. LIMITATION OF ACTIONS (§ 5*)—APPLICATION OF STATUTE.

The statute of limitations applies alike to all actions, whether they were before the enactment of the Code called legal or equitable.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 13-15; Dec. Dig. § 5.*]

8. EQUITY (§ 71*)—LACHES—TIME AS AN ELEMENT.

Notwithstanding the statute of limitations, time is an important element in the defense of laches.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 204-211; Dec. Dig. § 71.*]

9. DEEDS (§ 211*)—LACHES—LOSS OF EVIDENCE.

Where a grantor in a warranty deed delayed more than 20 years before claiming that the deed was secured through fraud, his testimony alone was insufficient to establish such fraud.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 637-647; Dec. Dig. § 211.*]

10. JUDGMENT (§ 335*)—INNOCENT PURCHASER OF LAND—TITLE ATTACKED BY PETITION FOR REVIEW.

Under Rev. St. 1899, § 784, providing that no sale or conveyance of property for the satisfaction of any judgment regularly made shall be affected by the setting aside of the judgment on petition for review, if the property be in the hands of innocent purchasers, the title of innocent purchasers for a valuable consideration from the holder of a legal title cannot be set aside in proceedings for review by the holders of the equitable title.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 647-663; Dec. Dig. § 335.*]

11. VENDOR AND PURCHASER (§ 231*)—BONA FIDE PURCHASERS—CONSTRUCTIVE NOTICE.

While a purchaser of land has constructive notice of all matters of public record in his own chain of title, including matters collateral thereto pointed out by the record, he is not chargeable with notice of proceedings to obtain a corrected patent to the land, nor of any chain of title adverse to that of the patentee, from the mere fact that the patent stated that it was made in lieu of a prior patent "in which the description of the land was erroneous, the record of which has been canceled."

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 487, 513-539; Dec. Dig. § 231.*]

12. VENDOR AND PURCHASER (§ 228*)—BONA FIDE PURCHASERS—ACTUAL NOTICE—EFFECT.

Where one has actual notice of an equitable claim affecting the legal title he is about to purchase, he completes the transaction at his own risk.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 495-501; Dec. Dig. § 228.*]

13. VENDOR AND PURCHASER (§ 227*)—BONA FIDE PURCHASERS—ACTUAL NOTICE.

A purchaser has actual notice, when he knows of the existence of an adverse claim of title, or is conscious of having the means of knowledge, though he may not use them.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 474; Dec. Dig. § 227.*]

14. VENDOR AND PURCHASER (§ 228*)—PURCHASER IN GOOD FAITH—NOTICE.

Where the purchaser from the holder of the legal title before paying the purchase money had formal notice of the claim of the holders of the equitable title, he was not a purchaser in good faith for a valuable consideration without notice.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 495-501; Dec. Dig. § 228.*]

15. QUIETING TITLE (§ 49*)—DECREE—RELIEF TO PURCHASER OF TITLE.

Where a mining company purchased land from the holder of the legal title with notice of an outstanding equitable title, and thereafter made valuable improvements on the land, and, on being made a party to an action to quiet title between the owners of the equitable and the legal title, asserted its rights under the contract, the court, on finding in favor of the equitable owner, will enforce the contract of sale, on payment to such equitable owners of the contract price.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. §§ 98, 99; Dec. Dig. § 49.*]

In Banc. Appeal from Circuit Court, St. Francois County; C. A. Killian, Judge.

Petition by Leander J. Marshall and others

against Norman J. Hill and others. From judgment for plaintiffs, defendants appeal. Modified and affirmed.

The following is the opinion in Division No. 1:

Statement.

BROWN, C. In February, 1905, the defendant Norman N. Hill filed his petition in the St. Francois circuit court, returnable at the next May term thereof, in words and figures as follows:

"Norman N. Hill, Plaintiff, v. Charles R. Marshall; Leander J. Marshall, John Marshall, and the Unknown Heirs, Grantees, and Devisees of John Marshall; Della Lashley and the Unknown Heirs, Grantees, and Devisees of Austin Marshall, Deceased; the Unknown Heirs, Grantees, and Devisees of Stanhope Marshall, Deceased; the Unknown Heirs, Grantees, and Devisees of James Marshall, Deceased; Adeline Boggs and the Unknown Heirs, Grantees and Devisees of Adeline Boggs; and the Unknown Heirs, Grantees and Devisees of Sarah Marshall, Deceased, Defendants.

"Plaintiff states that he claims to own and does own, in fee simple, the following described lands situate in the county of St. Francois, in the state of Missouri, to wit: All of the southeast quarter of the southeast quarter of section No. 1, township 36 N., range four east, containing about 40 acres. He further states that he is informed and believes that the above-named defendants claimed to have and own an interest in said lands. Plaintiff further states that defendants are nonresident of the state of Missouri and cannot be served with process in said state in the manner prescribed in article 4, chapter 8, Revised Statutes of Missouri, 1899.

"Plaintiff states that he verily believes there are persons, as hereinafter set forth, who are interested in, or who claim to be interested in, the subject-matter of this petition as heirs, grantees, and devisees of the parties named in this petition, and whose names he cannot insert, because unknown to him. He further states that Adeline Boggs, formerly Adeline Marshall, and John Marshall are children and heirs of Sarah Marshall, deceased, aforesaid; that he has no definite knowledge as to whether the aforesaid Adeline Boggs and John Marshall are still living, and hence their unknown heirs, grantees, and devisees are made parties to this action. He further states that James Marshall, deceased, Austin Marshall, deceased, and Stanhope Marshall, deceased, are also children and heirs of the aforesaid Sarah Marshall, who died more than 20 years ago; that the said unknown heirs, grantees, and devisees of Sarah Marshall, and the unknown heirs, grantees, and devisees of Adeline Boggs, John Marshall, James Marshall,

Austin Marshall, and Stanhope Marshall, claim title to the aforesaid premises, as plaintiff is informed and believes, by and through the aforesaid Sarah Marshall as the common source of title, the exact nature of which claim this petitioner is unable to state.

"Plaintiff therefore prays the court to determine the estate, title, and interest in said real estate of the parties herein respectively, and to define by its judgment or decree the title, estate, and interest of the parties severally in and to such real estate.

"Norman N. Hill, being duly sworn, upon his oath states that the matters and things contained in the foregoing petition are true to the best of his knowledge and belief, and that he verily believes there are persons, as described in said petition, claiming to own an interest in the lands described in said petition, whose names he cannot insert, because unknown to him, and their interests are set forth and described so far as his knowledge extends.

"Subscribed and sworn to before me this — day of February, 1905."

Upon this an order of publication was made and published, returnable on the first day of the May term. None of the defendants appearing at that time, default was taken, and on the 23d day of August, 1905, a final decree was entered, reciting that the plaintiff was the absolute owner in fee of the land described in the petition, that he had been in possession of, exercising acts of ownership over, said land since the year 1894, and that the defendants, or either of them, had no estate, title, or interest therein, and adjudging that all title or claim of right of defendants, and each of them, in and to said lands, be vested in Hill, absolutely and in fee simple.

On October 20, 1905, the original petition in this case was filed by Leander J. Marshall, Mrs. W. S. Marshall, Adeline M. Boggs, and Adella M. Lasley, as plaintiffs, against Norman N. Hill, Jr., Charles R. Marshall, and Doe Run Lead Company. The defendants were all notified and appeared. Mrs. Boggs conveyed her interest to the plaintiff Leander J. Marshall, and died. Leander J. Marshall also died, and the action was revived and continued in the name of his daughter and sole heir, Winifred Marshall Dittmar, and an amended petition was filed in May, 1907. This petition admits the truth of the allegation in the petition of Hill against Marshall that the defendants in that petition claimed to own an interest in the lands, and denies specifically each and all other allegations thereof. It charges that these plaintiffs are the absolute owners of the land in controversy, that the suit was a fraudulent scheme to deprive them of their property, that the statements in the petition by which jurisdiction was attempted to be obtained by publication were false, that the notice by publication is void upon the face of the record, and

that the judgment was obtained by false representations and upon false testimony. They set up their own title substantially as follows:

On or about May 6, 1872, Hill entered the land in question at the United States land office; that by an error the certificate of entry described it as "the southeast quarter of the *northeast* quarter of section 1, township 36 north, range 4 east of the fifth principal meridian; that on August 30, 1872, a patent was issued to Hill, in which the same error was made; that on or about the 19th day of June, 1874, the said Hill sold the land so entered to plaintiff Leander J. Marshall, and executed and delivered to him a warranty deed, in which the land was erroneously described as the southeast quarter of the *northeast* quarter, instead of the southeast quarter of the southeast quarter of said section; that at the time of making this conveyance Hill delivered to Leander J. Marshall the original patent above mentioned, and afterwards on August 31, 1875, Leander J. Marshall for a valuable consideration conveyed the same land by the same erroneous description by warranty deed to Sarah S. Marshall, his mother, from whom plaintiffs deraign their title; that in all these transactions the southeast quarter of the southeast quarter was intended, but by mistake of all the parties it was described as the southeast quarter of the *northeast* quarter; that there is no such tract of land as the southeast quarter of the *northeast* quarter of said section; that in March, 1898, Hill, who was formerly of Richland county, Ohio, but was then living in Washington, D. C., applied for and obtained from the United States a patent granting to him the said southeast quarter of the southeast quarter of section 1, township 36, range 4, on the sole ground that he had entered the said land as above stated, and that by mistake the patent therefor had described it erroneously. The said last patent states upon its face that it was made to rectify said mistake. The petition also charges that Hill procured from Charles R. Marshall, one of the heirs of Sarah S. Marshall, a quitclaim deed to the lands in controversy, dated June 23, 1890, which plaintiffs believe was procured by fraud and misrepresentation, and could convey no greater interest than the undivided one-sixth interest owned by the grantor as one of the heirs of Sarah S. Marshall; that all the acts charged in the petition constituted a fraudulent scheme, having for its object the unlawful acquisition by Hill of the land in controversy. Charles R. Marshall is made a defendant in order that his interest may be adjudicated in the suit, and the Doe Run Lead Company to adjudicate their claim on account of an option to purchase the same land from Hill. The petition concludes as follows:

"Wherefore plaintiffs pray the court to

set aside the decree entered in the cause aforesaid, to permit the plaintiffs herein to controvert by proof the allegations of the petition in said cause, and to support the allegations herein, and, upon testimony being heard, to declare the title which may have been conveyed by the United States by the patent of March 21, 1898, to Norman N. Hill, Jr., of southeast quarter of southeast quarter of section 1, township 36 north, range 4 east, to be vested in the plaintiffs as herein set forth. Plaintiffs' interest herein be decreed in said lands as herein set out; that is, to Winifred Marshall Dittmar two-fifths, Mrs. W. S. Marshall one-fifth, Adella M. Lasley one-fifth, Charles R. Marshall one-thirtieth, and to Norman N. Hill, Jr., or Charles R. Marshall, as the court may determine, five-thirtieths—and for all other and further equitable relief."

Petition was duly sworn to.

Hill answers that Charles R. Marshall repaid him one-half the amount of money he had paid for the land, and that he supposed he had conveyed him one-half the land, but denies any knowledge of the deed to Leander J. Marshall, although he does not deny its execution. He also pleads adverse possession of the land for more than 10 years prior to the filing of the petition, and the 10-year statute of limitations.

The Lead Company set up its option to purchase from Hill, upon which it has paid \$100, and expended in prospecting about \$3,000 more, and asserts its willingness to pay the purchase price, \$15,000, as soon as it can get title. It also says it has no knowledge of the truth or falsity of the matter set up in the petition, and answer of Hill, except such as it pleads, and such records and facts as the law would charge it with knowledge of.

The answer of Charles R. Marshall set up, among other things, that the quitclaim deed of June 23, 1890, was obtained by Hill through fraud and misrepresentation, and asks that it be set aside. To this answer Hill filed a motion to strike out that part referring to, and asking relief on account of, the quitclaim deed, on the ground, among others, that "in this cause Norman N. Hill can set up no title other than that which he set up, or might have set up, in his original petition in this suit, the decree in which is herein sought to be vacated."

All the matters pleaded in the several answers were properly put in issue. The facts relating to the title to the land in controversy are as follows:

On May 6, 1872, Norman N. Hill applied at the local United States land office at Ironton, Mo., to enter the southeast quarter of the southeast quarter of section 1, township 36 north, range 4 east, in St. Francois county, Mo. His application is now on file in the local land office, and the plat book shows the entry (43,783) by its proper description. The register of cash entries and

the tract books of the local office show the entry to cover the "S. E. $\frac{1}{4}$ N. E. $\frac{1}{4}$ " of said section, but the letter "S" appears written in pencil over the "N," changing the description to the "S. E. $\frac{1}{4}$ S. E. $\frac{1}{4}$." The acreage of the last described tract (41.02) appears on the records throughout. The certificate was erroneously made out as the southeast quarter of the *northeast* quarter, which was covered by the claim of one Joseph Girrard, Jr., which had been patented to him June 6, 1836. Patent was issued to Hill by the same erroneous description August 30, 1872. Hill conveyed the southeast quarter of the northeast quarter to Leander J. Marshall June 19, 1874, and the deed was, on May 18, 1875, duly recorded in St. Francois county. Leander J. Marshall conveyed the same land to Sarah S. Marshall, his mother, August 31, 1875, by warranty deed, recorded January 4, 1876. The plaintiffs in this case are the heirs of this grantee, who have acquired her interest by inheritance and transfers between themselves, in the proportions stated in the prayer of the petition.

The Flat River lead district began to develop in the '80's; the first map of it having been made, as disclosed by the record, in 1882. In 1886 and 1887 lands in the vicinity of the tract in question began to sell, and in December, 1889, Mr. Hill, who was then occupying a position in the pension office in Washington, seems to have become aroused, and paid \$38 and some cents in taxes which had been assessed against the tract in controversy from 1874 to 1889, inclusive, and has since paid the taxes from year to year, both before and since the emanation of the legal title from the United States, up to the time of the trial. In 1890 the defendant Doe Run Lead Company was working on the Cofman and Hampton lands adjoining, and Judge Taylor was working his land east of it. June 23d of that year Hill sent a lawyer named Sewall, of Mansfield, Ohio, who is now dead, to Charles R. Marshall, and procured a quitclaim deed to the same land described in the second patent. This is the deed that is now being attacked by the defendants Marshall as fraudulent. He testifies that it was procured by misrepresentation, while Hill testifies that he obtained it because Charles R. Marshall had, in 1874, refunded half the cost of the land to him, and he had, or supposed he had, for that consideration, conveyed to him an undivided half of the tract described in the patent.

December 17, 1894, Hill wrote to the Commissioner of the General Land Office as follows: "I am the owner of the S. E. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of Sec. 1, Tp. 36, R. 4 E., in St. Francois county, Missouri. The original patent has been lost. I desire to know what steps are necessary to secure a copy of said patent. The land was entered by me in 1872, I believe about May of that year, and

I have owned it since that time." This application proceeded, with voluminous correspondence. February 25, 1895, the Commissioner called upon Mr. Hill for an affidavit showing loss of the patent issued in case of C. E. 43,783, also conveyance to the United States of the land described in that patent, and an abstract showing that such land was free from all incumbrances, mortgages, assignments, and conveyances, to which Hill replied with an affidavit that the patent had been lost and an abstract as follows: "Abstract of title to S. E. $\frac{1}{4}$ of S. E. $\frac{1}{4}$ Sec. 1, Tp. 36 N., R. 4 E.: United States to Norman N. Hill, entry dated May 6, 1872, S. E. $\frac{1}{4}$ Sec. 1, Tp. 36 N., R. 4 E., Chas. R. Marshall to Norman N. Hill, quitclaim deed, dated June 23, 1890, filed July 2, 1890, Rec. 39, p. 465."

Further proceedings on this application led to the disclosure of the record of the deed to Leander J. Marshall. To this Mr. Hill answered that the patent of June 6 1836, under private land grant survey No. 870 to Joseph Girrard, Jr., had divested the title from the United States, so that the patent of August 13, 1872, was void, from which it followed that the alleged transfer by him to Leander J. Marshall was void and that it was also void for the reason that it was obtained covertly and by fraud, and was intended to be and believed to be to Charles R. Marshall, who afterward conveyed to him. May 23, 1896, the department ordered notice to Leander J. Marshall, which was afterward given, and the matter proceeded until it was finally determined by the Commissioner of the General Land Office February 7, 1898, in a decision containing the following paragraph:

"It is true that there is no evidence of service of notice on the Marshalls of the motion for review now pending, as is required by rule of practice 76; but there are no adverse parties before this office. The Marshalls all claim under Hill's entry, and the conflict of interest between Hill and the Marshalls this office has no jurisdiction to determine. They may have conflicting interests; but, if so, it will be for another tribunal to decide. Nor did the Marshalls come into this case as adverse parties, under rule 102. They have asked nothing, simply objected to this office correcting its own error, when, so long as the title to the S. E. $\frac{1}{4}$ S. E. $\frac{1}{4}$ remains in the government, neither the Marshalls nor Hill can enforce whatever rights they may have."

Hill testified that he knew nothing of his own conveyance to Leander J. Marshall in 1874, but that he supposed the only conveyance he had executed had been an undivided one-half to Charles R. Marshall, while Charles R. Marshall testified, at the time of the date of this deed, he knew Mr. Hill personally and well. He was a justice of the peace in Richland county, Ohio, while Hill lived in Plymouth, Ohio, a part of which was in Rich-

land county and part in Huron county; that his brother, Leander J. Marshall, made a trade with Hill to purchase the 40 acres in controversy, and gave the witness the purchase money to go over to Hill's home and pay him for the land and have the deed executed, which he did. Mr. John Rank, who had gone to Plymouth with him in a buggy, and is now dead, and Mr. Emery, a citizen of Plymouth, witnessed the deed, which was signed by Mr. Hill and his wife, both of whom went with him across the street into Richland county and acknowledged it, knowing well what it contained. Mr. Hill, besides paying the taxes, exercised various other acts of ownership over the land in question; one of them being the sale of wood cut from the land in 1895, to the value of \$170.40.

The petition and cross-petition of Charles R. Marshall were dismissed, and costs adjudged in favor of Hill and Lead Company, and after the overruling of motions for a new trial and in arrest of judgment, the case is here by appeal.

Opinion.

[1] I. The first question that confronts us relates to the effect of the judgment in the proceeding instituted by Mr. Hill in 1905, against the Marshall heirs, to quiet his title to the 40 acres of land in controversy. That proceeding was founded upon the provisions of section 650, Revised Statutes 1899. The only service upon any of the defendants was by publication in a newspaper. None of them appeared; so that if this petition is to be given the effect of a petition for review, under section 777 of the Revised Statutes of 1899, the judgment does not stand in the way of the trial of the issues presented by it.

No statute of our state has been subjected to more or greater vicissitudes, both legislative and judicial, than that which relates to the quieting of titles. At the time of the bringing of the Hill suit, sections 647 and 650 appeared together upon the statute book. The former had stood substantially the same for many years. It contains its own provisions for issuing and serving notice of proceedings under it, and provided, in substance, that any person in possession of real property claiming a freehold, or unexpired term of not less than 10 years, might file a petition in the circuit court, setting forth his estate, describing the premises, and averring that he was credibly informed and believed that the defendant made some claim adverse to such estate, and praying for summons to show cause why such person should not bring an action to try such title; and, if so, upon the return, duly executed, of the notice as provided, the defendant should make default, or, having appeared, should disobey the lawful order of the court to bring an action to try the title, or, having brought it, should fail to prosecute it with effect, and the court be of the opinion that such person had no valid right in law or equity, it should enter

a judgment that he be forever debarred and estopped from having or claiming any right or title adverse to the petitioner. This section carefully guarded the interests of the defendant, and the bringing and effective prosecution of a suit appropriate to try the title claimed by the plaintiff, against all such parties as should be necessary to a determination of the questions involved, would be a complete return to and compliance with the order and judgment of the court. This was a fair and honest law, so far as it went. It answered all the purposes of those visibly and openly in the possession of lands who desired to compel those threatening such possession to put their words into acts and measure their rights with the possessor. It gave no countenance to those being out of possession to ripen claims which had never, by any visible act, been brought to the notice of the true owners, by judicial proceedings hidden in the folds of obscure newspapers. Even as to the cases to which it applied, the courts were admonished to take care of the interest of those who might fail to receive such notice as would enable them to take care of themselves by withholding judgment until they should be of the opinion that there was no valid right, either at law or in equity, that required protection.

In 1897 the following section, known in the Revision of 1899 as 650, was enacted: "Any person claiming any title, estate or interest in real property, whether the same be legal or equitable, certain or contingent, present or in reversion, or remainder, whether in possession or not, may institute an action against any person or persons having or claiming to have any title, estate or interest in such property, whether in possession or not, to ascertain and determine the estate, title and interest of said parties, respectively, in such real estate, and to define and adjudge by its judgment or decree the title, estate and interest of the parties severally in and to such real property." This section alone does not indicate an intention to repeal section 647, in so far as that section authorizes the trying of titles and interests in land by such proceedings and against such parties as should be necessary to a full determination of the questions legitimately involved, nor remove a single safeguard with which it protected an unconscious defendant from the careless or fraudulent use of the drastic remedies it provided. Nor does the repealing section (3), providing that "all acts and parts of acts inconsistent herewith are hereby repealed" (Laws 1897, p. 74), indicate any such intention. It has, however, an "emergency clause" in the following words: "This act, being remedial in its character and taking the place of statutes which failed in their object, creates an emergency within the meaning of the Constitution; therefore this act shall take effect and be in force from and after its passage." Id. § 5.

In *Meriwether v. Love*, 167 Mo. 514, 519,

67 S. W. 250, 251, this court referring to section 5, already quoted, assumed that "the lawmakers unquestionably believed that section 2092 was inconsistent with the act of 1897, and intended to repeal section 2092, and to provide a more complete and efficient and direct statutory method of determining and quieting land titles." In this connection the court said: "In *Huff v. Land Co.*, 157 Mo. loc. cit. 69 [57 S. W. 715], it was pointed out that the act of 1897 was probably enacted in consequence of what was said in the *Northcutt Case*" (*Northcutt v. Eager*, 132 Mo. 265, 33 S. W. 1125) "about section 2092 not being broad enough to authorize the life tenant to make the remainderman, who claims under, and not adverse to, the life tenant, bring a suit to try his title." This case was followed in *Hudson v. Wright*, 204 Mo. 412, 423, 103 S. W. 8, and in *Powell v. Crow*, 204 Mo. 481, 486, 102 S. W. 1024. The act was further construed in an opinion by Valliant, P. J., by which it was held that in proceedings brought under it the court was confined to trying the issues and affording the remedies authorized by its terms. The attention of the Legislature does not seem to have been again directed to any fault or imperfection in this law until by the act of June 1, 1909 (Laws 1909, p. 343), it not only enlarged the jurisdiction in such cases, but in express terms gave the parties the right to present to the court for adjudication such questions, germane to their respective titles, as they see fit. Whether this act was in any way influenced either by the opinion of this court in *Powell v. Crow*, supra, or in *Richard v. Coal & Mining Co.*, 221 Mo. 149, 173, 119 S. W. 953, while of interest as a matter of curiosity, has no bearing upon this case, which had already been tried.

[2] The question here is whether the petition of these plaintiffs should be considered from the standpoint of a petition for review under sections 777, 780, Revised Statutes 1899. These sections require (1) that it should state the existence of the facts set forth in section 777; (2) that the petition of plaintiff, upon which the judgment complained of was obtained, is untrue in some material matter; or that the defendant has, and then had, a good defense thereto, setting such defense forth, or both. That it sets out all these matters with the utmost detail, and closes with the prayer for relief prescribed by the statute, namely, the setting aside of the judgment, cannot be denied. These sections require it to be verified, and it is verified. True, it makes an additional party; but this is necessary to a complete defense. Charles R. Marshall is transferred to the other side; but this also was probably necessary to meet the exigencies of the case. The statute does not seek to control the arrangement of the parties. It names the proceeding a "petition for review," a name created by the Legislature to avoid any com-

bination of words incumbered with a definition from the common law or equity jurisprudence of the past. It is highly remedial, and must necessarily accommodate itself to the needs and practice of every proceeding that comes within its scope.

The act under which the suit which it is sought to reopen was brought is equally silent upon this matter of pleading. It only requires that "the institution, prosecution, trial and determination of suits under the preceding section shall conform in all respects to the provisions of the 'Code of Civil Procedure' now existing and be in force in this state concerning actions affecting real estate." R. S. 1899, § 657. Under this we have held that, although it only permits the person desiring to take advantage of its provisions to "institute an action," it may be used as a defense as well. *Summet v. Realty & Brokerage Co.*, 208 Mo. 501, 506, 514, 106 S. W. 614; *Lambert v. Railroad*, 212 Mo. 692, 706, 111 S. W. 550. The remedy is distinctly given, and the Code affords the means to make it applicable in the particular case. So in this case the plaintiffs have in the form of a "petition," as the statute requires, presented a complete defense to the absolute title set up in the petition of Mr. Hill to quiet his title; they have made the parties necessary to the trial of the contest to which they have been invited; they have given the notice required by section 781 of the Revised Statutes of 1899, and have tried the issue so presented. Even if section 780 contemplates that all these things should be repeated in an answer, this petition has been treated as an answer for all the purposes of the proceeding. The arrangement of the parties plaintiff and defendant is of the same inconsequence in this case as in the *Summet* and *Lambert* Cases, supra. If, under the law and evidence, the plaintiffs have made out their title, they have the right to have the judgment decreeing Mr. Hill's title to be good and valid as against them set aside, and to have such relief as they are entitled, in law or equity, to have under their petition and evidence.

[3] II. The title of Mr. Hill depends upon a patent issued directly to him March 21, 1898, which contains the following statement: "*This patent is issued in lieu of one dated August 30, 1872, in which the description of the land was erroneous, the record of which has been canceled.*" It is not contended that there was any other consideration for its issuance than the money that was paid upon the entry made in 1872, for which the patent was issued purporting to grant the southeast quarter of the northeast quarter of the same section. All the rights that he acquired by virtue of the payment of this money, and of the patent last mentioned, were transferred by him to Leander J. Marshall by the warranty deed dated June 19, 1874, which expressed a consideration of

\$500, and was spread upon the deed records of St. Francois county May 18, 1875. The consideration for the later patent consisted solely of rights belonging to Marshall, so that, under the well-settled principles of law applicable to such cases, Hill received and holds the legal title so granted in trust for Marshall, who became, in the manner stated, the equitable owner. *Groves' Heirs v. Fulsome*, 16 Mo. 543, 57 Am. Dec. 247; *James v. Groff*, 157 Mo. 402, 57 S. W. 1081; *Davis v. Filer*, 40 Mich. 310; *Sensenderfer v. Kemp*, 83 Mo. 581; *Widdicombe v. Childers*, 84 Mo. 382.

The plaintiffs, his representatives in title, are therefore entitled to the relief asked to the extent of their present interests, unless it has been shown that they have in some way forfeited their right to such relief.

[4] III. Another question preliminary to the consideration of the real merits of the controversy relates to the application of the statute of limitations. This proceeding was, for all purposes connected with the application of that statute, begun with the filing of the petition on the 20th day of October, 1906, and there does not seem to be any doubt that during the year 1895, and again in 1896, Mr. Hill was selling timber which was being cut and taken from this land. Whether the acts done on the land in connection with this transaction constituted adverse possession as to these plaintiffs, and, if so, whether such possession was continuous up to the time this proceeding was begun, are questions which, in the view we take, are not necessary to be decided. The plaintiffs rest their claim for relief upon the theory that by the issue of the patent of March 21, 1898, the legal title to these lands, then first emanating from the government, inured in equity to them, and that the primary object of this proceeding is to ripen that equity into a legal title, and that the state statute of limitations had no bearing upon the rights of the parties until the issue of the patent which divested the title of the United States. The plaintiffs seem to be right in this contention. There is no difference between the question so stated and that involved in the decision of the Supreme Court of the United States in *Gibson v. Chouteau*, 13 Wall. 92, 20 L. Ed. 534, which has been consistently followed by this court. *Smith v. McCorkle*, 105 Mo. 135, 16 S. W. 602; *Cummings v. Powell*, 97 Mo. 524, 10 S. W. 819; *Hammond v. Johnston*, 93 Mo. 198, 6 S. W. 83; *Buren v. Buren*, 79 Mo. 538; *McIlhinney v. Ficke*, 61 Mo. 329. It is not necessary for us to speculate as to whether or not there may be cases in which the statute of limitations will take hold upon the right of possession emanating from the government while it retains the naked legal title. We simply say, in the language of this court, quoted from *Hammond v. Johnston*, *supra*, quoting *Smith v. McCorkle*, *supra*, that "as to the govern-

ment there is no statute of limitations, and in the *Gibson* Case it is held that the statute leaves the right of entry upon the legal title, subsequently acquired by the patent, wholly unaffected by adverse possession; that such possession, either by the plaintiffs or defendants, will not control the legal title. This being so, we do not see how the statute can operate as a transfer of the equitable right." 105 Mo. loc. cit. 142, 16 S. W. 604. This language is peculiarly applicable to this case, in which the cause of action is dependent upon the issue of the patent.

[5] IV. Defendant Hill, proceeding upon the assumption that this is a suit to enforce the specific performance of a contract between himself and Leander J. Marshall, made in 1874, and for the reformation of the several deeds, as well as of the patent, that grew out of it, now urges that the delay of the plaintiffs in seeking a declaration of the trust resulting from the patent of 1898 is to be measured by these earlier transactions, and constitutes such laches as to preclude the relief they now seek. In this case they ignore the position of plaintiffs that their equities arise from the transfer to Leander J. Marshall, by the warranty deed of 1874, of the equities arising out of the original entry and erroneous patent. That patent needs no reformation, because it had borne its fruit—the legal title. The deed needs no reformation, because it has borne its fruit, the trust they are now seeking to enforce. If laches is to be imputed, it could find in this case no firmer foundation upon which to rest than his own failure, during the 20 years that succeeded the placing of the Marshall deed upon the records, to take notice of its existence.

[6] Even when, on February 25, 1895, the General Land Office distinctly called upon him for the abstract of title of the tract described in the first patent, he sent, instead, an abstract of the title to the land in controversy, which did not, of course, show that deed. So far as the record shows, he succeeded in keeping from the land department the fact of its execution until January 29, 1896, when one John P. Clark disclosed it. Mr. Hill then stepped from cover, and on April 29, 1896, filed a paper in which he claimed that "it was obtained covertly and by fraud." The department then ordered Mr. Marshall to be notified, and from that time on Mr. Hill fought openly for his patent, contending that the equities between himself and Marshall were for the courts to determine, and the Commissioner finally agreed with him, as we do now, and issued the patent upon that theory, stating the consideration on its face. He also found that, "so long as the title to the S. E. $\frac{1}{4}$ S. E. $\frac{1}{4}$ remains in the government, neither the Marshalls nor Hill can enforce whatever right they may have."

[7, 8] Our Code of Civil Procedure permits but one form of action for the enforcement or protection of private rights and the re-

dress and prevention of private wrongs, and our statute of limitations applies alike to all, whether they were before the enactment of the Code called legal or equitable. These statutes establish the only limitation, founded upon time alone, of the right to bring an action of either variety. In the words of Judge Norton in *Blackford v. Construction Co.*, 132 Mo. App. 157, 164, 112 S. W. 287, 290: "It is certain that mere lapse of time alone is entirely without influence in those cases, where the statute of limitations does not obtain." It is, however, an element, and an important one, in the defense of laches, which still remains a creation of equity designed to meet those cases in which the duty to move promptly in the assertion of a right arises out of the corresponding right of the adverse party to be protected from some injury that would result from delay. These respective rights growing out of the adverse interests of the parties, are often carefully weighed, and the administration of the doctrine of laches thus often becomes one of the most difficult and delicate branches of equity jurisprudence. All definitions of the doctrine adapted to our system of practice contain, in some form, statements of this general idea. In *Spurlock v. Sproule*, 72 Mo. 503, 511, this court said: "In cases where the relief asked may or may not be granted in the discretion of the chancellor and where a remedy exists at law, the aid of the court may be refused, and the party remitted to his action at law, on the sole ground of laches. But in cases where a party comes before the court with a clear right entitling him to the relief, there being no remedy at law, something more than mere delay must be shown before the relief asked can be refused, such as that the party has slept upon his rights till the property sought to be regained has been enhanced in value by improvements made, or that some other matter has intervened which would give to the party who had thus lain idle an unconscientious advantage over the other party, if the relief asked were granted him."

There is nothing in this that tends to support the claim that the increase in value of real property which arises from the development of its surroundings, the discovery of natural resources, or from any other cause unconnected with the labor or expenditure of others, is not, in equity as well as at law, the legitimate property of the true owner. He may let it lie idle, if he so chooses, without subjecting it to appropriation by a wrongdoer. He is only required to act when he sees another expending his own labor or means in the enhancement of its value, under such circumstances that it would be inequitable that he should remain silent and claim the result. The other party may, however, and sometimes does, stand solely upon the strength of his own claim. Asking no terms, and showing no disposition to grant any, he throws down his gauntlet and proposes to

move to victory in his own way. "In such case no consideration of good faith requires that the plaintiff should open the legal warfare at the very earliest opportunity. When a hostile attitude is thus taken, the challenged party may justly be expected, and reasonably be allowed, to be wary and deliberate in choosing his time and opportunity for attack. The law does not demand the utmost exertion of diligence in repelling a hostile invasion of one's rights, deliberately undertaken with full knowledge of all the facts." *Potter v. Schaffer*, 209 Mo. 586, 589, 108 S. W. 60, 63, quoting from 18 A. & E. Enc. Law (2d Ed.) 105.

All the parties to this transaction are, and have been, during the entire period of the growth of the controversy, nonresidents of this state. For 17 years from the time of Hill's entry they all seemed oblivious to the fact that they had any interest in the locality in question until lead was discovered in the Flat River district. Then Mr. Hill sat up and took notice. In 1872 Mr. Hill was acquainted with Mr. Austin Marshall, a brother of Leander J. Marshall and son of Sarah S. Marshall, through whom these plaintiffs claim, and he says that Austin Marshall was with him at the Ironton land office when he made this entry No. 43,783. He died June 10, 1874, and on the 19th of the same month the warranty deed was made by Hill and wife to Leander J. Marshall, who conveyed it in the following year to Mrs. Marshall. In the absence of anything in the nature of a full and frank statement explaining these transactions otherwise, it is but fair to assume that they honestly and fairly attempted to consummate the intention of the parties by putting the legal title in the person for whom the entry was made. Had the land been properly described in the first patent, the legal title would have been vested in Mrs. Marshall. That mistake having been made, the equitable title resulting from the entry was vested in her, and attached itself to the legal title when, by the correction of the mistake, it emanated from the government.

Mr. Hill seems to have moved promptly following the discovery of lead. On December 20, 1889, he paid \$38.87, taxes for the 16 preceding years. He continued afterwards to pay them, much more than reimbursing himself by wood sold from the land. It is fair to assume that on June 23, 1890, he had forgotten to which Marshall he had conveyed the land in 1874, and sent his lawyer for a quitclaim deed to Charles R., who had never, up to that time, had any connection with the title. In 1894 he began proceedings to procure a correct patent. When this could no longer be concealed from the Marshalls, he inaugurated the open fight by charging that their deed had been obtained from him by fraud. Having obtained the patent, he challenged these plaintiffs to a legal contest to try the title, and, having obtained judgment, he was able to negotiate the option

under which the Lead Company claims. We have gone so fully into these facts merely for the suggestion they contain that, from the time Mr. Hill became aware of the desirable quality of these lands, he assumed a hostile attitude toward those who claim under his deed of 1874, and when he had strengthened his position challenged them to the contest they are now maintaining against him. We fail to see in his conduct any evidence of confidence in or dependence upon them that would make it inequitable for them to choose their own time and opportunity to assert their rights. For having done this they cannot now be charged with laches.

[9] V. We do not impute to Mr. Hill any willful misstatement, in holding that the evidence of fraud or mistake in the procurement of the deed from himself to Leander J. Marshall is not of that clear and cogent character which would justify us in setting it aside, or in holding that it is not the deliberate, fair, and intelligent act of the parties to it. We have arrived at the same result with reference to the deed from Charles R. Marshall to Mr. Hill, dated June 23, 1890. Although we have no doubt of the truth of the statement that he has been an invalid for 28 years, and has been physically and mentally unfit during that time to transact any business as "an occupation," as he states in his testimony, the reading of that testimony has given us a high opinion of his mental accuracy, and we do not think the record discloses any reason why he should not be responsible for what seems to have been his deliberate act. Even were his testimony admissible under the circumstances, and that is a question we find it unnecessary to decide, we do not think he should be permitted upon that testimony alone to overthrow his own solemn deed, upon a statement showing nothing more than carelessness in making it. He does not claim that it was made as an accommodation, but acknowledges that he received a cash consideration. We are therefore of the opinion that this deed should stand as a release of the interest that was then vested in him as one of the heirs of Sarah S. Marshall.

[10] VI. The statute under which this review is had provides (R. S. § 779) that, "if such petition for review be not filed within three years after such final judgment is rendered, the same shall stand absolute," and (Id. § 784) that "no sale or conveyance of property for the satisfaction of any judgment, regularly made, shall be affected or prejudiced by the setting aside of any judgment on the appearance of a defendant, as hereinbefore provided, if the property shall be in the hands of innocent purchasers." In this case Mr. Hill is seised of the legal title to the lands involved in the proceeding, and his conveyance to an innocent purchaser, for value paid, would carry the title discharged of the trust these plaintiffs are trying to en-

force. The judgment of Mr. Hill in his proceeding to quiet the title works no change in this situation. The provisions of section 784, quoted above, evidently intended to give stability to sales made in the execution of legal process, and thereby prevent the sacrifice of the property of litigants, are not appropriate to this proceeding, which leaves the property intact, merely declaring the ownership provisionally, by a judgment admitting further judicial inquiry before it becomes absolute.

[11] The Lead Company had constructive notice of all matters of public record in its own chain of title, including such collateral matters as these records pointed out. In this case the chain of title consists solely of the patent of 1898 and their own option. It is true the patent points out that it is made "in lieu of one dated August 30, 1872, in which the description of the land was erroneous, the record of which has been canceled." This notation does not tend to direct attention to the fact that any chain adverse to the patentee existed. Nor do we think that a purchaser from the patentee, or those claiming under him, who has had no connection with the proceedings by which the patent was obtained, is, by his purchase alone, chargeable with notice of such proceedings.

[12, 13] One may, however, have actual notice of an equitable claim affecting the legal title he is about to purchase, and in such case he completes the transaction at his own risk. He has actual notice when he knows of the existence of the adverse claim of title, or is conscious of having the means of knowledge, though he may not use them. *Sensenderfer v. Kemp*, 83 Mo. 581, 588, 589. In this case the vendor of the Lead Company stated in his petition to quiet his title that he was informed and believed that the Marshalls claimed to have and own an interest in the lands. This information should have attracted the attention of a prudent person, and it would have been the most natural thing in the world to have inquired of Hill what it meant, an obvious means of knowledge of which the Lead Company was conscious. Instead of doing this, it took the precaution to make the payment of the purchase price under its option depend upon a perfect title.

[14, 15] Whatever may be said of the question of notice at the time of its purchase, the fact that the purchase money was unpaid at the time formal notice of their claim was given it by the Marshalls is conclusive against its character as a purchaser in good faith for a valuable consideration without notice. *Arnholz v. Hartwig*, 73 Mo. 485. It has, however, done valuable work upon the land in the way of prospecting for minerals, having drilled between 9,000 and 10,000 feet for that purpose. It pleads, also, that it elected, within the time provided in its contract for that purpose, to exercise its option to purchase the land by paying \$5,000 in cash,

and the balance in two equal payments in one and two years, evidenced and secured as provided in the contract.

Under the circumstances we do not think it will be inequitable to permit the Lead Company to settle with the true owners of the land upon the terms of their contract with Hill. It will only be applying the same equitable principle, to a less marked extent, that was applied by us in *Bucher v. Hohl*, 199 Mo. 320, 97 S. W. 922, 116 Am. St. Rep. 492.

The judgment of the circuit court for St. Francois county is reversed, and the cause remanded to that court, with directions to enter its judgment in accordance with the principles herein stated, so that the legal title to the land in controversy will be vested in the parties hereto as tenants in common in the following proportions, that is to say: to plaintiff Winifred Marshall Dittmar two-fifths, to plaintiff Mrs. W. S. Marshall one-fifth, to plaintiff Adella M. Lasley one-fifth, to defendant Norman N. Hill, Jr., one-sixth, and to defendant Charles R. Marshall one-thirtieth, subject, however, to the right of the defendant Doe Run Lead Company, at any time within 30 days from the date of said decree, to purchase said land for the sum, and upon the terms, stated in the contract or option executed by defendant Hill and wife February 21, 1906, by depositing the cash and securities representing the purchase price provided in said contract with the clerk of said circuit court, to be delivered to the parties to whom said title is so adjudged, and upon such payment and deposit, within the time so specified, the legal title shall pass to and vest in said Doe Run Lead Company. The costs of this suit to be adjudged against the defendants Hill and Doe Run Lead Company.

BLAIR, C., concurs.

W. D. Isenberg, H. J. Cantwell, and Andrew C. Ketring, all of St. Louis, for appellants. William Henry White, of Washington, D. C., for respondents.

PER CURIAM. Since the transfer of this cause to the court in banc, and after submission, the parties, both appellants and respondents, have filed a stipulation as follows:

"It is stipulated and agreed between counsel for appellants and counsel for respondents that whereas, all of the interest of the parties plaintiff and Charles R. Marshall, defendant, have prior to the decree in Division No. 1 of this court been transferred by deed to Winifred Marshall Jackson (formerly Winifred Marshall Dittmar, she having married Jackson since the trial below), the decree may be amended so as to vest the interest to the land in controversy herein in Winifred Marshall Jackson, five-sixths, and Norman N. Hill, Jr., one-sixth, and that all of said interests shall vest in the Doe Run Lead

Company upon the payment by said Doe Run Lead Company of fifteen thousand dollars (\$15,000.00), twenty-five hundred dollars (\$2,500.00) of which to be paid to Norman N. Hill, Jr., and twelve thousand five hundred dollars (\$12,500.00) to Winifred Marshall Jackson, or to their respective attorneys of record; and

"Whereas, the Doe Run Lead Company has already deposited with the clerk of the circuit court of St. Francois county the sum of fifteen thousand dollars (\$15,000.00) in cash:

"It is stipulated and agreed between counsel that a decree may be entered for the payment of the same to the attorneys of record for Winifred Marshall Jackson and Norman N. Hill, Jr., respectively, in above proportions, and that all the title and interest of the parties to this suit in the land in controversy shall, upon said payment, be vested in the Doe Run Lead Company. The costs of the suit to be adjudged against the Doe Run Lead Company."

Whereupon it is ordered and adjudged by the court, sitting in banc as aforesaid, that the decree heretofore made and entered in Division No. 1 be so changed and modified that the said cause be and it is remanded to the circuit court for St. Francois county, with directions to enter a final decree therein in all respects in accordance with the terms of said stipulation, and that the mandate of this court in accordance herewith issue immediately.

The opinion of BROWN, C., in Division No. 1 is adopted as the opinion of the court in banc, with the modification suggested by WOODSON, J., in a concurring opinion filed; but our direction as to the entry of the decree in the circuit court is founded upon the stipulation.

WOODSON, J. I concur fully to everything contained in this opinion, except what is said in regard to the right of the Doe Run Lead Company to purchase the land in controversy from the appellants for the sum and upon the conditions stated in the optional contract to purchase the same by it from respondent, without the appellants' wish voluntarily to so do, and as to that I dissent.

STATE v. LOVAN.

(Supreme Court of Missouri. Division No. 2.
Nov. 13, 1912.)

1. FALSE PRETENSES (§ 34*)—INFORMATION—FORM—RELiance ON PRETENSE.

Rev. St. 1909, § 4765, provides that every person who, with intent to cheat and defraud, shall obtain or attempt to obtain from any other person or persons any money, property, or other valuable thing whatever, by means or by use of any trick or deception, or false and fraudulent representation, or statement or pretense, etc., shall be deemed guilty of a felony. An information charged a person with making

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

false and fraudulent statements in regard to the ownership of real estate, and that another relying thereon and being deceived thereby transferred certain shares of stock to the maker of the representation, setting forth all the facts of the transaction, but only in its last paragraph charged the obtaining of the stock by means or by use of the false pretense. *Held* that, while such charge should appear in the body of the information, as the information as a whole clearly advises the defendant of the offense with which he is charged, and clearly sets forth the facts upon which the charge is based, it is sufficient in spite of the technical objection.

[Ed. Note.—For other cases, see False Pretenses, Cent. Dig. § 46; Dec. Dig. § 34.*]

2. CRIMINAL LAW (§ 761*)—TRIAL—INSTRUCTIONS—INVADING PROVINCE OF JURY.

In a prosecution for obtaining property by false pretenses by inducing an exchange of shares of stock for a half interest in an investment company, to which the defendant represented that he would convey unincumbered realty, when such realty as described was in reality incumbered, the court's instruction required the jury to find that the defendant made the representations aforesaid with intent to cheat and defraud, and concluded, "and if the jury further find that, whereas in truth and in fact," the representations made were not true, and they should find that the defendant made them with knowledge that they were not, and with the intent to defraud, they should find him guilty as charged. *Held* that, while the word "whereas" in the negative part of the instruction is awkward and meaningless, the use of the words "if the jury shall further find that," before it, is sufficient to remove from the instruction the objection of invasion of the jury's province.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1731, 1738, 1754-1764, 1771; Dec. Dig. § 761.*]

3. FALSE PRETENSES (§ 38*)—EVIDENCE—DESCRIPTION OF PROPERTY—DEEDS—ADMISSIBILITY.

Where, in a prosecution for obtaining shares of stock by false pretenses as to the condition of the title to certain property, the information described certain land in a particular county in two parcels, containing in all 280 acres, which was shown in the contract simply as "280 acres," two deeds, which were testified to have been handed the prosecuting witness upon his request for a description of the 280 acres mentioned in the contract, were properly admitted with such testimony to establish the identity of the 280 acres in question.

[Ed. Note.—For other cases, see False Pretenses, Cent. Dig. §§ 50-53; Dec. Dig. § 38.*]

4. FALSE PRETENSES (§ 49*)—EVIDENCE—FAILURE OF PROOF.

And where the descriptions in such deeds, taken together, corresponded to the description of the entire 280 acres in the information, there was no failure of proof of the subject-matter of the representation in regard thereto, alleged in the information.

[Ed. Note.—For other cases, see False Pretenses, Cent. Dig. § 62; Dec. Dig. § 49.*]

5. FALSE PRETENSES (§ 42*)—EVIDENCE—INTENT.

Where, in a prosecution for fraudulent representations as to the ownership of property inducing a transfer of shares of stock to the defendant, the state's testimony developed the fact that at the time of the making of such alleged representations land represented to be unincumbered was incumbered by two deeds of trust, testimony of the defendant which would tend to show that he had an arrangement with the person who held the deeds of trust as collateral for a loan, whereby he could obtain a

surrender of such deeds at any time, was improperly refused, as, if the defendant had pledged the mortgages, it must be assumed that he owned them; and if he could recover them at any time the fact would be material on the question of intent.

[Ed. Note.—For other cases, see False Pretenses, Cent. Dig. § 56; Dec. Dig. § 42.*]

6. CRIMINAL LAW (§ 1169*)—EVIDENCE OF OTHER TRANSACTIONS—EFFECT OF WITHDRAWAL.

In a prosecution for obtaining property by false pretenses, the court improperly permitted the prosecutor to include in his statement matter in regard to another transaction involving the defendant, and of a fraudulent character, and the admission of evidence in respect thereto, over the defendant's objection, even though it afterward ruled the evidence incompetent and withdrew it from the jury's consideration, as its prejudicial effect could not be removed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3088, 3137-3143; Dec. Dig. § 1169.*]

7. EVIDENCE (§ 434*)—WRITTEN INSTRUMENT—PAROL PROOF AS TO FRAUD.

The rule applied in civil actions upon written contracts, that prior conversations and oral agreements are merged in the writing, is inapplicable in a prosecution for fraudulent representations inducing the contract, as the fraud is not merged in the writing, and may be proved by parol.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2005-2020; Dec. Dig. § 434.*]

Appeal from Criminal Court, Jackson County; E. E. Porterfield, Judge. |

Ernest Lovan was convicted of obtaining property by false pretenses, and appeals. Reversed and remanded.

Defendant was convicted in the criminal court of Jackson county on an information charging him with the crime of obtaining property by false pretenses, and sentenced to two years in the penitentiary. The information charges that defendant, with intent to defraud one George F. Hannay, did falsely, etc., represent to said Hannay that he (the defendant) and the Ernest Lovan Investment Company, owned in fee simple, and free and clear of all incumbrances, several parcels of real estate, described in detail in the information, and that said Hannay was the owner of certain capital in certain corporations, set out in detail. The information then proceeds as follows:

"That said Lovan then and there offered and proposed to him, the said Geo. F. Hannay, that he, the said Lovan, would then and there trade, transfer, and convey to him, the said George F. Hannay, one-half of the capital stock of said Ernest Lovan Investment Company, a corporation as aforesaid, and would then and there trade, transfer, and by good and sufficient warranty deed convey to the said Ernest Lovan Investment Company, one-half of the real estate above described, in exchange for the said shares of stock of Palace Stable Company, a corporation as aforesaid, and said shares of stock in Fashion Stable Company, a corporation as aforesaid, owned by said Hannay, as aforesaid:

that said Hannay, believing the said Ernest Lovan and the Ernest Lovan Investment Company to be the owners of said real estate, described as aforesaid, and believing the said false and fraudulent statements of said Lovan in that behalf, made as aforesaid, to be true, and relying thereon and being deceived thereby, was induced by reason thereof to assign, convey, transfer, and deliver, and did then and there assign, convey, transfer, and deliver, to the said Lovan all of said shares of stock in said Palace Stable Company and the said Fashion Stable Company as above set forth and described, by him, the said Hannay, owned as aforesaid, in exchange for one-half of the capital stock of said Ernest Lovan Investment Company, and one-half of interest in the real estate above mentioned and described, which he, the said Ernest Lovan, did then and there pretend to assign and convey to him, the said George F. Hannay; whereas, in truth and in fact, neither the said Ernest Lovan nor the Ernest Lovan Investment Company was then and there the owner of, nor had they, or either of them, any title or claim whatsoever to the said real estate, or any part thereof, as hereinbefore described and referred to as tracts 1, 2, 3, 4, and 6, except that said Ernest Lovan was lessee in a lease, for a period of ninety-nine (99) years, covering the land mentioned and described in tract 1; and whereas, in truth and in fact, the said Ernest Lovan and the said Ernest Lovan Investment Company, or either of them, was not then and there the owners of the lands in Morgan county, Missouri, hereinbefore mentioned and described, referred to and designated as tract No. 5, free and clear of all incumbrances whatsoever, but the said land and every part thereof was then and there incumbered with a valid and subsisting mortgage lien of fourteen hundred (\$1,400) dollars, by virtue of two deeds of trust, both dated July 3, 1909, executed by J. E. Snodgrass to S. E. Berry, to secure the payment of two promissory notes of even date for six hundred (\$600) dollars and eight hundred (\$800) dollars, respectively, the former due nine months after its date, the latter due one year after its date, both notes drawing interest at the rate of 7 per cent. per annum, said mortgages being of record in the office of the recorder of deeds in Morgan county, Missouri, in Book 21, page 396, all of which he, the said Ernest Lovan then and there well knew. And so the prosecuting attorney says, upon his oath aforesaid, that he, the said Ernest Lovan, by means of the said deception and false and fraudulent statements and pretenses, so made as aforesaid, then and there unlawfully, knowingly, and fraudulently and feloniously did obtain of and from him, the said George F. Hannay, the shares of the capital stock of the Palace Stable Company and the said shares of the capital stock of Fashion Stable Company, as above described, and of the aggregate value of \$17,714.28, against the peace and dignity of the state."

The state introduced in evidence the following written contract:

"This contract and agreement entered into this 9th day of April, 1910, by and between Ernest Lovan, of Kansas City, Missouri, hereinafter called party of the first part and G. F. Hannay, of Kansas City, Missouri, hereinafter called the party of the second part, witnesseth:

"That whereas, the party of the first part is now engaged in the general real estate and brokerage business, having offices at 517-521 Finance Building, Kansas City, Missouri; and whereas it is his intention to enlarge his business, giving more attention to the handling of farms and lands, and desiring to associate with him the party of the second part, and with this end and purpose in view, the party of the first part binds himself and guarantees to do as follows:

"First. That he will transfer to party of the second part one-half ($\frac{1}{2}$) of the stock of the Ernest Lovan Investment Company, an incorporation under the laws of Missouri.

"Second. That party of the first part will convey to said investment company for the use and benefit of said company the real estate and personal property hereinafter described, guaranteeing that each and every tract of land specified is free and clear of all incumbrances, save and except such incumbrances as may be noted at this time, and that the valuation placed by the party of the first part against each separate tract, piece or parcel of land is a fair and just cash valuation, and that it will and must net the company at least a profit of five thousand dollars (\$5,000) within a reasonable time.

Description of Property Clear and Free from Incumbrance.

| | |
|---|------------|
| Flat property located No. 576 Oak St., Kansas City, Missouri..... | \$6,000 00 |
| 4 cottages, 100 feet ground (front), Topeka, Kansas | \$2,000 00 |
| 640 acres, McPherson county, Nebraska..... | \$6,400 00 |
| 280 acres, Morgan county, Missouri..... | \$3,500 00 |
| 166½ acres, Morgan county, Tennessee..... | \$ 500 00 |
| 40 acres, Newton county, Missouri..... | \$1,500 00 |
| 40 acres, Orange county, Indiana..... | \$ 500 00 |
| 2 lots, Ft. Scott, Kansas..... | \$ 300 00 |
| Merchandise in storeroom at 10th & Garfield | \$1,000 00 |
| Office furniture and fixtures..... | \$ 400 00 |
| 160 acres, Logan county, Kansas, value \$2,000, | |
| Mtg. \$500, equity..... | \$1,500 00 |
| 160 acres, Harper county, Oklahoma, value \$2,500, | |
| Mtg. \$1,000 equity..... | \$1,500 00 |
| 80 acres, Dallas county, Missouri, value \$1,000, | |
| Mtg. \$500, equity..... | \$ 500 00 |
| 100 ft. Virginia Ave., Kansas City, Missouri, value \$2,000, | |
| Mtg. \$1,800, equity..... | \$ 700 00 |
| 7 lots and business house, Wentworth, Mo., value \$3,500, | |
| Mtg. \$2,500, equity..... | \$1,000 00 |

"Third. The real estate above described is subject to change by agreement of the parties hereto; that is to say, that if the party of the second part desires other real estate owned by the party of the first part substi-

tuted for any property listed herein, then the same is to become an asset of the Ernest Lovan Investment Company, and such substitution will be made by the party of the first part. One of the main features and points to this agreement on the part of the party of the first part is that the property shown and described belonging at this time to the Ernest Lovan Investment Company must and shall net to said company within a reasonable time at least twenty-five thousand dollars (\$25,000) which will be a profit of (25) per cent. on twenty thousand dollars (\$20,000).

"Fourth. The party of the first part agrees to accept from the party of the second part, for the interest as herein stipulated, the sum of ten thousand dollars (\$10,000), and that he will accept for the ten thousand dollars (\$10,000) the interest of said party of the second part in the Palace Stable Company and the Fashion Stable Company. The transfer of the interest of the party of the second part in this company is distinctly understood to be without any guaranty on his part as to the value of such interests.

"Fifth. The party of the first part agrees to loan the Ernest Lovan Investment Company immediately one thousand dollars (\$1,000), same to be placed in the bank to the credit of the company. He further agrees to loan them an additional one thousand dollars (\$1,000) if needed at any time within the next six months (6), to insure the party of the second part his salary of two hundred dollars (\$200) per month. Conveyances of any kind for property belonging to said investment company, whether real or personal, and all checks drawn on the bank, are to be signed by the president and secretary in their official capacity. Ernest Lovan, party of the first part, is to be president, and C. F. Hannay, party of the second part, is to be secretary and treasurer.

"Sixth. The party of the second part is to give particular attention to land and farm sales, and it is understood that he will devote such time as may be necessary to the examination of such property.

"Seventh. In the event of the dissatisfaction on the part of either party, it is understood that the party of the first part is to buy for cash the interest of the party of the second part, and pay him therefor within three months from written notice the actual value at the time of sale, which shall not be less than the amount of the original investment, ten thousand dollars (\$10,000). It is understood that if withdrawals have been made from the business in excess of salaries that the same is to be taken into consideration and applied against the original investment and profits.

"Eighth. Both parties hereto are to receive a salary of two hundred dollars (\$200) per month. This may be changed at any time by mutual consent.

"Ninth. It is understood and agreed that

the property of the Ernest Lovan Investment Company, real and personal, is to secure the carrying out of this contract according to the legal tenor and effect, and further understood that the party of the second part may if he so elect, sell and assign his stock either with or without this contract and agreement, provided he has first given notice to the party of the first part that he wishes to sell in accordance with section seven (7) of this contract.

"To all of which we bind ourselves, our heirs, executors and administrators forever
Ernest Lovan.
"G. F. Hannay."

All of the parcels of real estate were eliminated from the case, save the 280 acre in Morgan county, Mo. The case went to the jury upon the representations concerning this one parcel. Testimony was given to the state tending to sustain the allegation in the information. The evidence for the state showed that at the time when the alleged representations were made the Morgan county land was incumbered by two deeds of trust. The defendant testified that he told Hannay about these incumbrances and told him, further, that he had arranged to clear them from the land. Hannay testified that defendant specifically told him, before the trade was made, and before the contract above set forth was signed, that this land was clear and free from incumbrances. Further facts necessary to an understanding of the questions discussed herein will be found in the opinion.

Cooper & Wilson, Wofford & Kimbrell, and Moore & Creel, all of Kansas City, for appellant. Elliott W. Major, Atty. Gen., and John M. Atkinson, Asst. Atty. Gen., for the State.

FERRISS, J. (after stating the facts as above). [1] 1. It is claimed that the information is bad, under section 4565, R. S. 1909, because of the absence of the word "designedly," which is an essential element of the offense defined by the statute. This court has held that an information omitting the word "designedly" is bad under said section. *State v. Pickett*, 174 Mo. 663, 74 S. W. 844. This holding is somewhat doubtfully recognized in *State v. Martin*, 226 Mo. loc. cit. 547, 126 S. W. 442. We need not re-examine the question, as we consider the information good, under section 4765, R. S. 1909.

Defendant contends that the information is bad under section 4765, and sets out his contentions thus in his brief:

"(3) The information is bad, under section 4765, Revised Statutes of Missouri 1909, for the reason that it does not charge that Hannay, "by means or by use of" the alleged misrepresentations, trick, or deception, was induced to assign, convey, transfer, and deliver, and did then and there assign, convey,

transfer, and deliver, to Lovan all of said shares of stock.

"(4) The information is bad, under section 4765, Revised statutes of Missouri 1909, for the reason that the alleged trick, deception, or false and fraudulent representations are not set forth in the information with particularity, so that the accused might be informed sufficiently of the cause and nature of the accusation.

"(5) The information is bad, for the reason that it does not charge that said Lovan falsely, fraudulently, and feloniously offered and proposed to him, the said Hannay, that he, the said Lovan, would then and there trade, transfer, and convey to him, the said Hannay, one-half of the capital stock of the Lovan Investment Company, and falsely, fraudulently, and feloniously offered and proposed that said Lovan would then and there trade, transfer, and convey to Hannay one-half of the real estate described."

There is, we think, no merit in the contentions embraced in the above fourth and fifth assignments. The other assignment, No. 3, raises a serious question of pleading. There is authority for the position taken that the information is technically defective, according to approved precedents, because in the charging part there is no charge that the defendant obtained the stock from Hannay by means or by use of the false pretense; in other words, it does not charge the specific offense defined by the statute. This charge is found only in the last paragraph of the information. Upon precedent, it should appear in the body of the information, immediately after the allegation that Hannay, believing said representations, etc., was induced thereby, and did, convey, etc. Approved forms in this regard may be found in *State v. Martin*, supra; *State v. Donaldson*, 148 S. W. 79; *Wharton, Prec. of Indict.* vol. 1, form No. 529 et seq. In *Commonwealth v. Dean*, 110 Mass. 64, an indictment similar in form to the one under discussion was held bad. The court, speaking of the concluding statement, says: "It is a statement of a legal conclusion from the facts charged. The conclusion does not follow the premises. The only allegation of intent to defraud is made argumentatively and as a legal inference from facts stated, and the inference is unsound." The contention of defendant also finds support in *State v. Pickett*, supra. The point, however, was not controlling in the latter case. The main objection was the failure to describe the false pretense, and it was upon that ground that the information was held defective.

We are not disposed to encourage purely technical objections, based upon ancient forms and precedents. With due respect for precedent and rule, we think that when an information, taken as a whole, clearly advises the defendant that he is charged with

an offense as defined by the statute, and clearly sets forth the facts on which the charge is based, it is sufficient. Measured by this rule, the information is good. We do not agree with the reasoning of the Massachusetts court, above set forth. A charge of felonious intent is necessarily a deduction or inference from the alleged facts. The charge in the final paragraph of the information sufficiently charges the intent, and appropriately refers to the previous allegations of fact upon which the inference naturally arises.

[2] 2. The defendant makes the following objection to instruction No. 1, given by the court: "Instruction No. 1 is erroneous, for the reason that it assumes and directs the jury that Ernest Lovan and the Ernest Lovan Investment Company were not the owners of the real estate described, assumes and directs the jury that said real estate was not free and clear of incumbrances, assumes and directs the jury that Ernest Lovan knew that said real estate was not free and clear, and assumes and directs the jury that Lovan knew it was mortgaged."

Said instruction is as follows: "The court instructs the jury that if they find and believe from the evidence that at the county of Jackson and state of Missouri, at any time within three years next before the 29th day of October, 1910, the date of the filing of the information in this case, that the defendant, Ernest Lovan, with intent unlawfully and feloniously to cheat and defraud one George F. Hannay, did falsely, fraudulently, and feloniously represent and pretend to the said George F. Hannay that he, the said Ernest Lovan and the Ernest Lovan Investment Company, a corporation organized and existing under the laws of the state of Missouri, were then and there the owners in fee simple, free and clear of all incumbrances whatsoever, of the real estate set out and described in the information as lying and being in Morgan county, Missouri, and that the said George F. Hannay was then and there the lawful owner of one hundred and twenty-seven and two-sevenths ($127\frac{2}{7}$) shares of the capital stock of the Palace Stable Company, a corporation organized and existing under the laws of the state of Missouri, and engaged in Kansas City, in said state, and that said shares of stock were at said time of the value of \$30 or more, and of one hundred and sixty (160) shares of the capital stock of the Fashion Stable Company, a corporation organized under the laws of the state of Missouri, and engaged in Kansas City, in said state, which said shares of stock were at said time of the value of \$30 or more, and that the said Ernest Lovan then and there offered and proposed to him, the said George F. Hannay, that he, the said Ernest Lovan, would then and there trade, transfer, and convey to him, the said George F. Hannay, one-half of the

capital stock of the said Ernest Lovan Investment Company, a corporation as aforesaid, and would then and there trade, transfer, and, by good and sufficient warranty deed, convey to the said Ernest Lovan Investment Company one-half of the real estate above described in exchange for the said shares of stock of Palace Stable Company, a corporation as aforesaid, and the said shares of stock of the Fashion Stable Company, owned by said Hannay as aforesaid, and that the said George F. Hannay, believing the said Ernest Lovan and the Ernest Lovan Investment Company to be the owners of said real estate described as aforesaid, and believing the said statements of said Lovan in that behalf, made as aforesaid, to be true, and relying thereon and being deceived thereby, was induced by reason thereof to assign, convey, transfer, and deliver to the said Ernest Lovan all of the said shares of stock in the said Palace Stable Company and the said Fashion Stable Company, as above set forth and described, by him, the said George F. Hannay, owned as aforesaid, in exchange for one-half of the capital stock of the said Ernest Lovan Investment Company, which he, the said Ernest Lovan, did then and there pretend to assign and convey to him, the said George F. Hannay; and if the jury further find that whereas, in truth and in fact, neither the said Ernest Lovan nor the said Ernest Lovan Investment Company was then and there the owner of the said real estate, as hereinbefore described, free and clear of incumbrances; and if the jury shall further find that whereas, in truth and in fact, the said Ernest Lovan and the Ernest Lovan Investment Company, or either of them, was not then and there the owner of the lands in Morgan county, Missouri, hereinbefore mentioned and described, free and clear of all incumbrances whatsoever, but that the said land, and every part thereof, was then and there incumbered with a valid and subsisting mortgage lien of fourteen hundred (\$1,400.00) dollars, by virtue of two deeds of trust, both dated July 3, 1909, executed by J. E. Snodgrass to J. E. Berry to secure the payment of two promissory notes of even date for six hundred (\$600.00) dollars and eight hundred (\$800.00) dollars, respectively, the former due in nine months after its date, the latter due one year after its date, both notes drawing interest at the rate of 7 per cent. per annum, said mortgages being of record in the office of the recorder of deeds of Morgan county, Missouri, in Book 21, page 396, all of which he, the said Ernest Lovan, then and there well knew; and if the jury further find and believe from the evidence that the said Ernest Lovan, by means of the said deception and false and fraudulent statements and pretenses, if any, so made as aforesaid, then and there unlawfully, knowingly, and fraudulently and feloniously did obtain of and from him, the said George F. Hannay, the

said shares of the capital stock of the Palace Stable Company and the said shares of the capital stock of the Fashion Stable Company, as above described, and the said property was of the value of \$30 or more—then you will find the defendant guilty as shown in the information, and assess his punishment at imprisonment in the state penitentiary for a term of not less than two years, and not more than five years."

The use of the word "whereas" in the negative part of this instruction is awkward and meaningless. Still, by using before it the words "if the jury shall further find that," the defect pointed out by this court in *State v. Steele*, 226 Mo. 583, 126 S. W. 406, cited by defendant, is cured.

[3,4] Defendant offered, and was refused, an instruction directing the jury to acquit, on the theory that there was a failure of proof. The information describes the land in Morgan county as follows: "The west half of southeast quarter and southeast quarter of northeast quarter and the northeast quarter of the southeast quarter, all in section 10, township 40, range 19, containing 160 acres; and the east one-half of the northeast quarter of section 15, and the southeast quarter of the southeast quarter of section 10, township 40, range 19, containing 120 acres, all in Morgan county, Missouri"—making in all 280 acres.

Hannay testified that defendant told him that he owned 280 acres in Morgan county, Mo., free and clear of incumbrances, and gave him a list of the lands owned by him, all of which lands he said were clear and free of incumbrances, except those designated otherwise in the list; and that he copied this list into the contract read in evidence. In that contract appears this item in the list of lands: "280 acres, Morgan county, Missouri, \$3,500." Hannay further produced and put in evidence two deeds, one for 160 acres and one for 120 acres, in Morgan county, Mo. The description in the two deeds, taken together, corresponds to the description in the information. Hannay testified that defendant handed him these two deeds, in response to his request for a description of the 280 acres mentioned in the list in the aforesaid contract, and told him that they covered that property. All this testimony was strenuously objected to as not sustaining the description of the property in the information, and also because these deeds were handed to Hannay by defendant after the transaction complained of was completed. The deeds were admitted for the sole purpose of establishing a description of the 280 acres. We think the court committed no error in overruling the objections, and consequently no error in refusing the instruction offered by defendant. The introduction in evidence of the two deeds and the testimony therewith tended to establish the identity of the 280 acres mentioned in the contract, and the subject of the alleged rep-

representations, with the land described in the information.

[5] 3. The testimony for the state developed the fact that at the time when the alleged representations were made by defendant concerning the Morgan county land, the same was incumbered by two deeds of trust of several hundred dollars each. Defendant testified that he told Hannay of the existence of these two incumbrances, and told him, further, that he had an arrangement with the holder of them, Mr. J. J. Swofford, by which he could get them at any time and clear them. Mr. Swofford testified that he held the two deeds of trust on this Morgan county land, and that they had been put up with him by defendant as collateral for a loan. Defendant's counsel asked Swofford, in substance, whether he had a conversation with defendant with reference to surrendering these notes. Objection by the state was sustained. Defendant urges that this ruling was error materially affecting his rights. The state contends that defendant has no standing to urge this assignment, because he made no formal offer to show such arrangement to take up the notes as defendant claimed; and, further, that, even if there had been such an arrangement, it would be immaterial. The defendant's counsel sufficiently indicated their purpose, and the court so understood it. The ruling of the court was put upon the ground that such arrangement was immaterial, inasmuch as it had not been carried out. We think the objection to this line of inquiry should have been overruled. If an arrangement existed by which defendant could at any time clear the lien of these deeds of trust, that fact would be material upon the question of intent. Defendant had testified, without objection by the state, that he had told Hannay that he had an arrangement with Swofford by which he could at any time get these notes and deeds of trust. We think testimony upon this point from Swofford would be competent in corroboration of the testimony of defendant. If defendant pledged these mortgages to Swofford, it is fair to assume that he owned them. Suppose he had not pledged them, but was holding them as owner—it is conceded that he had title to the land—and had said, under such conditions, that the land was clear of incumbrances, it would hardly be claimed that such facts could not be shown upon the question of criminal intent. Yet, if he had an agreement by which he could certainly clear the land of these mortgages, although they were hypothecated, and intended so to do, the effect would be practically the same, so far as the facts related to a criminal intent. The ruling of the court was prejudicial error, and must result in a reversal of the judgment.

[6] 4. In his opening statement the prosecutor detailed to the jury certain facts which he proposed to prove, concerning another

transaction involving defendant, and of a fraudulent nature. Objections by defendant were overruled. A witness was permitted to testify to the facts of this transaction, against defendant's objection. After the testimony was in, the court ruled it incompetent, and withdrew it, by verbal direction, from the jury. The unfairness to defendant of such proceeding is obvious. The evidence was damaging to the character of the defendant. The court, by this ruling and direction, withdrew it from the jury in form; but was it within the court's power to withdraw it from their consideration in fact? It is easy to believe that a man who has done wrong once will do wrong again. The converse of this is recognized by the law, when it permits proof of good character to be given in evidence in favor of a defendant. Out of consideration for the defendant, our law, whether wisely or not, refuses to permit the state, in making out its case, to give evidence of bad character, or of former crimes committed by the defendant; yet knowledge of bad character and former offenses is exceedingly persuasive to believe in the truth of the present charge. It is practically impossible for a man sitting in judgment to exclude from the final make-up of his mind facts which have lodged there, even if the court gravely tells him that such facts should not have been disclosed, and tells him, further, not to consider them. The court does not tell him that such statements are not true. The objections by counsel for defendant probably convince him that they are true. He may believe that the witness has testified truthfully to facts which the court tells him he should not consider. So that to the juror it must appear that he is directed to exclude from consideration the truth, and a truth of a most convincing character. He is unable to obey this direction if he would. Hence, so long as this rule of exclusion is the law, it is incumbent upon the court to see to it that such evidence does not get before the jury. We have suggested what we regard as the proper course in such case in *State v. Hyde*, 234 Mo. 200, 136 S. W. 316. In the case at bar it would have been a simple matter, when the objection was first made to the opening statement, to send the jury out, get a full statement from the prosecutor, and rule on the question. Whether a case should be reversed where this is the only error committed, we need not decide, as the ruling finally made by the trial court will, no doubt, control the matter if it comes up on a retrial.

[7] 5. It is finally urged that the contract read in evidence does not sustain the charge in the information. It was argued that the written contract does no more than bind the defendant to a guaranty of title, and does not amount to an assertion of present clear title. If the case depended solely upon the written contract, this point might be worthy

of serious consideration; but the prosecuting witness swears that the defendant assured him verbally, before the written contract was drawn, that the land was unincumbered. The rule applied in civil cases in actions upon written contracts, namely, that prior conversations and oral agreements are merged in the writing, can have no application here. Fraud is not merged in a written contract. *Gooch v. Conner*, 8 Mo. 391. There is no question here as to the contract between the parties, or that the writing does not truly state it. Where the written contract itself was brought about by fraud, proof of that fraud may be in parol. When the parol testimony was offered, defendant did not object, presumably because counsel saw no grounds for objection. In our judgment, none existed.

Because of the error committed in ruling out the testimony of witness Swofford, the judgment is reversed and the cause remanded.

BROWN, P. J., and KENNISH, J., concur.

STATE ex rel. COLEMAN, County Treasurer,
v. BLAIR et al.

(Supreme Court of Missouri. July 2, 1912.
Rehearing Denied Nov. 14, 1912.)

1. DRAINS (§ 14*)—ORGANIZATION OF DISTRICTS—COLLATERAL ATTACK.

The legality of the organization of a drainage district cannot be collaterally attacked in an action to collect drainage taxes.

[Ed. Note.—For other cases, see *Drains*, Cent. Dig. §§ 5, 6; Dec. Dig. § 14.*]

2. DRAINS (§ 14*)—INCORPORATION OF DISTRICT—NOTICE TO OWNERS.

Rev. St. 1909, § 5587, providing a notice to landowners of the application to incorporate a drainage district shall be published in four issues of some weekly paper, the last insertion to be before the day set for hearing, does not require the last publication of a notice to be on the last day before the day set for hearing.

[Ed. Note.—For other cases, see *Drains*, Cent. Dig. §§ 5, 6; Dec. Dig. § 14.*]

3. CONSTITUTIONAL LAW (§ 290*)—DRAINS (§ 76*)—DUE PROCESS OF LAW—HEARING IN DRAINAGE PROCEEDINGS—TIME.

Rev. St. 1909, § 5587, requires notice to landowners of an application to incorporate a drainage district to be published in four issues of a weekly paper; the last insertion to be before the day set for hearing. The hearing of objections by landowners of assessment of benefits was set for March 20, 1906, and notice of hearing was published on February 16th, March 2d, 9th, and 16th. A certain landowner resided in the state of New Jersey, and the time required to travel from New Jersey to Bates county, Mo., where the land is situated, was 36 hours. The clerk or judge of the county court knew where such defendant lived. *Held*, that it could not be said that the notice required was not notice at all until its publication the fourth time, or that the publication of the notice was for so short a time as

to constitute the taking of the property without due process of law.

[Ed. Note.—For other cases, see *Constitutional Law*, Cent. Dig. §§ 871-875; Dec. Dig. § 290;* *Drains*, Cent. Dig. §§ 76-81; Dec. Dig. § 76.*]

4. NOTICE (§ 11*)—SUFFICIENCY OF PUBLICATION.

As a rule, when the law requires a notice to be published for a certain number of days before legal proceedings are had, it is sufficient if the last publication occur before such proceedings are had.

[Ed. Note.—For other cases, see *Notice*, Cent. Dig. §§ 25-29; Dec. Dig. § 11.*]

5. COURTS (§ 93*)—RULE OF DECISION.

The Supreme Court is not bound to follow its prior decisions if they be erroneous, though it usually follows them when to do otherwise would disturb a large number of titles.

[Ed. Note.—For other cases, see *Courts*, Cent. Dig. §§ 336-339; Dec. Dig. § 93.*]

6. DRAINS (§ 76*)—ESTABLISHMENT—NOTICE TO PROPERTY OWNERS.

Rev. St. 1909, § 5584, provides for the appointment of a surveyor and three viewers to survey and estimate the expense of draining lands and assess the benefits, and that the viewers shall state in their report the name of the owners of each tract "so far as they are by diligent effort able to ascertain the same," and section 5587 provides that the clerk shall fix a time for hearing objections to the assessment of benefits, and thereupon issue a notice directed by name to every person returned by the engineer and viewers as the owner of every lot affected, and issue like notice by name to all persons "whom it may in any manner be ascertained" own any interest in the land, as well as notice generally to all persons owning such lands, without mentioning their names. *Held*, that the statutes do not require the viewers to go to the record of deeds to ascertain who owns the lands against which they have assessed benefits.

[Ed. Note.—For other cases, see *Drains*, Cent. Dig. §§ 76-81; Dec. Dig. § 76.*]

7. DRAINS (§ 76*)—COLLECTION OF ASSESSMENTS—SUFFICIENCY OF NOTICE.

Since the drainage law does not require the same kind of notice as in ordinary suits to collect back taxes, the sufficiency of the notice of hearing of objections to the assessment of benefits in drainage proceedings must be governed by the provisions of the drainage law.

[Ed. Note.—For other cases, see *Drains*, Cent. Dig. §§ 76-81; Dec. Dig. § 76.*]

8. STATUTES (§ 227*)—CONSTRUCTION—MANDATORY STATUTES—"MAY."

The word "may," when used in a statute, is sometimes construed as mandatory, but more frequently as directory.

[Ed. Note.—For other cases, see *Statutes*, Cent. Dig. §§ 308, 309; Dec. Dig. § 227.*]

For other definitions, see *Words and Phrases* vol. 5, pp. 4418-4447; vol. 8, p. 7719.]

9. DRAINS (§ 76*)—ESTABLISHMENT OF DISTRICT—PUBLICATION OF NOTICE.

The fact that an order of the county court, directing notice of the assessment of drainage benefits, directed the clerk to insert the notice in the "Western Enterprise," when it was in fact inserted in the "Rich Hill Enterprise," was not a fatal variance so as to invalidate the notice, where the evidence showed that there was only one paper in the city, which was sometimes designated by the one name and sometimes by the other.

[Ed. Note.—For other cases, see *Drains*, Cent. Dig. §§ 76-81; Dec. Dig. § 76.*]

10. DRAINS (§ 76*)—CONSTITUTIONAL LAW (§ 290*)—NOTICE—PERSONS ENTITLED.

A notice of drainage proceedings addressed to "the estate of B., B.'s heirs," etc., was not objectionable as not being due process of law because B.'s will investing his heirs with title to the land sought to be assessed was on record showing the name of the heir taking the estate.

[Ed. Note.—For other cases, see *Drains*, Cent. Dig. §§ 76-81; Dec. Dig. § 76;* *Constitutional Law*, Cent. Dig. §§ 871-875; Dec. Dig. § 290.*]

11. DRAINS (§ 76*)—OBJECTIONS TO ASSESSMENT—TIME OF HEARING—"REGULAR SESSION"—"REGULAR MEETING"—"REGULAR TERM."

Under Rev. St. 1909, § 5615, providing that the terms "regular session" and "regular meeting" of the county court, as used in the article, shall include the regular sessions of such court commencing on the first Monday in February, etc., as well as any adjourned term provided for by the court when in session, fixing the date of hearing objections to an assessment of benefits at an adjourned session of the county court was sufficient within Rev. St. 1909, § 5587, contained in the same chapter and article, requiring such date to be fixed at "the next regular term" of the county court.

[Ed. Note.—For other cases, see *Drains*, Cent. Dig. §§ 76-81; Dec. Dig. § 76.*]

For other definitions, see *Words and Phrases*, vol. 7, pp. 6038, 6040.]

12. STATUTES (§ 185*)—CONSTRUCTION.

Whatever is implied is as much a part of a statute as though expressly inserted therein.

[Ed. Note.—For other cases, see *Statutes*, Cent. Dig. § 264; Dec. Dig. § 185.*]

13. NOTICE (§ 9*)—TIME RETURNABLE.

If the law fixes a definite date on which a notice is returnable, it cannot be returned on a different date.

[Ed. Note.—For other cases, see *Notice*, Cent. Dig. §§ 16-21; Dec. Dig. § 9.*]

14. PROCESS (§ 70*)—SERVICE—CONSTRUCTIVE SERVICE.

Statutes giving jurisdiction by constructive service must be strictly construed.

[Ed. Note.—For other cases, see *Process*, Cent. Dig. § 84; Dec. Dig. § 70.*]

in Banc. Appeal from Circuit Court, Vernon County; B. G. Thurman, Judge.

Suit by the State, on the relation of S. L. Coleman, Treasurer and ex officio Collector of Revenue of Bates County, against De Witt C. Blair and others. From a judgment for plaintiff, defendants appeal. Affirmed.

Civil action in the circuit court of Bates county to collect drainage taxes in the sum of \$2,659.20. Plaintiff had judgment below, and defendants appeal.

Plaintiff's petition alleges the organization of drainage district No. 1 in Bates county, Mo., by the county court of that county on February 7, 1906, under the provisions of article 4, chapter 122, R. S. 1899 (now article 4, chapter 41, R. S. 1909). The taxes sued for were levied by the county court in the year 1907, to pay bonds issued and sold to raise money to drain overflowed lands of defendants and other persons situated within said drainage district. These taxes remained unpaid on November 1, 1908, and this

suit is to enforce the lien of said taxes against the lands of defendants. Defendant De Witt C. Blair filed a separate answer asserting ownership in himself of the lands described in plaintiff's petition, and denying generally all other allegations therein. The other defendants filed no pleadings and made no defense. For the purpose of this opinion, Blair will be hereafter treated as the sole defendant. The delinquent drainage tax bills upon which plaintiff's suit is based were introduced in evidence. Whereupon, to overcome the prima facie case thus made by plaintiff, defendant assailed the incorporation of the drainage district, and attempted to prove the invalidity of the tax bills by introducing the records of the county court and the petition, reports, notices, and other proceedings which resulted in the organization of said drainage district and the assessment of benefits against his lands.

John H. Lucas, of Kansas City, and Harvey Clark, of Nevada, Mo., for appellants. T. J. Smith and J. F. Smith, both of Butler, for respondent.

BROWN, J. (after stating the facts as above). I. The defendant contends that the judgment of the county court organizing and incorporating the drainage district is void because: (1) Only two of the three viewers, appointed by the court to examine the lands sought to be drained, reported in favor of the necessity, utility, and practicability of the proposition, while the third viewer made an adverse report on said proposition; and, (2) section 5581, R. S. 1909, is unconstitutional, in that the notice therein prescribed is not due process of law. Defendant also asserts that the notice issued under said last-named section was irregular and insufficient in both form and substance.

[1] Neither of the issues thus tendered can avail defendant in this action, because a drainage district is a public corporation, and the legality of its organization and the sufficiency of its corporate existence cannot be inquired into in this collateral action. *State v. Fuller*, 96 Mo. 165, 9 S. W. 583; *Catholic Church v. Tobbein*, 82 Mo. 418; *Burnham v. Rogers*, 167 Mo. 17, 66 S. W. 970; *School District v. Hodgin*, 180 Mo. 70, 79 S. W. 148.

[2, 3] II. It is further contended that the length of time prescribed by section 5587, R. S. 1909, for the publication of notice to landowners of the date when they may be heard on the question of benefits assessed against their lands for the drainage of same, is so short as to constitute the taking of property without due process of law, as prohibited by section 30, article 2, Constitution of Missouri, and section 1, fourteenth amendment to the Constitution of the United States.

Section 5587, *supra*, provides that notice to landowners of the application to incorporate a drainage district "shall be published

in four issues of some weekly newspaper published in the county, the last insertion to be *before* the day set for hearing." From the phraseology of the statute quoted, it is evident that the last publication of the notice need not be on the last day before the day set for the hearing. Statutes of practically the same purport have been construed by this court to be complied with when the last insertion of the notice occurred 10 days before the cause was set for hearing. *Robbins v. Boulware*, 190 Mo. 33, 88 S. W. 674, 109 Am. St. Rep. 746; *Ratliff v. Magee*, 165 Mo. 461, 65 S. W. 713. Thus it will be seen that the issue presented here is not alone whether section 5587, *supra*, is unconstitutional, but whether the notice as published and the judgment based thereon amounted to taking defendant's property without due process of law.

The hearing of objections by the landowners to the assessment of benefits against their lands was set for March 20, 1906, and the notice of said hearing was published in the *Rich Hill Enterprise* on February 16 and March 2, 9, and 16, 1906. Defendant Blair resided in the state of New Jersey, and the time required to make the trip from New Jersey to Bates county, Mo., is 36 hours.

What constitutes due process of law is in a large measure governed by the particular facts of each case. No general rule can be laid down that will cover all cases.

The defendant cites and mainly relies upon *Roller v. Holly*, 176 U. S. 398, 20 Sup. Ct. 410, 44 L. Ed. 520, which was an action to enforce a vendor's lien against real estate in Texas owned by a party residing in the state of New Jersey. The statute of Texas prescribed five days' notice; and the process in that case was delivered personally to the defendant five days before the action was set for trial. The distance between the place of trial and the place of service was so great that it would have required four days' continuous travel for defendant to have been present at the trial. The process so served was adjudged insufficient because not allowing the defendant a reasonable time to employ counsel and attend the trial, and therefore was held not to be due process of law. It will be readily seen that the facts in this case are entirely unlike the facts in *Roller v. Holly*, *supra*. There, the clerk of the court issuing the process must have known that the defendant was so far away from the place of trial that he would need more than five days' time after service of process to go to Texas, employ counsel, and prepare for his defense. The clerk knew where defendant lived, otherwise, he could not have forwarded the process to be served on him in New Jersey; while in the case at bar it does not appear that the clerk of the county court or the judges thereof had any knowledge of the whereabouts of defendant. It would certainly be a danger-

ous doctrine to announce that constructive service by publication in a newspaper might be rendered invalid because the defendant or other parties to be notified were so far away from the place where the court is sitting that the notice could not reach them in time to be effective.

In *Wade on the Law of Notice* (2d Ed.) § 1029, it is said: "Publication is a means authorized by statute in most, if not all, the states of the Union, for obtaining constructive service of process, when from the non-residence, absence from the state, or absconding of the defendant, a more direct mode of service becomes impracticable. Service of summons in this manner is called 'constructive,' not because the publication in the manner prescribed by statute raises any reasonable presumption that thereby the defendant is advised of the pendency of the suit, for its authorization is not confined to cases where there is even a possibility of its ever coming to the knowledge of the party to be affected. The defendant may have removed so far beyond the confines of civilization that it would be impossible in the nature of things for the paper containing the first insertion of the notice to reach him before the return day, and it will still be as effective as though the paper came regularly to his hands."

Defendant proceeds on the theory that the notice which he complains of was no notice at all until it was inserted in the newspaper the fourth time. We do not think this proposition can be sustained upon authority or sound reason. Undoubtedly the first, second, and third publications of the notice performed some office. It is well known that no one person reads all the newspapers, and that whether or not a defendant will actually see a notice to him when published in a newspaper is a mere matter of chance. He would certainly be as likely to see the notice when published the first time as any subsequent publication.

[4] The usual rule is that, when the law requires a notice to be published for a certain number of weeks or days before legal proceedings are had, it is sufficient if the last insertion of the notice shall occur before such proceedings are had. *German Bank v. Stumpf*, 73 Mo. 311; *Drainage District v. Campbell*, 154 Mo. 159, 55 S. W. 276; *Harper v. Ely*, 56 Ill. 179; *Fry v. Bidwell*, 74 Ill. 381.

Defendant's resourceful counsel has called our attention to many statutes of Missouri prescribing how service may be had by publication; but he omits section 152, R. S. 1909, providing for publication of notice to creditors and others interested in proceedings to sell real estate of deceased persons to pay debts. That statute calls for a notice very much like the notice prescribed in the drainage law now in judgment. To sell real

estate through the probate court to pay debts it has never been deemed necessary to insert the notice of the proceeding in a newspaper more than 28 days before the cause is set for hearing. If we were to adopt the rule for which the defendant contends, it would probably invalidate a large number of the probate sales which have heretofore taken place in Missouri. *Young v. Downey*, 145 Mo. 250, 46 S. W. 1066, 68 Am. St. Rep. 568.

[5] We are not bound to follow prior decisions of this court if the law as announced therein be erroneous, but we usually follow our precedents when to do otherwise would disturb a large number of titles. *Cruzen v. Stephens*, 123 Mo. 337, loc. cit. 346, 27 S. W. 557, 45 Am. St. Rep. 549. Upon the authorities hereinbefore cited and for the reasons noted in paragraph 5 of this opinion, we overrule defendant's contention on this point.

[6] III. Defendant contends that the notice as published fails to comply with sections 1770 and 1776 of our general Code of Civil Procedure, citing *Davis v. Montgomery*, 205 Mo. 271, 103 S. W. 979, and many other cases defining the requirements of orders of publication under the foregoing sections.

It is manifest that the notice in judgment does not conform to the requirements of sections 1770 and 1776, *supra*; and this requires us to determine what kind of a notice is contemplated by section 5587, R. S. 1909. If article 4, chapter 41, R. S. 1909, relating to the organization of drainage districts, had simply required the notice under section 5587, *supra*, to be directed to the owner of the land, then said section would have to be construed in the same manner as orders of publication intended to notify nonresident owners in ordinary suits to collect delinquent taxes. Section 11,498, R. S. 1909. In other words, it would be necessary in organizing a drainage district to notify either the real or the record owners of lands situated in the district by their true names; or, if their names were unknown, then it would be necessary to describe their interests or claims to such lands and how such claims or interests were derived.

[7] However, we find that the drainage law does not require the same kind of notice as in ordinary suits to collect back taxes, and the sufficiency of the notice now under consideration must be tested by the provisions of the drainage law. *Ratliff v. Magee*, 165 Mo. 465, 65 S. W. 713. Section 5584, which provides for the appointment of a surveyor and three viewers to survey and estimate the expense of draining overflowed lands and to assess benefits against same, provides that said viewers shall in their report give "the name of the owner or owners of each tract of land and any interest therein, so far as they are by diligent effort able to ascertain the same." Section 5587,

supra, provides that the clerk shall fix the time for hearing objections to the assessment of benefits assessed against the lands within the drainage district, and "shall thereupon issue in the name of the state a notice directed by name to every person returned by the engineer and viewers as the owner of every lot or parcel of land affected by the proposed improvement or any interest therein;" and also like notice by name to all other persons "whom it may in any manner be ascertained" own such land or any part thereof, or any interest therein; and also notify generally "all other persons, without mentioning their names who may own such lands or any part thereof, or any interest therein, of the general object and nature of the petition and report of the engineer and viewers, and that on the day so fixed, the county court will hear said petition, and report and any evidence that may be adduced concerning the same."

In construing this section, we must determine what is meant by requiring the notice to designate by name "all persons whom it may in any manner be ascertained own such land." Do these words require the viewers to go to the deed records and there ascertain who owns the lands against which they have assessed benefits? We think not. It is evident that the framers of this drainage law thought it would seldom or rarely be applied in draining lands which were unimproved or which were owned by nonresidents. By requiring the viewers and engineer to ascertain and return the names of the owners, it was contemplated that said viewers and engineer should find out who were the owners of the land by inquiry of the persons in possession thereof or other persons within the drainage district. Section 5583, R. S. 1909, provides that, after the first notice is given of the intention to organize the district, persons opposed to such organization may file their remonstrances with the court, and, where such remonstrances are filed, it would, under this law, become the duty of the clerk to notify the remonstrators of the date fixed for hearing objections to the assessment of benefits. The provision in section 5587, *supra*, that all other persons shall be notified of the petition and assessment of benefits, "without mentioning their names," indicates that it was not the intention of the framers of this law to have the land records examined in order to ascertain who should be notified.

[8] The word "may" is sometimes construed as mandatory, but more frequently otherwise. As used in the words of the statute last quoted, it does not impose upon the clerk of the county court, the viewers, engineer, or any other persons connected with the proceeding, the duty of examining the land records to ascertain the names of persons who own the lands against which

benefits have been assessed. This point is ruled against defendant.

The sufficiency of the notice of the hearing on the assessment of benefits is also attacked on three other grounds: (1) That the notice was not published in the newspaper designated by the county court; (2) that the defendant was not named in said notice as published, therefore, as to him, it was not due process of law; and (3) that the notice was not returnable to the next regular term of court after its issue.

[8] IV. The order of the county court of Bates county, directing the publication of notice of the assessment of benefits, directed the clerk to insert said notice in the "Western Enterprise"; but it was in fact published in the "Rich Hill Enterprise." Oral evidence introduced by the plaintiff proves that there was only one newspaper published in the city of Rich Hill, Mo., using the word "Enterprise" as a part of its name, and that it was sometimes designated by the public as the "Western Enterprise," and sometimes as the "Rich Hill Enterprise." This variance in the name of the paper is not sufficient to invalidate the notice.

Wade, in his treatise on the Law of Notice (2d Ed.) § 1067, correctly announces the law on this point as follows: "A slight variance in the title of the paper in which the notice is directed to be published, from that by which it is really known, will not vitiate the process, where it satisfactorily appears that the publication was in the one intended by the order. As where the order designated the 'Evening Day Book,' and the notice was published in the 'New York Day Book,' there being no evidence offered that there was any other paper of the same or a similar name, to which the order could apply, this was held sufficient."

[10] V. The notice as published is directed to the estate of John I. Blair, John I. Blair's heirs, and numerous other persons owning land in the drainage district, and further purports to notify "all other persons who own or have any interest in or to the following described real estate lying and being in the county of Bates and state of Missouri, followed by a description of all lands in the district, including those involved in this action." Defendant earnestly insists that, although the notice as published may have been in conformity with the drainage laws, nevertheless, it was not due process of law under the federal Constitution, because the will of his father, John I. Blair, whereby defendant became invested with title to the lands sought to be subjected to the lien of the tax bills, was on record in Bates county before any steps were taken to organize the drainage district; and therefore the notice should have been directed to defendant by name instead of to the estate of heirs of his father.

This contention is entirely unsound. When

a statute has required notice to be given in a certain form to absent landowners, such statute has almost universally been held to constitute due process of law. *Huling v. Kaw Valley Railroad & Improvement Co.*, 130 U. S. 559, 9 Sup. Ct. 603, 32 L. Ed. 1045, was a suit under a statute of Kansas governing the condemnation and appropriation of lands for railroad purposes. That statute did not provide that the notice to absent landowners should designate them by name, but only required that such notice should give the numbers of the sections, townships, and ranges through which the railroad would be constructed. The Supreme Court of the United States, in upholding the constitutionality of the above-mentioned statute, said: "The owner of real estate who is a non-resident of the state within which the property lies cannot evade the duties and obligations which the law imposes upon him in regard to such property by his absence from the state. Because he cannot be reached by some process of the courts of the state, which, of course, have no efficacy beyond their own borders, he cannot therefore hold his property exempt from the liabilities, duties, and obligations which the state has a right to impose upon such property; and in such cases some substituted form of notice has always been held to be a sufficient warning to the owner of the proceedings which are being taken under the authority of the state to subject his property to those demands and obligations. Otherwise, the burdens of taxation, and the liability of such property to be taken under the power of eminent domain, would be useless in regard to a very large amount of property in every state of the Union. It is therefore the duty of the owner of real estate who is a non-resident to take measures that in some way he shall be represented when his property is called into requisition; and, if he fails to do this, and fails to get notice by the ordinary publications which have usually been required in such cases, it is his misfortune, and he must abide the consequences. Such publication is 'due process of law' as applied to this class of cases." See, also, *Leigh v. Green*, 193 U. S. 79, 24 Sup. Ct. 390, 48 L. Ed. 623, and *Johnson et al. v. Hunter* (C. C.) 127 Fed. 219.

[11, 12] VI. This brings us to the further contention of defendant that the assessment of benefits against his land is invalid because the clerk of the county court fixed the date of hearing objections to said assessment of benefits at an adjourned sitting of said court instead of during "the next regular term" thereof, as required by section 5587, R. S. 1909.

[13] It is undoubtedly true that, where the law fixes a definite date on which a notice or other process shall be returnable, it cannot be made returnable at a different date. *Holliday v. Cooper*, 3 Mo. 286. Section

5615, art. 4, c. 41, R. S. 1909, in which said section 5587, supra, is found, provides that: "The terms 'regular session' and 'regular meeting' of the county court, as used in this article, shall be held to include the regular sessions of such court commencing on the first Monday in February, May, August and November of each year, as well as any adjourned term provided for by the court when in session." It will be observed that said section 5615, supra, does not in express language declare that whenever the words "next regular term" are used in said article 4, supra, said words shall include adjourned or special sittings of the county court. However, the language quoted clearly implies that such was the legislative intent; and "whatever the law will imply is as much a part and parcel of the legislative enactment as though in terms inserted therein." State ex rel. v. Mason, 155 Mo. 500, 55 S. W. 640; Sutherland on Statutory Construction, § 334. The county court acquired jurisdiction over the matter of assessing benefits against defendant's lands by *filing a date for the hearing* and giving notice accordingly. Whether such hearing was at a regular or adjourned term did not affect the court's jurisdiction.

[14] We are fully aware of the rule that statutes which permit courts to acquire jurisdiction by constructive service must be strictly construed. That is indeed a valuable rule, but should not be followed to a point which would force the courts to disregard their reason and common sense.

The notice met every requirement of the law under which it was issued and published.

VII. Defendant also complains of the action of the trial court in allowing an attorney's fee in the sum of \$1,000 in favor of plaintiff and taxing same as costs in the case, as permitted by section 5599, R. S. 1909.

The suit involved, directly and indirectly, the validity of taxes aggregating \$16,000, and, considering the number of issues tendered to defeat the plaintiff's action, we think not only the evidence introduced but the facts disclosed by the record warranted the court in allowing the sum of \$1,000 and taxing the same as an attorney's fee.

The judgment is affirmed. All concur.

STATE ex rel. DEEMS et al. v. HOLTCAMP,
Judge, et al.

(Supreme Court of Missouri. Nov. 14, 1912.)

1. PROHIBITION (§ 10*)—SCOPE OF REMEDY—POWER OF SUPREME COURT.

The Supreme Court has power to prevent all inferior courts from exceeding their jurisdiction by a writ of prohibition.

[Ed. Note.—For other cases, see Prohibition, Cent. Dig. §§ 37-56; Dec. Dig. § 10.*]

2. COURTS (§ 2*)—JURISDICTION—GROUNDS—IN GENERAL.

To acquire jurisdiction, a court must possess the power to determine the general class of cases to which the one it is attempting to adjudicate belongs; and, in a case where its judgment will affect the title to particular property, it is generally necessary that such property be situated within its territorial jurisdiction, and it must, by its process or by voluntary appearance, acquire jurisdiction over the persons whose rights will be affected by its decree.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 1; Dec. Dig. § 2.*]

3. COURTS (§ 198*)—PROBATE JURISDICTION—CONSTITUTIONAL PROVISIONS.

Under the express provision of Const. art. 6, § 34, a probate court has jurisdiction over the sale of land by administrators within its territorial jurisdiction.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 469, 471-475, 478; Dec. Dig. § 198.*]

4. EXECUTORS AND ADMINISTRATORS (§ 337*)—SALE BY ADMINISTRATOR—STATUTORY PROVISIONS—NOTICE.

An administrator selling incumbered real estate to pay his own unprobated claim or the debts due to incumbrancers must proceed under Rev. St. 1909, §§ 150, 151, by petition accompanied by his account and inventory of the estate and a list of debts remaining unpaid, and must give the notice required by section 152.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1397-1409; Dec. Dig. § 337.*]

5. EVIDENCE (§ 5*)—JUDICIAL NOTICE—INCUMBRANCES UPON PROPERTY.

Courts take judicial notice that a very large percentage of the lands of this commonwealth, and some of the most valuable thereof, are incumbered for some amount, either great or small.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 4; Dec. Dig. § 5.*]

6. EXECUTORS AND ADMINISTRATORS (§ 326*)—SALE BY ORDER OF COURT—STATUTORY PROVISIONS.

Under Rev. St. 1909, §§ 147, 148, which authorize the sale of incumbered real estate in administration, even though there be no general creditors, it is only necessary that the probate court find that such sale will promote the interest of the estate—that is, of the parties entitled to it as heirs or devisees—and that it will not be prejudicial to creditors, the sale not being for the benefit of incumbrancers; and where there is no personal estate to redeem the incumbrances, or to be promoted, and the incumbered realty belongs to the heirs, unless necessary to sell it to pay an alleged debt to the administrator, and there is no showing that the land cannot be partitioned in kind among the heirs, but the administrator applies for a sale to prevent such partition and to consume in fees and commissions all the equities existing in favor of the heirs, the probate court is not justified in making an order of sale.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 1843; Dec. Dig. § 326.*]

7. PROHIBITION (§ 11*)—ADMINISTRATION PROCEEDINGS—SALE OF LAND.

Where a probate court possesses the power to determine for itself the propriety of making an order for the sale of incumbered realty in administration, it should not be prohibited

from exercising its statutory jurisdiction, since its error can be corrected on appeal.

[Ed. Note.—For other cases, see Prohibition, Cent. Dig. § 36; Dec. Dig. § 11.*]

8. CONSTITUTIONAL LAW (§ 277*)—DUE PROCESS OF LAW—"PROPERTY"—EQUITY OF REDEMPTION.

An equity in incumbered real estate is "property" within Const. art. 2, § 30, providing that no person shall be deprived of property without due process of law.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 762, 766, 949; Dec. Dig. § 277.*]

For other definitions, see Words and Phrases, vol. 6, pp. 5693-5728; vol. 8, pp. 7768-7770.]

9. CONSTITUTIONAL LAW (§ 309*)—EXECUTORS AND ADMINISTRATORS (§ 337*)—"DUE PROCESS OF LAW"—ADMINISTRATORS' SALE OF INCUMBERED REALTY—NOTICE TO HEIRS.

"Due process of law," as used in Const. art. 2, § 30, is construed to be reasonable notice and opportunity to be heard in defense of one's rights; and though Rev. St. 1909, §§ 147, 148, providing for a sale by order of court of incumbered real estate in administration, do not require any notice to the heirs, the law will imply that notice was intended, and require that notice be given; and hence the court's order for the sale of such estate, without notice to heirs having an equity therein—regarded as property—is a deprivation of property without due process of law.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 929, 930; Dec. Dig. § 309.* Executors and Administrators, Cent. Dig. §§ 1397-1409; Dec. Dig. § 337.*]

For other definitions, see Words and Phrases, vol. 3, pp. 2227-2256; vol. 8, p. 7644.]

10. APPEARANCE (§ 9*)—SALE OF LAND BY ORDER OF PROBATE COURT—SPECIAL APPEARANCE BY HEIRS.

Where heirs to incumbered real estate in administration appeared specially in the probate court for the sole purpose of objecting to its jurisdiction to order a sale on the administrator's application, and took no part in the proceedings resulting in the court's order of a sale, the court acquired no jurisdiction over them.

[Ed. Note.—For other cases, see Appearance, Cent. Dig. §§ 42-52; Dec. Dig. § 9.*]

Ferriss and Kennish, JJ., dissenting.

In Banc. Prohibition by the State on the relation of Harry W. Deems and another against Charles W. Holtcamp, Judge of the Probate Court in and for the City of St. Louis, and Augustus Ross, administrator of the estate of Anna Deems Ross, deceased. Preliminary writ of prohibition made absolute.

Relators' petition for a writ of prohibition against the respondents on the ground that the probate court is proceeding without jurisdiction in the matter related below. The following facts appear from the petition and return thereto: Anna Deems Ross died intestate, without issue, in the city of St. Louis in April, 1909. At the time of her death she owned five parcels of real estate in that city, each one of which was incumbered by a deed of trust to secure certain promissory notes executed by her jointly

with her husband. In April, 1909, letters of administration on her estate were granted to Augustus Ross, her husband. She left as collateral heirs the relators, Harry W. Deems and Laura V. Deems. Subsequently Augustus Ross presented a claim for about \$3,000 against the estate which, after due hearing, was disallowed in October, 1911, and an appeal taken to the circuit court, where it is now pending. No other claims are shown to have existed against the estate. On June 30, 1911, the respondent judge, on a petition filed by the administrator, entered an order of record directing the administrator to take possession and manage said real estate, which order was made under the provisions of the act of 1911, known as section 139a, Laws of 1911, p. 80, the same being an amendment to article 6 of chapter 2, R. S. 1909, and which reads as follows: "Whenever letters of administration or testamentary shall have been granted on an estate, and it shall appear to the court or judge in vacation that the decedent died possessed of real estate in the state, and his heirs or legatees have failed to take charge of same, or the identity or whereabouts of such heirs or legatees are unknown, then the court or judge in vacation may on its or his own motion, or that of any party interested, direct the administrator or executor in charge of said estate, to take charge and manage the real estate, until such time as such heirs or legatees shall appear and petition the court to turn the management of said real estate over to them, or until the same shall escheat to the state, as is provided by the 'escheat act.'"

The administrator is in charge of the real estate under said order. On the 10th day of July, 1911, said administrator, while his claim for allowance was pending in the probate court, filed in said court a petition in which he alleged that all of said real estate was incumbered with deeds of trust as aforesaid, and also with liens for taxes, and that the holders of the deeds of trust were threatening to sell under same; that, if the equities should be sold under favorable conditions, they would bring an amount considerably larger than could be realized at a sale under the deeds of trust; that his claim for \$3,004.28 was pending in said probate court; and that the personal assets were practically valueless—the petition concluding with the following prayer: "Inasmuch as there are no assets to redeem such real estate, the petitioner prays that the court shall make an order that all the right, title and interest of the decedent and her estate to such property, or so much thereof as the court shall determine, be sold at private or public sale, as the court in its judgment may determine." This petition was not accompanied by an account of the administration, nor by a list of debts due to

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

and owing by deceased and remaining unpaid, nor was notice given to the heirs, relators herein, as required by section 152, R. S. 1909.

Thereafter, on July 11, 1911, these relators appeared specially in the probate court and filed the following motion verified by affidavit: "Now at this day come Harry W. Deems and Mrs. Laura V. Deems, and, appearing for the purpose of this motion only, give the court to be informed and understand that they are heirs at law of Anna Deems Ross, deceased, and as such heirs are entitled to distributive shares of the estate of said Anna Deems Ross. That on Monday, January 10, 1911, one Augustus Ross, administrator of the estate of Anna Deems Ross, deceased, applied to this honorable court for an order to sell certain real estate in his petition described, and that such petition was not accompanied by a true account of said Augustus Ross' administration nor accompanied by a list of debts due to and by the deceased and remaining unpaid, or an inventory of the remaining personal property, together with its appraised value, or of any other assets in his hands. That no notice has been given to the persons interested in said estate, and particularly this petitioner, of the filing of such petition, nor have they been given until the first day of the next term of this court to show cause why such an order should not be made, nor has any such notice been published for four weeks in any newspaper in the city of St. Louis, nor has such notice been published by 10 handbills placed in 10 public places in said city. Wherefore petitioners say that this court is without jurisdiction to hear and determine the petition of said Augustus Ross, filed as aforesaid, and pray that the same may be dismissed." This motion was continued by the court to the next September term, at which term the court stated to counsel for relators that evidence would be heard, if offered, as to the imminent danger of a sale under the deeds of trust; but no such evidence was offered, relators electing to stand on their plea to the jurisdiction.

In October, 1911, the probate court, being of the opinion that the application was under sections 147 and 148, R. S. 1909, entered the following order: "Now at this day, the court being fully advised of and concerning the petition of Augustus Ross, administrator of the estate of Anna D. Ross, deceased, for an order of sale of all the right, title, and interest of said deceased of, in, and to certain real estate in said petition described heretofore, to wit, on the 15th day of September, 1911, submitted and taken under advisement, and it appearing that said real estate is incumbered by certain deeds of trust and liens in said petition described, that said deceased died without having devised said real estate or providing for

the redemption thereof by will or otherwise, and that there would not be sufficient assets in the hands of said administrator to redeem said real estate after payment of the debts due by said estate, it is therefore ordered that the said administrator do, on such day as he may select, at the eastern front door of the courthouse of the city of St. Louis, and during the session of the circuit or probate court of said city, between the hours of 10 o'clock in the forenoon and 5 o'clock in the afternoon of that day, expose to sale at public vendue or outcry, all the right, title, and interest of said deceased of, in, and to the following described real estate, to wit (describing the same), and sell the same for the purpose in said petition mentioned, for cash, with leave to sell the same at private sale, for cash, first having the same appraised, and, if sold at public sale, notice of the time, terms, and place of said sale published for four weeks prior thereto in some newspaper in the city of St. Louis, as directed by law, and that he make a full report of his proceedings within ten (10) days after such sale." It further appears that there are no debts proven against the estate, and no creditors except said administrator, whose claim has since the filing of his petition for an order of sale been disallowed by the probate court and, as stated above, is now pending on appeal in the circuit court. It also appears that, since the institution of this proceeding, one of the parcels of real estate has been sold under foreclosure of the deed of trust thereon.

On July 13, 1911, the relators filed a suit in the circuit court to partition the real estate involved herein, which suit is now pending. The respondent Ross charges that this partition suit was filed in order to oust the probate court of jurisdiction, and to defeat him in the collection of his claim for \$3,004, if it should be allowed in the pending appeal in the circuit court. Respondents Holtcamp, Judge, and Ross, administrator, each filed a return, conceding the facts substantially as stated above, both alleging that the order of sale is based on sections 147 and 148 of the Revised Statutes 1909.

There is no important dispute about the facts. The relators claim that, if it is intended as a proceeding to pay debts, it is invalid, because there are no debts, and no notice was given as required by the statute, and because none of the provisions of the statute in that regard were complied with. Relators further contend that the proceedings cannot be justified under the provisions of section 147, which provides for the redemption of mortgaged real estate out of the personal assets or by the sale of other real estate. They further contend that the order to sell cannot be justified under the provisions of section 148, supra, and urge as reasons that, under our system, real estate descends directly to the heirs, and the ad-

ministrator has nothing to do with it except that, first, he may take charge of and preserve it until the heirs apply to the court for permission to do so; second, that, if there are debts, he may sell for the purpose of paying them.

Hiram N. Moore and Richard F. Ralph, both of St. Louis, for relators. Christian F. Schneider, of St. Louis, for respondents.

BROWN, J. (after stating the facts as above). Upon the foregoing facts, has the probate court of St. Louis city power to cause the real estate of Anna Deems Ross to be sold by the administrator of her estate?

[1] The power of this court to prevent all inferior courts from exceeding their jurisdiction by the writ of prohibition is not denied; but it is contended that the respondent court is not exceeding its jurisdiction in the proceedings set out in relator's petition.

[2] To acquire jurisdiction, a court must (1) possess the power to determine the general class of cases to which the one belongs which it is attempting to adjudicate; (2) when its judgment, as in this case, will affect the title to particular property, it is generally necessary that such property be situated within the territorial jurisdiction of the court; and (3) the court must, by its process or by voluntary appearance, acquire jurisdiction over the persons whose rights will be affected by its decree.

[3] It cannot be denied that probate courts are by section 34, art. 6, of our Constitution, given express jurisdiction over "the sale of lands by administrators."

1. It is admitted that the land sought to be sold is in St. Louis city. This leaves for our determination only the first and third propositions above noted. In other words, has the General Assembly authorized probate courts to order the sale of real estate upon the facts presented in this case?

[4-6] 2. It is not necessary to consider the alleged indebtedness of the estate of Anna Deems Ross to the administrator (which indebtedness had not been finally established when this proceeding was instituted), for the reason that sections 147 and 148, R. S. 1909 (under which the probate court is proceeding), authorize a sale of incumbered real estate even though there be no general creditors. To direct such a sale as the probate court of St. Louis city has ordered, it seems to be only necessary for it to find that such sale will "promote the interest of the estate and not be prejudicial to creditors." If there are no creditors, then, of course, the sale could not prejudice them.

The phraseology of the statute (sections 147 and 148, *supra*) clearly indicates that the sale to be made thereunder is not for the benefit of the party holding a mortgage or

other incumbrance, but to "promote the interest of the estate"—that is, the parties entitled to the estate as heirs, legatees, or devisees—so that in a proper case, after acquiring jurisdiction of the parties entitled to be heard, or whose interests will be affected by the intended sale, probate courts may order the sale of incumbered real estate of deceased persons. Such sales, however, are not intended as a substitute for the action of partition, nor to afford an excuse for making fees or commissions for administrators.

In the case before us there is no personal estate to be "promoted," and the incumbered lands belong to the heirs unless it be found necessary to sell them to pay the alleged debt of the administrator. If the sale is being made to pay the unprobated claim of the administrator or the debts due the incumbrancers, then clearly the administrator must proceed under sections 150, 151, and 152, R. S. 1909, and give the notice required by the latter section.

Under the facts in the case before us, it is apparent that the administrator is proceeding with the sale of the real estate of deceased, not to "promote the interest of the estate," nor of the relators as heirs thereto, but to prevent mutual or judicial partition among the heirs and as nearly as possible to eat up in fees and commissions all the equities that may exist in favor of the heirs. Estates are not supposed to be administered for the sole benefit of administrators; but, on the contrary, they must be so administered as to promote in the highest possible degree the welfare of the heirs, legatees, devisees, and creditors.

Courts take judicial notice that a very large per cent. of the lands of this commonwealth and some of the most valuable thereof are incumbered for some amount, either great or small, and if such property is to be sold by administrators without giving the heirs an opportunity to partition the same among themselves, and then pay off or assume the incumbrances (as may suit their convenience) many hardships and losses are likely to be sustained by persons who inherit incumbered property. The right of persons who have inherited real estate to partition the same among themselves is a very valuable privilege, and it cannot be successfully contended that a sale by the administrator, which would destroy that right, would in any manner "promote the welfare" of the heirs.

In the instant case, the administrator seems to be an heir of his wife, but in many cases administrators have no interest in the real estate of the person whose estate they are administering, and the fact that they are ordinarily not entitled to commissions on the real estate unless they sell same would be a strong incentive to them to sell the real estate in order to increase their fees. Section

229, R. S. 1909. There is nothing in sections 147 and 148, R. S. 1909, indicating a legislative intent to repeal or modify the partition statute. There is no showing made why the lands of Anna Deems Ross cannot be partitioned in kind among her heirs; and, there being a suit now pending for that purpose, we find nothing to justify the probate court of St. Louis city in making the order of sale it did make.

[7] However, as the respondent court possessed the necessary power to determine for itself the propriety of making the order of sale, and as its error can be corrected upon appeal, it should not, on account of matters stated in this paragraph, be prohibited from exercising its statutory jurisdiction in the matter. This court will not undertake to prohibit a trial court from deciding a case incorrectly when such trial court has jurisdiction, but will review the error on appeal. What we have said in this paragraph about the invalidity of the order of sale is in a certain sense premature, but seems to be called for by the demand of the parties that the statutes under which respondents are proceeding be construed.

[8.9] 3. The assumed right of the respondent to order a sale of the real estate of Anna Deems Ross, without the service of process or notice of any kind to her heirs, raises a more serious issue. We are aware that a somewhat similar sale was upheld by this court in *Garrett v. Bicknell*, 64 Mo. 404, but the objection to the administrator's deed in that case was mainly on the ground that no petition was presented to the probate court asking that the sale be made, and the deed in that case was not assailed on the ground that there was no notice to the heirs. Courts usually do not pass upon issues which are not specifically called to their attention. *Howard v. Brown*, 197 Mo. 36, loc. cit. 45, 95 S. W. 191. The lack of notice to the heirs was not called to the court's attention in the *Garrett* Case, *supra*, and therefore the opinion in that case is not authority upon the issue now under consideration. The right of heirs to redeem the lands of their ancestors from incumbrances, the right to partition such incumbered lands among themselves, not to speak of the right to use and occupy the lands until they are actually sold under the incumbrances, are such substantial rights that it is difficult to understand how a sale can be constitutionally made without notice to those whose rights are so vitally affected. Our organic law ordains that "no person shall be deprived of * * * property without due process of law." Section 30, art. 2, Constitution of Missouri. No authority need be cited to demonstrate that an equity in incumbered real estate is property, and therefore under protection of the Constitution. Due process of law is usually construed to be reasonable notice and an opportunity to be heard in defense of one's rights.

It is true, as contended by respondents,

that sections 147 and 148, R. S. 1909, do not require any notice to heirs or creditors of a proceeding to sell incumbered lands; but in the well-considered case of *State ex rel. v. Walbridge*, 119 Mo. 383, loc. cit. 394, 24 S. W. 457, 460 (41 Am. St. Rep. 663), we said: "The law in accordance with the principles of justice—principles which are fundamental and eternal—will require that notice be given before any person be passed upon, either in person, estate, or any other matter or thing to which he is entitled. And though the statutes do not in terms require notice, the law will imply that notice was intended." See, also, *State ex rel. v. Maroney*, 191 Mo. 531, 90 S. W. 141. It is needless to multiply authorities in support of a proposition, the mere statement of which demonstrates its correctness.

[10] It is contended by respondents that, as relators appeared in the probate court and objected to the proceeding whereby the respondents sought to sell their property, therefore the court acquired jurisdiction over them to make the order of sale. However, the record shows that the relators appeared specially for the sole purpose of objecting to the jurisdiction of the court, and that they took no part in the pretended trial or investigation which resulted in the order of sale complained of, therefore the court acquired no jurisdiction over them. *Thomason v. Mercantile Town Mutual Ins. Co.*, 217 Mo. 435, 116 S. W. 1092. It is not necessary to determine whether or not the notice specified in section 152, R. S. 1909, would have been sufficient to confer jurisdiction upon the probate court of St. Louis city to proceed under sections 147 and 148, R. S. 1909, and make the order of sale it did make, for the reason that no notice of any kind was given in the instant case.

The probate court of St. Louis city exceeded its jurisdiction in making an order for the sale of property in which relators are interested, without giving them notice or acquiring jurisdiction over their persons in any other manner; therefore the preliminary writ of prohibition issued herein will be made absolute. It is so ordered.

FERRISS and KENNISH, JJ., dissent in opinion by FERRISS, J. VALLIANT, C. J., concurs. GRAVES, WOODSON, and LAMM, JJ., concur in the result, and express the further opinion that probate courts have no jurisdiction even with notice to order the sale of lands of deceased persons for purposes of partition.

FERRISS, J. (dissenting). The petition of the administrator for an order to sell all the interest of the estate in the realty is evidently based on sections 147 and 148, R. S. 1909. It was so construed by the probate court, as is apparent from the terms of the order of sale, and so stated in the return of respondent Holtcamp, judge of that court.

The relators contend that, under the facts, the probate court was without jurisdiction to make the order of sale. This contention presents the only question necessary for consideration, namely, Did the probate court act within its jurisdiction? Our writ of prohibition does not issue to restrain a court, acting within the limits of its jurisdiction, from committing error, nor to correct errors after they are committed. Such erroneous rulings, if any, can be corrected only on appeal. Under our system of practice this rule is essential, however desirable it might be in particular instances to lay it aside. This court, in a case involving an order of the probate court to sell real estate, defines jurisdictions as follows: "Jurisdiction may be defined to be the right to adjudicate concerning the subject-matter in a given case. To constitute this, there are three essentials: First, the court must have cognizance of the class of cases to which the one to be adjudged belongs; second, the proper parties must be present; and, third, the point decided must be, in substance and effect, within the issues. *Munday v. Vall*, 34 N. J. Law, 422." *Stark v. Kirchgraber*, 186 Mo. loc. cit. 645, 85 S. W. 872, 105 Am. St. Rep. 629.

I think there can be no question as to the existence here of the first and third essentials as defined above. The probate court is given authority, by statute, to order the sale of real estate in a proper case. Under sections 150 and 184, real estate may be ordered sold to pay debts. Under section 143, the interest of the estate in real estate, which has been purchased but not fully paid for, may be ordered sold. Sections 147 and 148 provide for the sale of real estate for the purpose of redeeming mortgaged land, and also (section 148) for selling the equity of redemption. In *Jackson v. Magruder*, 51 Mo. 55, speaking of statutes similar to the one cited, it is said: "Under our administration of law as it stood when this sale was made, and as it still exists, the county court had the power to order land to be sold for the purpose of redeeming mortgages on other lands, or the courts might make a special order to sell the equity of redemption of the mortgaged premises. But the court also had the power, on application of the administrator or a creditor of the estate, to make a general order for the sale of the real estate for the payment of debts, embracing equities of redemption and all other interests in lands." In *State, to Use, v. Schleiffarth*, 9 Mo. App. loc. cit. 433, this is said: "The statute provides (sections 143, 144 [R. S. 1879]) that, when any person dies owning an equity of redemption, the probate court may order the administrator to redeem the property out of the personalty, or by the sale of other real estate, or may order the equity of redemption to be sold."

Were the proper parties before the court? No notice was given to the heirs as required by the statute (section 152), and, if this

were a proceeding under section 150 et seq., such failure would defeat the jurisdiction of the probate court. *Hutchinson v. Shelley*, 133 Mo. 400, 34 S. W. 838.

Sections 147 and 148, which must be read together, provide as follows:

"Sec. 147. If any person die leaving land incumbered by mortgage or deed of trust, or any lien whatever, or owning any equity of redemption, or leaving mortgaged or pledged any personal property, and shall not have devised the same or provided for redemption thereof by will, the court shall have power, if, in its judgment, it will promote the interests of the estate and not be prejudicial to other creditors, to order executor or administrator to redeem the same out of the personal assets of the estate, or to order the sale of other real estate to redeem such land or personal property so incumbered, and also to order the executor or administrator to mortgage or pledge any personal property of the estate in his hands for the purpose of raising and providing money with which to redeem said premises so incumbered.

"Sec. 148. If such redemption would injure the estate or creditors, or if there would not be assets to redeem such estate after payment of debts, the court shall order all the right, title and interest of the estate to such property to be sold at public or private sale."

No provision is made for any notice to heirs in a proceeding under these sections. We have been cited to no case involving the construction of said sections, and, after diligent search, I have found none. Sections 142 and 143 are closely related to sections 147 and 148, and involve the same proceedings under substantially similar conditions. They are as follows:

"Sec. 142. If any person die, having purchased real estate, and shall not have completed the payment, nor devised such real estate, nor provided for the payment by will, and the completion of such payment would be beneficial to the estate and not injurious to creditors, the executor or administrator, by order of the court, may complete such payment out of the assets in his hands, and such estate shall be disposed of as other real estate.

"Sec. 143. If the court believe that, after the payment of debts, there will not be sufficient assets to pay for such real estate, the court may order the executor or administrator to sell all the right, title and interest of the deceased therein."

This court decided in *Garrett v. Bicknell*, 64 Mo. 404, that no petition was necessary under these sections, and in that connection said: "It will be perceived, upon an examination of the law regulating the disposition which shall be made of a decedent's interest in land bought by him in his lifetime and not paid for by him, that the Leg-

islature intended to invest the county and probate courts with powers freed from many of the restrictions imposed by those sections regulating sales of land on petition of the administrator, executor, or creditor for the sale of real estate to pay debts." The case of *Valle v. Fleming*, 19 Mo. 454, 61 Am. Dec. 566, inferentially holds that no notice would be necessary under these sections.

The statutes providing for the sale of the right, title, and interest only of the deceased in incumbered property, whether such incumbrance is by deed of trust or vendor's lien, make no provision for petition or notice. It is only when we come to the provisions for the sale of real property to pay debts that we find particular directions as to notice, publication, filing accounts, etc. I therefore conclude that in this proceeding, under sections 147 and 148, the provisions of sections 151, 152, 153, providing for the filing of lists of debts, notice, publication, etc., do not apply, and that there is no want of proper parties before the court, nor failure of other jurisdictional facts.

The Legislature, no doubt, regarded proceedings to sell real estate to pay debts as essentially different, in relation to the interests of the heirs, from proceedings to protect incumbered property and dispose of equities, and hence the minute restrictions as to the former which are wanting in the latter cases. However that may be, the statute plainly makes a distinction in the matter of jurisdiction of the court. The probate court has jurisdiction to pass judgment on the points presented, namely, whether, under the facts, it was proper to order the sale of the equities in the real estate. The propriety of the ruling can be tested on appeal from any order it may make confirming a sale. *Wilson v. Brown*, 21 Mo. 410; *McVey v. McVey*, 51 Mo. 420; *Desloge v. Tucker*, 196 Mo. 587, 94 S. W. 283; section 289, R. S. 1909.

For the foregoing reasons, I respectfully dissent from the opinion of the court.

KENNISH, J., concurs.

WARNER et al. v. MICHEL et al.

(St. Louis Court of Appeals. Missouri. Nov. 12, 1912.)

1. APPEAL AND ERROR (§ 907*)—REGULARITY OF ACTION OF TRIAL COURT—PRESUMPTIONS.

Where the abstract of record is in the short form, and contains a copy of the judgment appealed from and the order allowing the appeal, but contains no recitals with reference to an objection made by counsel, the reviewing court will presume in favor of the regularity of the trial court's action and affirm the judgment.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 2911-2915, 2916, 3673, 3674, 3676, 3678; Dec. Dig. § 907.*]

2. JUDGMENT (§ 585*) — CONCLUSIVENESS — QUESTIONS CONCLUDED.

A judgment adjudging that a party is not entitled to a release of a deed of trust securing

a debt bars an action for the statutory penalty for a refusal to release the deed of trust.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. §§ 1062-1064, 1067, 1073, 1084, 1085, 1092-1097, 1132; Dec. Dig. § 585.*]

Appeal from St. Louis Circuit Court; W. B. Homer, Judge.

Action by Franceska Warner and another against Frank H. Michel and others, partners under the firm name of Hammell & Karleskind. From a judgment of nonsuit, plaintiffs appeal. Affirmed.

Louis Mayer and L. P. Crigler, both of St. Louis, for appellants. J. L. Hornsby, of St. Louis, for respondents.

REYNOLDS, P. J. This is the second appeal in this case. It was here under the same title and will be found reported 143 Mo. App. 133, 122 S. W. 338. The petition contained two counts, the first asking for the cancellation of the record of a certain deed of trust, it being averred that the debt secured by it had been paid off in full and that plaintiffs had tendered the legal fee to entitle them to have satisfaction of the deed of trust; the second count averring the payment in full of the debt secured by the deed of trust and tender of the legal fee for the release thereof on the margin of the record, along with the demand that the release be indorsed, and averring the refusal of defendants to release the deed of trust of record, demands the statutory penalty of 10 per cent. of the debt as damages for failure so to do.

At the former trial the cause was tried before the court as to the first count and before the jury as to the second, the testimony as to both counts being heard together. At the conclusion of that trial the court found for defendants on the first count, but the jury before whom the second count for the statutory penalty was tried, returned a verdict in favor of plaintiffs. Plaintiffs filed a motion for new trial as to the first count, and defendants filed one as to the second count. The court sustained the motion of defendants for new trial on the second count but overruled the motion of the plaintiffs for a new trial on the first count. Plaintiffs appealed from this to our court and we affirmed that action, remanding the case for further proceedings. Thereupon the cause coming on for trial before the circuit court, defendants objected to the introduction of any evidence in the case on the ground that the judgment of the court on the first count in favor of defendants was a bar to the action on the second count, and claiming that that judgment is conclusive on the issues in the case as set out in the second count or cause of action of the petition and that there is nothing remaining for trial or submission to the court. The court sustained that objection, whereupon plaintiffs took

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

a nonsuit with leave to move to set it aside and that being overruled and exceptions saved have perfected their appeal from that action of the trial court.

[1, 2] The abstract of the record is in such shape before us that it is almost impossible to handle the case intelligently. We are not able to determine whether the cause went to this second trial on both counts of the petition or on the second count. Nor can we tell what judgment is referred to in the objection made by counsel. No judgment of any kind is in this record. The abstract is barren of any recitals on this. The only judgment before us is the one of nonsuit, which is on file with us, this case coming to us on what is known as the "short form," appellant filing a copy of the judgment appealed from and the order allowing the appeal. In this condition of the record, the presumption always being in favor of the regularity of the action of the trial court, we would have no other course than to affirm the judgment of that court. But not resting on that, if we are to assume, as counsel for appellants seem to concede was the fact, that the finding and judgment on the first count, was as set out when the cause was previously before us, and which we then affirmed, then the action of the trial court, in holding that the judgment on this first count is a bar to an action of the second count, is manifestly correct. That judgment was conclusive of the fact that the plaintiffs were not entitled to have the deed of trust released. It necessarily followed that plaintiffs could not recover damages for failure to release it.

The judgment of the circuit court is affirmed.

NORTONI and CAULFIELD, JJ., concur.

FRUMBERG v. HADERLEIN.

(St. Louis Court of Appeals. Missouri. Nov. 12, 1912.)

PARTIES (§ 19*)—PLAINTIFF—JOINT CONTRACT FOR JOINT SERVICES.

A several action on a contract by one with two others jointly to pay them a certain sum for services to be performed by them jointly cannot be maintained by one of the obligees against the obligor.

[Ed. Note.—For other cases, see Parties, Cent. Dig. §§ 19-23; Dec. Dig. § 19;* Contracts, Cent. Dig. §§ 1580, 1598-1601.]

Appeal from St. Louis Circuit Court; Hugo Muench, Judge.

Action by A. M. Frumberg against Joseph Haderlein. From a judgment for defendant on appeal from a justice, plaintiff appeals. Affirmed.

J. F. Merryman and William H. Killoren, both of St. Louis, for appellant. Karl M. Vetsburg and Chas. H. Franck, both of St. Louis, for respondent.

REYNOLDS, P. J. Plaintiff, appellant here, instituted this action before a justice of the peace, against the respondent Haderlein and one Charles H. Franck, filing a statement with the justice, to recover \$250 alleged to be due him under a contract hereafter referred to. Plaintiff dismissed as to defendant Franck before the justice and judgment was rendered against Haderlein, from which the latter appealed to the circuit court where the cause was tried before the court, a jury being waived, on an agreed statement of facts.

It appears by this statement that the basis of the action was the following writing:

"Received of Joseph Haderlein, five hundred (\$500) dollars, retaining fee in his injunction suit against W. Schneider Wholesale Wine & Liquor Company et al. It is understood that if a perpetual injunction is procured for Mr. Haderlein, then he is to pay an additional attorneys' fee to Chas. H. Franck and A. M. Frumberg of five hundred (\$500) dollars; and in the event the injunction is not procured, then there is to be no further attorneys' fee to said attorneya.

"In duplicate.

"[Signed] Chas. H. Franck.

"[Signed] A. M. Frumberg.

"Dated November 18th, 1909.

"Accepted:

"[Signed] Jos. Haderlein."

It was further stipulated that appellant and Charles H. Franck prepared and filed a petition for the injunction referred to in this agreement, "and prosecuted said suit until on discharge of said Frumberg without cause by defendant Haderlein from further service in said cause," and that plaintiff and Frumberg received \$500 from Haderlein, the retaining fee mentioned in the agreement; that after the discharge of plaintiff in the cause Franck and George W. Lubke, Jr., have prosecuted and are still prosecuting the suit, which suit is still pending and in which no perpetual injunction has been procured, as mentioned in the agreement. It is further stipulated that plaintiff at the times mentioned was a licensed and practicing attorney of the St. Louis bar.

No other evidence appears to have been introduced outside of this stipulation, the cause being submitted to the court upon it. Thereupon the court made this declaration of law: "It appearing that the contract of employment, for the breach of which plaintiff prosecutes this suit, was made by defendant with plaintiff and Charles H. Franck jointly, the court declares the law to be that plaintiff cannot at law prosecute a several action upon the same, and the judgment herein must therefore be in favor of defendant." Plaintiff excepted to the giving of this declaration, filed his motion for a new trial, and saving exception to that being overruled,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

duly perfected his appeal from the judgment rendered in favor of defendant.

The only error assigned by counsel for appellant is to the action of the court in giving the declaration of law above set out, it being urged that Franck was not a proper or necessary party either plaintiff or defendant.

While other authorities are cited in the brief of counsel for appellant, in the argument accompanying the brief the authorities relied on are 15 Ency. Plead. & Prac. 735; State ex rel. Glass et al. v. Beasley, 57 Mo. App. 570, loc. cit. 574; and State ex rel. Jackson v. Bradley, 193 Mo. 33, 91 S. W. 483. The quotation from the Encyclopedia of Pleading and Practice is that the test of unity of interest intended by the statute is such joint connection with the subject-matter as would preclude a separate action. However true this proposition may be, to apply it to the case at bar, as contended for by learned counsel for appellant, is the assumption of the very point in controversy. The question here for determination is whether this contract shows such joint connection with the subject-matter as will preclude a separate action by either Mr. Frumberg or Mr. Franck. The holding of the learned trial judge, as evidenced by the declaration of law, is that it will not.

In the Bradley Case, supra, it is distinctly said (193 Mo. loc. cit. 45, 91 S. W. 486) that the employment of the two attorneys there named, one of whom had sued for compensation claimed to be due him, "although for a contingent fee was wholly independent of each other." That is not the case here. The contract is for services which were to be jointly performed by appellant and Mr. Franck; it is a joint contract for the joint services of the two in the conduct of a certain cause which the respondent here was desirous of having brought and prosecuted.

The Beasley Case, supra, was an action for trespass where several persons, alleged to have been damaged in their several interests, undertook to sue jointly. The Kansas City Court of Appeals very properly held that this could not be done.

In very many cases and from an early day, our Supreme Court has held that where the cause of action is on a joint contract the suit must be brought in the names of the joint obligees. Welles, to Use, etc., v. Gaty et al., 9 Mo. 565, was the earliest of these and the rule there announced has never been departed from, nor has it been changed by statute. A later case that collates many authorities and announces the same rule is that of Slaughter v. Davenport, 151 Mo. 26, 51 S. W. 471. There it appeared that the action had been begun before a justice of the peace in the name of three parties plaintiff who recovered a judgment. The defendant appealed from that to the circuit court. There plaintiff amended his petition by leave

of court, striking out the names of two of the plaintiffs, leaving Slaughter as the sole plaintiff and a verdict and judgment was returned in his favor. From this an appeal was taken to the Supreme Court. It appeared that the contract involved was to pay Brooking, Slaughter and Green a certain sum of money and that the only condition therein was that the necessary funds subscribed should be equal to one-fourth the cost of macadamizing a public road. Our Supreme Court (151 Mo. loc. cit. 32, 51 S. W. 472) there held that the cause of action being a joint contract, the suit was properly brought in the names of the joint obligees; that the amendment changed it to an action on a several contract; that if the contract was several there was no reason why this might not be done, for if a party plaintiff to a suit is an unnecessary party, the dismissal as to him would not in any way change the cause of action. "But," says Judge Burgess, "It is not so when the suit is (on) joint contract, and the amendment changes it to an action on a several contract, for in that case there is an entire change in the cause of action, from a joint to a several cause of action upon a joint contract which is not permissible." Further along (151 Mo. 33, 51 S. W. 472) it is said, referring to the action as originally instituted, "In the contract which formed the basis of that action the obligees were joint promisees, one of whom could not have maintained a separate suit upon the contract." In the light of these adjudicated cases, as well as of many more cited by counsel for respondent, we think that the learned trial court correctly applied the law as announced by him in the declaration of law complained of. That is the only error assigned and it is not tenable.

The judgment of the circuit court is affirmed.

NORTONI and CAULFIELD, JJ., concur.

GILLFILLAN v. SCHMIDT.

(St. Louis Court of Appeals. Missouri. Nov. 12, 1912.)

1. APPEAL AND ERROR (§ 1002*) — VERDICT—CONCLUSIVENESS.

A verdict on conflicting evidence, and sustained by evidence, if believed, is conclusive on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3935-3937; Dec. Dig. § 1002.*]

2. TRIAL (§ 296*) — INSTRUCTIONS — ERROR CURED BY OTHER INSTRUCTIONS.

Where, in an action for commissions for procuring a purchaser of real estate, the court at plaintiff's instance charged what the terms of sale of the property were to be, an instruction that the burden of proof was on plaintiff to show that he procured a purchaser ready, able, and willing to purchase on the terms fixed

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes 151 S.W.—11

was not objectionable, as leaving the jury to determine the contract employing the broker.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 705-713, 715, 716, 718; Dec. Dig. § 296.*]

3. BROKERS (§ 88*)—COMMISSIONS—ACTIONS—EVIDENCE—INSTRUCTIONS.

Where, in an action for commissions for procuring a purchaser of real estate, the broker and a customer procured by him testified to a proposal to purchase materially different from the terms fixed by the owner, an instruction that the broker, to recover, must procure a purchaser ready, willing, and able to purchase on the terms fixed by the owner, was not erroneous.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 121-130; Dec. Dig. § 88.*]

4. TRIAL (§ 244*) — INSTRUCTIONS — UNDUE COMMENT ON SINGLE FACT.

An instruction, in an action for commissions for procuring a purchaser of real estate, that if the broker brought a prospective purchaser to the owner on Sunday, the owner was not bound to accept him as a purchaser, or to enter into negotiations on that day, and that what the parties did on that day was immaterial, was not objectionable, as an undue comment on a single fact.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 577-581; Dec. Dig. § 244.*]

Appeal from Circuit Court, Warren County; Jas. D. Barnett, Judge.

Action by Thomas P. Gillfillan against George F. Schmidt. From a judgment for defendant, plaintiff appeals. Affirmed.

Emil Roehrig, of Warrenton, for appellant. T. W. Hukriede and J. W. Delventhal, both of Warrenton, and E. Rosenberger & Son, of Montgomery City, for respondent.

REYNOLDS, P. J. This action, instituted before a justice of the peace to recover commissions on the sale of land, being determined there against plaintiff, was appealed to the circuit court, where on a trial de novo before the court and a jury, a verdict was again returned in favor of defendant, judgment following, from which plaintiff, filing his motion for a new trial and saving exception to that being overruled, has duly perfected appeal to this court.

[1] The verdict is challenged by the learned counsel for appellant, as unsupported by the evidence and further that the evidence introduced at the trial did not support the instructions given at the instance of defendant. As is usual in transactions, the proof of which rests wholly in parol, the evidence was somewhat conflicting but not irreconcilable. We cannot say, on reading it, that there was no evidence to support the verdict. Even admitting that it was seriously conflicting, it is clear that the jury believed that offered and introduced by defendant in the case. To do that was entirely within their province.

Nor can we agree that the instructions given at the instance of defendant were unsupported by the evidence.

[2] The most serious complaint is leveled

against an instruction given at the instance of defendant, to the effect that the burthen of proof in the case is upon plaintiff to show by the greater weight of the evidence that he procured a purchaser for defendant's farm; that that person was ready, financially able, and willing to purchase defendant's farm on the exact terms fixed by defendant, and unless plaintiff had shown these facts by the greater weight of the evidence, their finding should be for defendant. It is complained of this instruction and of the following ones, which embody in different form this same direction, that they are in direct conflict with what is said by this court in *Dalton v. Redemeyer*, 154 Mo. App. 190, 133 S. W. 133. If these instructions stood alone in referring to the contract, they might be subject to this criticism. But the analogy between this case and the *Dalton Case* fails when the instruction given at the instance of plaintiff is considered. In that instruction the court told the jury, at the instance of plaintiff himself, exactly what the terms of the sale of the farm were to be. Hence it cannot be said, as was said in the *Dalton Case*, that the jury were left to grope in the dark to determine what the contract between the parties was.

[3] It is further assigned as error that the court told the jury that plaintiff to recover should have procured a purchaser ready, willing and able to purchase the farm, "on the exact terms fixed by defendant." That might be error if it were not for the fact that by plaintiff's own testimony and that of his customer, it appears that that customer and the plaintiff proposed to conclude the purchase on terms which were not only not exactly as authorized by defendant, but were very materially different. With this in evidence, we do not think the error is, in this case, reversible error.

[4] Criticism is leveled at one of the instructions which told the jury that if they believed that plaintiff brought a person named as prospective purchaser, who was a customer of plaintiff, on Sunday, then defendant was not bound to accept him as a purchaser or enter into negotiations on that day, but if they found that anything was said or done by defendant on that occasion, the fact that the day was Sunday "becomes immaterial and will not be considered by the jury." We see no cause for complaint by plaintiff as to this. It is urged, however, that it is an undue comment on a single fact. We do not think so.

Finding no error to the prejudice of plaintiff in the record in the case or in the instructions given, nor in the action of the court in overruling the motion for new trial, the judgment of the circuit court is affirmed.

NORTONI and CAULFIELD, JJ., concur.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

MYERS-GOLDBERG NECKWEAR CO. v.
GROSSMAN.

(St. Louis Court of Appeals. Missouri. Nov. 12, 1912.)

DAMAGES (§ 80*)—CONTRACT—PROVISION FOR
LIQUIDATED DAMAGES.

A provision of an employment contract that, if the employé should quit before the expiration of the term of one year, he should forfeit \$250 to his employer as liquidated damages, was an enforceable provision for liquidated damages, and not for a penalty, where the contract was made to secure the personal services of the employé on account of his peculiar skill and special qualifications for the work.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 170-175; Dec. Dig. § 80.*]

Appeal from St. Louis Circuit Court; Geo. H. Williams, Judge.

Action by the Myers-Goldberg Neckwear Company, a corporation, against Morris Grossman. From a judgment for plaintiff on appeal from a justice of the peace, defendant appeals. Affirmed.

A. S. Paxson, of St. Louis, for appellant.
Thos. E. Mulvihill, of St. Louis, for respondent.

REYNOLDS, P. J. Plaintiff instituted this action before a justice of the peace, filing a statement of its cause of action, in which statement the contract between it and defendant, appellant here, is set out in full. Summarizing, plaintiff, designated as the party of the first part, and defendant, designated as the party of the second part, premise that the party of the first part, for and in consideration of the promises and obligations of the party of the second part, employs the party of the second part for a period of one year from January 7, 1910, and ending January 7, 1911. In consideration of the employment, the party of the second part obligated and bound himself to devote all his time and best endeavors to the interest of the party of the first part, the party of the second part to work under the direction and to the satisfaction of the party of the first part and to perform such work as the party of the first part should direct, such work including the duty of machine operation and such work as the party of the first part should deem proper. As compensation to the party of the second part for the services to be performed by him the party of the first part agreed to pay him a weekly salary of \$27, commencing the 7th of January, 1910. Then follows this provision: "In case said second party shall fail or refuse to comply with the duties here undertaken by him or shall sever his connections with said party of the first part, without its consent, before the expiration of said year, then said second party shall forfeit to said first party as liquidated damages the sum of \$250, to be paid in cash to the party of the first part."

The contract further provides for the working hours and days in different months, for the payment of overtime, for the allowance of holidays and supper money, and "in the event of serious illness or death in the family of said second party, the party of the first part agrees to permit said party of the second part to absent himself for a period of two weeks." This contract was signed by the several parties. The statement, alleging performance on its part by plaintiff of all the terms of the contract, avers that after the making of it defendant, without just cause and in direct violation of the contract, withdrew from the services and quit the employment of plaintiff against its consent before the 7th of January, 1911, thereby committing a breach of his contract by reason whereof plaintiff claims defendant is indebted to it in the penalty of the contract, \$250, to be paid by defendant to plaintiff as liquidated damages as stipulated in the contract. Judgment is demanded for this sum.

We are not directly advised by the abstract as to the result of the trial before the justice of the peace but apparently plaintiff recovered there and defendant appealed, executing an appeal bond in due form which was approved. The case coming on for trial before the circuit court, a jury being waived, the court at the conclusion of the trial refusing certain declarations of law asked by defendant, found for plaintiff and rendered judgment against defendant and his surety in the sum of \$250 and costs. Filing his motion for a new trial and saving exception to that being overruled, defendant has duly perfected his appeal to this court.

Learned counsel for appellant makes four points for a reversal. First, whether the justice of the peace or the circuit court obtained jurisdiction because the written instrument, which is the basis of the action, was never filed with either court as required by the statute, referring to section 7412, R. S. 1909. As neither counsel make any very serious argument over this proposition, it is not necessary to determine it and we pass it sub silentio.

The second point, and which learned counsel for appellant says is the main point, is whether the stipulation in the contract for a forfeiture in case of a breach shall be construed as liquidated damages or as a penalty.

Arguing that it is a penalty and not liquidated damages, the third assignment is, that the amount of the damages claimed is out of proportion to the breach alleged.

In the view which we take of the case, it is not necessary to go into a discussion of this third proposition, for it falls to the ground if it is held that the second proposition in the case must be decided against appellant.

It is argued as the main point in the case that the court below erred in construing the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

contested clause in the contract to be as for liquidated damages and not as a penalty. That the court did so construe it is evident by the refusal of the declarations of law asked by defendant, to the effect that that was the meaning of the contract.

Learned counsel for appellant as well as for respondent, in support of their several contentions, rely on the decision of our Supreme Court in *Thompson v. St. Charles County*, 227 Mo. 220, 126 S. W. 1044. Other authorities are cited by the several counsel in support of their contentions, but we agree with counsel for appellant, that the decision in *Thompson v. St. Charles County* covers the law so thoroughly and so completely that it is idle to go outside of that and the authorities therein cited for light on this question as to whether, when damages are provided for and are stated to be liquidated, in point of fact they are to be considered by the court as liquidated damages or a mere penalty. As said by Judge Lamm in the *Thompson Case*, supra, his discussion of this proposition commencing at page 235 of 227 Mo., at page 1049 of 126 S. W., it is "a much vexed question upon which courts have been unable to hold a voice even and harmonious, viz., that of 'penalty' as over against 'liquidated damages.'" In the *Thompson Case* the court, considering the testimony in it, and on that arriving at the intention of the parties, concludes that the amount stated in that contract as a per diem deduction for each day of default in completing the building for the county, was to be construed as liquidated damages.

Examining the testimony in this case as set out in the abstract, we have come to the same conclusion. It is evident from that testimony that the employment of defendant under this contract by plaintiff, was not the mere employment of a day laborer or of any one that could be found competent to do the work, but that the underlying thought of plaintiff in making this bargain with defendant was to secure defendant's individual, personal services. The defendant at one time had been a stockholder in the plaintiff corporation, which was a small concern composed of Messrs. Myers and Goldberg, their wives and of this defendant. The defendant had \$400 in stock in the concern. He became uneasy about the investment and the probable success of the concern and sold his stock to two of the members of the concern, was paid par for it and thereupon the corporation entered into this contract set out with defendant. It further appears that defendant was a skilled operator in the making of the articles, in the manufacture of which the company was engaged, and furthermore was possessed of the requisite mechanical skill to be able to keep the machines used in the process of the work in order. In other words, he was a person thoroughly

skilled in the practical details of this particular line of work. While it is plain from the evidence that plaintiff could have gone out and hired other men or hands to work for it, it nowhere appears that the person so hired would have met the particular requirements thought to be possessed by defendant in this employment. In short, this contract provided for the personal skill, the personal services of this defendant: the corporation desired him, employed him, on account of his peculiar skill; not merely because he could run a machine, but because he was specially qualified for the work. It wanted him, not some one else. The penalty for the breach of the contract was put in with the full knowledge and consent of this defendant. He knew that if he threw up the employment he incurred the penalty. There was no compulsion used to secure his consent, no fraud practiced in procuring the contract. Under the contract plaintiff was entitled to the services of defendant for the term specified and for failure to give which defendant had lawfully contracted that he would forfeit to plaintiff as liquidated damages the sum of \$250. Entering into this contract on the 7th of January, 1910, defendant quit the employment of plaintiff on the 26th day of the following February, without any excuse whatever, without any pretense of any violation or non-performance of the contract on the part of plaintiff, and apparently for the sole reason that he was offered employment at a higher rate by another concern. This is the substance of the testimony in the case and it was on this testimony that the learned trial court refused the declarations of law asked by defendant, to the effect that this was a penalty and not liquidated damages. We think that his action in the premises was correct. The judgment of the circuit court should be, and it is hereby affirmed.

NORTONI and CAULFIELD, JJ., concur.

BLACKMER & POST PIPE CO. v. MOBILE & O. R. CO.

(St. Louis Court of Appeals. Missouri. Nov. 12, 1912. Rehearing Denied Dec. 3, 1912.)

1. NEW TRIAL (§ 162*)—PROCEEDINGS TO PROCURE—REMISSION OF EXCESSIVE RECOVERY.

The trial court did not err in granting a new trial for excessive damages, notwithstanding plaintiff's offer to remit the excessive portion, where he did not indicate how much should be remitted, or on what counts, but threw the burden of determining the proper amount on the court.

[Ed. Note.—For other cases, see *New Trial*, Cent. Dig. §§ 324-329; Dec. Dig. § 162.*]

2. APPEAL AND ERROR (§ 842*)—REVIEW—AMOUNT OF RECOVERY.

On appeal from an order granting a new trial in an action stating two causes of action

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

in four counts, on the ground that the jury, by finding for plaintiff on all counts, had allowed a double recovery, the Court of Appeals is not authorized to determine whether the total of the verdict exceeds the amount of damages proved.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3316-3330; Dec. Dig. § 842.*]

3. TRIAL (§ 233*)—INSTRUCTIONS—AMOUNT OF RECOVERY.

Where plaintiff states the same cause of action in different counts, the court should charge that, if the jury finds for him on one of the counts, it should find no damages, or at the most mere nominal damages, on the other counts.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 527-530; Dec. Dig. § 233.*]

Appeal from St. Louis Circuit Court; Geo. H. Shields, Judge.

Action by the Blackmer & Post Pipe Company against the Mobile & Ohio Railroad Company. From an order granting a new trial, on defendant's motion, plaintiff appeals. Affirmed and remanded, with directions.

Dawson & Garvin, of St. Louis, for appellant. R. P. & C. B. Williams, of St. Louis, for respondent.

REYNOLDS, P. J. This is the second appeal in this case, the first appeal by defendant. It was reversed and remanded, the opinion being reported under the title of Blackmer & Post Pipe Co. v. Mobile & Ohio Railroad Co., 137 Mo. App. 479, 119 S. W. 1. At the same time the companion case of the same plaintiff against this defendant and other railroad companies was also reversed and remanded, the latter case being reported under the title of Blackmer & Post Pipe Co. v. Mobile & Ohio Railroad Company et al., 137 Mo. App. 479, 119 S. W. 1. This present case reaching the circuit court under our order of remander, plaintiff "dismissed without prejudice," it is stated, as to all of the defendants except the Mobile & Ohio Railroad Company, and filed an amended petition against that company alone, founded on losses said to have been sustained on the same shipments involved in the former case. This amended petition contains four counts, the pleader evidently following the suggestion made by this court in reversing and remanding, that as before presented the petition was confusing in that it appeared to charge, in one and the same count, the carrier on its common law liability and for breach of contract. In and by the first count of the amended petition, plaintiff avers common law liability on the part of the common carrier for sewer pipe damaged in transit, damage being claimed in the aggregate sum of \$285.77, the shipment contained in four cars. The second count is on the same shipment in the same four cars, the same amount of damage being alleged to have been sustained for negligence in the carriage

of the freight in those same cars. The third count is for damages under the common law liability of the carrier in the transportation of one car load of sewer pipe, damages laid at \$59.40, inclusive of interest and costs; the fourth count claiming the same amount of damages, interest and costs for negligence in the transportation of the same car of sewer pipe.

The answer admitting the incorporation of defendant, pleads that the carriage of the sewer pipe was at a reduced rate of freight, on which consideration plaintiff agreed with defendant that the pipe should be carried at the risk of plaintiff. Various other stipulations in the bill of lading are set out which are not now material to notice, except that it is averred that it was provided among other things in the bills of lading, that claims for loss or damage must be made in writing to the agent at the point of delivery promptly after the arrival of the property, and if delayed more than thirty days after delivery of the property, or after due time of delivery thereof, no carrier of the property should be liable in any event, the answer claiming that this had not been complied with. As a further defense to each of the counts, the five-year statute of limitations is set up. These matters were put in issue by the reply.

The reply set out that the notice of the breakage had been duly given defendant, its connecting carriers and agents and that plaintiff's claim for damages was received by defendant as duly presented and was considered by defendant in the same manner as if it had been entered in thirty days, and all requirements regarding the time or manner of presentation of said claim had been waived by the defendant, payment of the claim being refused on other grounds.

There was a trial of the cause before the court and a jury, at the conclusion of which, the jury, having been instructed by the court, returned a verdict in favor of plaintiff on the first count in the aggregate sum of \$284. On the third count the jury found for plaintiff and assessed its damage at the aggregate sum of \$43.21. There was also a verdict for plaintiff on the second count in the aggregate sum of \$207.84, and on the fourth count in the aggregate sum of \$43.21. Judgment followed in the sum of \$502.10, "being the aggregate damages as assessed by the jury as aforesaid upon the four counts of the petition." In due time defendant filed its motion for a new trial and in arrest. Among other grounds stated in the motion for new trial were that the verdict was excessive; that the jury had rendered two verdicts in the same case; that the verdict is void and will not support a judgment.

The motion in arrest need not be noticed as it does not appear to have been acted on one way or the other by the court.

[1] The court sustained the motion for

new trial, as stated in the record, "because the plaintiff sued on two causes of action in four counts and the jury found for the plaintiff on all four counts, assessing double damages and because the verdict is excessive." In a memorandum handed down by the court and in the record, it is stated that the motion for new trial was sustained "because the plaintiff sued on two causes of action in four counts and the jury found for the plaintiff on all four counts, assessing double damages, and because the verdict is excessive," and the court did not think the evil could be cured by remittitur. Thereupon counsel for plaintiff filed a written offer to remit such part of the damages theretofore assessed as the court considered excessive. The court declined to enter an order of remittitur, whereupon plaintiff, duly saving exception, perfected its appeal to this court.

We confine ourselves to the one proposition that is decisive of the appeal; that is, whether the court committed error in granting a new trial for the reasons assigned, and in overruling the application of plaintiff to the court to remit, and in disregarding and declining the offer of plaintiff to remit.

It is to be noted that learned counsel for plaintiff did not indicate in their motion before the trial court how much should be remitted or on what counts a remittitur should be made, but threw upon the court the burden of determining what the proper amount of the verdict should be and how much should be remitted. That is a burden the court is not bound to assume. When a remittitur is offered it should be stated in so definite a manner that the court may intelligibly act on it.

[2, 3] It is argued in our court with great earnestness by counsel for appellant that even taking the sum total of the verdict, it is not in excess of the amount of damages which were proved up in the case. We, as a court, are not authorized to determine that. This error of the jury in assessing damages on each one of the counts was probably brought about by the form of verdict submitted to them and by the somewhat confused instruction of the court in that respect, that instruction not clearly telling the jury, as it should, that if they found damages as on common law liability, they should return a verdict for that, in which event plaintiff was not entitled to any damages or at most mere nominal damages on the counts sounding in actual damages, and vice versa as to breach of contract. *Lancaster v. Connecticut Mut. Life Ins. Co.*, 92 Mo. 460, loc. cit. 467, 5 S. W. 23, 1 Am. St. Rep. 739.

We think the learned trial court committed no error in granting a new trial. Its action in that behalf is affirmed and the cause remanded with directions to proceed in due course of law.

NORTONI and CAULFIELD, JJ., concur.

CRONAN v. STUTSMAN et al.

(St. Louis Court of Appeals. Missouri. Nov. 12, 1912. Rehearing Denied Dec. 3, 1912.)

1. LOGS AND LOGGING (§ 15*)—FLOATING CONTRACTS—EVIDENCE OF BREACH.

In an action for breach of a contract to float logs providing the water was high enough, evidence held to warrant a finding that there was sufficient water.

[Ed. Note.—For other cases, see *Logs and Logging*, Cent. Dig. §§ 40-42; Dec. Dig. § 15.*]

2. DAMAGES (§ 163*)—EVIDENCE—NOMINAL DAMAGES.

One who proves damage, but does not give any evidence to prove the amount thereof, can recover only nominal damages.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 454-459; Dec. Dig. § 163.*]

3. DAMAGES (§ 62*)—BREACH OF CONTRACT—NEGLECT OF PLAINTIFF.

In an action for breach of a contract to float logs, where the defendant kept putting off performance, saying there was not sufficient water, until the logs had rotted, plaintiff could not be limited to nominal damages on the ground that the damages were due to his own failure to float the logs himself, since he had no notice of defendant's abandonment of the contract.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 119-131; Dec. Dig. § 62.*]

4. DAMAGES (§ 189*)—NEGLECT OF PLAINTIFF—EVIDENCE.

In an action for breach of a contract to float logs, evidence held to warrant a finding that plaintiff had no notice of defendant's abandonment of the contract, so that he was not called upon to float them himself, in order to lighten the damages.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 288, 512; Dec. Dig. § 189.*]

5. JUDGMENT (§ 250*)—GROUNDS OF ACTION—CONFORMITY TO PLEADING.

In an action for breach of a contract to float logs, based on the theory of mere failure to perform, thereby causing total loss of the logs, plaintiff could not recover on the theory that there had been an abandonment of the contract by defendant to plaintiff's knowledge, thereby casting on him the duty to float himself to minimize damages, and, not having done so, that his damages were the cost of so floating.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. § 436; Dec. Dig. § 250.*]

Appeal from Circuit Court, Dunklin County; J. L. Fort, Judge.

Action by J. H. Cronan against L. E. Stutsman and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Ward & Collins, of Caruthersville, for appellants. C. G. Shepard, of Caruthersville, for respondent.

REYNOLDS, P. J. Plaintiff and defendants, the latter under the name of Southeast Missouri Cypress Company, were engaged in the business of cutting logs and piles from lands in Pemiscot county and placing them along the railroad at different points for shipment, the principal shipping point of defendants being at Clay Root, a station on what is known as the St. Louis & Gulf Railroad.

Prior to February 27, 1908, having had numerous dealings together growing out of this business according to the averments of the petition, a dispute arose between the parties over them and defendants instituted one and threatened other actions against plaintiff. These actions pending or threatened, on February 27, 1908, as is averred and admitted, the parties compromised and settled all the matters in dispute between them up to that date and entered into a written contract, the execution of which is admitted. In and by that contract defendants agreed, among other things, to float to Clay Root all the oak piles in controversy, these piles to be found in water sufficient to float them to the bayou at the west end of the land on which the timber was cut; defendants to float, skid and load these piles on cars at Clay Root without cost to plaintiff. Defendants agreed that "from the total amount of indebtedness determined by the inspecting of all accounts and notes now at hand John H. Cronan is to be allowed a reduction of \$550.00; the Southeast Missouri Cypress Company is to assist John H. Cronan in borrowing \$500.00, which shall be added to the said John H. Cronan's indebtedness." Summarizing the remainder of the petition, plaintiff alleges that after the making of this contract the water was sufficient to float the piles to the bayou and remained so long enough to float all of these piles; that in order to handle oak piles of the nature and kind covered by the contract between plaintiff and defendants, it takes large and strong machinery and equipment to haul them out of the water and load them on cars; that defendants at that time had such equipment at Clay Root which they were using in loading piles of like nature; that plaintiff had no such equipment, and was wholly unprepared to handle the piles himself, and was therefore bound to rely solely upon the contract entered into with defendants to handle them and have them placed on cars; that the reasonable market value of the piles was \$4,411.68; that defendants failed and refused to float the piles except 88 pieces of the value of \$512.96, and that the remainder, of the value of \$3,899.02, was wholly lost, to plaintiff's damage in that sum.

The answer, as summarized by counsel for defendants, is an "admission of contract and general denial; plea of insufficiency of water, and that plaintiff, knowing of the insufficiency of water over the piling where they lay, refused to put them in water sufficient to float them; permitted them to lay and rot, and the damage, if any, was occasioned by plaintiff's own negligence."

By way of counterclaim the answer further set out that plaintiff is indebted to defendants in the sum of \$314.75 on account accruing after making the contract and judgment is prayed for this amount. No is-

sue on the correctness of this counterclaim is now presented.

At the close of the testimony in the case the jury returned a verdict in favor of plaintiff in the sum of \$1,000, and in favor of defendants on the counterclaim in the sum of \$314.74, a balance in favor of plaintiff of \$685.25, for which amount judgment went in favor of plaintiff. Filing a motion for new trial as well as one in arrest and these being overruled and exceptions duly saved, defendants have perfected their appeal to this court.

Defendants here make four assignments of error. First, that the verdict is against the evidence and against the law under the evidence and could only have been for nominal damages; second, that the court erred in giving certain instructions for plaintiff; third, the court erred in refusing to give certain instructions asked by defendants, and fourth, that it erred in the admission of testimony.

The making of the contract and its terms are admitted. So also it is practically conceded that plaintiff had paid to defendants the \$550 of old indebtedness and the \$500 raised for him by defendants, in all \$1,050, for the work which defendants were to do in dragging out and loading the piles.

[1] As conceded by learned counsel for appellants, many witnesses swore that on one or more rises the water was deep enough to float the oak piles, and as many or more witnesses swore that at no time from the making of the contract until the piles spoiled, which was about a year after this contract had been entered into, did the water get high enough to float these piles. It was agreed by all the witnesses that green oak piles with the sap in them would not float and that to float them required "floaters," that is sticks of light weight timber, such as ash or cypress, to be placed on each side of the oak pile and fastened so as to buoy them. When properly buoyed, the oak piles, said one of the witnesses, could be floated and when floated it would take, say twenty-two inches of water to float an eighteen-inch oak pile. It seems that it was also the custom, in floating this timber, to cut through the swamps and sandy ridges or higher ground to the deeper water, what is called a "float road," that is, as we understand it, a ditch from which stumps and undergrowth were cleared for the requisite depth, and by means of these "float roads," the piles were carried through the swamps and ridges that might intervene between the starting point and the deep bayou down which they were to be floated. It was in evidence that by means of "float roads," the piles could easily have been floated out at different times between the making of the contract and the time when it is alleged that by allowing them to remain they had rotted and become valueless. In their statement

before us, counsel for appellants themselves admit that "whether or not the oak piling was ever found in sufficient water to float it, was the question for the jury, and by their verdict they evidently found that it was. Hence we are bound on this appeal by that verdict that there was a breach of the contract." Counsel then argue that "a breach of this contract without any other or further showing would only entitle plaintiff to a verdict for nominal damages." Herein lies the crux of this appeal and on it are based practically all the assignments of error except the fourth.

[2, 3] It may be conceded, as claimed by counsel, that where a plaintiff sues for damages and proves that he has been damaged, but fails to give any evidence tending to prove the amount of his damage, he can recover only nominal damages. Furthermore it is beyond doubt, as also urged by counsel that it is the duty of the party injured by a breach of contract to make reasonable effort to render the injury as light as possible. If he knows of the failure or neglect of the one with whom he has contracted to perform that contract within ample time to do it himself, and fails to do so, he cannot hold the other for a loss by such neglect. *Lawson on Contracts* (2d Ed.) § 484. See, also, *City of St. Louis v. Brown*, 155 Mo. 545, loc. cit. 564, 56 S. W. 298. We do not think that the facts in evidence bring defendants within the protection of these rules.

Counsel for appellants contend, in substance, that plaintiff, when defendants failed to do so, was bound to go in and attempt to float these piles out himself; that he did not undertake to show any excuse why he did not get them out himself and why he "sat around and let it rot"; that it was for him to have shown by proof what it would have cost him to take out and load these piles; that this amount was the measure of damage, and that while plaintiff had shown a breach of the contract entitling him to nominal damages, by reason of his failure to prove the cost of doing the work himself, he was not entitled to more than nominal damage.

[4] We are compelled to differ with learned counsel as to the statement that plaintiff had failed to introduce any evidence tending to show any excuse why he did not get out this timber. Plaintiff, testifying in his own behalf, has given his reason for not doing so. After stating that this timber in the woods was entirely ruined, he testified that neither defendants nor their foreman said they would not take it out before it was ruined; that he (plaintiff) had talked with Mr. Stutsman, one of the defendants, frequently about it; that Stutsman told him there was not sufficient water and that it was so reported by his men. "He said he would bring them down when there was water enough; kept promising he would load these piling when there was sufficient water." On cross-examination plaintiff further testified that Stutsman had

told him all the time that there was not sufficient water; that was his claim. "It was according to the report of his men, so he said. I wanted him to go with me and see and he set a day or two to go with me and something came up and he couldn't go, and I got Hammond to go with me. I wanted him to go with me so we could view it together; so we would know it ourselves. I believe if he had gone up there with me he would have put them out; I found sufficient water when I got there."

[5] This was evidence from which the jury had a right to conclude that plaintiff, for almost a year or until the piling had rotted, had been led into the belief that defendants intended to carry out this contract. In short, according to plaintiff, defendants never abandoned the contract, so far as plaintiff knew, until the piles had rotted; had never before then thrown it up, but put off performance from time to time until, by the action of the weather and of the water, the piling had become valueless. If there was no abandonment of the contract on the part of the defendants of which plaintiff was notified, he was under no obligation to go in himself, treat the contract as abandoned and attempt to get out this piling and save it from rot and decay. If he had done that, and brought his action for the expense thereby incurred, he would probably have been met with the defense that he was a mere volunteer in going into the work and had himself prevented defendants from performance. It is true that if he found defendants had thrown up their contract, he could have gone in and saved this timber or any of it, it was his duty to do so; but he would not, in this action, have been entitled, as these refused instructions said, to the value of his work in doing so, and his failure to prove what that work would have cost, did not limit him to nominal damages in this action. Plaintiff did not bring this action on any such theory; that is not his cause of action. It is for breach of contract and seeks the recovery of damages for the entire loss of the timber.

It is beyond question that plaintiff introduced testimony tending to prove that by the default of defendants, the timber was a total loss, so far as its market value as piles was concerned, and that its value was as alleged in the petition. This was evidence of actual damage. That the jury did not accept his valuation is immaterial, and to the loss of plaintiff, but he has not appealed.

Defendants, however, sought at the trial and now seek before us, to put this case on another basis, claiming that plaintiff can only recover for what it would have cost him to float out and load these piles himself. It was on this theory that the refused instructions were predicated.

The instruction marked A, which defendants asked and which the court refused to give, was to the effect that even if the jury found and believed from the evidence that

defendants broke the contract sued upon and failed and refused to carry out the provision to be performed by them, yet under the pleadings and evidence in the case, the verdict for plaintiff can only be for nominal damages and by nominal damages is meant a sum not exceeding one dollar. This instruction and the others refused proceeded upon the theory that it was the duty of the plaintiff to have gone in and attempted to save this timber himself, and that the measure of his recovery would be the cost of doing this, and that as he had not given any evidence of that cost, he could recover nominal damages only.

If plaintiff allowed this timber to rot when he could have saved it after knowledge of abandonment of the contract by defendants, he was bound to do so and in that event would be entitled to the cost of effecting salvage and, if not paid, could have brought his action for that cost. But that was not this case. To have instructed that plaintiff could recover the cost of saving this timber, would have allowed action on one cause and recovered on another. This it has been held in case after case, cannot be allowed.

We discover no reversible error in the instructions given at the instance of plaintiff. They were substantially correct on the theory upon which plaintiff brought his action.

Nor do we find any error to the injury of defendants in the action of the trial court in the admission of evidence.

Upon the whole record we find no error to the prejudice of defendants. In point of fact, considering the amount of the verdict in connection with the evidence in the case, we see no reason for complaint by defendants.

The judgment of the circuit court is affirmed.

NORTONI and CAULFIELD, JJ., concur.

BETTMAN et al. v. MOBILE & O. R. CO.

(St. Louis Court of Appeals. Missouri.

Nov. 12, 1912. Rehearing Denied

Dec. 3, 1912.)

1. APPEAL AND ERROR (§ 1008*)—REVIEW—QUESTION OF FACT.

In a shipper's action, tried without a jury, for injuries to goods shipped, the court's finding that the goods were damaged before delivery to a carrier was conclusive on appeal; the weight of the evidence and credibility of the witnesses being for the sole determination of the trial court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3955-3960, 3962-3969; Dec. Dig. § 1008.*]

2. EVIDENCE (§ 407*)—BILLS OF LADING—PAROL EVIDENCE—EFFECT OF RECITAL OF CONDITION OF GOODS.

Recitals in bills of lading that goods were received in good condition refer only to the external appearance of the goods themselves, or the packages in which they are contained, and the carrier may show, with-

standing such admissions, that loss or damage was caused by the spoiling of the goods from natural decay before they could be delivered, that they wasted from defects in the packages, or that the loss or damage arose from unskillful or improper packing, or prior to delivery to the carrier.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1826-1828, 1847; Dec. Dig. § 407;* Carriers, Cent. Dig. § 148.]

Appeal from St. Louis Circuit Court; Moses N. Sale, Judge.

Action by Louis Bettman and others against the Mobile & Ohio Railroad Company. Judgment for defendant, and plaintiffs appeal. Affirmed.

Henry H. Furth, of St. Louis, for appellants. R. P. & C. B. Williams, of St. Louis, for respondent.

REYNOLDS, P. J. This is an action by plaintiff to recover damage to merchandise said to have been delivered in good order to defendant as a common carrier, it being averred that in violation of its undertaking defendant had failed and neglected to deliver it in good order to the consignees at its destination and suffered the same to become greatly damaged in transportation. It is stated in the petition that the original consignees had assigned and conveyed to plaintiffs all their claim and right of action against defendant for the loss and damage to the merchandise aforesaid, whereupon plaintiffs demand judgment for the amount with interest and costs.

The answer, admitting the co-partnership of plaintiffs and that defendant is a corporation and common carrier, operating its line of railroad between East St. Louis, Ill., and Jackson, Tenn., defendant denies all the other allegations in the petition.

The cause was tried before the court, a jury being waived. No declarations of law were asked or given.

At the conclusion of the trial the court found for defendant and rendered judgment accordingly. From this plaintiffs have duly perfected their appeal.

From a stipulation filed in the case, and which was introduced in evidence at the trial, it appears that on the 19th of September, 1904, plaintiffs delivered to defendant at its freight depot in East St. Louis, Ill., three packages of merchandise containing clothing and ladies wrappers, consigned to parties at Jackson, Tenn. Defendant, on receipt of the merchandise, executed a receipt on a dray ticket, which dray ticket, dated September 17, 1904, recites: "Received in good order from Bettman, Kleinbauser & Co., Wholesale Clothiers, 709, 711 Washington Ave. By M. & O. To be delivered to Rosenbloom Brothers, at Jackson, Tennessee, * * * 3 cases clothing." Here follow the number of packages, their weight and various initials and figures not necessary to

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

set out. It also appears that later defendant issued and delivered to plaintiffs a regular bill of lading in exchange for the dray ticket. This bill of lading does not appear in the abstract of appellant but in a supplemental abstract filed by respondent and not controverted, it is set out that it was in usual form and shows on the receipt part of it the following: "St. Louis, Missouri, September 19,—04. Received by the Mobile and Ohio Railroad Company (hereinafter called the company) from Bettman-Kleinhauser & Co. (hereinafter called the shipper), and who makes this contract as owner or agent for the owner, the following described property (contents and value unknown), and in apparent good order, except as noted; signed and marked as indicated, to be transported by the Mobile and Ohio Railroad Company to Jackson, Tenn.," to the consignees before named. The merchandise was transported by the Mobile & Ohio Railroad Company from East St. Louis to Jackson, Tenn., and there delivered to the consignees on the 20th day of September, 1904. Upon being examined by the consignees immediately after delivery thereof the merchandise was found to be wet and damaged, whereupon the consignees returned it to the Mobile & Ohio Railroad Co., at Jackson. After the consignees had returned the merchandise to the railroad company it offered it to plaintiffs, but plaintiffs refusing to receive it, defendant sold it and tendered the amount realized at the sale to plaintiffs, which they refused to receive "in full satisfaction and discharge of the claim" against the railroad company. It appears that the parties have arranged among themselves about this money and that feature is out of the case. It is further set out in the stipulation that these three cases of merchandise were delivered by plaintiffs to a drayman in St. Louis, to be delivered by him to the railroad company and they were so delivered by him to that company at its freight depot in East St. Louis. It is further stipulated that the condition of the weather in St. Louis on the 18th and 19th of September, as shown from the reports of the weather bureau, was as follows: "Maximum temperature 73 degrees, minimum temperature 53 degrees. Rain occurred from 10:30 p. m. of the 18th, to 7:35 a. m. of the 19th. The amount of rainfall 1.7 inches." It is further agreed that there was no perceptible rainfall in East St. Louis on the 19th of September after 7:35 a. m., and no perceptible rainfall on the 19th or 20th of September from East St. Louis to Jackson, Tenn. The value of the articles was stipulated, and it was also stipulated that the car in which the merchandise was loaded contained other goods beside this shipment and that none of these other goods were damaged, and that the car itself was in good condition. It is further stipulated that certain depositions or parts of depositions might

be read which had been used in another case, and it was admitted that plaintiffs are the assignees of the consignees of this cause of action. Finally, it was stipulated that either party at the trial of the cause might introduce any other proper evidence desired.

Following the introduction and reading of this stipulation, a large volume of oral testimony was introduced on the issue as to whether the damage which had occurred to the merchandise in these three cases had occurred while in the hands of the defendant railroad company or whether that damage had occurred prior to the delivery of the goods to it. It appears that plaintiffs delivered the cases of goods to the drayman between 9 and 10 o'clock of the morning of the 19th, although they had been packed on the 17th, remaining in the custody of plaintiffs in St. Louis over Sunday, the 18th, and that they were delivered to defendant at East St. Louis about noon of the 19th. When the cases reached Jackson they appeared to be in good condition, although they were wet, and when opened the contents were found to have been damaged by water; that no rain fell after delivery of the goods to the carrier at East St. Louis, or while the car was in transit and the goods delivered to the consignee, nor was there any evidence tending to show that the cases became wet while in the hands of the carrier, although when they arrived at destination they appeared as if they had lain in water.

The trial court handed down a memorandum in connection with his finding in the case, which, while not in the bill of exceptions, is brought before us by appellants.

The case is before us on a general finding—or verdict—by the court; as one coming before us and presented upon a general verdict.

[1] The sole question in the case is one of fact; that is, whether the merchandise was damaged before it came into the hands of defendant. The court, in his written memorandum, sets out his reason for finding that the goods were not damaged while in the custody of defendant or in transit, and concludes that plaintiffs cannot recover. This finding for defendant on the facts is conclusive on us; the weight of the evidence and the credibility of the witnesses giving it was for the sole determination of the trial court.

Counsel for appellants contend that this is not an action for negligence but one founded on the common law liability of defendant as a common carrier. We think it clear from the petition that plaintiffs founded their right of action on the common law liability of the carrier. But inasmuch as the learned trial court found that the damage to the shipment did not occur while the goods were in the charge of the carrier, it is here immaterial whether the case pleaded is on the common law liability or on the negligence of the carrier. The contention of learned counsel for appellants seems to be, either that this re-

cial in the bill of lading constitutes an estoppel or that the dray ticket and the bill of lading made a prima facie case that the merchandise was in good order when received by respondent, and that this prima facie case had not been overcome by any substantial testimony. It will be noted that the receipt on the dray ticket does state that the articles were received in good order, but that same receipt further sets out that the articles were in cases. By the stipulation of facts it was also agreed that the bill of lading was later issued for the merchandise by defendant in exchange for the dray ticket. It is distinctly set out in this bill of lading that the contents and value of the merchandise in the cases were unknown and that the shipment was "in apparent good order."

[2] It is stated by an accepted writer on the law of carriers, treating of recitals in bills of lading, that "It has likewise been determined that the usual recital in such instruments that the goods are in good order has reference only to the external appearance, either of the goods themselves or of the packages into which they are put. Hence, it is always competent for the carrier to show, notwithstanding such an admission, that the loss or damage was caused by the spoiling of the goods from natural decay before they could be delivered, or that they had wasted from defects in the vessels in which they were contained, or that it arose from the unskillful or improper manner in which they were packed, or that they had deteriorated or were damaged at the time they were delivered to him. He is not presumed to know the quality of the goods, nor can he refuse to carry them, whatever it may be, if they are fit to carry and are of the kind he usually carries, nor can he, ordinarily, know the condition of the contents of the packages or vessels brought to him for transportation. It cannot be supposed, therefore, that he intends by such a recital to admit more than that the goods are in an apparently fit condition for shipment."

1 Hutchinson on Carriers (3d Ed.) § 163. Many authorities are cited in support of this proposition and while the author cites no Missouri cases, and we are referred to none on the proposition, this rule seems to be so reasonable that we have no hesitation in accepting it as a proper rule to be applied in cases of this character, and to hold that this recital in the bill of lading, or even in the dray ticket, does not amount to an estoppel against defendant as to the condition of the cases. Whether, therefore, as contended by the learned counsel for plaintiffs, the bill of lading made out a prima facie case and the burthen was on defendant to prove that the damage had occurred prior to the receipt by it of the cases of merchandise, the court found that this prima facie case had been overcome and that the damage had occurred to the goods before delivery of the cases to

defendant. Reading the testimony in the case we hold that there is substantial evidence warranting the court in arriving at this conclusion. It was for that court, not the appellate court, to pass on the weight and sufficiency of the evidence, and if it finds, as here it did, that the evidence before him establishes the fact found, we cannot disturb that finding. In this view of the case, it is unnecessary to consider other propositions advanced by learned counsel for the appellant.

The judgment of the circuit court is affirmed.

NORTONI and CAULFIELD, JJ., concur.

HANDLAN-BUCK MFG. CO. v. CHESTER,
P. & STE. G. R. CO.

(St. Louis Court of Appeals. Missouri. Nov. 12, 1912.)

1. CORPORATIONS (§ 507*)—PROCESS—SERVICE—STATUTORY PROVISIONS.

Under Rev. St. 1909, §§ 1766, 1767, requiring the service of summons in an action against a corporation on the president, or other chief officer, or in his absence by leaving a copy with the person in charge of any business office of the corporation, and requiring the officer serving the process to state in his return on whom and how it was executed, a return reciting service of process by delivering a copy to a person named, agent and auditor of the corporation, in charge of place of business of the corporation, is bad for failing to recite that the president or other chief officer of the corporation was absent when the service was made on the agent or auditor.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1971-2000; Dec. Dig. § 507.*]

2. JUSTICES OF THE PEACE (§ 84*)—APPEAL—APPEARANCE.

A defendant, appealing from a justice of the peace, and appearing on appeal for the sole purpose of quashing the return of the summons and dismissing the case, on the ground that the court had obtained no jurisdiction, does not thereby waive the defective service and confer jurisdiction over his person, but the court is without jurisdiction for want of proper service.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 266-278; Dec. Dig. § 84.*]

Appeal from Cape Girardeau Court of Common Pleas; R. G. Ranney, Judge.

Action by the Handlan-Buck Manufacturing Company against the Chester, Perryville & Ste. Genevieve Railroad Company. From a judgment of dismissal, plaintiff appeals. Affirmed.

J. H. Doris, of Cape Girardeau, for appellant. Davis & Hardesty, of Cape Girardeau, for respondent.

NORTONI, J. This is a suit on an account, which originated before a justice of the peace. Defendant is a railroad company incorporated under the Missouri statutes.

Plaintiff instituted the present suit on an account for indebtedness against defendant before a justice of the peace, and the constable served the summons upon Ralph Schultz, defendant's auditor. The return on the summons is as follows: "I hereby certify that I served the within writ by delivering a copy to Ralph Schultz, agent and auditor of the within-named corporation, in charge of an office and place of business of said corporation in Cape Girardeau county, Mo., the 7th day of October, 1909, in Cape Girardeau township, Cape Girardeau county, Mo. Mileage, _____ miles. Fees, \$0.60. [Signed] Geo. Rodenmayer, Constable."

[1] The statute requires service of the summons in such cases to be made upon the president or other chief officer of the company, or, in his absence, by leaving a copy thereof at any business office of the company with the person having charge thereof. See section 1766, R. S. 1909. And section 1767, R. S. 1909, requires the officer serving the process to express in his return upon whom, how, and when the same has been executed. The return above set forth is insufficient under the statute, for it does not recite affirmatively on its face that the president or other chief officer of the company was absent when the service was made upon the agent or auditor. Such is the established rule of decision in this state. See *Rixke v. Western Union Tel. Co.*, 96 Mo. App. 406, 70 S. W. 265; *Land & Mining Co. v. Land & Cattle Co.*, 187 Mo. 420, 86 S. W. 145.

[2] The defendant did not appear to the action before the justice of the peace, and the justice entered a judgment by default against it, as though a valid service of summons was had. Afterwards, within due time, defendant perfected an appeal from the judgment of the justice to the court of common pleas of Cape Girardeau county, and appeared in that court for the purpose only of quashing the return on the summons and dismissing the cause, for the reason that the court had obtained no jurisdiction over the person of defendant, as appeared from the return. The court sustained defendant's motion to this effect, quashed the return, dismissed plaintiff's cause, and vacated the alleged judgment of the justice. From this ruling, plaintiff prosecutes an appeal to this court.

It seems to be conceded here on the part of plaintiff that the service was defectively made on defendant, and that it at no time ever entered its appearance in the cause, unless it did so by perfecting an appeal to the court of common pleas. The only argument advanced in this court on the part of appellant is that, through perfecting an appeal from the judgment of the justice to the court of common pleas, the defendant thereby waived the defective service and voluntarily entered its appearance in the cause.

There can be no doubt that such was the prior course of decision in this state. It was held in *Rice v. Railroad*, 30 Mo. App. 110, "that the taking of an appeal by a defendant from the judgment of a justice of the peace waives all errors or imperfections in the service of process and is equivalent to a general appearance to the merits in the circuit court." To the same effect is *Fitzpatrick v. Railway*, 34 Mo. App. 280; *Witting v. Railroad Co.*, 28 Mo. App. 103. But the Kansas City Court of Appeals held in *Trimble v. Elkin*, 88 Mo. App. 229, that an appeal from the judgment of the justice did not waive the matter of defective service and confer jurisdiction over the person of the defendant. This court took the opposite view, and expounded it in *Meyer v. Insurance Co.*, 92 Mo. App. 392, and certified that case to the Supreme Court for final determination, on the ground that it was in conflict with *Trimble v. Elkin*, supra. The Supreme Court overruled the line of decisions above referred to, accepted the view of the Kansas City Court of Appeals, and declared that the mere act of perfecting an appeal from a judgment of the justice did not operate to waive the matter of defective service and confer jurisdiction over the person. See *Meyer v. Phoenix Ins. Co.*, 184 Mo. 481, 83 S. W. 479. Since that decision, the identical proposition has been determined in other cases, as will appear by reference to *Bente v. Remington Typewriter Co.*, 116 Mo. App. 77, 91 S. W. 397; *State ex rel. v. Ayers*, 116 Mo. App. 90, 91 S. W. 398.

From what has been said, it appears that the justice acquired no jurisdiction over the person of defendant, and that under the more recent rule of decision the matter of defective service was not waived and jurisdiction conferred by perfecting an appeal from the justice court. This being true, the court of common pleas very properly quashed the service and dismissed the cause.

The judgment should be affirmed. It is so ordered.

REYNOLDS, P. J., and CAULFIELD, J., concur.

LEWIS et al. v. FISHER.

(St. Louis Court of Appeals. Missouri. Nov. 12, 1912.)

1. APPEAL AND ERROR (§ 1011*)—REVIEW—FINDINGS.

Finding of fact by the trial court, based on conflicting testimony, is not subject to review.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983-3989; Dec. Dig. § 1011.*]

2. PRINCIPAL AND AGENT (§ 146*)—LIABILITY OF AGENT—CONCEALMENT OF AGENCY.

An agent who conceals the fact of his agency and contracts as the ostensible principal

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

pal is liable on the contract, just as though he were the real principal.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 521-527; Dec. Dig. § 146.*]

3. CORPORATIONS (§ 30*)—PROMOTER'S CONTRACTS.

Where a promoter of a corporation entered into a contract which was to be assumed by it when incorporated, he was liable on such contract.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 97-100; Dec. Dig. § 30.*]

Appeal from Circuit Court, New Madrid County; Henry C. Riley, Judge.

Action by J. W. Lewis and another against A. B. Fisher. From a judgment for plaintiffs, defendant appeals. Affirmed.

Brown & Gallivan, of New Madrid, for appellant. Henry C. Riley, of New Madrid, for respondents.

NORTONI, J. This is a suit for the purchase price of certain saw timber sold by plaintiffs to defendant. The finding and judgment were for plaintiffs, and defendant prosecutes the appeal. Though the sufficiency of the petition is challenged, the point may be dismissed without comment, except to say that it is obviously good after verdict.

Plaintiffs are partners, and the testimony tends to prove that they sold and delivered to defendant 204 sawlogs, under an agreement whereby they were to receive \$9 per thousand feet for cypress and ash, and \$6 per thousand feet for other timber. Eighty-six of the logs delivered were of ash and cypress, and contained about 200 feet per log; that is to say, about \$154.80 worth of timber. One hundred and eighteen logs, averaging about 200 feet each, consisted of timber other than cypress and ash, and under the contract were valued at \$6 per thousand, or a total of \$141. The value of the entire lot of timber delivered to defendant, according to plaintiffs' evidence, appears to have been \$296.40. On this defendant paid \$150, and the suit proceeds for the balance due; however, the recovery allowed was for \$109.35 only.

[1] There is no controversy in the case concerning the fact that plaintiffs delivered the logs, and were to receive compensation therefor, as above stated; but defendant contends that he is not personally liable therefor, because the purchase was made by him as the agent of the New Madrid Cooperage Company, and of this fact the plaintiffs were fully advised at the time. Touching this matter, the evidence for plaintiffs tends to prove that the sale was made directly to defendant as though he were dealing for himself, and that no mention whatever was made of the New Madrid Cooperage Company. It is true defendant testified that he stated to plaintiffs he was purchasing the timber for the New Madrid Cooperage Company; but plaintiffs insist to the contrary. Lewis, one of the plaintiffs who negotiated

the sale with defendant, testified in direct terms, in speaking of defendant at the time the contract was made, "He didn't say anything to me about the cooperage company." It is urged the judgment should be reversed, for the reason it appears defendant acted as agent only, and disclosed his principal at the time the purchase was made. Obviously this argument is without merit; for, as said, the evidence on the part of plaintiffs is plain and direct to the contrary. The question was one of fact for the court who tried the issue; and in view of the controversy about it, and the evidence pro and con thereon, it is precluded here from review.

[2] If there were instructions given in the case, they are not contained in the abstract before us, and no question is raised as to the rules of law stated therein. No one can doubt that an agent who conceals the fact of his agency and contracts as the ostensible principal is liable to respond on the contract in the same manner and to the same extent as though he were the real principal in interest. See Mechem, Agency, § 554. As the court found the issue for plaintiffs on contradictory testimony, the matter in judgment must be viewed here as if defendant purchased the logs as the ostensible principal, and without disclosing his agency, in which event liability may, of course, be enforced against him personally on the contract.

[3] However, defendant is liable, according to his own testimony, on another principle of law which the facts invoke. Defendant testified that the New Madrid Cooperage Company, a corporation for which he claimed to act as agent, was not yet organized or incorporated at the time the contract of purchase was made. He said the preliminary arrangements had been made for incorporating the company, and that he purchased the logs from plaintiffs for the corporation to be thereafter chartered. He says, too, that he was one of the persons engaged in promoting and organizing the cooperage company, and it appears that he owned a majority of the stock of the concern when it finally came into existence. The law is abundantly settled that, where persons associate together with the purpose of forming a corporation, and one or more of them contracts for the corporation with a third person in advance of the formation of the corporation, such person or persons may be held liable to respond on the contract as if they were partners. This alone is sufficient to sustain the judgment. See Furniture, etc., Co. v. Crawford, 127 Mo. 356, 30 S. W. 163. On defendant's testimony, he may be held liable for the balance due on the contract of purchase, as it appears he, as one of the incorporators, contracted for and in the interests of a corporation not yet formed.

We find nothing further in the record wor-

thy of discussion in the opinion, and the judgment should therefore be affirmed. It is so ordered.

REYNOLDS, P. J., and CAULFIELD, J., concur.

EMERY et al. v. G. H. BOEHMER SHOE CO.

(St. Louis Court of Appeals. Missouri. Nov. 12, 1912. Rehearing Denied Dec. 8, 1912.)

1. SALES (§ 126*)—RESCISSION—TIME FOR EXERCISE OF RIGHT.

A purchaser of shoes, if desiring to rescind because not in accordance with the sample, must do so promptly; and a purchaser of shoes shipped in two different consignments, who retained them for more than two weeks after the receipt of the last consignment, selling them in stock all of the time, delayed an unreasonable time, and cannot then rescind.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 313-317; Dec. Dig. § 126.*]

2. SALES (§ 126*)—RESCISSION—QUESTIONS FOR COURT AND JURY.

While ordinarily the question whether the rescission of a sale was made within a reasonable time is for the jury, it is proper for the court, when the uncontroverted facts show that an unreasonable length of time elapsed before the rescission, to declare the right lost as a matter of law.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 313-317; Dec. Dig. § 126.*]

3. SALES (§ 355*)—ACTIONS FOR PURCHASE PRICE—GENERAL DENIAL.

Under a general denial the defendant, in an action for the price of goods sold, cannot establish a partial failure of consideration by showing that they were not in accordance with the sample.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1025-1043; Dec. Dig. § 355.*]

Appeal from St. Louis Circuit Court; George H. Williams, Judge.

Action by Harry R. Emery and another against the G. H. Boehmer Shoe Company. From a judgment for plaintiffs, defendant appeals. Affirmed.

D. D. Holmes, of St. Louis, for appellant. Claud D. Hall, of St. Louis, for respondents.

NORTONI, J. This is a suit on an account for goods sold and delivered, amounting in all to \$1,406.15, with interest thereon. At the conclusion of all of the evidence, the court peremptorily instructed a verdict for plaintiffs, and defendant prosecutes the appeal.

[1, 2] Plaintiffs are copartners, and as such engaged in the business of manufacturing shoes in Massachusetts. Defendant is a retail shoe merchant in St. Louis. It appears that defendant purchased the shoes involved, by sample, through plaintiffs' salesman, and they were manufactured by plaintiffs and shipped accordingly. The shoes were shipped in two consignments. The first

consignment was received by defendant at its store in St. Louis on April 29, 1908, and the second consignment on May 11th of the same year. Immediately upon the receipt of the shoes, April 29th and May 11th, defendant unpacked and placed them in stock for sale. 'Upon unpacking the shoes defendant marked each pair with a lead pencil, indicating the size, width, stock, make, pair, price, etc., and commenced selling therefrom to the trade. After having sold a number of pairs of shoes and kept them in stock for about two weeks, defendant, on May 25, 1908, wrote plaintiffs to the effect that lot Nos. 231 and 232 were checked, and the buckles on pumps were tarnished, and therefore they did not deem it advisable to keep them, and asked shipping instructions from plaintiffs. In due course plaintiffs replied that they expected defendant to keep the shoes, as they were manufactured for them, and no complaint had been made within a reasonable time. Finally, on June 12th defendant returned the shoes to plaintiffs, but they refused to receive them. Upon this showing the court instructed a verdict for plaintiffs, on the theory that defendant had waived its right to rescind the contract of purchase through not acting promptly with respect to the matter.

It is urged the court erred in this ruling; but we are not so persuaded. Defendant had sold some of the shoes, and made no effort to return all of them to plaintiffs. Indeed, it tendered only such as remained unsold in its store at the time. The law not only requires a disaffirmance of a contract of sale at the earliest practical moment after discovery of the defect, but a return of all that has been received under it, and a restoration of the vendor to the condition in which he stood before the contract was made. See *Tower v. Pauly*, 51 Mo. App. 75; *Cobb v. Hatfield*, 46 N. Y. 533, 537. Indeed, it stands upon the most obvious justice and equity that the seller should be apprised promptly if there is any objection, and the vendee intends to reject the goods, so that he may retake possession or resell the goods and save himself, as far as practical, from loss. See *Pierson v. Crooks*, 115 N. Y. 539, 22 N. E. 349, 12 Am. St. Rep. 831. Especially are these principles pertinent to the sale of goods, like shoes, which are known to be manufactured in accordance with changing styles. As to such goods, rescission should be made with promptness, for the reason that delay may entail considerable loss upon the seller. Frequently the value of goods depends in a large measure upon quick sales; and therefore, unless the contract is immediately rescinded, it is impossible to place the seller in statu quo.

But it is said the question as to whether rescission was made within a reasonable time was one for the jury, and the court

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

erred in peremptorily directing a verdict for plaintiffs. There can be no doubt that ordinarily the question of reasonable time is one of fact to be determined by the jury, yet, when the facts are admitted, and the lapse of time is such that fair-minded men with a knowledge of the circumstances of the case would not hesitate to hold the delay unreasonable, it becomes the duty of the court to declare it such as a matter of law. This court has frequently so declared, and the rule of decision is now well established, as will appear by reference to the following cases in point: *Metropolitan Rubber Co. v. Monarch Rubber Co.*, 74 Mo. App. 266; *Tower v. Pauly*, 51 Mo. App. 75; *Long v. International, etc., Machine Co.*, 158 Mo. App. 662, 139 S. W. 819; *Manley v. Crescent Novelty Mfg. Co.*, 103 Mo. App. 135, 77 S. W. 489. According to the prior course of decision, the court very properly directed a verdict for plaintiffs on the admitted facts above stated; for it appears that plaintiffs must have been possessed of full knowledge concerning the shoes, as they unpacked, marked, and placed the first lot in stock on April 29th, and the second lot in stock on May 11th, and made no complaint touching the same until May 25th, or about two weeks after handling by pairs the second shipment. In *Metropolitan Rubber Co. v. Monarch Rubber Co.*, 74 Mo. App. 266, a lot of rubber coats, which had been purchased by plaintiff from defendant by sample, were received by plaintiff on July 6th and held in stock for seven days, or until July 13th, when they were rejected and a rescission declared by the purchaser. Upon these facts this court ruled that it was proper for the trial court to declare, as a matter of law, that the right of rescission had been waived through the omission of the purchaser to act promptly; or, in other words, that the delay in rejecting the coats was an unreasonable one.

[3] But it is argued, as the evidence reveals that the shoes were not according to sample, defendant was, by the peremptory instruction, denied its right to have the diminution in value determined by the jury. Defendant's answer is a general denial, and contains no plea whatever of a failure or partial failure of consideration. However, the argument is that it was competent for defendant to show a partial failure of consideration under the general denial, and have the amount of recovery mitigated through the diminished value of the shoes because of their defective condition. There is nothing whatever in the record suggesting that any such theory was advanced at the trial, and the proposition thus asserted seems to have originated with counsel since the appeal was made. But be that as it may, we are not inclined to hold that a failure or partial failure of consideration may be shown in this state under the general

denial; for the Supreme Court has heretofore declared the contrary, as will appear by reference to *Williams v. Mellon*, 56 Mo. 262. See, also, *Smith Co. v. Rembaugh*, 21 Mo. App. 390, to the same effect. However, a remark in *Voss v. McGuire*, 18 Mo. App. 477, would seem to indicate that a contrary rule obtained; but, in view of the Supreme Court decision above cited, the proposition asserted by the Kansas City Court of Appeals in that case, by Judge Hall, is without authority here.

For the reasons stated, the judgment should be affirmed. It is so ordered.

REYNOLDS, P. J., and CAULFIELD, J., concur.

McCONNELL v. McCONNELL

(St. Louis Court of Appeals. Missouri. Nov. 12, 1912.)

DIVORCE (§ 62*)—JURISDICTION—RESIDENCE OF PLAINTIFF.

Under Rev. St. 1909, §§ 2371, 2373, providing that an action for divorce should be had in the county where plaintiff resides, and declaring that no person shall be entitled to divorce who has not resided within the state for a year next before the filing of the petition, unless the offense complained of was committed within the state, the court has no jurisdiction of a suit for divorce by a nonresident husband for his wife's adultery committed in the state while residing in the state.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 200-202, 208-216, 220, 282; Dec. Dig. § 62.*]

Appeal from St. Louis Circuit Court; Moses N. Sale, Judge.

Action by Ernest A. McConnell against Lydia McConnell. From a judgment of dismissal, plaintiff appeals. Affirmed.

Henry B. Davis and Charles Erd, both of St. Louis, for appellant.

NORTONI, J. This is a suit for divorce. After hearing the testimony, the court dismissed the petition, and plaintiff prosecutes the appeal from that judgment. In support of its ruling the trial court filed a written memorandum containing a concise statement of the facts and its conclusion of law thereon. This memorandum opinion prepared by the trial judge will suffice here, and we therefore set it out as follows:

"This is a suit for divorce filed by the plaintiff, who lives in New York City, in the state of New York, and who has never lived or resided in the city of St. Louis, or in the state of Missouri. He brings this suit for divorce in this jurisdiction, alleging that the defendant, his wife, committed adultery since the marriage in the city of St. Louis, and that the offenses complained of were committed in this state while the defendant resided within this state.

"This appeared to me at the time of the

trial as rather an extraordinary proceeding. Neither the plaintiff nor the defendant reside in this state, or resided in the state at the time of the trial. The plaintiff himself filed an affidavit of nonresidence against the defendant, and applied for an order of publication against her, and the only service in the case is by proof of publication. Counsel for plaintiff, at the hearing, stated that he was proceeding under section 2373, R. S. 1909, which provides as follows: 'No person shall be entitled to a divorce from the bonds of matrimony who has not resided within the state one whole year next before the filing of the petition, unless the offense or injury complained of was committed within this state or whilst one or both of the parties resided within this state.' Counsel contended that under this section, if the injury complained of—that is, if the ground for divorce was committed within this state—then the question of residence is not involved or becomes altogether immaterial. If a husband and wife, residing in the state of New York, should be traveling through the state of Missouri, and the husband, while on his journey in this state, should commit adultery or should be guilty of such barbarous or cruel treatment as to endanger the life of his wife, then the suit for divorce could be brought in this state. * * * I think I am safe in saying that there is not a state in the Union that does not require as a prerequisite for the exercise of its jurisdiction in divorce cases a bona fide residence in the state of the applicant for divorce.

"Section 2373, R. S. 1909, is to be construed with other sections of the statutes on divorce. Section 2371, R. S. 1909, specially provides that the proceedings shall be had in the county where the plaintiff resides. If the offense or injury complained of was committed within this state, then the plaintiff in the divorce suit need not have resided within the state one whole year next before the filing of the petition. The plaintiff in such case may have resided here less than a year. But the statute nowhere authorizes one who is not a resident of the state to institute suit for divorce in this state under any circumstances, and I believe I am safe in saying that that is * * * the law of this state."

We concur with the trial judge in the views above expressed. Indeed, the proposition that a complainant in an action for divorce must be a resident of this state has been pointedly determined by our Supreme Court and this, too, under the identical statutes above referred to. *Kruse v. Kruse*, 25 Mo. 68. The section of the act concerning divorce and alimony (R. C. [Rev. St.] 1845) referred to in the opinion of the Supreme Court is identical with section 2371 of the Revised Statutes 1909, which is still the second section of the act on divorce. It

is obvious the circuit court was without jurisdiction of the cause for the reason plaintiff was not a resident of the state, and the proceeding was very properly dismissed.

The judgment should be affirmed. It is so ordered.

REYNOLDS, P. J., and CAULFIELD, J., concur.

CROUCH v. BRUCKMAN.

(St. Louis Court of Appeals. Missouri. Nov. 12, 1912. Rehearing Denied Dec. 3, 1912.)

BROKERS (§ 54*)—EMPLOYMENT—COMMISSIONS—WHEN EARNED.

Where a broker, employed to procure a loan on real estate by the owner conveying the property to a third person, who should execute a deed of trust to the lender, or by the owner executing a deed of trust directly to the lender, as the lender might desire, procured a lender ready and willing to make a loan on the owner giving him directly a deed of trust, and the loan was not made because of the owner's insistence that he should execute a deed to the third person, who should execute a deed of trust, the broker had earned his commissions.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. §§ 75-81; Dec. Dig. § 54.*]

Appeal from St. Louis Circuit Court; Moses N. Sale, Judge.

Action by James N. Crouch against Ernest G. Bruckman. From a judgment for defendant, plaintiff appeals. Reversed and remanded.

Buder & Buder, of St. Louis, for appellant. McDonald & Taylor, Jacob Chasnoff, and Lynn N. Secord, all of St. Louis, for respondent.

NORTONI, J. This is a suit for commission alleged to have accrued on account of services rendered in negotiating a loan of \$80,000. The finding and judgment were for defendant, and plaintiff prosecutes the appeal.

Plaintiff is a real estate and loan agent in the city of St. Louis, and defendant desired a loan on certain real property owned by him, and numbered 515 Locust street, in the same city. It appears that there was a loan of \$100,000, secured by a deed of trust, on defendant's property, and that he desired to negotiate another for the purpose of liquidating that indebtedness. Defendant employed plaintiff to negotiate a loan of \$100,000 on the property at 5 per cent. for three years, and agreed to pay him 1 per cent. on the amount of the loan as a commission for securing it. Plaintiff put forth efforts to that end, but was unable to secure a loan for more than \$80,000. Finally the original agreement was modified between the parties, so as to contemplate a loan of \$80,000 instead of \$100,000.

There is no controversy in the evidence

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

touching the fact that defendant finally authorized plaintiff to procure a loan of \$80,000 for three years at 5 per cent. interest on the property, and agreed to pay him 1 per cent. on this amount for effecting it. Defendant resided in the state of New York, and after preliminary negotiations on his own behalf committed the whole matter to his brother-in-law, Mr. Orville Groves, of St. Louis, for consummation.

According to the evidence of plaintiff, it was agreed between him and defendant that the loan should be consummated in any one of three ways which was most satisfactory to the lender. It was agreed, first, that the old, or prior, deed of trust on the property could be taken up, assigned, and transferred to the lender; or, second, that the defendant and his wife would execute a deed conveying the property to his brother-in-law, Orville Groves, in St. Louis, and that thereupon Mr. Groves should execute a deed of trust upon the property directly to the lender; or, third, that the defendant and his wife would execute a deed of trust on the property for the amount loaned directly to the lender. In either event, a certificate of good title to be furnished by defendant with the loan.

The evidence is well-nigh conclusive that plaintiff procured a party ready, able, and willing to make the loan of \$80,000 for three years at 5 per cent. interest upon a deed of trust executed directly by defendant and his wife, accompanied by the certificate of title stipulated for. Indeed, Mr. Samuel C. Davis agreed to make the loan upon these terms, and the proposition was submitted to defendant's brother-in-law, Orville Groves, in due time to that effect. Mr. Groves offered to take the money and himself execute a deed of trust, payable to Mr. Davis, on the property, and exhibited a deed from defendant and his wife conveying the property to him for that purpose. It appears Mr. Davis declined to make the loan in this manner, because he was without sufficient assurance that the deed from defendant to Mr. Groves was in every respect valid, and insisted upon a deed of trust directly from the real owner of the property, defendant and his wife, instead. Because of this, Mr. Groves, defendant's agent, acting for him, rejected the proffered loan, declined further negotiations touching the matter, and procured the money through another agent.

Throughout the instructions, the court omitted to reckon with the fact that plaintiff's contract contemplated that the loan might finally be consummated in either one of the three ways above mentioned: First, through taking up of the old, or prior, deed of trust and its assignment to the lender; or, second, through the execution of a new deed of trust by Mr. Groves; or, third, through the execution of a new deed of trust

by defendant and his wife directly to the lender—for it submitted the matter to the jury as though the offer of Groves, defendant's brother-in-law, to execute a deed of trust in his own name was a full compliance on the part of defendant. This was error; for the evidence reveals that the lender had a right to demand the security should be made in any one of the three ways above mentioned, and that plaintiff's obligation was fully discharged upon procuring a loan to be consummated in either one of the three ways stipulated.

Among others, plaintiff requested the following instruction as originally drafted without the words in parentheses: "The court instructs the jury that by the writings offered in evidence, which are admitted to be true and to have passed between the parties, the defendant employed the plaintiff to negotiate for a loan of \$100,000 on the property located at 515 Locust street, in the city of St. Louis, Missouri, and to pay him \$1,000 commission, providing the defendant had not arranged for said money prior to hearing from the plaintiff, and that thereafter said defendant directed plaintiff to consult one Orville Groves, to whom he had referred the entire matter, and that thereafter the said defendant, Bruckman, authorized and directed the said Groves to accept a loan of \$80,000 for three years at 5 per cent.; and the court further instructs the jury that if you find and believe from the evidence that plaintiff, Crouch, did, on the 9th day of December, 1908, pursuant to said authority and the direction of said Groves (and on the terms mentioned by said Groves), find a person ready, willing, and able to loan \$80,000 (on the terms agreed to by Groves) for three years at 5 per cent. on said property, 515 Locust street, and so notified defendant prior to defendant's arranging for the same elsewhere, then your verdict will be for the plaintiff, and against the defendant for the sum of \$800 (unless, under other instructions given you, you find the facts to be that plaintiff was requested and employed to procure a loan for defendant upon a deed of trust to be executed by Orville Groves)."

The court refused the instruction as requested, and inserted the words which appear in parentheses therein. The insertion of these words limited plaintiff's right of recovery to the terms of a contract imposed by Groves, without regard to the terms of the original contract made between plaintiff and defendant, which contemplated the loan could be made in any one of three ways, in accordance with the preference of the lender. The modification of this instruction through inserting the words in parentheses was highly prejudicial, in view of the evidence that defendant agreed that he and his wife should execute a deed of trust directly to the lender, in event the lender preferred

it; for Mr. Davis was ever willing to make the loan on such security, and declined it for no other reason than that Groves insisted it should be made upon a deed of trust executed by him, to whom defendant and his wife had conveyed the property for the mere purpose of the transaction.

In view of the error thus pointed out, the judgment should be reversed and the cause remanded. It is so ordered.

REYNOLDS, P. J., and CAULFIELD, J., concur.

STATE ex rel. GOODMAN & CO. et al. v.
CIRCUIT COURT OF ST. FRAN-
COIS COUNTY.

(St. Louis Court of Appeals. Missouri. Nov. 12, 1912.)

1. CERTIORARI (§ 5*)—ADEQUACY OF OTHER REMEDY.

Certiorari does not take the place of mandamus to compel the making of a record, but it takes the record as it finds it, excluding the mere evidence which can, in the nature of things, relate to the merits only, tending to show, as it does, that the court erred in its judgment, since the office of the writ is not to review errors of that sort, and is only allowed when no appeal or writ of error or other available mode of review is afforded.

[Ed. Note.—For other cases, see Certiorari, Cent. Dig. §§ 5-6; Dec. Dig. § 5.*]

2. CERTIORARI (§ 5*)—ADEQUACY OF OTHER REMEDY.

Where a motion, under Rev. St. 1909, § 7573, for rule and attachment to compel a justice of the peace to allow an appeal and return his proceedings in an action, together with the papers required to be returned by him, is denied by the circuit court, the ruling is reviewable by appeal or writ of error; and certiorari does not lie to review the ruling, though no formal judgment has been entered, since on a proper motion a formal judgment may be entered.

[Ed. Note.—For other cases, see Certiorari, Cent. Dig. §§ 5, 6; Dec. Dig. § 5.*]

3. CERTIORARI (§ 16*)—FINAL JUDGMENT.

Certiorari reaches only to cases in which there are final orders or judgments.

[Ed. Note.—For other cases, see Certiorari, Cent. Dig. §§ 31, 32; Dec. Dig. § 16.*]

Certiorari by the State, on the relation of Goodman & Co. and another, against the Circuit Court of St. Francois County. Writ quashed.

Merrill Pipkin, of Farmington, for relators.
J. H. Malugen of Bonne Terre, for respondent.

REYNOLDS, P. J. One William Good, at the relation and to the use of Abe Gordon, commenced his action before a justice of the peace of St. Francois county, for damages alleged to have accrued to him on the breach of a bond said to have been executed by Goodman & Co., the United States Fidelity & Guaranty Co., and Merrill Pipkin. Summons was issued, returned as served as to some of the defendants. Mr. Pipkin appear-

ed and filed an affidavit denying the execution of the bond by him in any other capacity than as agent for others of the defendants. The other defendants, Goodman & Co. and the United States Fidelity & Guaranty Co., filed motions denying the jurisdiction of the court in the cause and Goodman & Co., denied that they had been served. The motions to dismiss for want of jurisdiction were overruled and the cause continued for service as to Goodman & Co. On the day to which the cause had been continued, plaintiff appeared by attorney but the defendants making default and the judgment reciting that it appearing that all the defendants had been duly served, the justice proceeded to hear the cause and found for plaintiff, rendering judgment against the defendants for the damages claimed. In due time the attorney for defendants filed an affidavit for appeal, the affidavit setting out that defendants appeared only for the purpose of appeal, and "that the application for an appeal from the judgment in the above entitled cause is not made for vexation, or delay, but because he believes the appellants are injured by the judgment of the justice therein." This was filed by the justice. Defendants thereupon signed and executed a bond which was approved by the justice. The justice entering up on his docket the fact of filing the bond and the application for an appeal, set out this in his docket entry: "The appeal is by me not granted on account of the defect in the affidavit."

Afterwards at the November, 1911, adjourned term of the circuit court of St. Francois county, the defendants filed their motion setting out that judgment had been rendered in the justice's court in December, 1911, for plaintiff and that within ten days thereafter the defendants filed affidavit for appeal, together with a good and sufficient bond, and that notwithstanding the filing of the bond and affidavit, the justice refused to grant and allow an appeal to the circuit court. The motion proceeds: "Wherefore by (virtue) of section 7473, R. S. 1909, defendants move for a rule and attachment on said justice to compel him to grant said appeal and send all papers to this court." The circuit court thereupon, on January 29, 1912, at the adjourned November term, issued an order reciting the motion "requiring the justice to grant an appeal," and that the court had seen and heard it and ordered "that the case be certified to this court by said justice O. M. Bonney, for examination and review in order that the court may determine whether the appeal herein should be granted." (The italics are in the return.) The justice thereupon, on March 21, 1912, filed the transcript and papers above referred to in the circuit court.

Afterwards, and at the succeeding May, 1912, term the defendants, by leave of court,

filed an amended affidavit for appeal. This amended affidavit states "that the application for an appeal from the merits in the above cause is not made for vexation or delay but because he (affiant) believes the appellants are injured by the judgment of the justice herein. Affiant further states that this appeal is from the merits of the cause." After filing this amended affidavit, and apparently during the same May term, the defendants served on plaintiff's attorney notice of the appeal. This on the 4th of June, 1912, and during the May term. On the 13th of June and during the May term, 1912, of the circuit court the following proceedings were had in the cause, namely:

"Abe Gordon, Plaintiff, v. I. Goodman & Company, Defendants. Certified J. P. Now at this day the court of its own motion orders an entry nunc pro tunc correcting the record herein and that the entry of record of this court on January 29, 1912, which read as follows: 'Now comes defendant and files its motion to make a rule, order and attachment upon O. M. Bonney, justice of the peace of Perry township, St. Francois county, requiring said justice to grant an appeal of this cause to the circuit court, said motion being seen and heard; it is ordered that the case be certified to this court by said O. M. Bonney,' be corrected and reformed so as to read nunc pro tunc or now for then as follows: 'Now comes defendant and files its motion to make a rule, order and attachment upon O. M. Bonney, justice of the peace of Perry township, St. Francois county, requiring said justice to grant an appeal of this cause to the circuit court, said motion being seen and heard, it is ordered that the case be certified to this court by said justice O. M. Bonney for examination and review by this court, and now it is further adjudged that this court has no jurisdiction to order the appeal herein to be granted.'"

The defendants in the court below thereupon presented to this court a petition for certiorari to issue to the circuit court requiring it to send up the record and files in the cause. We issued the writ as prayed for and the return of the circuit court being duly made, sets out the foregoing as the record in the case.

[1] In the recent case of *State ex rel. Evans v. Broadbent et al.*, Judges, 149 S. W. 473, not yet officially reported, our Supreme Court has held that where an appeal or writ of error does not lie, "certiorari does not go as a right, but it goes in such cases in order that profert of the challenged record be made to be searched for jurisdictional defects; that is, orders, judgments, and parts of judgments without (or in excess of) the jurisdiction of the subordinate court making or rendering them. * * * Certiorari does not take the place of mandamus to compel the making of a record; but it takes the

record as it finds it, excluding the mere evidence which can, in the nature of things, relate to the merits only, tending to show, as it does, that the court erred in its judgment. The office of the writ is not to review error of that sort." Certiorari is only allowed when no appeal or writ of error or other available mode of review is afforded. *State ex rel. v. Edwards*, 104 Mo. 125, 16 S. W. 117.

[2] The proceeding before the trial court in this case was under section 7573, R. S. 1909. It has been held by our court in *Morris v. Scherer*, 76 Mo. App. 401, loc. cit. 406, that proceedings under this section, triable before the court without a jury, are not reviewable on appeal as to the finding of fact, but no decision that we are aware of holds that they cannot be reviewed on questions of law, by either appeal or writ of error. The action of the trial court in the case at bar was in effect a denial of the motion made before it for an order on the justice to grant an appeal. That was a final disposition of the cause by the circuit court. While it is true that no formal judgment appears then to have been entered up, that does not change the fact that the court denied the prayer of the motion; the relief sought. On proper motion a formal judgment to that effect could undoubtedly have been entered. At all events, while the motion of the relators here, made in the circuit court, was for an order on the justice requiring him to grant an appeal, the circuit court declined to issue an attachment or make an order granting an appeal. Nor did it ever make any such order. Even in the original order as entered, it does not, "by rule and attachment, compel the justice to allow the (appeal) and to return his proceedings in the suit, together with the papers required to be returned by him" (section 7573), but orders "that the case be certified to this court by said justice * * * for examination and review, in order that the court may determine whether the appeal herein should be granted." When the court subsequently entered up a nunc pro tunc order, it did not order an appeal but following its former order, ordered that the case be certified "for examination and review," and followed this up by the finding that it had no jurisdiction to order an appeal.

[3] As before noted it does not appear that any further order was entered in the cause by the court. If it be argued that the omission of a formal and final judgment precludes an appeal, then such omission is equally fatal on certiorari, for that writ reaches only to cases in which there are final orders or judgments. We do not think that the omission of a formal order is of substance here. It was open to correction, could have been supplied. Its omission does not change the fact that the court did deny the relief sought by relators here, defendants below. That order denying the rule for an appeal was a final disposition of the case, and authorized an appeal or writ of error.

Coming to the exact point in decision in this case, we hold that where application is made under the provisions of section 7573, R. S. 1909, for rule and attachment to compel the justice to allow an appeal and return his proceedings in an action, together with the papers required to be returned by him, and the circuit court refuses the rule, the action and the ruling of the court on that application is appealable or can be brought before the appellate court on writ of error.

Causes arising under what is now section 7573 have been before the appellate courts several times. In all of them to which our attention has been directed, the proceedings in the circuit court have been considered on appeal. See *Kelm v. Hunkler*, 49 Mo. App. 664; *Morris v. Scherer*, supra; *Hagerty v. Llerly*, 109 Mo. App. 631, 83 S. W. 542; *Bader v. Jones*, 119 Mo. App. 685, 96 S. W. 305; *Leeper v. Carter*, 137 Mo. App. 617, 119 S. W. 463. Being appealable, certiorari does not lie.

It follows that the writ of certiorari issued herein should be and it is quashed.

NORTONI and CAULFIELD, JJ., concur.

BRADLEY v. NORTHERN CENT. COAL CO.
(Kansas City Court of Appeals. Missouri.
Nov. 25, 1912.)

1. MASTER AND SERVANT (§§ 101, 102*)—LIABILITY FOR INJURIES—DUTIES AS TO TOOLS AND MACHINERY.

The operator of a coal mine owed to an employé operating a coal mining machine the duty of exercising reasonable care to provide and maintain a feed chain, used in drawing the machine forward, reasonably suited to the purposes of its intended use.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 135, 171, 174, 178, 179, 180-184, 192; Dec. Dig. §§ 101, 102.*]

2. MASTER AND SERVANT (§ 107*)—LIABILITY FOR INJURIES—DUTIES AS TO TOOLS AND MACHINERY.

An employer who continued a chain on a machine in use after it had become worn and dangerous, and after reasonable regard for the safety of employes required that it should be replaced, was negligent.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 199-202, 212, 254, 255; Dec. Dig. § 107.*]

3. MASTER AND SERVANT (§ 226*)—LIABILITY FOR INJURIES—ASSUMPTION OF RISK.

A servant does not, and cannot, assume risks caused by the master's negligence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 659-667; Dec. Dig. § 226.*]

4. MASTER AND SERVANT (§ 208*)—LIABILITY FOR INJURIES—ASSUMPTION OF RISK.

Where it was inevitable and natural that breakages of the chain on a machine operated by an employé would occur on occasions of unusual and unavoidable stress on the machine, the risks of injury therefrom, being natural and incidental to the service, were assumed by the employé, but the risks resulting from continuing to use a chain so defective as to be un-

safe for ordinary usage were not assumed by him.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 551; Dec. Dig. § 208.*]

5. MASTER AND SERVANT (§ 284*)—LIABILITY FOR INJURIES—CONTRIBUTORY NEGLIGENCE.

An employé who knew that a chain on the machine he was operating was defective was not guilty of contributory negligence in continuing in the service, if a reasonably careful man in his situation would have concluded that he could work without subjecting himself to danger of immediate injury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 684-686, 706-709; Dec. Dig. § 284.*]

6. MASTER AND SERVANT (§ 289*)—ACTIONS FOR INJURIES—QUESTIONS FOR JURY.

In an employé's action for injuries, evidence held to present a question for the jury whether the danger of a chain breaking, which the employé knew to be defective was so obvious and imminent as to render the employé guilty of contributory negligence in continuing work.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1069-1132; Dec. Dig. § 289.*]

Appeal from Circuit Court, Randolph County; A. H. Waller, Judge.

Action by Odus Bradley against the Northern Central Coal Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Willard P. Cave, of Moberly, for appellant. F. E. Murrell and M. J. Lilly, both of Moberly, for respondent.

JOHNSON, J. Plaintiff sued to recover damages for personal injuries he alleges were caused by negligence of defendant. He prevailed in the circuit court, and the cause is here on the appeal of defendant. The facts of the case are as follows: At the time of the injury, March 20, 1912, defendant was operating a coal mine in Randolph county, and plaintiff, an experienced miner, was employed in the mine, and was engaged in operating a coal mining machine. One of the links of a heavy wrought iron chain, called a feed chain and used in drawing the machine forward, broke while the machine was in operation, and a broken end was thrown violently against plaintiff, who was standing near the place of the breaking, and the small bone of one of his legs was fractured. The feed chain was 60 feet long, and its links were an inch and a half long, and made of round wrought iron rods $\frac{5}{8}$ of an inch in diameter, and, when new, its pulling strength was 14,000 pounds. The machine attached to the chain was an electrical cutting machine, the main parts of which were a powerful motor, a system of sprocket and pulley wheels through and around which the feed chain passed and a cutter bar. The feed chain "threaded" through the machine by being coursed around the various pulley and sprocket wheels, was firmly anchored at each end, and the machine was moved forward by means of the motor revolving the sprocket

wheels, the teeth or sprockets of which engaged the links of the chain. In short, the machine traveled by pulling itself along the feed chain, and the chain carried the machine, as well as its load, which consisted of the resistance offered to the work of the cutter bar. It was the office of the bar to undermine the ledge of coal by cutting out the underlying and supporting material and the ordinary working load carried by the feed chain when the machine was cutting through dirt or soapstone was about 4,000 pounds. When the cutter encountered harder substances, the load was increased, and, when it struck hard rock or sulphur, it was necessary to remove the cutter as it could not work in such substances, and the attempt to go on would result either in breaking the chain or some part of the machine. The operator could tell by the hum of the motor the character of the resistance opposed to the cutter and by moving a lever which controlled the power could stop the machine instantly. There was also a fuse which would blow out and shut off the current when the strain on the machine became too great, and, in addition to these safety and regulatory appliances, there was a friction nut by which the attachment of the machine to the feed chain could be regulated on a scale varying from zero or no attachment to "positive," which firmly engaged the sprockets with the links of the chain in a manner to prevent any slipping. The friction nut was set periodically by the electrician employed by defendant, and usually was kept at the point where the sprocket teeth would not engage the links when the total load exceeded 7,000 pounds. Plaintiff states that he was forbidden to change the position of the friction nut. Defendant denies this statement, and contends that it was plaintiff's duty to use this appliance as one of the safety devices of the machine. For the purposes of the demurrer to the evidence which defendant insists should have been given, we shall accept the testimony of plaintiff on this subject, especially as it appears to be supported by a very plausible reason, viz., the amount of plaintiff's wages depended on the quantity of coal taken out, and it was found that the operators of machines, if allowed to manipulate the friction nut, were inclined to set it too high, and thereby throw a greater burden on the machine than it could stand. In other words, to increase the output to the maximum, they would try to force the cutter through harder substances than the safety of the machine and chain would permit. Hence the rule forbidding operators from touching the friction nut. In addition to these devices for safety and economy, the evidence of defendant shows that the bullders of the machine provided for the use of a feed chain which, though strong and powerful, would be much weaker than the weakest part of the machine, in order that

the feed chain first would break and save the more expensive parts of the apparatus in the event of the machine being overloaded from any cause.

Breakages of the chain, therefore, were contemplated as possible and probable incidents of the life of the machine, and we infer that a desire to minimize the natural dangers of such mishaps was one of the motives leading to the selection of wrought iron, instead of steel, chains. On account of the great resiliency of steel, the recoil of a suddenly broken, tense chain of that material would be accompanied by peculiar dangers that could be avoided by the use of wrought iron chains, which do not rebound under such conditions, no matter how great the strain. The injury to plaintiff was not caused by a recoil of the chain. When the link broke, it was passing over a revolving sprocket wheel, and the chain end was propelled against plaintiff by motion it received from the wheel. The chain had been in service eight months, and the evidence of plaintiff tends to show that it had become so worn and fatigued it could not stand the strain of ordinary work. It had broken repeatedly during the preceding month or six weeks, and defendant, on the complaints of plaintiff, had promised to provide another chain. Twice before the occasion in question it broke that day and had been repaired by the blacksmith. The machine had been running through soft material, and had not been subjected to more than an ordinary strain. It had been carrying a load of about 4,000 pounds, its safety strength had been rated and should have been rated at 7,000 pounds, and yet it kept breaking under the burden of half a load. The evidence of plaintiff tends to show that defendant had actual knowledge of this defective condition of the chain in ample time by the exercise of ordinary care to remedy the defect. The petition charges: "That said defendant carelessly and negligently failed and refused to furnish him with reasonably safe and sufficient tools, appliances, and machinery with which to work, but, on the contrary, negligently and carelessly furnished him with dangerous, unsafe, and insufficient tools, appliances, and machinery with which to work, in that the feed chain of said mining machine was at the time, and for a long time prior thereto had been, weak and insecure, and incapable of sustaining the strain thereon when said machine was being operated, all of which was known, or by the exercise of ordinary care might have been known, to defendant." The answer is a general denial and pleas of contributory negligence and assumed risk.

[1,2] Defendant owed plaintiff the duty of exercising reasonable care to provide and maintain a feed chain reasonably suited to the purposes of its intended use. The chain had become worn and dangerous, and defendant, with knowledge of its condition,

continued it in use after it should have been replaced if reasonable regard for the safety of plaintiff and his fellow workmen had been observed. Of the negligence of defendant there can be no serious question.

[3, 4] Counsel for defendant argue that the risk was one assumed by plaintiff. The rule now is firmly imbedded in our law that the servant does not, and cannot, assume risks caused by the master's negligence. *Curtis v. McNair*, 173 Mo. 270, 73 S. W. 167. It was inevitable and natural that breakages of the chain should occur on occasions of unusual and unavoidable stress on the machine and the risks of injury from such causes being natural and incidental to the service were assumed by plaintiff as a part of his contract of employment, but the breaking of the chain was not intended to be an incident of the ordinary work of the machine, and, since defendant could not remain within the confines of reasonable care and compel its servant to work with a chain so defective as to be unsafe for ordinary usage, so plaintiff, the servant, should not be held to have assumed a risk that obviously was caused by defendant's lack of due care.

[5, 6] Nor do we find good support in the facts and circumstances of the case for the contention of defendant that plaintiff was guilty in law of contributory negligence. Though he knew the chain was defective, he had the right to continue in the service provided a reasonably careful man in his situation would have concluded that he could work with the chain without subjecting himself to danger of immediate injury. We regard the question of whether the danger was so obvious and imminent as to convict plaintiff of contributory negligence as one for the jury. *Burkard v. Rope Co.*, 217 Mo. loc. cit. 480, 117 S. W. 35, and cases cited.

There is a vital difference between knowledge of the extent and character of a danger and knowledge of a defect in which lurks a danger the extent or imminence of which is not discoverable to the servant by the reasonable use of the opportunities his situation affords. *Dodge v. Coal Co.*, 115 Mo. App. loc. cit. 506, 91 S. W. 1007. An ordinary breaking of the chain would have entailed small risk to plaintiff. It was the fortuitous breaking at the revolving sprocket wheel that caused the injury. The jury were entitled to the belief that such a risk was not one that was glaring and obvious and that threatened plaintiff with imminent danger, but was one that the wisdom and prudence of an ordinarily careful master would have anticipated and employed reasonable care to obviate. The demurrer to the evidence was properly overruled.

A close inspection of the record convinces us the case was tried without prejudicial error. Points made against the rulings on evi-

dence and in the instructions given the jury are ruled against the contention of defendant.

The judgment is affirmed. All concur.

KIEL v. OTT.

(St. Louis Court of Appeals. Missouri. Nov. 12, 1912.)

1. WITNESSES (§ 391*)—IMPEACHMENT—ADMISSIBILITY OF EVIDENCE.

Defendant, seeking to impeach plaintiff, asked a witness, who had testified to a certain statement made by plaintiff, what, if anything further, plaintiff had then said, to which the witness answered: "Well, he said this: 'You know as well as I do that O. is a good man, and a good church member, and has lots of friends, and if you prove my reputation it will be a job for me to gain this.'" Held, that the answer was proper as against an objection, made after it was given, that it had no bearing on the issues and tended to prejudice the jurors against plaintiff.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. § 1248; Dec. Dig. § 391.*]

2. WITNESSES (§ 391*)—IMPEACHMENT—ADMISSIBILITY OF EVIDENCE.

The answer of the witness was admissible on the issue as to plaintiff's statement and as to his character, and as purporting to give the entire conversation.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. § 1248; Dec. Dig. § 391.*]

3. APPEAL AND ERROR (§ 1066*)—HARMLESS ERROR—INSTRUCTIONS.

Where, in an action for injuries from plaintiff's horse being frightened at a wood pile alongside the road, there was evidence tending to show that the horse had not been frightened, an instruction to find for defendant if plaintiff was injured from any cause, other than his horse being frightened at the wood pile, was harmless, though there was no direct evidence of any other cause.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 4220; Dec. Dig. § 1066.*]

4. NEW TRIAL (§ 72*)—GROUNDS—VERDICT—PREPONDERANCE OF EVIDENCE.

Where plaintiff's case rested almost exclusively on his own testimony, and his credibility was attacked, there was no such preponderance of evidence in his favor as warranted a new trial on the ground that a verdict for defendant resulted from prejudice, corruption, or gross ignorance of the jury.

[Ed. Note.—For other cases, see *New Trial*, Cent. Dig. §§ 146-148; Dec. Dig. § 72.*]

Appeal from Circuit Court, Franklin County; R. S. Ryors, Judge.

Action by August Kiel against Simon Ott. From a judgment for defendant, plaintiff appeals. Affirmed.

John W. Booth, of Washington, Mo., and J. G. Copeland, of Union, for appellant. Jesse H. Schaper, of Washington, Mo., and O. E. Meyersleck, of Union, for respondent.

REYNOLDS, P. J. This is an action by plaintiff to recover damages alleged to have been sustained in consequence of being thrown from his horse, it being charged that defend-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

ant had wrongfully and unlawfully and without right, piled or caused to be piled a lot of cord wood on a public road in such manner as to create an obstruction calculated to frighten horses of ordinary gentleness and that while plaintiff was traveling along the road, riding a horse of ordinary gentleness, the horse became frightened at the piles of wood and jumped and threw plaintiff to the ground, thereby seriously injuring him, for which injuries sustained plaintiff claims judgment in the sum of \$1,500.

The answer was a general denial.

On trial before the court and a jury, the jury returned a verdict for defendant from judgment on which plaintiff, filing his motion for a new trial and saving exception to that being overruled, has duly perfected his appeal to this court.

As to the facts it may be said that plaintiff's testimony tended to show that he received certain injuries by being thrown from his horse while he was riding along the road and through the piles of wood alongside of it. Defendant attacked the character of plaintiff for truth and veracity and also introduced evidence tending to show that the horse had not jumped; that measuring the tracks of the horse in the road showed the horse had neither jumped nor run off, as claimed by plaintiff.

The errors assigned are three: First, to the court refusing to strike out the testimony of a witness named. Second, giving to the jury an improper instruction, and third, to the overruling of plaintiff's motion for a new trial.

[1, 2] The first assignment of error cannot be sustained. The witness referred to being under examination on part of defendant, and testifying as to conversations between himself and plaintiff concerning the transaction, after having testified that in that conversation plaintiff had made a certain statement, was asked what, if anything further, plaintiff had then said. Whereupon the witness answered: "Well, he said this: 'You know as well as I do that Ott is a good man and a good church member, and has lots of friends, and if you prove my reputation it will be a job for me to gain this. You know that as well as I do.'" It is stated in the abstract that plaintiff thereupon moved the court to strike out the answer of the witness to the last question, "as having no bearing on the issues in the case and being improper evidence tending to prejudice the jurors against plaintiff." This is the motion referred to, which the court overruled and to which ruling plaintiff duly excepted. It will be noted that the question itself was not objected to when asked. The objection was made to the answer and for the reasons above. That answer might possibly have been objected to as not responsive to the question asked, although this is doubtful, but no such objection was made. The objection as raised is not

tenable. The answer did bear on the issues as to plaintiff's own statements and on his character, and purported to give the whole conversation, as the witness was asked to do. That it may have influenced the jury in passing upon plaintiff's testimony unfavorably to plaintiff, does not render it improper.

[3] The instruction complained of is to the effect that if the jury found and believed from the evidence that plaintiff was injured on the date named, in the public road in front of the premises of defendant, by reason of any cause other than the frightening of the horse at the wood pile mentioned in the evidence, then the verdict will be for defendant. It is objected to this instruction that there is no evidence tending to show any other cause of injury than the frightening of the horse. It is true that there is no direct evidence of any other cause, but there was evidence tending to show that the horse had not been frightened and had not jumped on the occasion referred to. From that it would seem to follow that the jury had a right to infer, from the testimony in the case, that it was not the frightening and jumping of the horse that caused the injury. Apart from this, however, even conceding the proposition of the learned counsel for plaintiff, that there was a lack of evidence of any other cause, we are not prepared to say, on reading all the testimony in the case, that this instruction was harmful or in any manner misled the jury. It was undoubtedly understood by the jury to mean that to find for plaintiff, they must find that he sustained his injuries in the manner and from the cause alleged by him.

[4] This disposes of all the assignments of error except that plaintiff's motion for new trial, it is claimed, was improperly overruled. It is argued in support of this assignment that the motion for new trial should have been sustained by reason of the reception of the evidence and the giving of the instruction above referred to. We have disposed of these grounds. It is also claimed that the verdict of the jury is against the weight of the evidence to such an extent as to indicate that it is the result of prejudice, influencing the jury against plaintiff. In support of this ground, we are referred to *Walton v. Kansas City, Ft. Scott & Memphis Railroad Co.*, 49 Mo. App. 620, loc. cit. 627. In that case it is there stated that in *Price v. Evans*, 49 Mo. 396, Judge Bliss impliedly states that it is error in the trial court to refuse a new trial where the preponderance of evidence against the verdict is so strong as to raise the presumption of prejudice, corruption or gross ignorance on the part of the jury. Our court held in the *Walton* Case that the facts in it clearly called for an application of that rule. Without determining whether that rule, said to be drawn from the *Price* Case, in the light of many decisions recognizing the right to pass upon the weight

of evidence as resting solely in the trial court, is now in force, it is sufficient to say that the present case does not call for its application. We cannot say that the preponderance of the evidence in this case is so strong as to raise the presumption of prejudice, corruption or gross ignorance on the part of the jury. Plaintiff's case rested almost exclusively on his own testimony, and his credibility as a witness was very seriously attacked by several witnesses.

The judgment of the circuit court is affirmed.

NORTONI and CAULFIELD, JJ., concur.

BYRD v. VANDERBURGH.

(St. Louis Court of Appeals. Missouri. Nov. 12, 1912.)

1. APPEAL AND ERROR (§ 842*)—GROUNDS FOR NEW TRIAL—SUFFICIENCY OF EVIDENCE.

A ground of a motion for a new trial that "the verdict and judgment are for the wrong party," and that they are contrary to the evidence, is, in substance, the same as a claim that they are contrary to the greater weight of the evidence, which is not a ground of appellate interference.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3316-3330; Dec. Dig. § 842.*]

2. APPEAL AND ERROR (§ 1003*)—FINDINGS—CONCLUSIVENESS.

That the verdict is contrary to the greater weight of the evidence is not a ground for disturbing a verdict by the appellate court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3938-3943; Dec. Dig. § 1003.*]

3. NEW TRIAL (§ 128*)—SUFFICIENCY OF MOTION.

A ground for a motion for new trial that the judgment and verdict are against the law is not sufficiently specific for consideration.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 257-262; Dec. Dig. § 128.*]

4. APPEAL AND ERROR (§ 1061*)—HARMLESS ERROR—RULINGS ON EVIDENCE.

Error in sustaining a demurrer to appellant's evidence in an attachment suit involving the right to possession of hoops as to particular hoops loaded in a car, was not reversible, where judgment went for appellant as to such hoops.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4137, 4209-4211; Dec. Dig. § 1061.*]

5. APPEAL AND ERROR (§ 260*)—OBJECTION TO EVIDENCE.

Error in admitting evidence cannot be reviewed if the ruling admitting it was not excepted to.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1503-1515; Dec. Dig. § 260.*]

6. APPEAL AND ERROR (§ 1056*)—HARMLESS ERROR—EXCLUSION OF EVIDENCE.

Error in excluding evidence relating to an item of property in controversy as to which judgment was rendered for appellant was harmless.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4187-4193; Dec. Dig. § 1056.*]

7. NEW TRIAL (§ 90*)—GROUNDS—PERJURY OR MISTAKE—DISCRETION OF COURT.

Rev. St. 1909, § 2022, authorizing the granting of a new trial if the court is satisfied that perjury or mistake was committed by a witness, occasioning an improper verdict or finding as to such matter, if the moving party has a just cause of action or defense, gives the trial judge a wide discretion in granting a new trial on such ground, subject only to its reasonable exercise under the facts.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 181-183; Dec. Dig. § 90.*]

8. APPEAL AND ERROR (§ 994*)—FINDINGS—CONCLUSIVENESS.

It is not the appellate court's province to interfere with findings by the court which depend upon the credibility of witnesses.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3901-3906; Dec. Dig. § 994.*]

9. NEW TRIAL (§ 89*)—GROUNDS—SURPRISE—ADMISSION OF EVIDENCE.

Where, in attachment proceedings involving the right to possession of hoops, the only issue was whether interpleader who purchased the hoops from the debtor had taken actual possession thereof, and interpleader introduced evidence that it had marked the hoops, it could not claim a new trial on the ground that it was surprised because plaintiff's witnesses testified that the hoops were not marked when levy was made, though that fact was not denied at the justice's trial.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 177-180; Dec. Dig. § 89.*]

10. NEW TRIAL (§ 97*)—GROUNDS—SURPRISE.

If a party is surprised by any action at trial, such as the admission of evidence, he should immediately ask a reasonable postponement to enable him to produce counter evidence or move for nonsuit, in order to rely thereon for a new trial.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 195-198; Dec. Dig. § 97.*]

11. ATTACHMENT (§ 308*)—ACTIONS—BURDEN OF PROOF.

In attachment proceedings involving the right to possession of hoops claimed by interpleader as purchaser from the debtor, the burden was on interpleader to show that it had taken actual possession upon purchasing as required by law.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 1102-1109, 1111-1118; Dec. Dig. § 308.*]

Appeal from Circuit Court, St. Genevieve County; Peter Huck, Judge.

Action by J. M. Byrd against W. F. Vanderburgh, in which the Bank of Marston interpleaded. From a judgment for plaintiff, interpleader appeals. Affirmed.

The controversy here is between the plaintiff, Byrd, an attaching creditor of defendant Vanderburgh, and the Bank of Marston, interpleader in the attachment suit, and involves the right to the possession of a quantity of hoops piled in the hoop sheds of the Marston hoop mill at Marston, Mo. The issues made upon the bank's interplea were tried to the court, jury being waived, and were found in favor of the plaintiff, the attaching creditor, as to all the hoops except some, which, when attached, had been loaded into a railroad car for shipment. The bank, interpleader, has appealed to this court. It claimed the right

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

to the possession of the hoops under and by virtue of an instrument in the form of a bill of sale to it which was executed by defendant Vanderburgh on February 11, 1909, to secure certain advancements made and to be made by the bank, and purporting to transfer to the bank all hoops then in said sheds and all that might thereafter be manufactured by said mill or piled in said sheds or thereabout. It is conceded that neither the said instrument nor a true copy thereof was recorded or filed in the recorder's office. Up to Saturday, May 15, 1909, all the hoops remained in the hoop sheds, where they had been placed and kept by Vanderburgh while concededly in his possession. Part of them had been manufactured before the "bill of sale" was executed and part thereafter. The bank does not appear to have had possession or control of the sheds. They were appurtenant to the hoop mill which defendant Vanderburgh operated. On Saturday, May 15, 1909, the bank caused part of the hoops to be loaded on a car for shipment to a buyer whom Vanderburgh had found, he says, for the bank. The buyer's order for the car of hoops was addressed to the bank. A bill of lading issued in the name of the buyer. This loading was done by one Nelson, Vanderburgh's foreman, who was, however, according to the bank's evidence, employed by the bank for such loading. The hoops not so loaded remained in the sheds. On Monday, May 17, 1909, the hoops in the sheds as well as those on the car were levied on under the writ of attachment. The sole question upon the trial was whether the bank had taken possession of the hoops in the manner required by statute, before the attachment was levied. The cashier of the bank testified on its behalf that several weeks before the attachment the bank caused the hoops to be marked "here and there all over the several piles, 'Property of the Bank of Marston'"; that the words "Bank of Marston" were put on with a rubber stamp, and the words "Property of" written with a lead pencil just above them. Ankershell, assistant cashier, testified that he marked the hoops for the bank; that, in addition to the rubber stamp and lead pencil marking, he had written on sheets of paper the words, "Property of the Bank of Marston," and attached one or more of such sheets on each pile of hoops in the shed. On the other hand, W. A. Nelson, who had charge of the loading of the car for the bank, and J. D. Dockery, the constable who levied on the hoops, gave testimony on behalf of plaintiff, the attaching creditor, to the effect that the hoops were not marked by the bank until after the levy of the attachment. Dockery denied having testified before the justice of the peace that when he went to the shed he found the notices on the hoops. The grounds stated in the bank's motion for a new trial are as follows: "(1) Because the verdict and judgment is for the wrong party. (2) Because the verdict and the judgment are con-

trary to the greater weight of the evidence. (3) Because the verdict and judgment is contrary to the law and the evidence. (4) Because the court erred in sustaining in part the motion of the plaintiff, J. M. Byrd, in the nature of a demurrer as offered at the conclusion of the testimony of interpleader. (5) Because the court erred in sustaining the motion of plaintiff, Byrd, offered at the conclusion of all the testimony. (6) Because the court erred in admitting incompetent and irrelevant testimony offered by plaintiff over the objection of interpleader. (7) Because the court erred in refusing to admit competent, material, and relevant testimony offered by interpleader. (8) Because witnesses for the plaintiff committed either perjury or mistake in testifying that the hoops involved in the suit were not marked by the interpleader prior to the levy of the attachment, as see affidavits filed herewith. (9) Because interpleader was surprised by the testimony offered by plaintiff to the effect that the said hoops were not marked when levy was made, as this fact was not denied at the hearing before the justice of the peace. Affidavits proving the contrary to be the fact are filed herewith."

Accompanying this motion were six affidavits, which, if accepted as absolutely true, would establish that the marking occurred prior to the levy of the attachment, and tended to prove that the plaintiff's witnesses, Nelson and Dockery, knew that such marking had been done. The affiants, however, do not agree with the bank's witnesses at the trial as to when such marking was done. None deposed that it was done more than two weeks before the attachment levy, and one deposed positively that only "several days" before the hoops were loaded into the car he saw Ankershell doing the marking.

E. F. Sharp, of Marston, for appellant.
Brown & Gallivan, of New Madrid, for respondent.

CAULFIELD, J. (after stating the facts as above). As the appellant, interpleader, does not claim that there is any error on the face of the record proper, we may only consider what has been finally passed upon by the circuit court on the motion for a new trial.

[1] The first ground stated in said motion is that "the verdict and judgment are for the wrong party." This, and that embodied in the third ground, viz., that the verdict and judgment are contrary to the evidence, are merely the statement in another form of the second ground, which is that "the verdict and the judgment are contrary to the greater weight of the evidence." State ex rel. Stewart v. Todd, 92 Mo. App. 1. See, also, Heine v. Morrison, 13 Mo. App. 577; State v. Scott, 214 Mo. 257, 113 S. W. 1069.

[2] That is not a ground on which we may interfere with the judgment of the trial court.

[3] The statement in the third ground that the verdict and judgment are against the law is not sufficiently specific to compel consideration. *State v. Scott*, supra.

[4] The fourth ground relates to the action of the trial court in sustaining a demurrer to the evidence of the interpleader (appellant) as to the hoops loaded on the car. This action was taken at the conclusion of the testimony of the interpleader. But the judgment should not be reversed because of such action for the reason that it was for the interpleader as to those hoops, and whatever error was involved in sustaining the demurrer was thereby rendered harmless. The fifth ground is that the court erred in sustaining the motion of plaintiff offered at the conclusion of all the testimony. The record does not disclose that any such motion was sustained or offered.

[5] The sixth ground, that the court erred in admitting incompetent and irrelevant testimony offered by defendant over the objection of the interpleader, must be overruled because the record does not disclose that the interpleader saved any exception to any ruling on the admissibility of evidence offered by the plaintiff. The seventh ground is that the court erred in refusing to admit competent, material, and relevant testimony offered by the interpleader. The only evidence offered by the interpleader which appears to have been excluded and exception noted was the bill of lading for the car load of hoops.

[6] As this evidence related only to the hoops in the car, and the judgment of the trial court was in favor of the interpleader as to them, the error in excluding it, if any, must be held to have been harmless. This brings us to the eighth and ninth grounds stated, which are the principal grounds relied upon by appellant in urging that the judgment be reversed and a new trial granted. The eighth is that "witnesses for the plaintiff committed either perjury or mistake in testifying that the hoops involved in the suit were not marked by the interpleader prior to the levy of the attachment."

[7] The statute (section 2022, R. S. 1909) provides that the trial court shall grant a new trial if it "is satisfied that perjury or mistake has been committed by a witness, and is also satisfied that an improper verdict or finding was occasioned by any such matters, and that the party has a just cause of action or defense." "The purpose of this enactment is to clothe the trial judge, who enjoys the advantage of meeting the parties and witnesses face to face, with a wide discretion to be exercised in furtherance of substantial justice. He should be satisfied with the justice of the verdict, otherwise, it is his duty to set it aside. * * * With respect to the ground for a new trial under consideration, the judge is invested by the statute with the functions of a trier of fact, and his discretion is limited only by the rule that it

must not arbitrarily be exercised, but must rest on a reasonable foundation of fact." *Ridge v. Johnson*, 129 Mo. App. 541, 107 S. W. 1103. See, also, *Rickroad v. Martin*, 43 Mo. App. 597; *Sly v. Union Depot R. Co.*, 134 Mo. 681, 36 S. W. 235. In the case at bar there was nothing to satisfy the trial court that perjury or mistake had been committed by plaintiff's witness, except the testimony of interpleader's witnesses and the ex parte, and to some extent contradictory, affidavits, which interpleader filed with the motion for a new trial.

[8] Its determination of the matter must necessarily have depended upon its view of the mere credibility of the witnesses, with which it is not our province to interfere.

[9, 10] As to the ninth ground, viz., "interpleader was surprised by the testimony offered by plaintiff to the effect that the said hoops were not marked when levy was made, as this fact was not denied at the hearing before the justice of the peace," the following, quoted from the decision of our Supreme Court in *Thiele v. Citizens' Ry. Co.*, 140 Mo. 319, loc. cit. 338, 41 S. W. 800, is a sufficient response: "It is a general rule that each party must understand his case and come prepared to meet the case made by his adversary. Therefore, a party cannot be surprised that his adversary introduced testimony in support of the issues made by the pleadings, even though such testimony is false. *Hayne's New Trial*, par. 79. The rule is thus forcibly stated by Phillips, P. J., in *Bragg v. City of Moberly*, 17 Mo. App. 221: 'If a party be surprised by an unforeseen occurrence at the trial, he should make his misfortune known to the court instantly and ask for a reasonable postponement to enable him to produce the countervailing proof. If he can relieve himself from his embarrassment by any mode, either by a nonsuit or a continuance, or the introduction of other testimony, or otherwise, he must not take the chance of a verdict, but must at once fortify his position by resorting to all available modes of present relief.'" In the case at bar the only issue was whether the interpleader had taken such actual possession of the hoops as was required by law of a vendor, or of a mortgagee whose mortgage was not recorded or filed.

[11] As to this the interpleader had the burden of proof. In an attempt to sustain this burden, it introduced evidence to the effect that it had marked or branded the hoops as its property prior to the levy of the attachment. The testimony introduced by the plaintiff, which interpleader claims was a surprise, merely contradicted the testimony which the interpleader had previously introduced. It is clear under the general rule just quoted that the interpleader could not be surprised that his adversary introduced such testimony, and, if he was, it was its duty to make known the fact of its surprise

at the trial, a thing which it neglected to do. Recognizing the rules above quoted, the judgment cannot be reversed on the ninth ground.

It appearing then that the record is barren of error warranting a reversal of the judgment, the judgment is affirmed.

REYNOLDS, P. J., and NORTONI, J., concur.

GRANT CITY v. SIMMONS.

(Kansas City Court of Appeals. Missouri. Nov. 25, 1912.)

1. COURTS (§ 66*)—TERMS—ADJOURNMENT.

Under Rev. St. 1909, § 3809, providing that, if after the commencement of a term of court, the court shall not be held, it shall stand adjourned from day to day until the evening of the third day, and that, if the judge of any court having but one judge cannot attend the regular term, he may notify the sheriff, who shall adjourn the court to the next regular term or to such special or adjourned term as the judge shall direct, where the judge of a court having but one judge was unable to attend a term, the sheriff had power only to adjourn the court until the next regular term and not to adjourn it from day to day until the evening of the third day.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 231-242; Dec. Dig. § 66.*]

2. CRIMINAL LAW (§ 1092*)—BILL OF EXCEPTIONS—TIME FOR FILING—EXTENSION—"NEXT REGULAR TERM."

Defendant was given until the last day of the next term of court to file a bill of exceptions. The next term should have been held in February, and the following term in May. Owing to the absence of the judge, the February term was not held. Held, that she had until the last day of the May term within which to file her bill of exceptions, since the order extending her time did not give her to any particular day of the year, but to a certain day in the "next regular term," which meant a term at which the court was legally open for the transaction of business, and not the time at which it could and should have been open, but was not because of the absence of the judge.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2829, 2834-2861, 2919; Dec. Dig. § 1092.*]

For other definitions, see Words and Phrases, vol. 5, p. 4804; vol. 8, p. 7732.]

3. MUNICIPAL CORPORATIONS (§ 642*)—APPEAL—MOTIONS TO DISMISS—EVIDENCE.

Under Rev. St. 1909, § 2083, providing that the Supreme Court and Courts of Appeals shall examine the record and award a new trial, reverse or affirm, or give such judgment as should have been given below, the court ordinarily is confined to an examination of the record, and cannot receive evidence de hors the record on any controverted issue, but, on a motion to dismiss the appeal, such evidence may be received to show that by a settlement there is no longer a real controversy before the court.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1412-1415; Dec. Dig. § 642.*]

4. MUNICIPAL CORPORATIONS (§ 642*)—APPEAL—MOTIONS TO DISMISS—HEARING AND DETERMINATION.

A party moving to dismiss an appeal on the ground of a compromise or settlement has the burden of showing such compromise and

that the person agreeing thereto on behalf of the appellant had authority to make such agreement.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1412-1415; Dec. Dig. § 642.*]

5. ATTORNEY AND CLIENT (§ 89*)—AUTHORITY—CONDUCT OF LITIGATION.

An attorney may dismiss his client's suit or stipulate that it shall abide the judgment in another suit where the facts and parties are the same in the two actions and, under his general authority, has a wide range of action as to those things pertaining merely to the remedy.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 133, 134, 139, 140, 167, 168; Dec. Dig. § 89.*]

6. ATTORNEY AND CLIENT (§ 101*)—AUTHORITY—SETTLEMENT OR COMPROMISE.

An attorney's general authority, as such, gives him no power to compromise his client's claim or demand or to make any agreement or take any action that will sacrifice his client's cause.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 209-216; Dec. Dig. § 101.*]

7. ATTORNEY AND CLIENT (§ 101*)—AUTHORITY—DISMISSING APPEAL.

Where a stipulation by an attorney to dismiss an appeal was merely an incident to an unauthorized compromise of the case by him, it related rather to the cause than the remedy and was unauthorized.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 209-216; Dec. Dig. § 101.*]

8. PRINCIPAL AND AGENT (§ 113*)—POWERS OF AGENT—CONDUCT OF LITIGATION.

Accused's father, who managed and conducted her defense, as agent, had no authority to bind her by an agreement to dismiss an appeal from a judgment of conviction and pay the costs if the amount of the fine was remitted.

[Ed. Note.—For other cases, see Principal and Agent, Dec. Dig. § 113.*]

9. MUNICIPAL CORPORATIONS (§ 635*)—VIOLATION OF ORDINANCE—CIVIL OR CRIMINAL.

A prosecution for the violation of a city ordinance is a civil and not a criminal case.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1400, 1401; Dec. Dig. § 635.*]

10. MUNICIPAL CORPORATIONS (§ 640*)—DEGREE OF PROOF—VIOLATION OF ORDINANCE.

A person prosecuted for a violation of a municipal ordinance, which is also an offense under the public laws of the state, is entitled to the benefit of the guaranties that attend one accused of crime, and is therefore entitled to the presumption of innocence and to have his guilt established beyond a reasonable doubt.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1410; Dec. Dig. § 640.*]

11. CRIMINAL LAW (§ 830*)—INSTRUCTIONS—REASONABLE DOUBT.

Where defendant's guilt is required to be established beyond a reasonable doubt, the court must give a proper instruction on the question of reasonable doubt, although the one requested is faulty.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2012, 2017; Dec. Dig. § 830.*]

Appeal from Circuit Court, Worth County; William C. Ellison, Judge.

Effie Simmons was convicted of the viola-

tion of a municipal ordinance, and she appeals. Reversed and remanded.

J. E. Engle and John Ewing, both of Grant City, for appellant. Dubois & Miller and Edward Kelso, City Atty., all of Grant City, for respondent.

JOHNSON, J. This cause originated in the police court of Grant City on the complaint of the city attorney charging defendant with disturbing the peace of certain persons named in the complaint in violation of an ordinance which provides: "Every person who shall within the corporate limits of the city disturb the peace of any other person or persons, or of any family or neighborhood by violent or tumultuous conduct, or by loud and unusual noises, or by unseemly, profane, or indecent or obscene language, or by language calculated to provoke a breach of the peace, or by quarreling, fighting, or challenging to fight, or by assaulting or striking another, and every person or persons who shall permit the same in or upon any house or premises owned by him or them or under his or their control, so that any other person or persons in the vicinity are disturbed thereby, shall upon conviction thereof be punished as hereinafter provided. Every person who shall be convicted of a violation of any of the provisions of this article shall, when no other punishment is provided, be punished by a fine not less than five nor more than ninety dollars."

[1, 2] A trial in the circuit court where the case was taken by appeal resulted in a judgment of conviction which assessed a fine of \$50 and costs against defendant. This judgment was rendered October 15, 1910, and on the same day defendant's motion for a new trial was overruled and an order was made allowing her an appeal to this court and giving her "until the last day of next term of this court to file her bill of exceptions." The next term of that court provided by law should have begun on the first Monday of February, 1911, and the next term after that term on the second Monday in May, 1911. Owing to the absence of the judge who was holding court in another county, the February term was not held, and no session of court was held in that county until the May term. The sheriff of the county convened the court on the first day of the February term (February 5), and adjourned from day to day until the third day (February 8), when he adjourned the court to the next regular term. Since the February term had no "commencement" within the meaning of that term, as employed in section 3869, Rev. Stat. 1909, and as there was but one judge of that court and he was unable to attend at that term, the sheriff had no power, under the section of the statute just cited, to open court and adjourn from day to day until the evening of the third day, and

the only authority he possessed in such case was, on being notified by the judge of his inability to attend, to make proclamation at the courthouse door adjourning court until the next regular term. Respondent contends that, inasmuch as appellant's bill of exceptions was not filed on or before February 8th, which respondent treats as the last day of the February term, and no order of extension was made in that time, the bill which was signed and filed February 25th was filed out of time and cannot be considered as a part of the record. We held the bill was filed in the time specified in the original order, and that appellant was not required to procure an extension of time.

The order giving appellant "until the last day of the next term to file her bill of exceptions" had reference, not to any particular day of the year, but to a certain day in the next regular term of the court; and by the expression "the next regular term" is meant a term at which the court was lawfully opened for the transaction of business, and not to a time at which it could and should have been commenced but was not lawfully opened because of the absence of the judge.

The February term of the court had neither beginning nor ending—neither a first nor a last day. It was abandoned as the law provided it should be in such event, and the next term, within the meaning of the order granting leave to file a bill of exceptions, was the May term, since that was the first regular term at which the court was opened for the transaction of business. Notwithstanding the difference in the facts of the two cases, this case in principle is the same as that of *State v. Tevis*, 234 Mo. loc. cit. 283, 136 S. W. 339. In that case the appellant was given until the second day of the April, 1909, term of the circuit court to file his bill of exceptions. In the meantime the Legislature changed the date of holding that term from April to May. The bill of exceptions was not filed until the second day of the May term. The Supreme Court held it was filed in time, though it would have been out of time had the next term been held in April. The bill of exceptions is properly before us.

Before passing to the case on its merits, we will dispose of a motion of respondent to dismiss the appeal. It appears, from affidavits filed by respondent, that, after the rendition of the judgment, the case was compromised and settled by the parties on the following terms: Respondent agreed to remit the fine of \$50, and appellant agreed to dismiss her appeal and pay the costs. It is not claimed that appellant personally participated in the settlement and the antecedent negotiations, but that she was represented by her attorney of record and by her father, who had managed and conducted

her defense as her agent. Further it appears that respondent had prosecuted the father of appellant for an alleged violation of one of its ordinances; that a trial of the case had resulted in a judgment of acquittal from which respondent had appealed; and that, at the time of the settlement of the present case, that case also had been compromised and settled in a way to deprive respondent of the right to prosecute the appeal or to prosecute another action on account of the offense. Appellant has filed in this court the affidavits of herself, her father, and her attorney, in which all of the affiants state that neither the father of appellant nor her lawyer had any authority from her to compromise and settle the cause, and the last-named affiants deny that they made any agreement with respondent for the settlement of the case in hand or for the dismissal of the appeal.

[3] Under the statute (section 2083, Rev. Stat. 1909), an appellate court, in the disposition of causes coming to it on appeal or writ of error, is confined to an examination of the record, and cannot receive evidence de hors the record on any controverted issue. But this rule is not without exceptions, and among such exceptions are instances where there has been a settlement of the controversy, with an agreement to dismiss the appeal or writ of error. When a cause is settled and there is no longer a real controversy before the court, neither party will be permitted to urge a decision of issues no longer in existence, and evidence de hors the record will be received on the issue of settlement or no settlement. In *re Hutton's Estate*, 92 Mo. App. loc. cit. 186; *Railroad v. Bridge Co.*, 215 Mo. loc. cit. 296, 114 S. W. 1084; *Wait v. Railroad*, 204 Mo. loc. cit. 506, 103 S. W. 60; *Dulaney v. Buffum*, 173 Mo. 1, 73 S. W. 125.

[4] The burden is on respondent to show the existence of the alleged settlement; and, to do this, it devolved on respondent to establish by proof, not only the fact that the father and the attorney of plaintiff or either of them made the settlement, but that they had authority from appellant to make it in her behalf. It is not contended by respondent, nor do its affidavits tend to show that appellant gave either of her agents express authority to compromise her case, or that she in any way consented to or ratified their act in entering into a compromise agreement, if, in fact, they did such a thing. Respondent relies on the general authority of the attorney as such to enter into an agreement for the dismissal of the appeal.

[5. 6] The general authority of an attorney gives him a wide range of action as to those things that pertain merely to the remedy. He may dismiss his client's suit or stipulate that it shall abide the judgment in another suit—the facts and the parties being the

same in the two actions—but he has no authority from his employment as an attorney to compromise his client's claim or demand, or to make any agreement or take any action that will sacrifice his client's cause without express authority. The cases properly make a sharp distinction between acts of the attorney that pertain only to the remedy and those that strike at the root of the client's right. *Davis v. Hall*, 90 Mo. 659, 3 S. W. 382.

[7. 8] The agreement before us cannot be said to have provided merely for the performance of an act relating solely to the remedy. In many instances a stipulation to dismiss an action is of such nature and will be enforced, though made by the attorney without the knowledge or consent of his client; but the circumstances of the case in hand disclose a stipulation of an entirely different character. Here the agreement to dismiss the appeal was but a mere and, we might add, unnecessary incident of the contract compromising the cause. If that contract were valid, respondent could have forced a dismissal of the appeal without any special stipulation therefor and in the face of appellant's opposition. Since the real purpose and object of the alleged contract was the compromise and settlement of the cause, and the agreement to dismiss the appeal, at most, was but auxiliary to that purpose, that agreement partook of the nature and character of the purpose it was designed to serve, and therefore was one relating to the cause and not to the remedy. Neither the attorney nor the father of defendant had authority, under a general employment, to defend the action to bind her to a contract of that character.

The wisdom and justice of the rule that denies an attorney, under a general employment to prosecute or defend an action, the authority to enter into an agreement compromising his client's right could not find better exemplification than that offered by the facts of the present case. The judgment against defendant not only adjudged her guilty of a violation of law, but, in effect, denounced her as an unchaste and immoral woman. The record discloses, as we shall show, that she did not have a fair trial. To hold that her attorney, in virtue of his general employment to defend her against a charge so serious, might compromise the case in a manner to leave her under the perpetual stigma of such a judgment would be to give to attorneys a power and authority over the rights of their clients never recognized by the courts and abhorrent to all reason or sense of justice. The motion to dismiss the appeal is overruled.

Defendant is a widow who, with her two children, lived in the north part of Grant City. The prosecuting witnesses were neighboring housewives who had become scandalized by the nocturnal occurrences they had

observed in the vicinity of defendant's home. Defendant admits that various men and boys had attempted to visit her at night, to her great shame and annoyance, and explains that such attempts were not in response to her invitations, express or implied, but were instigated by the cunning malice of her brother-in-law, who was her bitter enemy, and who sought in this manner to ruin her good name and reputation. She had procured a revolver to repel such assaults, and one night fired several shots at a man who tried to gain admission to her house and refused compliance with her command that he take his immediate departure. The neighbors, believing that the shots were fired in the course of some carousal or orgy, had defendant prosecuted for a violation of the city's peace ordinance. At the trial the witnesses for plaintiff testified to facts and circumstances which tended to support their view of the occurrence, while the evidence of defendant was to the effect that she fired the revolver in the necessary defense of her person and home.

[9, 10] We find prejudicial error in the record. The court refused an instruction asked by defendant to the effect that the law cast on plaintiff the burden of establishing, by proof, the guilt of defendant, beyond a reasonable doubt. Though it has been held repeatedly in this state that a prosecution for a violation of a city ordinance is a civil and not a criminal case, the Supreme Court in the recent case of *King City v. Duncan*, 238 Mo. 513, 142 S. W. 246, say that, where the offense for which the defendant is prosecuted—as for a violation of a municipal ordinance—is also an offense under the public laws of the state, the defendant is entitled to the benefit of the guaranties that attend one accused of crime under the general law, and therefore is entitled to the presumption of innocence and to have his guilt established beyond a reasonable doubt. At this term we held, in a case of this nature, that a "reasonable doubt" instruction was proper and should be given. *City of Stanberry v. O'Neal*, 150 S. W. 1104, not yet officially reported.

[11] And we will add that, though an instruction on this subject asked by the defendant be faulty, the duty devolves on the court to give an instruction in proper form. *State v. Clark*, 147 Mo. loc. cit. 38, 47 S. W. 886; *State v. Reed*, 154 Mo. loc. cit. 129, 55 S. W. 278; *State v. Moore*, 160 Mo. 443, 61 S. W. 199.

We do not deem it necessary to discuss the other assignments of error in appellant's brief. It suffices to repeat that defendant is entitled to the benefit of the guaranties accorded by our laws to a person accused of an offense against the criminal laws of the state.

The judgment is reversed, and the cause remanded. All concur.

ARNOLD v. AETNA LIFE INS. CO.

(Kansas City Court of Appeals. Missouri. Nov. 25, 1912.)

1. APPEAL AND ERROR (§ 262*)—EXCEPTIONS—NONSUIT.

Where plaintiff did not except to the giving of a peremptory instruction to find for defendant, the nonsuit so taken must be regarded as voluntary.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 1582-1595; Dec. Dig. § 262.*]

2. APPEAL AND ERROR (§ 274*)—EXCEPTIONS—VOLUNTARY NONSUIT.

Where plaintiff did not except to a peremptory instruction to find for defendant, but took "an involuntary nonsuit with leave to move to set the same aside," an exception afterwards taken to the overruling of such a motion could not relate back to the ruling on the instructions; the nonsuit being in fact a voluntary nonsuit, since no exception was taken to the instruction.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 1631-1645; Dec. Dig. § 274.*]

Appeal from Circuit Court, Jackson County; James E. Goodrich, Judge.

Action by Ida M. Arnold against the Aetna Life Insurance Company. Judgment for defendant, and plaintiff appeals. Affirmed.

Aleshire, Hardin & Gundlach, of Kansas City, for appellant. Rosenberger & Reed, of Kansas City, for respondent.

JOHNSON, J. This is an action on a policy of accident insurance. The court, with the aid of a jury, proceeded to try the issues raised by the pleadings, and at the conclusion of the evidence gave a peremptory instruction to the jury to return a verdict for defendant. Plaintiff did not except to the giving of this instruction, but took "an involuntary nonsuit with leave given to move to set the same aside," and the court discharged the jury. Afterward plaintiff filed a motion to set aside the nonsuit. The court overruled the motion, and plaintiff excepted to that ruling and appealed.

[1] There is nothing in the record for us to review. The failure of plaintiff to save an exception to the ruling of the court in giving the peremptory instruction precluded her from taking an involuntary nonsuit, and we must regard the nonsuit as voluntary. As is said by Broadus, J., in *Carter v. O'Neill*, 102 Mo. App. 391, 76 S. W. 717: "All the authorities in this state are to the effect that a party, in order to have adverse rulings reviewed in an appellate court, must except to such rulings. For his failure below in that respect, plaintiff is not entitled to an appeal." *Lewis v. Mining Co.*, 199 Mo. 463, 97 S. W. 938.

[2] The exception afterward taken to the ruling on the motion to set aside the nonsuit could not, and did not, relate back to the ruling on the peremptory instruction and

provide an exception to that ruling, nor convert into an involuntary nonsuit one that had become irretrievably stamped as voluntary. *Allen v. Railway*, 141 Mo. App. 586, 126 S. W. 254; *Bushyager v. Packing Co.*, 142 Mo. App. 311, 126 S. W. 985.

The judgment is affirmed. All concur.

MURPHY v. LORWOOD COOPERAGE CO.
(St. Louis Court of Appeals. Missouri. Nov. 12, 1912.)

1. PLEADING (§ 185*)—REBUTTER.

As the Code specifically provides that the reply shall be the last pleading in the cause, a rebutter to the reply, though filed, will not be considered.

[Ed. Note.—For other cases, see Pleading, Dec. Dig. § 185.*]

2. EXCEPTIONS, BILL OF (§ 54*)—SIGNING—EX PARTE AFFIDAVITS.

Where the record in the trial court did not show that a bill of exceptions to the motion for new trial was preserved, and the judge refused to approve a bill so reciting, but did approve one omitting the recital of an exception, an ex parte affidavit of counsel, made part of an abstract, will not supply that defect; for *Rev. St. 1909, §§ 2030, 2031, 2034*, respectively providing that if the judge refuses to sign a bill of exceptions he shall certify his grounds, that the bill of exceptions may be signed by bystanders, and that when the trial judge refuses to permit the filing of a bystander's bill affidavits of its truth may be taken, provide the exclusive remedies for the refusal of the trial judge to sign or approve a correct bill of exception.

[Ed. Note.—For other cases, see Exceptions, Bill of, Cent. Dig. § 89; Dec. Dig. § 54.*]

3. APPEAL AND ERROR (§ 502*)—PRESENTATION OF GROUNDS OF REVIEW IN COURT BELOW—NECESSITY.

Unless an exception to the overruling of the unsuccessful party's motion for new trial appears of record in the bill of exceptions, all inquiry into the proceedings of trial is closed to the appellate court; and it can only examine the record proper.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2306-2309; Dec. Dig. § 502.*]

Appeal from Circuit Court, New Madrid County; Henry C. Riley, Judge.

Action by W. T. Murphy against the Lorwood Cooperage Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Brown & Gallivan, of New Madrid, for appellant. Brewer & Riley, of New Madrid, for respondent.

REYNOLDS, P. J. This action, brought in the circuit court of New Madrid county, seeks the recovery of a balance claimed to be due from defendant to plaintiff on the sale of certain timber then standing on lands in that county, to be cut into logs by plaintiff and the logs to be delivered at a price designated f. o. b. cars at a railroad switch in the county, it being charged that the amount was due when the logs were loaded

by plaintiff on the cars at that place. It is averred that plaintiff cut and hauled a designated number of feet of the timber as described into logs, and loaded the logs on cars as required; that defendant received and paid for one of the carloads of logs but refused to receive or pay for the other two cars and notified plaintiff that no more of the timber would be received by it. Claiming a balance due, plaintiff demands judgment for that, with interest and costs.

The answer was first a general denial; then a denial of the incorporation of the plaintiff company, the answer duly verified. The reply took issue on this and also pleaded that at the time of the agreement mentioned in the petition, a person named represented to plaintiff that defendant was then an organized corporation; but that it was afterwards organized and had then ratified the contract made in its name. Defendant moved to strike out this reply on the ground that it was a departure. That motion being overruled, defendant filed what its counsel call "an answer to the replication."

The jury returned a verdict in favor of plaintiff. Defendant in due time filed its motion for a new trial. That was overruled but so far as shown by the abstract of the bill of exceptions and, as admitted by counsel, so far as appears by the bill of exceptions which was filed, no exception was saved to the action of the court in overruling the motion for a new trial. Plaintiff in due time filed a motion in arrest of judgment. That was overruled and exception saved to the overruling of that motion. Defendant thereupon duly perfected appeal to this court.

[1] It is hardly necessary to refer to the pleadings or attempted pleadings, following the reply. Our Code specifically provides that the reply is the last pleading in a cause, that, of course, subject to a motion to strike it out or to a demurrer, as to any other pleading. An answer to a reply is unknown under our Code.

[2] Counsel attempt to cure the omission from the bill of exceptions of any exception to the action of the trial court in overruling the motion for a new trial by an affidavit made by one of those counsel, to the effect that he assisted in conducting the trial, that he prepared and filed the motion for new trial, presented it to the court, was there when the court overruled it and excepted to the action of the court in overruling the motion; that he prepared the bill of exceptions in the cause and presented the same to the attorney for respondent for approval; that that attorney refused to approve it for the reason that the record made by the clerk did not show that the appellant excepted to the action of the court in overruling the motion for new trial; that he presented the bill of exceptions to the judge of the circuit court for his signature and that that judge re-

refused to sign the bill of exceptions containing an exception of appellant to the action of the court in overruling the motion for new trial because the record did not show any exception to his action in overruling the motion, and that the attorneys for respondent still refused to approve the bill of exceptions, compelling "appellant to file said bill of exceptions without their exception to the action of the court in overruling said motion for new trial therein noted."

It is thus distinctly admitted in this affidavit of counsel that the bill of exceptions does not show any exception to the action of the court in overruling the motion for new trial, and that the trial court refused to sign any bill of exceptions containing any statement that exception had been saved to the action of the court on the motion, but did sign what the court has certified to be a correct bill of exceptions and which counsel for appellant themselves filed as the bill of exceptions in this case. This affidavit of counsel appears printed in the abstract, there following the certificate of the clerk of the circuit court to the transcript. How it came into the abstract does not appear. It nowhere appears that it was filed in the circuit court or for that matter that it was ever filed with any court, unless incorporating it at the end of the abstract may be considered as filing it with us.

In support of this mode of attack upon the bill of exceptions, counsel rely upon *State v. Feeley*, 194 Mo. 300, loc. cit. 315, 92 S. W. 663, 3 L. R. A. (N. S.) 351, 112 Am. St. Rep. 511. In that case it is said at that page: "Matters of exception which occur in the presence of the court cannot be shown by affidavits, unless the court refuses to sign the bill when presented to him upon the ground that the matters therein stated, or some of them, are not true," citing several cases. This is very far from sustaining the contention of counsel, that a bill of exceptions can be amended as here attempted. The affidavits referred to by the court in the *Feeley* Case and cases there cited as being necessary are undoubtedly affidavits required to be filed in the trial court when the judge refuses to permit a bill of exceptions signed by by-standers to be filed. Section 2034, R. S. 1909. If the trial judge refuses to sign a bill of exceptions on the ground that it is not a true bill sections 2030, 2031, 2034, R. S. 1909, provide the mode and the only mode for meeting the situation and bringing the bill before the appellate court. One is, by preparing and filing a bill of exceptions to be signed by three by-standers, "reputable inhabitants of the state." The other is, if the judge refuses to permit the bill so signed to be filed, then the truth of that bill is tested by affidavits, not exceeding five; the by-standers or affiants to be disinterested spectators and not the parties in interest or

their attorneys. *State v. Jones*, 102 Mo. 305, 14 S. W. 946, 15 S. W. 556. Nor can affidavits in contradiction of a bill of exceptions which has been regularly signed and filed be regarded. *State v. De Mosse*, 98 Mo. 340, 11 S. W. 731. It is true these two cited cases are criminal causes, but as said in *State v. Jones*, supra, "bills of exception are procured in the same way, whether the cause be civil or criminal." No such course was here followed, so that we can do no less than accept the bill of exceptions which was filed as correct, and to hold that exception was not saved to the action of the trial court in overruling the motion for a new trial.

[3] The Supreme Court, in very many cases and from an early day, has uniformly held that unless that exception appears of record, all inquiry into the proceedings at the trial is closed to the appellate court. See *Parsons v. Clark & Co.*, 98 Mo. App. 28, 77 S. W. 582, and cases there cited. Bound by the decisions of the Supreme Court there cited by express mandate of the Constitution, we are compelled to hold that by reason of this purely technical defect in the record all consideration of this case on its merits is closed to us. All that is open to our examination and review is the record proper. Finding no error in that, we must and do affirm the judgment of the circuit court.

NORTONI and CAULFIELD, JJ., concur.

ANGEL v. CITY OF PORTAGEVILLE.

(St. Louis Court of Appeals. Missouri. Nov. 12, 1912.)

1. APPEAL AND ERROR (§ 501*)—PRESENTATION OF GROUNDS OF REVIEW IN COURT BELOW—NECESSITY.

Unless an exception to the overruling of the unsuccessful party's motion for new trial appears of record in the bill of exceptions, all inquiry into the proceedings of the trial is closed to the appellate court; and it can only examine the record proper.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 2300-2305; Dec. Dig. § 501.*]

2. PLEADING (§ 418*)—DEMURRER—ANSWER OVER.

Where, after the overruling of his demurrer, defendant answered over, the demurrer goes out of the record; and, under the direct provisions of Rev. St. 1909, § 1804, all exceptions except to the jurisdiction of the court over the subject-matter, and that the petition does not state a cause of action, are waived.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. §§ 1399, 1403-1406; Dec. Dig. § 418.*]

3. APPEAL AND ERROR (§ 270*)—EXCEPTIONS—NECESSITY—MOTION IN ARREST.

Where no exception to the overruling of a motion of arrest was reserved, the appellant can take nothing on appeal by such motion.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 1153, 1609, 1610, 1759, 1760, 1763; Dec. Dig. § 270.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

4. APPEAL AND ERROR (§ 193*)—PRESENTATION OF GROUNDS OF REVIEW IN COURT BELOW—PETITION.

That a petition does not state facts constituting a cause of action may be raised for the first time on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1226, 1238, 1240; Dec. Dig. § 193.*]

5. APPEAL AND ERROR (§ 232*)—OBJECTIONS BELOW—PETITION.

Where, for the first time, it is urged on appeal that a petition does not state facts constituting a cause of action, that objection is available only when it fails to state any cause of action; a defectively stated cause of action being sufficient.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1351, 1368, 1426, 1430, 1431; Dec. Dig. § 232.*]

6. PLEADING (§ 403*)—ANSWER—CURE OF DEFECTS.

Defective allegations of a petition may be supplied or cured by the answer.

[Ed. Note.—For other cases, Pleading, Cent. Dig. §§ 1343-1347; Dec. Dig. § 403.*]

Appeal from Circuit Court, New Madrid County; Henry C. Riley, Judge.

Action by Stella Angel against the City of Portageville. From a judgment for plaintiff, defendant appeals. Affirmed.

Brown & Gallivan, of New Madrid, for appellant. Ward & Collins, of Caruthersville, for respondent.

REYNOLDS, P. J. This is an action by respondent against the city of Portageville, to recover damages in the sum of \$2,000, for injuries alleged to have been sustained by plaintiff in consequence of a defective sidewalk in the defendant city. The answer, after a general denial, sets up that plaintiff, "if injured in the manner as set out in her petition, the same was the result of her own carelessness and negligence directly contributing thereto in this," and then sets up that plaintiff was going along the sidewalk in broad daylight and was crossing over the point where the hole was alleged to be with full knowledge of the alleged defect, which was open and obvious, and that she passed over it in a careless and negligent manner, "there being a safe and secure way for her to have gone, thereby endangering her own safety." After filing this answer plaintiff by leave withdrew it and filed a demurrer on the ground that the petition did not state facts sufficient to constitute a cause of action. This was overruled and defendant refiled its answer.

There was a trial before the court and a jury and a verdict for plaintiff in the sum of \$750. Defendant in due time filed its motion for new trial. This was overruled. Afterwards and in due time defendant filed its motion in arrest of judgment which was also overruled. Thereupon defendant duly perfected its appeal to this court, filing its bill of exceptions in due time.

[1] In the abstract of the record furnish-

ed by counsel for appellant are two affidavits following the certificate of the clerk of the circuit court to the transcript. In and by these affidavits affiants state that they were the attorneys who assisted the city attorney in defending this case in the circuit court; that they prepared the motion for a new trial and a motion in arrest of judgment, signed them and filed them; that they were both present in court when the motions for new trial and in arrest were acted on by the court and at the time the court overruled the motions they excepted in open court to the action of the court in overruling each of these motions. It is further set out in these affidavits that the attorney for plaintiff refused to O. K. the bill of exceptions with exception of defendant noted to the action of the court in overruling the motions for new trial and in arrest, for the reason that the clerk of the court failed to get the exceptions of the defendant to the action of the court in his minute book and that the court would not sign the bill of exceptions without the approval of the attorney for plaintiff inasmuch as the records of the court failed to show exceptions to his action in overruling these motions; that for this reason counsel were unable to get their exceptions noted in their bill of exceptions. One of these affidavits is sworn to before the clerk of the circuit court of New Madrid county, the other before a notary in Indiana. There is nothing in the abstract indicating that these affidavits were ever filed in the circuit court or that they have been filed in any court, save that they are embodied in the abstract of the record, as before stated, filed in this court by appellant.

The bill of exceptions, as is recited in it, which was filed, sets out that defendant had tendered it as its bill of exceptions and prayed that it might be signed and sealed as such, which was accordingly done by the circuit judge in vacation.

It is contended by counsel for appellant that we can consider these affidavits as correcting the bill of exceptions. This presents precisely the same point which was involved in the case of *Murphy v. Lorwood Cooperage Co.*, 151 S. W. 191, the opinion in which is to be filed along with the opinion in this case. It is unnecessary to repeat what is there said on this matter of the bill of exceptions. We refer to that as equally applicable to this case.

[2-6] This leaves for our consideration only the record proper. It is true that the petition in the case is indefinite and lacking in specific averments but we cannot say that it is so fatally defective as to state no cause of action or as not to support the verdict and judgment in the case. Demurring and that demurrer being overruled, plaintiff elected to answer and thereby lost the benefit of the demurrer save as to the juridic-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes 151 S.W.—13

tion of the court over the subject-matter of the action, or that the petition does not state facts sufficient to constitute a cause of action. Section 1804, R. S. 1909; *Hanson v. Neal*, 215 Mo. 256, loc. cit. 277, 114 S. W. 1073. Nor can it avail itself of a motion in arrest for the reason that it has failed to save exception to the overruling of that motion. Irrespective of this, it is always open to appellant to attack the petition in this court for failure to state any cause of action. However defective this petition is, it is clear that the necessary facts can be implied from what is defectively stated. When that occurs, a defendant will not be heard, after verdict and judgment, to object that such a petition will not sustain a judgment. Such objection is only available when the petition fails to state any cause of action, not where one is defectively stated. *Hurst v. City of Ash Grove*, 96 Mo. 168, loc. cit. 172, 9 S. W. 631; *Scamell v. St. Louis Transit Co.*, 103 Mo. App. 504, loc. cit. 513, 77 S. W. 1021. In addition to this it is a recognized rule of pleading in this state that the defective allegations of the petition may be supplied by the averments of the answer, so that reading them together a cause of action is stated. *Garth v. Caldwell*, 72 Mo. 622, loc. cit. 629; *Donaldson v. County of Butler*, 98 Mo. 163, loc. cit. 166, 11 S. W. 572. We have set out the substance of defendant's answer in this case. Construing it with the petition, we hold that there is such a cause of action stated in the case as warranted the verdict and supports the judgment. The judgment of the circuit court is affirmed.

NORTONI and CAULFIELD, JJ., concur.

WILSON v. SALISBURY et al.
(Kansas City Court of Appeals. Missouri.
Nov. 25, 1912.)

1. JUDGMENT (§ 568*)—ESTOPPEL.

A default judgment for plaintiff, in an indorser's action on a note against the makers, is a bar in a second action between the same parties to charge real estate fraudulently conveyed, as to a defense that plaintiff, being an indorser, was released by an extension of time, so that her payment of the note was voluntary.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1013; Dec. Dig. § 568.*]

2. FRAUDULENT CONVEYANCES (§ 61*)—FATHER AND SON—INSOLVENCY.

A gift by an insolvent father to his son is fraudulent as to creditors, whatever the intent.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 138-158; Dec. Dig. § 61.*]

3. EVIDENCE (§ 210*)—DEPOSITIONS—ADVERSE PARTIES—DECLARATIONS.

A deposition of a party to the suit is admissible in evidence as declarations of an adverse party, although such person is in court at the time.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 729-737; Dec. Dig. § 210.*]

4. FRAUDULENT CONVEYANCES (§ 241*)—CONDITIONS PRECEDENT TO ACTION—UNSATISFIED EXECUTION.

In a judgment creditor's action to reach land fraudulently conveyed by the debtor, plaintiff need not procure an execution and return nulla bona, where the debtor has been proved insolvent.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 694, 696-726; Dec. Dig. § 241.*]

Appeal from Circuit Court, Sullivan County; Fred Lamb, Judge.

Action by Martha Wilson against A. J. Salisbury and another. Judgment for plaintiff, and defendants appeal. Affirmed.

John W. Bingham, of Milan, and Smoot & Cooley, of Kirksville, for appellants. D. M. Wilson and J. W. Clapp, both of Milan, and Higbee & Mills, of Kirksville, for respondent.

BROADDUS, P. J. This is a suit to charge certain real estate with a lien to enforce a judgment.

On October 23, 1907, Jacob Salisbury, as principal, with the defendants, A. J. and E. H. Salisbury, as sureties, executed their promissory note for \$104.50, payable to plaintiff, Martha Wilson, due in one year after date. Jacob and E. H. were the sons of A. J. Salisbury. Soon thereafter and before due, the plaintiff transferred the note to the Farmers' Bank at Pollock. Before the maturity of the note, the defendant A. J. Salisbury sold and conveyed the land sought to be charged to his son, the defendant E. H. Salisbury. The consideration agreed to be paid was the assumption by the grantee of mortgage indebtedness on the land to about \$3,000, and the payment of unsecured debts of A. J. and E. H. Salisbury, which, it is claimed, amounted to about \$1,800 or \$1,900, but that of plaintiff was not included; and, as an inducement to E. H. Salisbury to buy the land, the father allowed him in the sale \$3,000 as the son's part of the father's estate, the father having previously given to each of his other children an equal or greater amount; and the son was to pay his father in cash the balance of what the value of the farm amounted to, rating it all at \$40 per acre, except about 12 acres, which was rated at \$35 per acre. The total value of the farm was thus estimated to be about \$8,601. The evidence tended to show that A. J. was insolvent, and that he had little or no other property, except the said real estate.

Over plaintiff's objection, defendants were allowed to show that, while the bank held the note, it extended to Jacob, the principal therein, without the consent of the sureties, an extension of time for payment; that is, for six months. After the expiration of the time extended, the defendant E. H. was called upon to pay the note; but he refused. Afterwards the bank received from G. W.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Wilson, the plaintiff's husband, the amount of the note and interest, and wrote on its face the words "Paid in full," and surrendered it. Thereafter plaintiff brought suit against all three of the signers of the note, but dismissed as to defendant E. H. and took judgment by default against Jacob and A. J. Salisbury. Thereafter this suit was instituted. The court found that the conveyance was voluntary to the extent of \$3,000, being the amount which was to be given to E. H. Salisbury to equalize his share in the father's estate, and rendered judgment charging the land with a lien to the amount of plaintiff's judgment. The defendants appealed.

It is contended that plaintiff was an indorser of the note, and, as such, was only secondarily liable, and was therefore released by the unauthorized extension of time; it being made without her knowledge and for a valuable consideration. Therefore, whether the payment was made by plaintiff or her husband, it was voluntary, for which reason she cannot attack the conveyance.

[1] Without going into the correctness of defendants' premises that plaintiff was only secondarily liable, and was by the act of the bank extending the time for the payment of the note released, it does not follow that their conclusion that she cannot now attack the validity of the conveyance is correct. If it is true that plaintiff, being secondarily liable, was released from all liability by the act of the bank extending the time for the payment of the note, it should have been set up as a defense to the suit on the note. As between the same parties and the same subject-matter, a judgment on the merits of the first action constitutes a bar to the second action, as to any admissible matter which might have been received to sustain or defeat the demand. *Paving Co. v. Field*, 132 Mo. App. 628, 97 S. W. 179, and authorities cited.

[2] As the court did not affirmatively decide that the conveyance was made with a fraudulent intent, it is contended that the same was not void as to creditors. In support of this theory defendants rely upon the case of *Bank v. Vollrath*, 135 Mo. App. 63, 115 S. W. 510. There the court held that the transfer was not voluntary, and the existence of an intention to defraud did not necessarily follow; but the opinion recognizes the universal doctrine that a gift by an insolvent father of his property to his son is fraudulent as to creditors. One of the latest expressions on the question is found in *Childers v. Pickenpaugh*, 219 Mo. 376, 118 S. W. 453. See, also, *Bank v. Nichols*, 202 Mo. loc. cit. 323, 100 S. W. 613.

[3] The deposition of A. J. Salisbury, who was in court at the trial, was read, over the objections of defendant. The practice is permissible, on the ground that they are

declarations of the adverse party. *Bank v. Nichols*, supra.

[4] It was not necessary that plaintiff should have procured an execution and return of nulla bona; the debtor having been proved insolvent. *Turner v. Adams*, 46 Mo. 95; *Iron Co. v. McDonald*, 61 Mo. App. 559. Affirmed. All concur.

STATE ex rel. RYAN, Collector, v. COLES et al.

(St. Louis Court of Appeals. Missouri. Nov. 12, 1912. Rehearing Denied Dec. 3, 1912.)

1. DRAINS (§ 14*)—FORMATION OF DISTRICT—COLLATERAL ATTACK—WHAT CONSTITUTES.

Where it was sought to defeat payment of assessments for the establishment of a drainage district, on the ground that the clerk's premature issuance of process deprived the county court of jurisdiction, the attack is a collateral one.

[Ed. Note.—For other cases, see *Drains*, Cent. Dig. §§ 5, 6; Dec. Dig. § 14.*]

2. DRAINS (§ 14*)—FORMATION OF DISTRICTS—COLLATERAL ATTACK—INFERIOR COURTS.

While ordinarily the facts necessary to confer jurisdiction upon an inferior court, not proceeding according to the common law, must appear on the face of its record, yet, in view of Ann. St. 1906, § 8288, providing that the county court shall first determine whether the required notice had been given, a proceeding for the establishment of a drainage district is not subject to collateral attack, though the record shows that the notice was given before the report of viewers, instead of after, as required by statute; there being an express finding by the court that notice was given in obedience to the statute.

[Ed. Note.—For other cases, see *Drains*, Cent. Dig. §§ 5, 6; Dec. Dig. § 14.*]

Appeal from Hannibal Court of Common Pleas; David H. Eby, Judge.

Action by the State, on the relation of Daniel Ryan, Collector, against W. Coles and others. From a judgment for plaintiff, defendants appeal. Affirmed.

Smoot & Cooley, of Kirksville, for appellants. David A. Rouner and F. H. McCullough, both of Edina, for respondent.

NORTONI, J. This is a suit on a tax bill. The finding and judgment were for plaintiff, and defendant prosecutes the appeal.

The tax bill in suit was issued, under the drainage laws, in part compensation for the construction of a ditch by a drainage district organized in Knox county and incorporated under the statutes. Defendant refused to pay the taxes assessed against his lands within the drainage district; and hence this suit upon the tax bill for the installment of taxes assessed for the year 1908.

It is first urged the petition is insufficient, for the reason it does not set forth for what year the taxes evinced by the tax bill were assessed. Obviously, appellant has erred touching the fact upon which this argument is predicated; for the petition is clear with

respect to the matter. It is set forth in the petition in plain and precise language that the taxes are due under an assessment made against the lands therein described in the year 1908. The point is not worthy of further consideration.

The principal argument advanced for reversal is to the effect that the notice of publication, issued by the clerk of the county court, in vacation, during the period in which the drainage district was in process of organization, is premature; and therefore, the entire organization of the drainage district is invalid. This argument proceeds from the fact that it appears in the record by a file mark that the report of the viewers appointed to view and report upon the practicability of the proposed drainage district was filed on July 19th, and the notice of publication, which the law contemplates should be predicated thereon, appears from a recital on the notice to have been issued by the county clerk on July 11th. Upon the petition being presented to the county court for the organization of the drainage district under the statutes (section 8278 et seq., Ann. St. 1906), and the preliminary proceedings thereon, the court appointed a board of three resident freeholders as viewers, or commissioners, to investigate the proposed district and report, under sections 8280, 8281, 8284, Ann. St. 1906. The record discloses that the viewers, or commissioners, thus appointed duly qualified and proceeded upon the discharge of their duties by filing with the county clerk a full and complete report touching the matter submitted to them. This report of the viewers is marked filed on July 19th; and it appears from the date line on the notice the clerk issued the notice of publication, which the law contemplates should be predicated upon the report of the commissioners, or viewers, on July 11th. The statute (section 8281, Ann. St. 1906) provides that after the report of the viewers is filed in the county court, as above provided, it shall be the duty of the court, or, in vacation, the clerk thereof, by an order of record, to fix the time of the hearing of the petition and report of the viewers thereon, and to cause a notice to be given, by publication by two insertions in some weekly newspaper of general circulation in the county, of the pendency of the petition, etc. Section 8287, Ann. St. 1906, also provides, upon the filing of the report of the viewers, the county clerk shall immediately set the hearing of the same for some day of the next regular term of the county court. This statute directs, too, that the clerk shall thereupon issue, in the name of the state, a notice, directed, by name, to every person returned by the engineer and viewers as the owner of every lot or tract of land affected by the proposed improvements, or of any interest therein, etc. When all of the provisions of the article touching the organization of drainage districts, and

especially the statutes above referred to, are read together, no one can doubt that the law contemplates the court shall issue the notice of publication after the viewers have filed their report, and not until then; for, indeed, such seems to be the express provisions of the statute.

[1] As before said in the case before us, it appears from the file mark that the viewers reported their finding in the county court July 19th; and it appears, too, from the date line on the notice that the clerk issued the notice of publication, which should have originated thereafter, on July 11th. On this appearing, it is earnestly argued that the notice of publication so issued by the clerk as of date July 11th was premature and wholly unauthorized; and it is said, too, that the jurisdiction of the county court failed in respect of the subject-matter, the organization of the drainage district, because of this fact. The argument goes to the effect that the issuance of the notice of publication by the clerk, after the report of the viewers, is jurisdictional, and that upon its appearing in the record that such notice was issued before the report of the viewers was filed the whole proceeding touching the organization of the drainage district was invalid; and therefore the district was without authority to run an assessment of the tax upon defendant's land for benefits accrued, and report it to the county authorities. Obviously the proposition asserted presents a collateral attack upon the organization of the drainage district, and for that reason may not prevail.

[2] If the issuance of the notice of publication by the clerk goes to the jurisdiction as contended, the time of the issuance of such notice was a jurisdictional fact in pais, which the county court is expressly empowered by the statute to find and determine for itself. Section 8288, Ann. St. 1906, touching this matter, is full and complete. The statute reads: "The court shall first determine whether the required notice has been given. If it finds that due notice has not been given, it shall continue the hearing to a day to be fixed by the court, and cause the notice to be given as provided in section 8287; and when the court finds that due notice has been given, it shall examine the report of the engineer and viewers. * * *"

From this it appears the court is to determine whether or not the notice of publication has been properly issued and given by the clerk; for it is said, if the court finds such notice has not been properly given, the cause shall be continued, in order that the notice may be given. On the contrary, if it is found by the court the notice has been properly given, then the court may proceed as further directed in the statute. It would be difficult to confer in few words more complete authority upon the county court to determine this fact pertaining to its jurisdic-

tion to proceed. The judgment of the county court finds and declares as a fact that this preliminary notice was properly issued and given. It appearing, as it does, that the court possessed full power, under the express provisions of the statute, to determine this jurisdictional fact, the matter pertaining to the issuance of the notice is forever concluded against a collateral attack by its judgment thereon. Though the general rule requires that courts of limited and inferior jurisdiction, such as the county court, not proceeding according to the course of the common law, should reveal affirmatively on the face of their records all the facts required by the statute to support their jurisdiction, it has been recently decided by the Supreme Court that an exception to the rule exists in those cases where the law, as here, invests the county court with authority to find the existence of such jurisdictional facts before it acquires or exercises jurisdiction in the premises. It is said in such cases the law presumes, when the matter is subjected to collateral attack, even in favor of a court of limited and inferior jurisdiction, that the inferior court found the essential jurisdictional facts to exist. See *State ex rel. v. Taylor*, 224 Mo. 393, 461, 123 S. W. 892. Indeed, the same court, in disposing of a question under the drainage laws very similar to the one here involved, said, in *State ex rel. v. Wilson*, 216 Mo. 215, 277, 115 S. W. 549, 568, as follows: "The law of this state is well settled to the effect that records of courts of limited and inferior jurisdiction, not proceeding according to the course of the common law, must show affirmatively all the facts which the statute requires to be stated, in order to give the court jurisdiction of the parties and the subject-matter of the suit. *State v. Metzger*, 26 Mo. 65; *Hansberger v. Railroad*, 43 Mo. 196; *Schell v. Leland*, 45 Mo. 289. But that law, like most laws, has its well-defined limitations and exceptions; and one of the exceptions is this: That where such court, or a mere ministerial board for that matter, possesses, under the law, jurisdiction of a certain class of cases, and is required to find the existence of certain facts in pais, in order to acquire jurisdiction of a particular case belonging to that class, the law will presume, in a collateral attack upon the judgment, that such facts did exist, and that such court or board passed upon them, as required by the statute. *State v. Dugan*, 110 Mo. 138 [19 S. W. 195], etc."

In the case last cited it was urged that the organization of the drainage district was invalid, for the reason that the record did not show the court had caused the notice of publication to be given. In other words, in that case no notice of publication whatever appeared to have been issued; but, notwithstanding this, the Supreme Court declared the organization of the drainage district valid, as against a collateral attack,

on the ground that the county court was authorized to find and determine as a jurisdictional fact in pais that the clerk had issued the notice before it proceeded to organize and equip the district with power. Under these authorities it is entirely clear that, whatever the filing marks may show with respect to the lodging of the report of the viewers with the county court, and the date of the issuance of the notice of publication, the matter is immune from collateral attack; for, no doubt, the court investigated into the matter and ascertained that the clerk issued the notice of publication subsequently to the filing of the report on July 19th, instead of July 11th, as the date of the notice seems to suggest. To hold the mere date line made by the clerk, an obvious ministerial act, on the notice revealing July 11th as the date of issue, to impart absolute verity would be to require us to reject as for naught the judicial finding of fact made by the court and recited in its judgment touching the same. The judgment is conclusive in this collateral proceeding. Obviously, the entire organization and its indebtedness should not be overturned because a date line on a notice made by the clerk in his ministerial capacity conflicts with a solemn judgment to the contrary on the same fact.

We have examined the other questions presented by the appeal, but do not regard them of sufficient merit to warrant discussion in the opinion.

The judgment should be affirmed. It is so ordered.

REYNOLDS, P. J., and CAULFIELD, J., concur.

STATE ex rel. RYAN, Collector, v. MALONE et al.

(St. Louis Court of Appeals. Missouri. Nov. 12, 1912. Rehearing Denied Dec. 3, 1912.)

Appeal from Hannibal Court of Common Pleas; David H. Eby, Judge.

Action by the State, on the relation of Daniel Ryan, as Collector, against Mary A. Malone and others. From a judgment for the plaintiff, defendants appeal. Affirmed.

Smoot & Cooley, of Kirksville, for appellants. David A. Rouner and F. H. McCullough, both of Edina, for respondent.

NORTONI, J. This is a suit on a tax bill. The finding and judgment were for plaintiff, and defendants prosecute the appeal. The tax bill involved was issued, under the drainage statutes, in part compensation for work and labor performed in constructing a system of drainage in Knox county, under a contract with a drainage district organized under the statutes.

The questions presented are identical with those involved in *State ex rel. Daniel Ryan, Collector, etc., v. W. Coles et al.*, 151 S. W. 195, decided to-day, and the disposition of this case depends in all respects upon that one. The whole matter is fully discussed in the opinion in the case above referred to, and for the reasons there given this judgment should be affirmed. It is so ordered.

REYNOLDS, P. J., and CAULFIELD, J., concur.

STATE ex rel. RYAN, Collector, v. GRAY et al.

(St. Louis Court of Appeals. Missouri. Nov. 12, 1912. Rehearing Denied Dec. 3, 1912.)

Appeal from Hannibal Court of Common Pleas; David H. Eby, Judge.

Action by the State, on the relation of Daniel Ryan, as Collector, against James A. Gray and others. From a judgment for plaintiff, defendants appeal. Affirmed.

Smoot & Cooley, of Kirksville, for appellants. David A. Rouner and F. H. McCullough, both of Edina, for respondent.

NORTONI, J. This is a suit on a tax bill. The finding and judgment were for plaintiff, and defendant prosecutes the appeal. The tax bill involved was issued, under the drainage statutes, in part compensation for work and labor performed in constructing a system of drainage in Knox county, under a contract with a drainage district organized under the statutes.

The questions presented are identical with those involved in *State ex rel. Daniel Ryan, Collector, et al., v. W. Coles et al.*, 151 S. W. 196, decided to-day, and the disposition of this case depends in all respects upon that one. The whole matter is fully discussed in the opinion in the case above referred to, and for the reasons there given this judgment should be affirmed. It is so ordered.

REYNOLDS, P. J., and CAULFIELD, J., concur.

SWEANEY v. MISSOURI, K. & T. RY. CO.

(Kansas City Court of Appeals. Missouri. Nov. 25, 1912.)

CARRIERS (§ 305*)—INJURY TO PASSENGER—FAILURE TO OPEN AND LIGHT DEPOT.

The injury to one who, knowing a depot would not be heated or lighted at night, went to it two hours before time for the train he was to take, and voluntarily got into a box freight car at the platform, occupied by a shipper, and in getting out, on arrival of the train fell, was not caused by any failure of the carrier in its duty to have the depot heated, lighted, and open a reasonable time before a train was due.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1132, 1136-1139, 1245-1246; Dec. Dig. § 305.*]

Appeal from Circuit Court, Cole County; John M. Williams, Judge.

Action by W. E. Sweeney against the Missouri, Kansas & Texas Railway Company. Judgment for plaintiff, and defendant appeals. Reversed.

A. M. Hough, of Jefferson City, and Lee Hagerman, of St. Louis, for appellant. W. C. Irwin and D. F. Calfee, both of Jefferson City, for respondent.

ELLISON, J. Plaintiff was injured by stepping or falling between one of defendant's freight box cars and its depot platform, while attempting to pass from the car to the platform at a little village called Tebbetts, after night. The negligence charged is not having the station building lighted, heated, and open, and not having the platform

lighted. Defendant's demurrer to the evidence was overruled, and the verdict and judgment were for plaintiff.

Plaintiff went on a train from Jefferson City to Tebbetts. He was acquainted with Reifsteck, who lived in the village, about 300 feet from the depot, and he and a man named Davis engaged a conveyance from Reifsteck's boys, and, taking two of them along, the four started into the country. It was in March and while the roads were quite muddy, yet some of the witnesses thought it was freezing a little; at any rate, the weather was stated to be "cool and damp." While on the trip there was a mist or possibly little flurries of snow. A quart of whisky was taken along by Davis, and the party partook of this. The night was dark, and they had several mishaps, in one of which the doubletrees were broken and the vehicle turned on its side against a bank. Notwithstanding this condition of things, they escaped injury and got safely back to Tebbetts between 11 and 12 o'clock p. m. Plaintiff and Davis intended to leave that night on a train passing there at 1:40 a. m. They, still in company with the Reifsteck boys and presumably after putting away the team, went at 11:40 to the depot to wait for the train. The platform was not lighted and the depot building was dark. It was still "cool," though there was no rain or snow falling. A hotel, which appears not to have been kept open after bedtime, was near by. They, however, noticed a box freight car by the side of the platform on one side of the depot building. The car was occupied by a man who had some articles of property he was shipping. The man had a lantern. So, though uninvited, they, including the Reifsteck boys, stepped into the car, there to wait for the train. After a time plaintiff half reclined on some straw in a corner of the car. At 1:40 the whistle of the incoming train was heard. Plaintiff testified that, though "drowsy," he was not asleep, and got up and proceeded to leave the car. Others said he was asleep and was awakened. The bottom of the car and the depot platform were flush—that is, on a level—and about 15 inches space between; yet plaintiff, in attempting to step onto the platform, missed and went in between, striking and breaking some of his ribs. He was well acquainted with the village, the depot, its surroundings, and knew it was not kept open and that lights were not kept through the night.

Defendant's demurrer to the evidence should have been sustained. Defendant, ordinarily, was not liable to plaintiff in his approach to its station platform by way of or through a freight car standing at the station on one of its side tracks. It can be seen that plaintiff realized that this suggestion

could stand in his way, and he has sought to avoid it by attempting to show that defendant's negligence in failing to have its station building open and lighted forced him into the car to protect himself from the weather, and thereby connected itself with his injury. There can be negligence without a neglected duty, and the duty must have been owing to the complaining party. *Frye v. St. L., I. M. & S. Ry. Co.*, 200 Mo. 377, 407, 98 S. W. 566, 8 L. R. A. (N. S.) 1069. It is therefore important to know when defendant's duty to plaintiff began, if at all. A depot building is not maintained as a rooming house or lounging place. It is intended as a waiting room for passengers for the reasonable time which should be allowed passengers for coming to it and making ready to depart on an incoming train, or to wait for delayed trains. *Archer v. Railway Co.*, 110 Mo. App. 349, 85 S. W. 934; *Phillips v. Southern Ry. Co.*, 124 N. C. 123, 32 S. E. 388, 45 L. R. A. 163; *Illinois Cent. Ry. Co. v. Laloge*, 113 Ky. 896, 69 S. W. 795, 24 Ky. Law Rep. 693, 62 L. R. A. 405.

Our statute (section 3094, R. S. 1909) specifically requires that stations at crossings with other roads shall be kept lighted and heated a reasonable time before departure of trains. The first part of the section requires that railway carriers "shall furnish sufficient accommodations for the transportation of all passengers * * * as shall, within a reasonable time previous thereto, be offered for transportation," etc. Whether this provision refers to waiting rooms, we need not inquire, since it is manifestly the duty of the carrier, aside from a statute, to keep its stations open, lighted, and heated such reasonable length of time before the arrival of trains, as we have above indicated. *Sargent v. Railway Co.*, 114 Mo. loc. cit. 355, 21 S. W. 823, 19 L. R. A. 460; *Draper v. Railway*, 165 Ind. 117, 120, 74 N. E. 889, 6 Ann. Cas. 569. In some states a penalty is provided if they are not opened and lighted one-half hour before the arrival. *Illinois Cent. Ry. Co. v. Laloge*, supra. The greatest time we have noted in any statute was in that of Texas, where one hour is named. *International & G. N. Ry. v. Pevey*, 30 Tex. Civ. App. 460, 70 S. W. 778.

Plaintiff, though knowing there was no light or heat at the station at night, went to it two full hours before the train was due. He got into the freight car from his free choice and not from necessity. He had the Reifsteck boys with him, and, if he did not wish to arouse the hotel man, he could have remained in the nearby barn where the horses had been put away, until a few moments of train time. *Sandifer's Adm'r v. Railway Co.*, 89 S. W. 528, 28 Ky. Law Rep. 464. Besides knowing the depot was not lighted when he went into the freight car, he knew it would not be when he would

come out, for he stated he had taken a train there at other times.

So, conceding that it was defendant's general duty to have had its depot building open and lighted a reasonable time before the train was due, plaintiff is in no position to complain. His injury did not result from lack of light in his approaching the station in the regular and proper way. It came from his having voluntarily placed himself in what turned out to be a hazardous place. He went into that place without defendant's invitation or fault, and he got out at his own risk.

The judgment is reversed. All concur.

VINSON et al. v. LEE JORDAN LUMBER CO.

(Kansas City Court of Appeals. Missouri. Nov. 25, 1912.)

ACCORD AND SATISFACTION (§ 8*)—PART PAYMENT—DISPUTE—CONSIDERATION.

Where a purchaser of lumber remitted, as each shipment was made, the contract price, less 2 per cent., and nothing was said as to the 2 per cent. till after all the shipments and such payments, there was no accord and satisfaction, not only because the payments were not made and accepted in full satisfaction, but because, there having been no dispute as to the amount of indebtedness, such an acceptance would have been without consideration.

[Ed. Note.—For other cases, see *Accord and Satisfaction*, Cent. Dig. §§ 60-65, 84, 87; Dec. Dig. § 8.*]

Appeal from Circuit Court, Cole County; John M. Williams, Judge.

Action by A. C. Vinson and others, partners as the Hawthorn Lumber Company, against the Lee Jordan Lumber Company. Judgment for defendant. Plaintiffs appeal. Reversed and remanded, with directions.

Pope & Lohman, of Jefferson City, for appellants. Irwin & Peters, of Jefferson City, for respondent.

BROADBUSH, P. J. This is an action for a debt instituted in a justice's court, where plaintiff filed an account setting out specifically different items as a charge of indebtedness against defendant.

The plaintiff is a company engaged in the lumber business at Tempson, Tex., and the defendant is a lumber company engaged in business at Jefferson City, Mo. The undisputed facts are that on August 20, 1909, the plaintiff sold to defendant a large quantity of lumber at a fixed price of so much per 1,000 feet f. o. b. at Caywood, La., with the exception of a small portion f. o. b. at Jefferson City. At the place and time of delivery of the lumber defendant was to pay on each car 80 per cent. of the price agreed upon, and the remaining 20 per cent. on each car as soon as unloaded. The lumber, which amounted to about 1,000,000 feet, was delivered as per the agreement, and the 80 per

cent. of the price and all of the 20 per cent. was paid, except 2 per cent. The defendant refused to pay the 2 per cent., which amounts to \$189.93, which is the amount sued on. The defendant filed its answer, in which it admits the purchase and delivery of lumber for which it agreed to pay a certain price, that the lumber was shipped by plaintiff to defendant from time to time in car load lots, and alleges that then and there defendant settled in full with plaintiff for each and every car load of lumber which was delivered, and deducted from the purchase price thereof 2 per cent. discount, and rendered to plaintiff a statement showing the deduction of said discount of 2 per cent. on each and every car of said lumber; and that plaintiff, with full knowledge of said deduction, consented and agreed to such settlement as final between plaintiff and defendant on each and every car that was delivered by plaintiff to defendant; that said deduction of 2 per cent. was made with full knowledge of plaintiff and in accordance with the understanding and agreement at the time of the making of the contract, although said deduction was not specifically mentioned in the contract entered into between plaintiff and defendant, but that it was agreed and understood by the laws of trade as well-established, long existing, and universal custom of the trade, etc. The contract was in writing and explicitly provided for payment of 80 per cent. of the purchase price upon delivery and the remaining 20 per cent. when unloaded. The defendant attempted to show that a dispute arose as to the amount of its indebtedness to plaintiff, and that defendant, with full knowledge and consent of plaintiff, deducted 2 per cent. discount from the indebtedness, which was accepted as a settlement in full, and that afterwards plaintiff's agent in a conversation with defendant's agent expressed himself as well satisfied with the settlement.

About all we can gather from defendant's testimony is that in making payments for lumber delivered at different times it retained 2 per cent. discount under the supposition that such was the trade custom, and that it sent a statement to plaintiff for each consignment of lumber received showing such deduction. But there was no evidence that plaintiff, not until after all the lumber was delivered and paid for, except the 2 per cent., demanded said 2 per cent. discount, consequently there was no dispute as to the amount of defendant's indebtedness during the time in which defendant made the different payments and rendered statements of the amount of lumber received and amount paid. According to defendant's evidence, plaintiff furnished no statement of account during the whole time.

There was nothing to dispute about, as the contract provided for no such discount. There was some evidence to the effect that there was a mistake in plaintiff's account of about \$37 which was called to plaintiff's attention and adjusted at a time when defendant's agent was at plaintiff's place of business at Caywood, La., where plaintiff's agent said to the former: "Lee, that is all right. I am more than pleased with the way you treated me on this lumber deal. I got better grades and better treatment than I ever did from any man I ever sold lumber to, and you remitted so promptly in settlement for this lumber than any lumber I have ever sold." This is relied upon as evidence that the parties had settled a dispute as to the account. We do not think so, as there was no reference whatever made as to the 2 per cent. discount, and it could have made no difference if there had been, because the 2 per cent. discount had not been a matter of dispute. And it cannot be treated as a waiver, for there was no consideration of any other kind to support it.

The law in relation to accord and satisfaction is said to be that: Where a debtor in good faith disputes the amount claimed by his creditor to be due, and tenders the amount admitted to be due, if the tender is on condition that it is in full payment of the amount due and the creditor accepts the tender, this would amount to accord and satisfaction. *Bahrenburg v. Trust Co.*, 128 Mo. App. 526, 107 S. W. 440. And it is said: "The acceptance of a part of an admitted debt in discharge of the whole will not bind the creditor for lack of consideration; but, if there is an honest difference in regard to the amount due and the parties agree that the debtor may pay a less sum in full of the creditor's claim and the former does so, he is discharged." *Chamberlain v. Smith*, 110 Mo. App. 657, 85 S. W. 645. The law as stated in these two opinions expresses fully the law in relation to accord and satisfaction.

The defendant's contention that there was an accord and satisfaction is not supported by these authorities. First, because there was no dispute as to the amount of the indebtedness; and, second, that the payment was not made and accepted in full satisfaction of the debt. The defendant did not even show that plaintiff accepted the payments made in full discharge of the debt, which was attempted, and, if it had been so shown, it did not bind plaintiff for lack of consideration.

The court erred in refusing plaintiff's demurrer to defendant's evidence, and should have instructed the jury to find for plaintiff. The cause is reversed and remanded, with directions to enter a judgment for the amount claimed.

LUCKEY v. CITY OF BROOKFIELD.

(Kansas City Court of Appeals. Missouri.
Nov. 25, 1912.)

LIMITATION OF ACTIONS (§ 32*)—PERMANENT INJURY TO LAND—NUISANCE.

The injury from polluting a stream flowing through the land of an individual by construction by a city of a sewer system emptying into the stream is permanent, and inflicted on the completion of the system; and the owner may only maintain a single cause of action for the consequential damages, past and future, caused by a diminution of the market value of the land, which action is barred in 10 years from the completion of the sewer.

[Ed. Note.—For other cases, see *Limitation of Actions*, Cent. Dig. §§ 143-145; Dec. Dig. § 32.*]

Appeal from Circuit Court, Linn County; Fred Lamb, Judge.

Action by B. C. Luckey against the City of Brookfield. From a judgment for plaintiff, defendant appeals. Reversed.

Bresnahan & West and Bailey & Hart, all of Brookfield, for appellant. Burns, Burns & Burns, of Brookfield, for respondent.

JOHNSON, J. Plaintiff sued the city of Brookfield, a city of the third class, to recover damages for injury to his live stock, caused by the pollution by defendant of a water course that ran through his pasture land. The period for which damages are claimed in the petition is from August 5, 1910, to March 22, 1911, and the stock injured consisted of 230 sheep and 4 horses, which were kept in the pasture and had access to the contaminated stream. In 1899 defendant built a sewer system, which discharged the sewage of the city into a ditch, which, in turn, emptied into the stream in question, and the stream carried the sewage through plaintiff's pasture. It appears from the evidence of plaintiff that in ordinary seasons the volume of water flowing in this natural water course was sufficiently large to dilute the sewage and render it practically innocuous to live stock, but that at intervals, averaging three or four years in duration, the volume of water in the stream would become so reduced by scarcity of rainfall as to render the water injurious to animals that drank it. The period for which damages are claimed was in one of these comparatively infrequent dry seasons which, as stated, recurred about three times in each decade.

Defendant built and operated the sewer in the manner stated without acquiring the right by purchase or condemnation to use the water course for carrying off the sewage. The cause of action pleaded in the petition and submitted to the jury is bottomed on the idea that the nuisance thus created and maintained by defendant was temporary as to the land of plaintiff, since its injurious consequences were intermittent and widely

separated, and that each injury should be treated as a new and independent cause of action. On this view of the case plaintiff insists that his damages in this instance are to be measured by the loss he suffered in consequence of the injury inflicted on his live stock, which had access to the stream during the period in question and drank its impure water. It is the theory of the defense that the nuisance is permanent; that all of the damages to the land of plaintiff accrued at the time of the completion of the sewer system in 1899; that such damages were comprised in and were to be measured by the diminution in the market value of the land, caused by the creation of a permanent nuisance; and that since this action was not commenced until October, 1911, more than 10 years after the cause of action accrued, it is barred by limitation. The trial of the issue thus raised resulted in a verdict and judgment for plaintiff, and the cause is here on the appeal of defendant.

With one exception, the facts and issues of this case run parallel with those we considered in the case of *Smith v. Sedalia*, 141 S. W. 1198, recently decided by this court and certified to the Supreme Court by one of the judges, on the ground that the decision was in conflict with the opinions of the Supreme Court in *Smith v. Sedalia*, 152 Mo. 283, 53 S. W. 907, 48 L. R. A. 711; *Id.*, 182 Mo. 1, 81 S. W. 165. The Supreme Court, in an opinion written by Ferriss, J., approved and amplified our view of the law of that case (*Smith v. Sedalia* [Sup.] 149 S. W. 597), and, we think, definitely removed the cause of much of the confusion and uncertainty in the decisions relating to the subject of permanent and temporary nuisances and the proper measure of damages to apply in each class of cases.

In that case the city of Sedalia had finally completed a sewer system about 18 years before the commencement of the action in question, and had during that period been emptying the sewage of the city into a natural water course that ran through the land of the plaintiff. The injury to the useful occupation and enjoyment of the land was continuous; but the plaintiff's action was founded on the view that the nuisance was temporary, and that he might maintain periodical suits for the recovery of the damages he suffered in each successive period. But this view was rejected by this court, and afterwards by the Supreme Court, on the ground that the sewer system, which for 18 years had remained unchanged and had discharged practically an unvarying quantity of sewage into the water course, was a permanent structure that, at the time of its final completion, inflicted a permanent injury to the land, for which a single and indivisible cause of action inured to the landowner. After a careful review of the case law, we

gave expression to the following conclusion: "These authorities compel us to say that the nuisance in question is permanent, and that plaintiff, if injured thereby, had a cause of action for his damages, past and future, all of which were comprehended in and were to be measured by the depreciation in the market value of his land, caused by the presence of the sewer. For 18 years past the sewer had remained in its present condition. It is just as substantial and enduring as a railroad embankment, drainage ditch, highway bridge, street pavement, office building, or city hall. It was built without any intention or expectation that it would be removed or materially changed for years to come; and if the present action was one for permanent damages, and was the only suit pending between the parties, we would not hesitate in declaring that plaintiff had made out a case for the jury, and that the true rule for measuring his damages was the depreciation in the market value of the land."

But it is argued by plaintiff that, though the sewer be permanent, and intended by defendant to be so, plaintiff, as the injured party, had the option to complain of it as a permanent injury and recover damages for the whole time, or to treat it as a temporary wrong to be compensated for while it continues; that is, until the act complained of becomes rightful by grant, condemnation of property, or ceases by abatement.

This idea is suggested in section 1046, 4 Sutherland on Damages (3d Ed.); but the suggestion is tentative, is not supported by authority, and, we think, is logically unsound. The reason successive actions may be prosecuted on account of a temporary nuisance is that, since the cause of injury is likely to be removed at any time, and thereby end the injury, there is no damage to the inheritance, and the injury is to the use of the land. The value of such use is measured by the depreciation in the rental value caused by the injury. But a permanent injury to the land is an injury to the inheritance, as well as to the use, and, as the whole is equal to the sum of all its parts, so recoverable damages for an injury which extends to the inheritance includes all temporary as well as lasting elements of damage; and all these elements, as we have said, are comprised in the rule that measures the damages by the depreciation in the market value of the land. There can be but one cause of action for a single injury, and a permanent nuisance is a single injury.

And Judge Ferriss observed in his opinion that "this suit is not grounded upon trespass merely, nor upon nuisance, although the injury takes the form of a nuisance, but upon the constitutional right to compensation for property damages for public use (*Webster v. Kansas City*, 116 Mo. loc. cit. 118, 22 S. W. 474; *Turner v. Railway*, 180

Mo. App. 540, 109 S. W. 101); and it is so argued in plaintiff's brief. The city, by proper proceedings to that end, had the right, by statute, to secure the use of this stream for sewer purposes. The city did not condemn, but appropriated, the use. Such action, however, does not deprive the plaintiff of his right to compensation; nor does it affect the measure of damages, which, for such use by the city, whether by condemnation or appropriation, is the diminution in market value of the land damaged. As this court said, in *McReynolds v. Railway*, 110 Mo. loc. cit. 488, 19 S. W. 824: 'No good reason, founded upon principle, can be assigned why the same rule should not be applied in both classes of cases [condemnation and appropriation].' The injury is the same; the damage is the same; and the compensation should be the same."

These decisions compel the conclusion that the sewer in the present case was a permanent structure; that on its completion it inflicted a permanent injury to the land now owned by plaintiff; and that a single cause of action then inured to the landowner for the damages, past and future, that were and would be consequent upon the injury, all of which damages were comprised in the diminution of the market value of the land.

We do not think the single departure in the facts of this case from those in the *Smith Case* materially affects the conclusion just expressed. That difference consists of the fact that in the *Smith Case* the injury flowing from the permanent structure to the land of plaintiff was continuous, while here it was intermittent, depending for its power to do evil upon the co-operation of a dry season, which came, and would continue to come, on an average of once in every three or four years. When the sewer was completed, the injurious effect it would have on the use of the land of plaintiff was apparent, and the loss that would be inflicted thereby could be ascertained and appraised with reasonable accuracy, and, doubtless, was reflected in an immediate depreciation of the market value of the land. It is a matter of common knowledge that such dry periods as were required to give potency to the injury recur as though controlled by some natural rule of averages. Broadly speaking, there was not only a permanent cause of injury in this case, but a resultant single injury that manifested itself and wrought damage periodically. In cases of this nature the test of whether the injury is permanent or temporary does not lie in the solution of the question of whether the injury caused continuous or intermittent damage, but in the question of whether or not its mainspring was a permanent cause that would insure the stability of the injury as a permanent and definite agency of damage.

This thought is expressed in the following excerpt from the decision of the Supreme

Judicial Court of Massachusetts, in *Fowle v. New Haven Company*, 112 Mass. 338 (17 Am. Rep. 106): "The case at bar is not to be treated strictly in this respect as an action for an abatable nuisance. More accurately, it is an action against the defendant for the construction of a public work, under its charter, in such a manner as to cause unnecessary damage by want of reasonable care and skill in its construction. For such an injury the remedy is at common law. And if it results from a cause which is either permanent in its character, or which is treated as permanent by the parties, it is proper that entire damages should be assessed with reference to past and probable future injury."

It is apparent from what we have said that the only cause of action accruing from the injury was barred by limitations duly pleaded in the answer long before the commencement of this suit; and therefore that the learned trial judge erred in not sustaining the demurrer to the evidence.

The judgment is reversed. All concur.

P. H. REA IMPLEMENT CO. v. SMITH.

(Kansas City Court of Appeals. Missouri.

Nov. 25, 1912.)

1. PRINCIPAL AND SURETY (§ 14*)—OBLIGATION OF SURETY.

One requesting a merchant to let a third person have goods and promising to pay for them is, when goods are sold and charged to him, a surety, entitled to stand on the letter of his agreement.

[Ed. Note.—For other cases, see *Principal and Surety*, Cent. Dig. § 33; Dec. Dig. § 14.*]

2. FRAUDS, STATUTE OF (§ 89*)—SALES—DELIVERY—ACCEPTANCE.

A defendant requested a merchant to let a third person have goods, to be charged to defendant, and promised to pay for them. The third person selected the goods, but he and defendant left without them. On the same day, the third person returned alone, and concluded that he desired in place thereof other goods costing \$5 more. He took the other goods, and gave a note for \$5 to the merchant, which he afterwards paid. *Held*, that the transaction showed a delivery and acceptance, within the statute of frauds (Rev. St. 1909, § 2784), of the goods originally selected, and that the third person immediately exchanged such goods for other goods, so that the agreement of defendant was valid.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. §§ 165-173; Dec. Dig. § 89.*]

3. FRAUDS, STATUTE OF (§ 90*)—SALES—DELIVERY—ACCEPTANCE.

While at common law delivery was not essential, as between seller and buyer, to the passing of title to specific and ascertained personalty, yet under the statute of frauds (Rev. St. 1909, § 2784), a sale of goods for more than \$30, unaccompanied by any writing or part payment, is not binding on the buyer, unless there is a delivery.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. §§ 162, 170, 171, 174-179; Dec. Dig. § 90.*]

Appeal from Circuit Court, Saline County; Samuel Davis, Judge.

Action by the P. H. Rea Implement Company against W. A. Smith. From a judgment granting a new trial after sustaining a demurrer to the evidence, defendant appeals. Affirmed.

Reynolds & James, of Marshall, for appellant. Alf. F. Rector, of Marshall, for respondent.

ELLISON, J. This is an action on an account for the purchase of a buggy and harness. At the close of plaintiff's case the trial court sustained a demurrer to the evidence. Plaintiff then, in due time, filed his motion for new trial, which was sustained, and defendant appealed to this court from that order.

The following is a synopsis of the evidence necessary to state: Defendant is a farmer, and plaintiff a merchant. Defendant is in such good repute as to have credit at plaintiff's store. A negro man wanted a buggy and harness, and defendant took him to plaintiff's store, where the negro, perhaps assisted by defendant, selected a buggy and a set of harness at the price of \$50. Defendant then said to the salesman to let the negro have the buggy and harness for \$50, and he would pay for it, or, as otherwise expressed in some statements of the witness, "to charge it to him." The salesman assented. Defendant and the negro then left, without taking the buggy and harness with them. That afternoon the negro returned alone to receive the buggy and harness. But he concluded he preferred another set of harness, worth \$5 more than the set defendant bought. He took away this latter set, with the buggy, by giving his note to plaintiff for \$5, which he afterwards paid. Afterwards, when plaintiff presented an account to defendant, the latter claimed to be discharged from his promise on the ground that plaintiff had changed the character of the transaction by substituting a different set of harness, at a different price, and that the contract plaintiff made with him had not been performed, in that the specific property had not been delivered.

[1, 2] One branch of defendant's case is likened to that of a surety, who is entitled to stand on the letter of his agreement. *Beers v. Wolf*, 116 Mo. 179, 22 S. W. 620. On the other hand, plaintiff insists that the contract was performed as made; that plaintiff sold a specific buggy and set of harness, there selected, which, being afterwards delivered to the negro, became his property; and that afterwards the negro exchanged the harness for another and more expensive set, by paying the difference in price.

We think it clear that, if the property had been delivered to the negro at the time

of the sale and he had taken it away with him, it would have been his and he might have done with it what he pleased. He could have brought the harness back that afternoon, and exchanged it for another set, without affecting defendant's obligation. What he actually did amounted to the same thing; for, when he came back, as was stated in evidence by the salesman, "he took it out, and he said he would like to have a little better set of harness, and for me to let him have it and take him for the difference. We agreed to do that." He "took" the property "out"; that is, he took the buggy and harness out, took possession, and then exchanged the harness for another set, paying the difference in price. The taking it out and exchanging it, in the circumstances stated, was an exercise of dominion which was at once delivery, acceptance, and receipt, and filled every requirement of the statute of frauds (section 2784, R. S. 1909). It is true that afterwards this question was asked the witness: "You never did deliver to this darkey the harness Mr. Smith bought, did you?" And he answered: "No, sir." But we think, taking all the evidence together, it was meant that the harness first selected was not taken away from plaintiff's place of business by the negro.

[§] But if it should appear on a retrial that no delivery was made of the harness that defendant bought, then there was no contract binding upon him, on his asserting its invalidity under the statute of frauds; for, while it is true, as asserted by plaintiff, that delivery is not essential (as between vendor and vendee) to the passing of title to specific and ascertained personal property under the common law (*Hamilton v. Clark*, 25 Mo. App. 428; *Commonwealth v. Hess*, 148 Pa. 98, 23 Atl. 977, 17 L. R. A. 176, 33 Am. St. Rep. 810), yet under the statute of frauds, in instances where the property is sold for more than \$30 and there is no writing, or part payment, the sale is not binding on the vendee if he asserts his right to avoid it. *Browne on Statute of Frauds* (5th Ed.) §§ 138d to 138l. And so the law is stated in *Cunningham v. Ashbrook*, 20 Mo. loc. cit. 558, 559.

The judgment granting the new trial is affirmed. All concur.

HAYWOOD v. KUHN.

(St. Louis Court of Appeals. Missouri. Nov. 12, 1912.)

1. DAMAGES (§ 158*)—PERSONAL INJURIES—PETITION—EVIDENCE—ADMISSIBILITY.

Under a petition which alleges, among other things, that plaintiff's "entire nervous system [was] disordered, shocked and also greatly injured internally," evidence of internal injury to other than the nervous system was admissible.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 441-446; Dec. Dig. § 158.*]

2. LANDLORD AND TENANT (§ 169*)—DEFECTIVE PREMISES—QUESTION FOR JURY.

In an action against a landlord for injuries to the tenant's wife, caused by a defect in the premises, whether the premises were in the same condition at the time of the accident as when rented was for the jury.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 644-646, 663-667, 681-684; Dec. Dig. § 169.*]

3. TRIAL (§ 256*)—DEFECTIVE PREMISES—QUESTION FOR JURY.

Where, in an action against a landlord for injuries to the tenant's wife from a defect in the premises, the landlord urged that the premises were rented in the same condition as at the time of the accident, and that the wife knew it and therefore assumed the risk, the landlord, desiring a specific instruction on the question, should ask it, and not demur to the evidence, and merely request an instruction to find for him.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 628-641; Dec. Dig. § 256.*]

4. LANDLORD AND TENANT (§ 169*)—INJURIES—DEFECTIVE PREMISES—INSTRUCTIONS.

Instructions, in an action against a landlord for injuries to the tenant's wife, caused by her stepping into an uncovered drain pipe, that if the pipe was kept covered by a stone, which was a reasonably safe covering, the jury should find for the landlord; that it was his duty to keep the premises in a reasonably safe condition, so that the tenant and his family, while exercising ordinary care, would suffer no injury; that if the landlord negligently permitted the pipe to remain open and without a reasonably safe covering to prevent persons from stepping into it when exercising ordinary care in the use of the premises, and plaintiff while in the exercise of ordinary care stepped into the pipe and was injured, the verdict should be for her, provided the landlord knew, or by ordinary care might have known, the condition of the opening of the pipe—covered the charge of negligence in the petition that, notwithstanding the character of the pipe, the landlord negligently allowed it to become out of repair and dangerous, in that it was allowed to remain open and unprotected, and that he knew, or could have known by ordinary care, of the defect in time to have repaired the same before the accident.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 644-646, 663-667, 681-684; Dec. Dig. § 169.*]

5. LANDLORD AND TENANT (§ 169*)—INJURIES—DEFECTIVE PREMISES—CONTRIBUTORY NEGLIGENCE.

Instructions, in an action against a landlord for injuries to the tenant's wife from stepping into an open pipe on the premises, that it was the duty of plaintiff in using the premises to exercise such care as an ordinarily prudent person would use under similar circumstances, and if she failed to use such care at the time of the accident the verdict must be for the landlord, and that the burden of proof was on plaintiff, except on the issue of her exercise of ordinary care, and as to that issue the burden was on the landlord, etc., sufficiently submitted the issue of contributory negligence.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 644-646, 663-667, 681-684; Dec. Dig. § 169.*]

6. TRIAL (§ 244*)—INSTRUCTIONS—UNDUE COMMENT ON THE EVIDENCE.

Where, in an action against a landlord for injuries to the tenant's wife, caused by a defect in the premises, the evidence showed that the landlord was a nonresident, and that the premises were in the immediate care of his son

as agent, an instruction that if the son, at the time of the accident and prior thereto, was the agent of the landlord, and he had knowledge a reasonable length of time prior to the date of the accident, his knowledge was notice to the landlord, was not objectionable as an undue comment on the evidence, or singling out a particular fact in evidence.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 577-581; Dec. Dig. § 244.*]

7. DAMAGES (§ 216*)—PERSONAL INJURIES—MEASURE OF DAMAGES—INSTRUCTIONS.

An instruction, in an action on the measure of damages for personal injuries, that in estimating the damages the jury must consider any change in plaintiff's physical condition resulting from the injury, the physical or mental anguish suffered on account of the injuries, and damages, if any, as the evidence reasonably shows she would suffer in the future therefrom, and that the jury should find a verdict for such sum as would under all the evidence reasonably compensate plaintiff for her injuries, including compensation for such sums as the evidence shows she has paid out for medical treatment, but not including any amount not actually paid by her, sufficiently defines the measure of damages.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 548-555; Dec. Dig. § 216.*]

Appeal from St. Louis Circuit Court; Chas. C. Allen, Judge.

Action by Bertie E. Haywood against Jacob Kuhn. From a judgment for plaintiff, defendant appeals. Affirmed.

Geo. W. Lubke and Geo. W. Lubke, Jr., both of St. Louis, for appellant. E. Rosenberger & Son, of Montgomery, and Kurt Von Rupert, of St. Louis, for respondent.

REYNOLDS, P. J. The husband of plaintiff in this case was the tenant of defendant, renting from him the upper rooms of an apartment house, in which rooms plaintiff and her husband resided. The lower rooms were rented to another family. To the rear of this apartment house was a yard, at the back of which were sheds and outhouses. A gate or opening led to an alley. This back yard and the outhouses were used in common by the several tenants of the apartment house. There was no made walk through the yard, the tenants throwing ashes and cinders from the rear of the house to the back of the lot in muddy weather. There were two sewer or drain pipes between the house and the vaults, one some twelve inches the other some five or six inches in diameter. The twelve-inch pipe projected some six or seven inches above the ground and was covered with what is described as a tin tub. The flange or rim of the six-inch pipe was broken off level with the surface of the ground on one side; a portion of it appears to have projected two or three inches above the surface. A loose flat rock was used as a cover for this six-inch pipe. The premises were in this condition when rented.

There is a good deal of conflict in the testimony as to the size and weight of this rock,

but that point is not material now. It was in evidence that the rock which was provided for this smaller pipe often became displaced and the tenants and members of their families were in the habit of replacing it over this sewer or drain pipe. Plaintiff testified she had often done that herself.

On the night of the 21st of October, 1907, plaintiff and a letter carrier, who was boarding with plaintiff and her husband, went out through this back yard and through the gate in the rear of the premises to go to a moving picture show on a street north of the premises. Returning from that and entering the premises through the rear gateway, plaintiff and her companion walking through the yard, plaintiff remembered that she had left some utensils out by the back fence. She turned back to get them to carry into the house. She had gone from six to eight feet away from her companion when he heard her scream. Going to her he found that she had fallen and that her right foot and limb had gone into this six-inch drain pipe and was so securely held that she could not withdraw the limb. Calling the tenants of the lower apartment to his assistance, they with considerable difficulty managed to extricate plaintiff's limb from the pipe, and her husband having joined them, they carried plaintiff into the house and up into her own apartment. She was confined to her bed for quite a length of time, and for a longer time to the house. While no bones were broken, she sustained a very severe sprain and was internally injured, the latter injury, as testified to by the attending physician, resulting in prolapse of the uterus, a permanent injury as testified by that physician. Plaintiff had paid the physician some \$25 for his attendance and had also paid a nurse or attendant \$2.50 a week for some six or eight weeks that she was with her. Plaintiff's occupation had been that of a seamstress and she earned about \$1.50 a day. She testified that she had lost the effective use of her right limb, with which before then she had operated her sewing machine, and her earning capacity as a seamstress very greatly diminished. The physician testified that her injuries, both external and internal, in all probability were permanent. The plaintiff testified that the moon was shining, although not very brightly, on the night and at the time of the accident; that she saw the stone lying in the yard but supposed that it was in its usual place over the opening of the drainpipe and was not aware that the drainpipe was open until she stepped into it.

At the conclusion of the testimony for plaintiff, and again at the conclusion of all the testimony, defendant interposed a demurrer, both of which were overruled. The jury returned a verdict in favor of plaintiff for \$1,750. Judgment following, defendant filed

his motion for new trial as well as one in arrest of judgment. These being overruled and exception saved, defendant duly perfected appeal to this court.

The errors here assigned are to the improper admission of testimony and the refusal of the demurrers. As to the latter, it is claimed that it clearly appeared that plaintiff's own want of care directly contributed to her injury and prevented a recovery on her part, and further, that it appeared that the property was in the same condition at the time of the letting to plaintiff's husband as it was at the time of her injury and that she knew it and therefore assumed the risk of using the property in that condition. It is also assigned for error that the court singled out the testimony of a witness and commented on it and had singled out a particular fact in the evidence, thereby giving undue prominence to that fact. It is further contended that the instruction given at the instance of plaintiff as to the measure of damages is erroneous and misleading. For these reasons it is urged that the motion for new trial should have been sustained.

[1] Taking up these assignments in their order, we have to say as to the first one that it is untenable. It is founded on the claim that the physician who attended plaintiff should not have been permitted to testify that she had suffered the internal injury referred to. The averment in the petition as to the damages sustained is broad enough to have let in the testimony of this internal injury. To follow the language of the petition covering this particular point, it is set out that as the direct result of her fall, plaintiff's right ankle was "dislocated, sprained and badly wrenched, and that her body and right lower limb was bruised, scarred and injured and her entire nervous system disordered, shocked and also greatly injured internally, and that her injuries are permanent and incurable; that as a result of said injuries she is now a cripple and will be a cripple for life, and that she was made sick and sore and was confined to her bed for a long space of time, unable to help herself; that she has suffered and will in the future suffer great bodily pain and mental anguish, * * * and that her health and strength and ability to perform any kind of labor has been greatly and permanently impaired and destroyed." Counsel apparently are of the opinion that these words, "and also greatly injured internally," refer to her nervous system. Evidently that is not what was meant by the pleader or what would be ordinarily understood. The whole clause is, "and her nervous system disordered, shocked and also greatly injured internally." It is evident that the pleader intended to aver that plaintiff was also greatly injured internally. This idea may not be expressed very accurately; it would have been helped if after the word "disordered," the word "and" had been in-

serted, and between the words "and" and "also," the words "she was," had been interlined. But we think the language used was clearly intended to refer to internal injuries, not to nervous shock, and was sufficient to admit the evidence of injury to her womb, and it is of this latter that complaint is made.

[2, 3] In support of the second assignment of error on the refusal of the demurrers to the evidence and of an instruction to find for defendant, it is argued that the property was in the same condition at the time of the letting to plaintiff's husband as it was at the time of her injury and that plaintiff knew it and therefore assumed the risk of using the property in that condition, and hence she could not recover. That question of the property being in the same condition as when rented, was a question of fact for the jury. If defendant desired a specific instruction on it, he should have asked one—which he did not.

[4] The cause of action pleaded is "that notwithstanding the character of the five-inch vertical pipe or shaft above as described in its manner of construction the defendant negligently and carelessly allowed said five-inch pipe or shaft to become out of repair and dangerous, in that the same was allowed to remain open and unprotected, and that the defendant well knew, or could have known the same by the exercise of ordinary care, in time to repair the same before the injuries to the plaintiff hereinafter complained of, and that the said five-inch vertical pipe or shaft aforesaid was in the condition above described at the time of the injuries hereinafter complained of, to wit: on the 21st day of October, 1907."

We think the negligence charged was practically covered by instructions given. By one given at the instance of defendant, "The court instructs the jury that if from the evidence they believe that the pipe in question was kept covered by a stone and that said stone was a reasonably safe covering for said pipe to prevent persons from stepping into said pipe when using the yard in question for such purposes to which said yard was ordinarily put, then the jury will find for the defendant." It was further covered by an instruction given at the instance of plaintiff, and on which no error is assigned. By that instruction the court told the jury, among other things, that it was the duty of defendant to keep the yard in a reasonably safe condition for the purposes for which such yard was ordinarily used, so that the tenant and his family, while exercising ordinary care in its use, would suffer no injury; that if they found there was a sewer pipe underground between the vaults and the main sewer; that "the defendant, on the date herein mentioned, had and maintained a certain vertical pipe or shaft extending from the underground connection

aforesaid, up and through the ground to the surface thereof, and that said pipe was hollow and open at the end and protruded from the ground; and if you further find and believe from the evidence that the defendant negligently permitted said pipe or shaft to remain open and without a reasonably safe covering to prevent persons from stepping into said pipe when exercising ordinary care in the use of said yard for such purposes to which said yard was ordinarily used and that the plaintiff while in the exercise of ordinary care and while using said back yard for the purpose for which it was ordinarily intended, stepped into, or slipped into said pipe and injured herself, then the court instructs the jury that your finding will be for the plaintiff, provided you further find and believe from the evidence, that defendant knew, or by the exercise of ordinary care might have known the condition of the opening of said pipe."

With these instructions before them the jury were practically required to pass on the very question on which counsel here assumes there was no evidence. The jury could only have found for plaintiff if they found from the evidence that the pipe in question had not been covered and kept covered by this stone and that the stone was not a reasonably safe covering for the pipe.

[5] It is further argued, in effect, in support of that assignment, that plaintiff cannot recover if she directly contributed to her injury. That proposition is beyond question, and as will be seen by the instruction quoted, given by the court at the request of plaintiff and not here challenged, that matter was submitted clearly and distinctly to the jury. It was further covered by an instruction given by the court of its own motion, "that it was the duty of plaintiff in using the yard in question to exercise such care as an ordinarily prudent person using said yard would have used under the same circumstances under which the plaintiff was using the same at the time described in the evidence, and if the jury find from the evidence that the plaintiff failed to use such care at the time she was injured, then the jury will find a verdict for the defendant." By other instructions given by the court of its own motion, the jury were correctly instructed as to the meaning of ordinary care and were further told that "the burden of proof is on the plaintiff to establish by a preponderance of the evidence the facts necessary for a verdict in (her) favor under these instructions, except upon the issue concerning the exercise of ordinary care by the plaintiff. As to that issue the burden of proof is on defendant to show the want of such ordinary care on the plaintiff's part." No error is assigned before us to the giving of any of these instructions. We think this error now assigned here is untenable.

[6] The third assignment of error is to the

second instruction given at the instance of plaintiff. That instruction, in substance, told the jury that if they found from the evidence that Edward Kuhn, at the time of the accident and prior thereto, was the agent of defendant for the purpose of looking after and making any necessary repairs as might be reasonably required on the premises, then the court instructed the jury that if they found and believed from the evidence that Edward Kuhn had knowledge a reasonable length of time prior to the date of the accident that the opening of the pipe was not reasonably well protected to prevent a person who was using the yard for the purposes for which it was ordinarily intended and while in the exercise of ordinary care from stepping into or slipping into the pipe, then the knowledge on the part of Edward Kuhn was notice to his principal, the defendant. It appeared that the defendant himself was a nonresident of this state and that this property was in the immediate care of his son Edward Kuhn, the witness here referred to. We do not think that this instruction was incorrect either as an undue comment on the evidence or in singling out a particular fact in the evidence and giving undue prominence to it as claimed by counsel for appellant.

[7] The most serious and strenuous argument of the learned counsel for appellant, however, is directed to the instruction which the court gave as to the measure of damages. That instruction, numbered 3, so far as pertinent to this assignment of error is as follows:

"The court instructs the jury that if you find a verdict for the plaintiff you are, in estimating her damages, to consider any change in her physical condition which you may believe from the evidence resulted from the injury to her; the physical or mental anguish, if any, suffered by her on account of her injuries at the time of and since such injuries, as shown by the evidence, and such damages, if any, as you may from the evidence find it is reasonably certain she will suffer in the future therefrom; and you will find a verdict for such sum as in your judgment will under all the evidence reasonably compensate her for such injuries, including compensation for such sums of money, if any, as the evidence shows she herself has heretofore paid out for medicines, nursing and medical treatment, but not including any amount not already actually paid by her."

We have very carefully examined the cases cited by learned counsel for the appellant and which they claim condemn this instruction, but are unable to find that it violates any of the rules laid down in any one of those cases. Comparing this instruction with the instruction which was given in *Curtis v. McNair*, 173 Mo. 271, on page 290, 73 S. W. 167, that instruction being there set out and designated as instruction B, we

are unable to perceive any substantial difference between this instruction here given and that in the Curtis Case, which was distinctly approved by our Supreme Court. The difference between the two instructions is a mere verbal difference, in no way whatever changing the meaning or altering the rule as announced in *Curtis v. McNair*, supra.

Finding no error to the prejudice of defendant, materially affecting the merits of the case, the judgment of the circuit court is affirmed.

NORTONI and CAULFIELD, JJ., concur.

McNULTY et al. v. MILLER.

(Kansas City Court of Appeals. Missouri. Nov. 25, 1912.)

NUISANCE (§ 3*)—PRIVATE NUISANCE—BREEDING BARNS.

One maintaining a barn and corral near a street for the sole purpose of keeping stallions to which he bred mares brought there maintains a nuisance to persons living from 200 to 400 feet from the barn and seeing the mares coming and going, and hearing the neighing and kicking, though the corral was inclosed with a high board fence, so that on the level one could not see in it or the barn.

[Ed. Note.—For other cases, see Nuisance, Cent. Dig. §§ 4, 5, 9-25; Dec. Dig. § 3.*]

Appeal from Circuit Court, Andrew County; A. D. Burns, Judge.

Action by John McNulty and others against Harry E. Miller. From a judgment for plaintiffs, defendant appeals. Affirmed.

B. R. Martin and C. C. Crow, both of St. Joseph, for appellant. W. R. Littell, of Tarkio, for respondents.

ELLISON, J. Plaintiffs are residents and property owners in the town of Tarkio, and instituted this action to enjoin and restrain defendant from using a certain building and corral as a breeding barn by the use of stallions and jacks. The decree in the circuit court was in their favor.

The decree suppressed an aggravated and disgusting nuisance, and was therefore right. Plaintiffs lived in their homes at distances from 200 to 400 feet from defendant's frame barn which he erected near the street in Tarkio for the sole purpose of keeping stallions to breed to mares. The plaintiffs' families consisted of their wives and children, some of the latter being grown girls. Others were young, of both sexes. The evidence showed that from spring till fall defendant kept three stallions to which he bred mares that were brought to his place for that purpose. The corral was inclosed with a high board fence, and on the level one could not see in it or the barn. But mares, many of them each day, were brought to the place and taken away. They were frequently hitched outside, in sight of the families.

Their coming and going were in full view. The neighing, kicking, squealing, and biting of the animals was terrific to small children, who asked their mothers what it meant. Older members of the families, from a sense of shame and modesty, were practically deprived of the use of their yards and porches and driven into the houses. They were embarrassed in having company at their premises, and some people went around over byways to avoid that street. The evidence in behalf of plaintiffs clearly shows a depreciation in the value of property, and that for defendant but tamely combats it. A prosecution by the town for a violation of an ordinance which forbids the acts of defendant was sustained at this term in a case submitted with this.

Equity affords relief in such situations as here presented. A like case was before the Supreme Court in which our view of the matter finds direct support. *Hayden v. Tucker*, 37 Mo. 214. It will be observed from the statement made in that case that the act of covering the mares could be seen from the outside, while here the act itself was screened from the sight. But it is obvious that a thing may be made a nuisance through other senses. Hearing many things identifies them completely without being corroborated by sight.

There is no need to discuss whether defendant's acts constitute a public or a private nuisance, or whether something of the nature of both. Certain it is that the offensive acts are recurring, and that they are of such nature that no money damage can afford relief (*Paddock v. Sones*, 102 Mo. 223, 240, 14 S. W. 746, 10 L. R. A. 254), unless we are to assume that plaintiffs' right to reside where they will can be made subject to defendant's choice of business.

The judgment is affirmed. All concur.

CITY OF TARKIO v. MILLER.

(Kansas City Court of Appeals. Missouri. Nov. 25, 1912.)

1. MUNICIPAL CORPORATIONS (§ 605*)—NUISANCES—POWER TO SUPPRESS.

A business which is a nuisance at common law may be suppressed by ordinance of a city.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1338, 1340; Dec. Dig. § 605.*]

2. NUISANCE (§ 61*)—PUBLIC NUISANCE—ACTS CONSTITUTING.

The keeping in a city of stallions for breeding purposes is a lawful and necessary business, and per se is not a nuisance, but it may be conducted in such a manner as to become a nuisance per se.

[Ed. Note.—For other cases, see Nuisance, Cent. Dig. §§ 142-151; Dec. Dig. § 61.*]

3. MUNICIPAL CORPORATIONS (§ 604*)—NUISANCE—ORDINANCES—VALIDITY.

An ordinance of a city forbidding the use of a building in the city for keeping stallions

for breeding purposes where such use disturbs the peace of the neighborhood or violates public decency is valid.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 152, 1335-1337; Dec. Dig. § 604.*]

4. MUNICIPAL CORPORATIONS (§ 631*)—NUISANCE—ORDINANCES—VIOLATIONS.

One keeping in a city stallions for breeding purposes in such a way as to scandalize the immediate neighborhood is guilty of violating an ordinance of the city prohibiting the keeping of stallions in such a way as to disturb the peace of the neighborhood, or violate public decency.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1386-1388; Dec. Dig. § 631.*]

Appeal from Circuit Court, Andrew County; A. D. Burns, Judge.

Harry El Miller was convicted of violating an ordinance of the city of Tarkio, and he appeals. Affirmed.

B. R. Martin and C. C. Crow, both of St. Joseph, for appellant. W. R. Littell, of Tarkio, for respondent.

ELLISON, J. This case is a prosecution against defendant for violating a town ordinance which forbids the use of a building in the town for keeping stallions or jacks for teasing and covering mares, where such use "would disturb the peace and quietude of the surrounding neighborhood, or scandalize them in the use and enjoyment of their property, or violate public decency or damage their property." He was convicted in the trial court.

The defendant here was the defendant in the injunction suit brought against him by the owners of property near his barn (decided at this term), and was submitted with that case.

[1] Defendant questions the power of the town to pass the ordinance. It is said that the town cannot, upon finding a man engaged in a business, declare it to be a nuisance and undertake to suppress it, unless it has been made a nuisance by statute or common law. But it is well understood that, if the business is a nuisance at common law, it may be suppressed by ordinance of a city.

[2] The keeping of stallions for breeding purposes is a lawful and necessary business and per se is not a nuisance. But it is a business which, like many others, may be conducted in such manner as to become a nuisance per se. Keeping a hotel is a necessary business; but its moral standard may be such as to make it a nuisance. A store for the sale of articles so necessary as groceries may be so conducted as to become a nuisance. A business, as such, may belong to the citizen as his common right, yet he may make a nuisance of it by his manner of exercising the right.

[3] Now, the ordinance in question does not forbid the keeping of stallions, nor breeding them to mares. It forbids its being done in

such manner as will scandalize and disturb the peace of the inhabitants of the neighborhood and violate public decency. It was rightly held to be valid.

[4] The facts of this case illustrate the soundness of what we have said. Defendant did not merely keep stallions for breeding, but he kept them in such way and at such place in the town as to scandalize the immediate neighborhood. We have set out in the other case how the squealing and other noises of the animals while teasing and covering mares disturbed the families, tended to demoralize little children, and put to shame the females of the households, to such extent as to send them in from their yards and porches. We have been cited to *Ex parte Robinson*, 30 Tex. App. 493, 17 S. W. 1057. There is nothing in that case to aid defendant when applied to the facts. The court stated that it was shown in that case that the keeping and breeding of the stallion was "in a large, close brick livery stable," which people could neither "see nor hear," and where persons passing could not "know what was going on." The court stated that it did not want to be understood as saying that the city in that case could not have properly ordained an ordinance prohibiting breeding in the public view, and that such an act would be a nuisance per se. And the court would, of course, have said the same as to hearing, if the sounds were such as to scandalize the people of the neighborhood and put them to shame.

The evidence justified the verdict, and the judgment is affirmed. All concur.

SHAW v. GOBEN et al.

(Kansas City Court of Appeals. Missouri. Nov. 25, 1912.)

1. MUNICIPAL CORPORATIONS (§ 297*)—PUBLIC IMPROVEMENTS—PROTESTS—"PROPERTY OWNER."

Under Rev. St. 1909, § 9255, providing that if a majority of the resident owners of property liable to taxation for a street improvement at the date of the passage of the resolution therefor, owning a majority of the front feet owned by residents of the city abutting on the street, shall not file a protest, a contract may be let for the work, a person having a contract for property of which he has taken possession, and on which he is living, and who has made part payment of the purchase price and been offered a deed, which has not been delivered because corrections therein were required, is a "property owner" entitled to sign such a protest.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 797, 798; Dec. Dig. § 297.*]

For other definitions, see *Words and Phrases*, vol. 6, p. 5728.]

2. MUNICIPAL CORPORATIONS (§ 297*)—PUBLIC IMPROVEMENTS—PROTESTS—"RESIDENT OWNER."

Under Rev. St. 1909, § 9255, a former resident of a city, who, with his family, has moved into the country, where he votes, is assessed, pays his taxes, and sends his children to school, is not a resident owner, although he

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes 151 S.W.—14

states that he intends to return to the city, since, while residence is largely a question of intention, an accomplished act cannot be overturned by the mere assertion of a contrary intention.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 797, 798; Dec. Dig. § 297.*]

3. MUNICIPAL CORPORATIONS (§ 297*)—PUBLIC IMPROVEMENTS—PROTESTS—"RESIDENT."

An owner residing outside a city, who moves to the city intending to remain there and become a citizen, immediately becomes a "resident" qualified to sign such protest.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 797, 798; Dec. Dig. § 297.*]

For other definitions, see *Words and Phrases*, vol. 7, pp. 6161-6166; vol. 8, p. 7788.]

4. MUNICIPAL CORPORATIONS (§ 297*)—PUBLIC IMPROVEMENTS—PROTESTS.

Under Rev. St. 1909, § 9255, a signer of the protest must have been qualified to sign it at the time the resolution was passed; and if not then qualified he cannot subsequently become qualified.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 797, 798; Dec. Dig. § 297.*]

Appeal from Circuit Court, Adair County; N. M. Pettingill, Special Judge.

Action by George Shaw against G. A. Goben and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Higbee & Mills, of Kirksville, for appellants. Charles E. Murrell, Smoot & Cooley, and A. Doneghy, all of Kirksville, for respondents.

ELLISON, J. This proceeding is by injunction, whereby plaintiff, a citizen of Kirksville, seeks to enjoin the city authorities from letting a contract for paving a certain street therein. A temporary injunction was granted, which afterwards, at the hearing of the case, was dissolved, and plaintiff appealed.

It appears that the paving was regularly proposed by proper resolution; and the city council, having found that a majority of the citizens owning property abutting the street had not protested, passed an ordinance directing the letting of a contract for paving. It is provided by statute (section 9255, R. S. 1909) that "if a majority of the resident owners of the property, liable to taxation therefor, at the date of the passage of such resolution, who shall own a majority of the front feet owned by residents of the city abutting on the street, avenue or alley proposed to be improved, shall not, within ten days thereafter, file with the city clerk their protest against such improvements, then the council shall have power to cause a contract for said work to be let to the lowest and best bidder."

A protest was filed, and the question is: Did it contain a majority of the resident owners of property, who own a majority of front feet owned by residents of the city? The contest is over the qualifications of two men, Webster and Vice. The former signed

the protest, and defendants claim he was not a qualified signer by reason of not being a resident of Kirksville, as required by the statute. Vice was conceded to be a resident; but plaintiff claims that he was not a property owner, and therefore should not be counted in determining whether the protest was signed by a majority of property owners. Either of these questions being determined in favor of defendants' view affirms the judgment.

[1] The evidence showed that Vice did not have a deed to the property which, it is claimed, made him a property owner. But it showed that he had a contract for the property, and had taken possession and was living thereon, and had paid \$1,000 in part payment of the purchase price, and had been offered a deed, which was returned for correction, and, owing to the fact that there were many joint owners, he had not yet received it. We think him a property owner, and that he was properly counted as such by the city council. He was the equitable owner, and could have compelled the execution of a deed upon tender of balance of purchase money. 22 Amer. & Eng. Ency. of Law, 925.

[2] The evidence showed that Webster was formerly a citizen of Kirksville, and that two or three years prior to signing this protest he moved with his family to a farm several miles in the country. He voted there at a primary election. He was assessed and paid his taxes there, and there sent his children to the public school. He stated, however, that he intended to return to Kirksville if conditions got better. Residence, as well as citizenship, is largely a question of intention; but one cannot overturn an accomplished fact by the mere assertion of a contrary intention. *Lankford v. Gebhart*, 130 Mo. 621, 638, 32 S. W. 1127, 51 Am. St. Rep. 585. A man who voluntarily and purposely does a thing will not be believed when he says that he did not intend to do it. Acts speak louder than words. So while Webster was residing with his family outside of Kirksville, he was not residing inside that place.

[3, 4] But it was shown that he moved with his family back to Kirksville on the 23d of November, 1911, intending to remain and become a citizen. On that day, though not yet a citizen qualified to vote, he became a resident qualified to sign a remonstrance, within the meaning of the statute. But the resolution was passed more than two weeks before his return to Kirksville. The statute requires that, to be qualified to sign a protest, he must be a resident at the time the resolution is passed.

We do not think the first point of objection to the judgment made in plaintiff's brief, as well as other objections, are well taken.

The foregoing considerations affirm the judgment. All concur.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

PACKARD PIANO CO. v. WILLIAMS.

(Kansas City Court of Appeals. Missouri.
Nov. 25, 1912. Rehearing Denied
Dec. 9, 1912.)

SALES (§ 454*)—NATURE OF CONTRACT—
"BAILEMENT FOR SALE"—"CONDITIONAL
SALE."

A contract providing that certain property should be held on consignment until sold by consignee with consignor's approval, that it should be invoiced to the consignee at a fixed price, and, while he could sell it at any price he saw fit, any overplus, after deducting expenses paid by him, should go to him as his compensation, and that the consignor could annul any sale and retake the property, and under which the consignee was not required to pay anything for the property, but was required merely to turn over certain of the proceeds of sales, the consignor having the right at any time to order the property returned, constituted a bailment for sale, and not a conditional sale, within Rev. St. 1909, § 2889, making conditional sales fraudulent as to creditors, unless acknowledged and recorded.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1324, 1325, 1333, 1334; Dec. Dig. § 454.*

For other definitions, see Words and Phrases, vol. 2, pp. 1408-1410.]

Appeal from Circuit Court, Adair County;
Nat M. Shelton, Judge.

Action by the Packard Piano Company against George F. Williams. From a judgment for defendant, plaintiff appeals. Reversed and remanded.

Smoot & Cooley, of Kirksville, for appellant. Higbee & Mills, of Kirksville, for respondent.

ELLISON, J. Plaintiff is a corporation engaged in selling musical instruments, and one Tallman was in the retail music business in Kirksville. A creditor of Tallman obtained a judgment against him, upon which execution was issued and placed in the hands of the sheriff, who levied it upon a piano and organ in Tallman's possession. Plaintiff, claiming to be the owner of the instruments brought this action of replevin against the sheriff. The judgment in the trial court was for the defendant.

Tallman got the property from plaintiff under the terms of a written contract between them, and the sole question is whether such paper evidenced a sale by plaintiff to Tallman, or a consignment to sell for plaintiff as its agent. The contract is divided into 10 paragraphs or divisions, and is so redundant in verbiage as to be confusing. Putting it into smaller compass, we find it provides, in the first division, that the property is to be held by Tallman on consignment until sold and sale approved by plaintiff, Tallman to keep insurance for plaintiff's benefit. Second. It appears from this division that the property is invoiced to Tallman at a certain price for which he must account to plaintiff in this way, viz., if the sale is for cash, then the invoice price, less

whatever discount may be agreed upon for cash remitted to plaintiff. If the sale is for notes, he indorses sufficient notes to make the invoice price and 20 per cent. more, which per cent. is to be credited to Tallman until the notes and interest thereon representing invoice price are collected, when it is to be paid to Tallman. If a sale for notes is not accepted by plaintiff, or if accepted and notes defaulted, then Tallman, on plaintiff's demand, is to take property from the purchaser and deliver to plaintiff if it wants it. If the property cannot be retaken, Tallman is then to pay plaintiff in cash. Other provisions allow plaintiff to retain all notes as security for any indebtedness of Tallman. Third. It is provided that, if Tallman should fail to indorse a note, plaintiff is authorized to do so for him. Fourth. Tallman is to pay all freight and taxes. Fifth. Provides that notes shall stand as security to plaintiff. Sixth. Provides that all property retaken from purchasers plaintiff may, if it so desires, reassign to Tallman. Seventh. If any property is returned to plaintiff, Tallman is to be credited with the invoice price less 10 per cent. as liquidated damages for shop wear, etc. Eighth. Tallman agrees, on demand, to deliver back to plaintiff all goods unsold and all notes in which plaintiff may have an interest. Ninth. Tallman is to make monthly report of all instruments on hand, or in possession of prospective purchasers, and not paid for. Tenth. Tallman agrees to assist plaintiff in all collections without charge, and that plaintiff may at all times have access to his books.

We have a statute in this state (section 2889, R. S. 1909) which avoids, as fraudulent, as to creditors, all conditional sales unless acknowledged and recorded, and it has been held in many instances that no disguise under the name of consignment or agency will be allowed to evade this statute. *Manufacturing Co. v. Carriage Co.*, 152 Mo. App. 401, 133 S. W. 412; *Bicking v. Stevens*, 69 Mo. App. 168; *In re Rabenau* (D. C.) 118 Fed. 471. On the other hand, it has been decided by the Supreme Court and this court that, notwithstanding the statute, there may be consignments for sale, or sale agencies established, where the consignor will remain the owner without the necessity of recording his agreement. *Weir Plow Co. v. Porter*, 82 Mo. 23; *Peet v. Spencer*, 90 Mo. 384, 2 S. W. 434; *Wilson-Moline Buggy Co. v. Priebe*, 123 Mo. App. 621, 100 S. W. 558. And so it is elsewhere held. *In re Columbus Buggy Co.*, 143 Fed. 859, 74 O. C. A. 611; *Lenz v. Harrison*, 148 Ill. 598, 36 N. E. 567.

So the question is: Does this contract evidence a sale or a consignment to an agent? It undoubtedly embodies some of the characteristics of each. Among the evidences of Tallman's ownership is the provision that he shall pay the freight, pay for insurance,

and, though paying a fixed price to plaintiff, selling at any price he pleases, the latter being one of the marks especially establishing a sale as distinguished from a bailment, unless controlled by other parts of the agreement. But there is no reason why one party may not put his goods in the hands of another to sell for him, and agree upon any mode of compensation he likes, including whatever sum that other may sell for over the fixed price to be paid the owner, less whatever he obligates himself to pay out for freight and insurance, provided other parts of the agreement make clear that the property has not passed. In *McCullough v. Porter*, 4 Watts & S. (Pa.) 177, 39 Am. Dec. 68, this illustration is given: "Were I to put my horse into the custody of a friend to be sold for a designated sum, with permission to retain whatever should be got beyond it, it would not be suspected that I had ceased to own him in the meantime, or that my friend would not be bound to return him, even without a stipulation, should he have failed to obtain the prescribed price." In *Re Columbus Buggy Co.*, 143 Fed. 859, 74 C. C. A. 611, after using that illustration from *McCullough v. Porter*, it is said that: "A contract between a furnisher of goods and the receiver that the latter may sell them at such prices as he chooses, that he will account and pay for the goods sold at agreed prices, that he will bear the expense of insurance, freight, storage, and handling, and that he will hold the unsold merchandise subject to the order of the furnisher, discloses a bailment for sale, and does not evidence a conditional sale. It contains no agreement of the receiver to pay any agreed price for the goods. It is not, therefore, affected by a statute which renders unrecorded contracts for conditional sales voidable by creditors and purchasers. The fact that such a contract provides that the receiver of the goods may fix the selling prices, and may retain the difference between the agreed prices of the accounting and the selling prices to recompense him for insurance, storage, commission, and expenses, does not constitute the contract an agreement of sale. It still lacks the obligation of the receiver to pay a purchase price for the goods and the obligation of the furnisher to transfer the title to him for that price." A reference to the contract, as epitomized by us, seems to clearly disclose a bailment for sale. It shows that the property is to be held on consignment until sold by Tallman, the sale to be approved by plaintiff. Next the property is invoiced to Tallman at a fixed price, and, while it may be sold by Tallman at any price he sees fit to ask, the overplus, after deducting expenses for insurance, freight, and taxes, going to Tallman as his compensation, yet a sale may be annulled by plaintiff, and the property ordered to be taken from the purchaser. But above all, and as making clear

the relation these parties bore one to the other, the face of the whole contract shows Tallman was not to pay anything for the property. *Lenz v. Harrison*, supra, a case quite applicable to this. He was merely to turn over the proceeds of sales which he might make. And the eighth division of the contract allows plaintiff at any time to order the property (which has not been sold) to be returned to it. We have no fault to find with cases cited by defendant. They concede that parties may place and receive goods in consignment for sale without trenching upon the statute, but they properly decide that a sale in reality will be called a sale though disguised by words, such as "consignor," "agent," "agency," etc.

We are satisfied the judgment should have been for the plaintiff; and it will be reversed and the cause remanded that the entry may be made. All concur.

THORNTON v. MERSEREAU.

(St. Louis Court of Appeals. Missouri. Nov. 12, 1912.)

1. APPEAL AND ERROR (§ 1002*)—VERDICT—CONCLUSIVENESS.

A verdict on conflicting evidence, rendered under proper instructions submitting the credibility of the witnesses, is conclusive on appeal.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3935-3937; Dec. Dig. § 1002.*]

2. MASTER AND SERVANT (§ 6*)—CONTRACT OF EMPLOYMENT—EVIDENCE—ADMISSIBILITY.

Where, in an action for services rendered, the issue was whether there was a contract between plaintiff and defendant, the testimony of a witness that he was in defendant's office with plaintiff and a party to a conversation between them, and that defendant agreed to give plaintiff and the witness a specified sum per week each as expense money, was admissible to prove the contract for plaintiff, in the absence of anything to show that the contract between witness and plaintiff on the one hand was a joint contract between them and defendant, so that it was immaterial whether the witness had carried out his contract.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 6; Dec. Dig. § 6.*]

3. TRIAL (§ 203*)—INSTRUCTIONS—SUBMISSION OF WHOLE CASE.

The court, undertaking to give an instruction on the whole case, must cover, not only plaintiff's, but also defendant's, side.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 477-479; Dec. Dig. § 203.*]

4. TRIAL (§ 253*)—INSTRUCTIONS—SUBMISSION OF WHOLE CASE.

Where, in an action for services, plaintiff proved an employment, the rendition of services thereunder, and their value, while defendant under the general denial proved that plaintiff was a partner in the work, an instruction authorizing a recovery if the parties entered into an agreement whereby plaintiff was to perform services, and plaintiff performed such services, was erroneous, when undertaking to cover the whole case, for failing to cover the issue of partnership.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 613-623; Dec. Dig. § 253.*]

5. PARTNERSHIP (§ 218*)—EXISTENCE OF RELATION—QUESTION FOR COURT OR JURY.

The fact of partnership, not necessarily created by a mere participation in profits and losses, is a matter for the jury, where there are facts authorizing a verdict to that effect, and the character of the contract between the parties must be deduced from the evidence; but the court must determine whether there is such evidence as will entitle the jury to find partnership.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 426-428; Dec. Dig. § 218.*]

6. WORK AND LABOR (§ 4*)—RECOVERY FOR SERVICES RENDERED.

One who is employed to superintend the construction of construction work, and who renders services under the employment, is entitled to recover for the services actually rendered.

[Ed. Note.—For other cases, see Work and Labor, Cent. Dig. §§ 3-7; Dec. Dig. § 4.*]

Reynolds, P. J., dissenting in part.

Appeal from Circuit Court, St. Louis County; G. A. Wurdeman, Judge.

Action by Ben B. Thornton against Charles V. Mersereau. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

L. A. Hall, of St. Louis, for appellant. Geo. B. Logan, of St. Louis, for respondent.

REYNOLDS, P. J. The petition in this case as originally framed consisted of four counts. The first and fourth were abandoned at the trial and while there was a verdict for plaintiff on the third count, he remitted all of that verdict so that the only count necessary for consideration is the second. That states that plaintiff entered into the service of defendant, at the request of defendant, and served as superintendent of construction of certain construction work, the work being the construction of certain alleys in the city of St. Louis and the construction of certain abutments in St. Louis county of a railroad; that he was engaged in the work for thirty-three and one-half weeks, with the exception of three weeks; that the reasonable value of the services was \$25 per week, making a total of \$833.33 and that the only money he had been paid as compensation for his work amounted to \$175.25. Judgment was demanded for the difference.

The answer was a general denial.

The jury returned a verdict in favor of plaintiff on the second count for \$500, and on the third count for \$50, but under a motion for new trial filed by defendant, plaintiff remitted \$175 of the verdict as to the second count and all of the amount returned on the third count. Judgment followed, plaintiff filing motions for new trial and in arrest, saving exception to the overruling of these, has duly perfected his appeal to this court.

The evidence of plaintiff as to the second count tended to show that he had an agreement with defendant as to superintending the doing of the work mentioned in the peti-

tion and that he was to receive a certain sum per week, also another sum as board money, and to have a share in the profits of the contracts under which the work was to be done; that defendant had failed to keep the contract.

Appellant makes six assignments of error here. First, to the refusal of an instruction in the nature of a demurrer to the evidence under the second count, asked at the close of plaintiff's evidence and of the whole case. Second, to error in the admission of certain evidence offered by plaintiff, it being contended that it was improper, incompetent, irrelevant and immaterial; and third, error of the court in giving an instruction at the instance of plaintiff and in refusing an instruction asked by defendant. Fourth, that the verdict and judgment is for the wrong party. Fifth, that it is the result of passion, prejudice and sympathy, and finally for the error of the court in overruling defendant's motion for new trial and his motion in arrest.

[1] Taking these up in their order, we cannot agree, even on the showing made by counsel for defendant, that the demurrer to the evidence under the second count of the petition should have been sustained. There was evidence given on the part of plaintiff in support of that count and while the testimony of the witnesses for plaintiff and defendant was very contradictory over this, its determination was for the jury and their finding is conclusive.

Counsel under this assignment argues that plaintiff's testimony is not entitled to belief. That matter was distinctly submitted to the jury by the instruction given at the instance of appellant, that if the jury believed from the evidence that any witness had willfully sworn falsely to any material fact, the jury was entitled to reject the testimony of that witness. The jury were further told by an instruction asked by appellant, that the burden of proof was on plaintiff and that he must prove his case by the greater weight of the evidence, and if the jury found from the evidence that plaintiff had failed to prove his case as to any one or more counts of his petition by the greater weight of the testimony, their verdict should be for defendant as to such count or counts. So that we rule the first assignment of error against appellant.

[2] The second assignment as to the admission of improper evidence is founded on evidence given by a certain witness, who testified that he was in appellant's office with respondent, was a party to the conversation between them, and in that conversation defendant had agreed to give plaintiff and witness \$2 a week each as expense money. Defendant objected to this and moved to strike out the evidence of the witness "because it is not shown that that contract was

ever carried out;" that plaintiff's evidence shows that this witness never became a party to any of this transaction at that time, and further that what the witness testified to was a conclusion, and counsel moved to have it stricken out. Counsel for appellant argues that it is apparent that if there was an agreement made between plaintiff, defendant and this witness, that contract, so far as the witness was concerned, was never carried out, and the fact that a contract of this character may have been made, to which the witness was a party and which is shown by his own testimony and that of plaintiff had never been carried out, is not admissible to prove and does not tend to prove that there was a contract between plaintiff and defendant, as the witness had testified that they were wholly unsuccessful in getting work and that he (witness) quit. There is no pretense that the contract between the witness and plaintiff on the one hand was a joint contract between them and defendant, so that while it was immaterial whether the witness had carried it out or not, his testimony was most clearly relevant, material and competent as tending to prove the contract on behalf of plaintiff with defendant. That error assigned is not tenable.

[3-5] The third assignment of error relates to the giving of an instruction at the instance of plaintiff and the refusing of one asked by defendant. The instruction given at the instance of plaintiff, of which complaint is made, in substance, is as follows: that if the jury found from the evidence that plaintiff and defendant entered into an agreement whereby plaintiff was to perform services for defendant in the capacity of foreman of construction and that plaintiff did in fact perform such services and such services were of value, then the jury will find for plaintiff for the reasonable value of such services as they may believe from all the evidence in the case plaintiff may be entitled to. It is urged against this instruction that it undertakes to cover the whole case and omits all reference to the defense set up by appellant. The defense pleaded was a general denial. At the trial defendant, appellant here, undertook to prove that in point of fact plaintiff was a partner with him in the work of construction, payment for which is the basis of the action. It is the duty of the court, when undertaking to instruct on the whole case, to cover not only the plaintiff's side of it but that of the defendant.

Plaintiff testified that he and defendant were partners in the matter, plaintiff denying partnership and claiming an interest in profits only, which he testified had not been paid him, hence his action on quantum meruit.

The fact of partnership is a matter for the determination of the jury, if there are facts in evidence authorizing a verdict to

that effect, *McDonald v. Matney*, 82 Mo. 358, and the character of the contract between the parties is to be deduced from the evidence, *Torbert v. Jeffrey*, 161 Mo. 645, loc. cit. 654, 61 S. W. 823, and it is for the court to determine whether there is such evidence before the jury as will entitle them to find partnership. *Edgell v. Macqueen*, 8 Mo. App. 71, loc. cit. 76; *Carson et al. v. Culver et al.*, 78 Mo. App. 597, loc. cit. 603. "A mere participation in the profits and loss does not necessarily constitute a partnership," between the parties so participating," says our Supreme Court in *McDonald v. Matney*, supra, 82 Mo. loc. cit. 365, citing and quoting from several cases. See also *Torbert v. Jeffrey*, supra, and *Nugent v. Armour Packing Co.*, 208 Mo. 480, loc. cit. 487 et seq., 106 S. W. 648. With this evidence in the case, the majority of our court hold that the trial court, in undertaking to instruct on the whole case, should have covered this issue. I do not agree to that. Counsel for respondent argues that as there was no plea of partnership, the answer being a general denial, that the evidence as to partnership should have been disregarded. Whether it should have been pleaded is not necessary to decide, as the evidence concerning it went in without objection.

[8] Appellant complains of the refusal of the court to give an instruction asked by him which, in substance, told the jury that if it believed from the evidence that the services mentioned in the second count of the petition were performed under an agreement between plaintiff and defendant and that defendant "did not under such agreement mentioned in these instructions, agree to pay plaintiff a salary for all or any part of such services, then plaintiff is not entitled to recover on the second count of his petition and your verdict on such count will be for defendant." This instruction is not correct and should not have been given in the form asked; it would have been error to say that plaintiff could not recover for "all or any part," unless defendant had agreed to pay plaintiff for all or any part, for the defendant surely was entitled to recover for that part of the services he might have proven he had rendered.

The above assignments are the material ones. As the judgment will be reversed and the cause remanded, it is unnecessary to consider the assignment as to the amount of the verdict.

We find no suggestion whatever in the argument of counsel for appellant even tending to show why the motion in arrest of judgment should be sustained.

For error in the first instruction, in that it fails to cover the whole case, while purporting to do so, the majority of the court are of the opinion that the judgment should be reversed and the cause remanded. It is so ordered.

CREASEY v. CREASEY.

(St. Louis Court of Appeals. Missouri. Nov. 12, 1912. Rehearing Denied Dec. 3, 1912.)

1. HUSBAND AND WIFE (§ 288*)—SEPARATE MAINTENANCE—RIGHT TO ALLOWANCE OF MAINTENANCE.

In view of Rev. St. 1909, § 8295, providing for support and separate maintenance for a wife, that the allowance shall be for such time as the nature of the case shall require, and that the court shall from time to time make further orders as shall be just, a husband's abandonment of and failure to support his wife will not entitle her to separate maintenance for any given length of time, and his sincere offer to take her back and maintain her with conjugal kindness and affection, even after decree for maintenance, will defeat her right to separate maintenance.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 1077; Dec. Dig. § 288.*]

2. HUSBAND AND WIFE (§ 298½*)—SEPARATE MAINTENANCE—POSTPONEMENT.

In an action for separate maintenance it is not error for the trial court to take the case under advisement and postpone its decision to a later date in order to give the parties an opportunity to become reconciled.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 1091, 1092; Dec. Dig. § 298½.*]

3. APPEAL AND ERROR (§ 265*)—EXCEPTIONS IN COURT BELOW.

Unless excepted to, the propriety of the action of the trial court in taking an application for separate maintenance under advisement and postponing its decision so that the parties may become reconciled cannot be reviewed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1461, 1536-1551; Dec. Dig. § 265.*]

4. HUSBAND AND WIFE (§ 298½*)—REOPENING CASE—DISCRETION OF TRIAL COURT.

In an action by a wife for separate maintenance, the trial court has the discretionary power of reopening the case and hearing additional evidence on the husband's attempts to effect a reconciliation after the action had been taken under advisement.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 1091, 1092; Dec. Dig. § 298½.*]

5. HUSBAND AND WIFE (§ 297*)—SEPARATE MAINTENANCE—EVIDENCE.

In a suit by a wife for separate maintenance, evidence held to support a finding that the defendant offered in good faith to take plaintiff back and maintain her.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 1090; Dec. Dig. § 297.*]

6. HUSBAND AND WIFE (§ 299*)—SEPARATE MAINTENANCE—JUDGMENTS—CONCLUSIVE-NESS.

An adverse judgment, in an action for separate maintenance by a wife whose husband had abandoned her, will be no bar to a future action, if upon the resumption of the marital relations he shall illtreat her, or upon an attempt to return to him in accordance with his offer he shall repulse her.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 1094-1097; Dec. Dig. § 299.*]

Appeal from Circuit Court, Audrain County; Jas. D. Barnett, Judge.

Action by Carrie B. Creasey against Ma-

son M. Creasey. From a judgment for defendant, plaintiff appeals. Affirmed.

Suit for maintenance brought by the wife against the husband under the provisions of section 8295 of the Revised Statutes 1909. The defendant, husband, had judgment, and the plaintiff has appealed.

The petition alleged that defendant, without good cause, abandoned his wife and refused and neglected to provide for her, other than to permit her to occupy one of his tenement houses. The answer admits the marriage and contains a general denial; also a plea, in substance, that defendant had offered to receive his wife again into his home and to afford her suitable maintenance, and was willing and able to do so, and that such offer, willingness, and ability continued up to the time of filing the answer. The reply alleged that the offer was not made in good faith and that defendant was not willing, etc. The trial began on June 14, 1910, and the hearing occupied that and the next day. The parties then announced that they rested, whereupon the court gave some declarations of law as offered by the plaintiff, modified some and gave them as modified, and refused others. It then laid the case over "to give the parties an opportunity to become reconciled." On November 9, 1910, the matter was called again for hearing, both the parties and their attorneys being present, and the court offered to give each party an opportunity to offer further evidence as to anything which might have happened in the interim. The defendant then offered testimony as to what had occurred in the way of endeavors on his part to effect a reconciliation with his wife. The plaintiff offered no testimony and refused to offer any, contenting herself with a mere formal statement by counsel in open court that her husband's endeavors were not in earnest; that some six weeks before she had asked the court to allow the costs and stated as a ground for the motion that she willingly forgave the defendant and promised to live with him as his wife; that the motion still remained undisposed of and no effort had been made to call it up; that "we do now consent to return and live with him." Counsel for plaintiff stated that he "offered no testimony at all on the theory that all this testimony has been improper." Thereupon the court rendered its decision and caused judgment to be entered, wherein it finds on the entire evidence that, though defendant originally abandoned plaintiff without cause and continued in fault until he endeavored in good faith to become reconciled to his wife and to provide for her, he has since September term, 1910, "been in good faith endeavoring to be reconciled to his wife and to have her live with him and to make ample provision for her," and, "finding no good

reason for the parties to longer live separate and apart," the court dismissed the cause at defendant's cost. The testimony upon which these findings were based occupies 522 pages of the printed record. It is not practicable to set forth within the necessarily narrow confines of a judicial opinion even a full synopsis of such a mass of testimony. The only question raised here which calls for a reference to the testimony is whether the defendant's offer to take his wife back was made in good faith. With that question in mind we have carefully reviewed the entire testimony and base our decision of the question last mentioned on that. However, the following statement is, we believe, a fair indication of the general purport or trend of the testimony:

Plaintiff and defendant were married in Mexico, Mo., April 17, 1907. Both had been residents there for 25 or 30 years. Each had been married before. She had a minor son by her former marriage; he had three minor children by his. He was 46 years of age at the time of the trial, was engaged in the secondhand furniture business, and had property worth some \$20,000, and an income of about \$175 per month. He was a sober, industrious man, and both were of excellent moral character. Upon their marriage they, with their respective children, took up their abode in a commodious, well-furnished, and desirably situated residence which was owned by the defendant. Plaintiff's aged father also soon made his home there, paying no board, though there is some evidence that he did work for defendant to pay for his keep. For over a year and a half—that is, until about January 1, 1909—happiness reigned supreme in the home, and kindness and respect characterized the conduct of its inmates toward each other. Just what caused an entire change after that date is not disclosed, but thereafter the parties became cold and indifferent and avoided and repulsed each other. He was discourteous, professed not to love her, and reproved her in the presence of his children, and she was not without fault. Nothing, however, occurred between the parties which formed any insuperable obstacle to them thereafter becoming reconciled. Affairs culminated in defendant moving plaintiff into another and smaller house owned by him and then leaving her and filing suit for divorce, charging that she had offered such indignities to him as to render his condition intolerable. He filed the divorce suit on July 21, 1909, the day he left her. He left her no money and little provisions, and after a while ordered the merchants of the town to sell her nothing on his credit. He contributed nothing to purchase food and clothing for her until February 7, 1910, when the court, in this suit for maintenance, made her a temporary allowance of \$100 for immediate personal

needs, \$150 for her attorney's fees, and \$40 per month thereafter. Until then she subsisted on money she earned, clerking in a department store, and on such credit as she could obtain on her own account, occupying, however, the house he had placed her in, rent free.

On September 29, 1909, while his divorce suit was pending, the defendant herein called upon plaintiff. A Mrs. Tucker was making a call on plaintiff at the time. Thereupon, in the presence of Mrs. Tucker, he asked his wife to come back to him. It is needless to describe that offer or incident here. It is described and discussed in another suit between the parties, the opinion in which is handed down with this one. *Creasey v. Creasey*, 151 S. W. 219. It is the same with other offers alleged to have been made up to the time of the first hearing of this suit. It may be accepted that defendant made no sincere offer to return to his wife or to take her back until at least after such first hearing. The divorce suit was dismissed on September 29, 1909, the day defendant first called on his wife after the separation, as aforesaid. At the first hearing in this suit defendant professed to love his wife, and expressed a desire and willingness to have her come back. On her part she denied that she had gotten into a temper of mind, that she did not love her husband, and said that she loved him all the time. She would not say whether she loved him at the time of the trial. She admits that she had done nothing towards resuming her marital relations. Being asked whether she would live with her husband, she was not permitted to answer because of the objection of her counsel. The evidence on the second hearing tends to prove that after the first hearing—that is, after the court had laid the case over to give the parties a chance to become reconciled—the defendant called on plaintiff three times trying to induce her to return to him and met with refusals. Then he went to Texas on a visit and while there wrote two letters to her. They are profuse with protestations of love and entreaties to her to come back to him and contain promises to forgive and requests to be forgiven. It does not appear that she answered any but the first letter. In such answer, under date of July 13, 1909, she told him that it seemed too true that he had already forgotten the way he had "imposed" on her, and suggests that he had written at some other person's suggestion and dictation and not with his own words. She insinuates that he is writing pursuant to a "lesson" in accordance with a "plan." She states that her heart is broken; that she feels entitled to his love and would give the world for it, but that her intuition tells her that it would never do, for he had long since made up his mind to discard and hu-

millate her. Her letter ends with, "I must close for I tremble so as I write this, and I do not want to say anything to discourage either of us in an honest effort to forget our differences." When defendant returned he called on plaintiff and asked her if, after studying the matter over, she was ready to come back, stating that he was willing to drop all past trouble and wanted her to do the same. He testified that he made this call upon his wife because he loved her. He repeated these visits 12 or 15 times asking her every time to come and live with him. She refused, saying that he was trying to set a trap to catch her in, and insisting that he deed her the house on South Jefferson street if she went back, and that he would have to go to her lawyers and settle with them. On October 16, 1910, he wrote to her again in the language of love and persuasion asking her to come back or to let him come back, promising to treat her right, etc. He asks for one more interview, intimating that he was getting discouraged and would have to give up unless she would consent this time. All the letters mentioned herein are set forth in full in the case before mentioned between the same parties. Finally she told him that she was "going to let the court pass on it."

During the cross-examination of defendant, plaintiff's attorney asked him whether if he was required to pay the attorney's fee if he would pay it rather than be living apart and separate from his wife, and he answered, "Certainly." The attorney then asked him why he did not take her back, and he answered, "She wouldn't go." Thereupon defendant's attorney challenged plaintiff's attorney to dismiss this suit for maintenance promising that defendant would take his wife back if it was done. Defendant interjected at this point, evidently addressing plaintiff's counsel: "Do you suppose I would have gone down after this woman as many times as I have and talked to her the way I have and not take her back? Would you have gone after anybody as many times as I have and her sit there and say, no, no, every time? Would you have gone back like I have if you wasn't sincere? No, you wouldn't, and no other man." Plaintiff's counsel merely answered, "We will see," and went on with his cross-examination. After this cross-examination had become rather acrimonious, impugning defendant's motives and disclosing or developing considerable antagonism between him and the examining counsel, without, we must say, having any tendency to encourage a desire or display of desire on defendant's part for reconciliation, the defendant refused to tell plaintiff's counsel whether he would take his wife back, saying that, though he had not given up hope of getting her back and had always wanted her to come back, he would let the court decide the matter, she having told him repeatedly

that the court must decide it; that he would not say what he would do after the court had decided the matter, would not say that he would or would not take her back, would not answer the question, would go to her and say what he wanted to say to her regardless of what her counsel did or said. It seems that plaintiff's attorneys filed herein a motion for an allowance of additional attorney's fees, "and for grounds thereof says that she willingly forgives the defendant for those unhappy differences which impelled her maintenance of the present suit, and purposes to faithfully discharge all of her duties as the wife of defendant." Defendant testifies that after this motion was filed he met his wife and asked her if she meant what was said in it, and she said she did. He told her the court had already allowed her attorneys \$150. She said he ought not to pay it again if that was the case. He proposed then that they go right away to the court house and dismiss this proceeding. She said: "No, sir; I am going to let the court pass on it." As we have already mentioned, the plaintiff refused to offer any evidence on the second hearing.

C. A. Barnes and D. A. Murphy, both of Mexico, Mo., for appellant. L. P. Crigler and Barclay, Fauntelroy & Cullen, all of St. Louis, and Fry & Rodgers, of Mexico, Mo., for respondent.

CAULFIELD, J. (after stating the facts as above). [1] Plaintiff's counsel advances the theory that the only issues of fact that could be raised or tried were whether the husband without good cause abandoned his wife and neglected or refused to support her, and that therefore it was error for the court to consider the question whether the defendant was able and willing to resume his duty of making proper provision for his wife and to become reconciled to her and honestly endeavored to do so. Carrying this theory to its logical conclusion, plaintiff's counsel contends in his brief that, an abandonment and failure to provide for the wife having been shown to have existed, "the only thing remaining was for the plaintiff to determine upon what length of time she desired a separate maintenance and support to be awarded, and, if substantial evidence was adduced supporting her prayer, it then became the duty of the court to award it for such period of time, so that when the plaintiff in the case at bar requested an allowance for the remainder of her natural life and predicated her prayer upon the proposition that the defendant had given plaintiff cause for divorce, a decree in accordance with her prayer was the only allowance the court could make." Such theory and the contention based on it are without merit or precedent to sustain them. The courts of various states differ as to whether they have power, without statutory authority, to make and enforce an allowance for

separate maintenance except as incident to a divorce proceeding; but there does not seem to be any question that a sincere offer on the husband's part to take back and maintain the wife and treat her with conjugal kindness and affection will generally defeat her right to a separate allowance. 21 Cyc. 1602; *Kenley v. Kenley*, 2 How. (Miss.) 751; *Hair v. Hair*, 10 Rich. Eq. (S. C.) 163; *Schraeder v. Schraeder*, 26 Ill. App. 524; *McMullin v. McMullin*, 123 Cal. 653, 56 Pac. 554; *Skittletharpe v. Skittletharpe*, 130 N. C. 72, 40 S. E. 851. The wife gets no vested right to separate maintenance because her husband has abandoned and refused to provide for her. Such right ceases if he does not persist in such wrongful conduct and sincerely offers to resume his marital relations and obligations. *Schraeder v. Schraeder*, supra. Nor is the husband's offer to deal rightly by his wife any the less effective to defeat his wife's right to separate maintenance because made after being sued for separate maintenance or even after a judgment in such suit, though, of course, the lateness of his repentance might be considered in adjudging the question of his sincerity. *Schraeder v. Schraeder*, supra. In fact, the judgment should be so framed as to anticipate that contingency and allow only for a separate support to the wife until he will take her back and treat her with conjugal kindness and affection; and such are the usual terms of such judgments. 1 Bishop on Marriage, Divorce & Separation, § 1417. If he should sincerely become willing and offer to do that, the necessity for separate maintenance would cease. *Skittletharpe v. Skittletharpe*, supra. If the judgment was otherwise drawn, it would still be the duty of the court to refuse to enforce it, if it appeared that the parties had come together again, or that the husband was willing to assume his marital relations and obligations and was prevented only by his wife's refusal from doing so. *Reid v. Robinson*, 9 Lower Can. Jurist, 103. Our statute is in harmony with the foregoing ideas, for it provides that the support and maintenance shall be "for such time as the nature of the case and the circumstances of the parties shall require," and that the court shall "from time to time make such further orders touching the same as shall be just." Section 8295, R. S. 1909.

Applying these principles to the facts of the case at bar, it is evident that the trial court did not err in denying plaintiff a judgment for separate maintenance; it being satisfied by substantial evidence that defendant was willing and had repeatedly offered to resume his marital relations and obligations, and was prevented from doing so only by the refusal of his wife.

[2, 3] It was not error for the court to take the case under advisement and postpone its decision to a later day, and if it had been plaintiff did not preserve the point by excepting to such action. *Kuhl v. Kuhl*, 160

Mo. App. 363, 140 S. W. 949. Plaintiff did not suffer because of the postponement, for in the meantime she was enjoying an allowance for temporary maintenance.

[4] Neither did the trial court err in reopening the case and hearing additional testimony bearing on defendant's attempts, after the first hearing, to effect a reconciliation with his wife. It is a matter of discretion with the trial court to admit or exclude testimony after a case has once been closed, and such discretion will not be interfered with except in case of its manifest abuse. *Kuhl v. Kuhl*, supra. And in a suit like this for separate maintenance, where, as we have seen, the judgment, if for plaintiff, would not be a final one, in the sense that term is usually used, but would only be for separate maintenance until the husband was sincerely willing to resume his marital relations and obligations, and would not preclude him from afterwards seeking to effect a reconciliation, evidence of the husband's present attitude would be clearly pertinent to the matter before the court, for it would be idle to enter such a judgment if the husband was then willing to do his duty, and therefore separate maintenance was not necessary. Likewise it was not error for the trial court to modify the declaration of law offered by the plaintiff which declared that if defendant abandoned plaintiff without cause she was entitled to a separate maintenance, by adding thereto, "until defendant resumes his duties of making proper provision for his wife and becomes reconciled to her or honestly endeavors so to do." Such addition was in entire harmony with the law as above mentioned.

[5] Plaintiff further contends that the finding that the defendant's offer to take her back was made in good faith is not supported by any evidence in the case. It is clear that there is no foundation for this contention. The evidence tending to support such finding was ample and was substantially, if not entirely, uncontradicted, as will be seen from our statement of the facts. The plaintiff, though given an opportunity, refused to offer any testimony on that subject. Nor are we inclined to disturb the judgment because the husband finally refused to tell counsel for plaintiff what he would do in the matter of taking his wife back. It is fair to infer that by that time—that is, at that point in his cross-examination—he had become aggravated and wroth at plaintiff's counsel and resented the manner of his cross-examination, and such refusal could more readily be attributed to mere temporary spleen directed at plaintiff's counsel than to a real disposition not to resume his marital relations. Especially is this so when his testimony as to his endeavors to make up with his wife and his declarations in the prior part of his testimony are considered.

[6] We may add to the foregoing that, if the plaintiff returns to her husband, and he should illtreat her to such an extent as to

justify her living apart from him, or if, upon an unequivocal attempt to return to him, he shall repulse her or refuse to cohabit with her as her husband, the decree in this case will not bar her remedy against him. *Schraeder v. Schraeder*, 26 Ill. App. 524, 525.

The judgment is affirmed.

REYNOLDS, P. J., and NORTON, J., concur.

CREASEY v. CREASEY.

(St. Louis Court of Appeals. Missouri. Nov. 12, 1912. Rehearing Denied Dec. 3, 1912.)

1. DIVORCE (§ 37*)—DESERTION—WHAT CONSTITUTES.

Where a husband wrongfully abandoned his wife, she is not guilty of desertion in living apart from him, unless, after a bona fide effort on his part to effect a reconciliation and to obtain her consent to his return, she refuses and continues to live apart for the statutory period.

[Ed. Note.—For other cases, see *Divorce*, Cent. Dig. §§ 27, 107-132; Dec. Dig. § 37.*]

2. DIVORCE (§ 133*)—ACTIONS—DESERTION—EFFORTS AT RECONCILIATION.

In an action by a husband for divorce, evidence held to show that his first efforts at reconciliation were not in good faith, but that subsequent efforts and attempts were in good faith.

[Ed. Note.—For other cases, see *Divorce*, Cent. Dig. §§ 446-448; Dec. Dig. § 133.*]

3. DIVORCE (§ 37*)—DESERTION—EFFORTS AT RECONCILIATION.

Where a husband abandoned his wife, previous insincere efforts to return and effect a reconciliation, while material on the integrity of subsequent ones, do not preclude him from the advantage of a bona fide effort so as to render her acts in continuing to live apart desertion.

[Ed. Note.—For other cases, see *Divorce*, Cent. Dig. §§ 27, 107-132; Dec. Dig. § 37.*]

4. DIVORCE (§ 37*)—DESERTION—EFFORTS AT RECONCILIATION.

Where actions for divorce and separate maintenance were pending between husband and the wife whom he had abandoned, the husband who had made numerous efforts at reconciliation was, upon the wife's offer to return to him, made the night before the day on which her action for maintenance was to be called, entitled to require as a condition to receiving her back that she agree to dismiss the action, without losing the benefit of his offers.

[Ed. Note.—For other cases, see *Divorce*, Cent. Dig. §§ 27, 107-132; Dec. Dig. § 37.*]

5. DIVORCE (§ 37*)—DESERTION—EFFORTS AT RECONCILIATION.

Where a wife, whose husband abandoned her, instituted an action for separate maintenance, alleged offers in her motions for attorney's fees that she was at all times willing and ready to resume marital relations, being but excuses for demanding money, are not such bona fide offers as to render the husband guilty of desertion.

[Ed. Note.—For other cases, see *Divorce*, Cent. Dig. §§ 27, 107-132; Dec. Dig. § 37.*]

6. DIVORCE (§ 37*)—"DESERTION"—WHAT CONSTITUTES.

A husband's wrongful abandonment of his wife does not constitute desertion, if within one

year thereafter she showed by her words or conduct that she acquiesced in the separation.

[Ed. Note.—For other cases, see *Divorce*, Cent. Dig. §§ 27, 107-132; Dec. Dig. § 37.*]

For other definitions, see *Words and Phrases*, vol. 3, pp. 2020-2024; vol. 8, p. 7635.]

7. DIVORCE (§ 37*)—GROUNDS—DESERTION.

Where a husband wrongfully left his wife, and she refused to return to him for more than a year, although he in good faith requested her return, the separation for more than a year does not entitle her to a divorce; the original abandonment in itself not being ground for divorce.

[Ed. Note.—For other cases, see *Divorce*, Cent. Dig. §§ 27, 107-132; Dec. Dig. § 37.*]

8. DIVORCE (§ 133*)—DESERTION—EVIDENCE—CONSENT.

In an action for divorce evidence held to establish that a wife consented to her husband's living apart.

[Ed. Note.—For other cases, see *Divorce*, Cent. Dig. §§ 446-448; Dec. Dig. § 133.*]

Appeal from Circuit Court, Pike County; W. T. Ragland, Judge.

Suit for divorce by Mason Creasey against Carrie B. Creasey. From a judgment awarding defendant a divorce, plaintiff appeals. Reversed and remanded, with directions.

Suit for divorce, wherein plaintiff was denied a divorce and defendant was granted one under the testimony on her cross-bill, with \$2,500 alimony in gross. Plaintiff has appealed. The statutory grounds for divorce stated in the petition are: (1) That defendant absented herself without a reasonable cause for the space of one year; (2) that she offered such indignities to plaintiff as rendered his condition intolerable, particularizing. In her cross-bill defendant states against the plaintiff the statutory ground of offering her such indignities, etc., particularizing. She also makes an allegation, which the trial court treated as a sufficient charge that defendant absented himself without reasonable cause for the space of one year, as follows: "That plaintiff, disregarding his duties as the husband of the defendant, did on or about the 21st day of July, 1909, without any cause or excuse whatsoever, and against the desire and without the consent of defendant, deserted and abandoned defendant, and since said date has ever failed, neglected, and refused to support and contribute to the support and maintenance of defendant and to make any provision therefor, other than to permit her to occupy one of his tenement houses and a special allowance provided for a short period of time by the court in a former and other cause."

With a view to determining whether it justifies the decree, we have carefully examined the evidence, which occupies over 660 pages of the printed abstract. As a result thereof we adopt certain of the findings of fact embodied in the decree of the circuit court, as follows: "The court finds: That plaintiff and defendant were married at Mexico, Mo., on the 17th day of April, 1907, and continued to live together as husband

and wife from that date until the 21st day of July, 1909. That plaintiff and defendant from the date of their marriage until the latter part of January, or first of February, 1909, faithfully demeaned themselves, and that each treated the other with kindness and affection. That during the latter part of January, or first of February, 1909, for some reason not disclosed by the evidence, a coolness sprang up between them, and their relations became estranged, and from that time on until their separation on the 21st day of July, 1909, there were mutual acts of retaliation and recrimination tending to alienate and destroy their mutual affection; but the court finds that all of the acts and conduct on the part of each of them, whether taken singly or together, did not constitute such indignities as to render the condition of either of them intolerable within the meaning of the statute so as to entitle either of them to a divorce on the ground of indignities alone. The court further finds: That from the date of the marriage of plaintiff and defendant until the 18th day of July, 1909, they lived in a large and well-furnished residence located in a desirable residence district in the city of Mexico, Mo. That on the 16th day or July, 1909, the plaintiff, with the intention of getting defendant out of his home and with the intention of abandoning her, after having so done, furnished a small house in a different part of said city of Mexico and removed his family, including plaintiff, thereto. That on the 21st day of July, 1909, and without any change in the general relations then existing between plaintiff and defendant, and without any previous notice or warning to defendant, plaintiff without legal cause or excuse deserted defendant, and on the same date instituted in the circuit court of Audrain county, Mo., his suit for divorce." We may, at this point, add to the foregoing that the divorce suit last mentioned was voluntarily dismissed by the plaintiff on the 29th day of September, 1909, on which day the plaintiff had offered to resume marital relations with the defendant. On November 9, 1909, the defendant instituted a suit for separate maintenance in the circuit court of Audrain county, Mo., which said suit was pending and undisposed of until November 9, 1910, during which time, however, and thereafter, from time to time, the plaintiff made offers of reconciliation and to resume marital relations with the defendant, which she did not accept or act upon.

The only question which we deem necessary to consider at greater length in this opinion is whether either of the parties is entitled to a divorce on the ground of desertion. That depends upon the sincerity of plaintiff's offers of reconciliation, and upon whether by her words or conduct, subsequent to his leaving her, she acquiesced in the separation continuing. In these respects the evidence discloses the following facts: On September 29, 1909, while his first divorce suit

was pending, the plaintiff called at the defendant's house. A Mrs. Tucker was there talking to the defendant. She had come before she had her breakfast, though she lived about four blocks away, and she stated that fact to defendant. It appears to have been the first time plaintiff called since he left his wife. Prior to that time all his efforts seem to have been directed toward procuring a dissolution of his marriage. Whether he and Mrs. Tucker met there by prearrangement so that she might serve as a witness is a question. Plaintiff and Mrs. Tucker testify that, on the evening before, he had asked her to call for the purpose of ascertaining whether his wife would talk to him. They both assert that neither had any idea of finding the other there. She says that she had called twice the evening before and had failed to find defendant in. Defendant testifies in effect that Mrs. Tucker did not make those two calls; that she was home at the time they were said to have been made. Plaintiff does not explain why he did not postpone his visit until he heard finally from Mrs. Tucker as to his wife's willingness to talk with him. Defendant's version of what occurred on this occasion is as follows: Mrs. Tucker told her that plaintiff had been to her (Mrs. Tucker's) house the night before and wanted to know if defendant would have a talk with him. Defendant said: "I don't know. I haven't really recovered from the way Mr. Creasey has done me to have a talk with him." Then, seeing her husband approaching the house, she said to Mrs. Tucker, "There comes Mr. Creasey, and I don't feel like I want to talk with him yet awhile." Mrs. Tucker answered: "If I didn't want to see him I wouldn't go to the door." She did not go to the front door when he rang the bell, and he came around to the kitchen door and asked her if he could come in. She told him it was his house. He came in and said: "Mamma, I have come to have a talk with you. I want you to forgive this and let's go back." He threw his arms out to her, saying: "Mamma, I have come to acknowledge I have done wrong. Come to my arms and let me hug and kiss you." She answered, "Mr. Creasey, I can say to you, as you said to me time without number, that you need not come to me." Then he said, "Now you see, Mrs. Tucker." Defendant said, "Now you see, Mrs. Tucker, wasn't there a plot you two should meet here this morning?" Mrs. Tucker said, "Oh, no." He then said: "Mamma, your nieces are coming this month. I want you to come back home with me to the big house so we can entertain her in the big house." She answered that her niece would be entertained wherever she was. Then he said, "Come on, quit your foolishness." She answered that there was no foolishness with her; that she could not forgive yet; that she would have to have time. He asked her how much time. She said all that she wanted; that he had caused a wound in

her heart it would take a long time to heal; that he had not only humiliated her but her father by having him arrested. Then she turned to him and said, "What would you give to have me back?" He pointed to his breast, and she answered: "Oh, is that all. Mr. Creasey, should I come back to you, you will have to meet conditions that you don't think you will have to meet." She says that ended the interview. Plaintiff testified, as to this first alleged attempt to effect a reconciliation: That when he came into the house he told her he wanted to have a talk with her. That he saw she had company there and that he wanted to talk to her alone. That she said, "No, she wanted a witness." "Very well," he said. Then followed his version of the conversation, which is in substance like hers, except that he says she told him he would have to deed her enough property to keep her as long as she lived. Mrs. Tucker's testimony corroborates his.

We may add here that, when plaintiff's suit for maintenance came on for trial, Mrs. Tucker appeared as a very friendly witness to plaintiff, having come voluntarily from Denver, Colo., where she was then living, for the purpose of testifying on his behalf. It may also be said that before she went to Colorado her conduct, if defendant's testimony is to be credited, savored of intermeddling in the affairs of this couple. Plaintiff caused his then pending divorce suit to be dismissed on that day. Defendant heard of this in a day or two. The divorce suit was then reinstated at her instance in order to have her motion for attorney's fees, which was pending at the time of the dismissal, passed on. It was then finally dismissed. He does not appear to have communicated further with his wife until October 28, 1909, when he sent her a letter by registered mail. It was excluded from evidence on the ground that it was a privileged communication, and it is not preserved in the record. Plaintiff testifies that he sent Will Steele, her intimate friend, to see her. In his answer filed in the maintenance suit plaintiff states that he sent a friend of hers and his, referring, we infer, to Steele, "to get her decision," meaning her decision on his offer made in the presence of Mrs. Tucker. Defendant admits that in the winter or fall of 1909 Steele spoke to her about returning to her husband, but says that when she asked him if he had been sent to see her he said, "No." What she said to Steele is not disclosed. She filed her suit for maintenance on November 9, 1909. In his answer filed in that suit on November 30, 1909, plaintiff admits that he had brought suit against her for divorce, but charges that it was on account of "the acts and conduct of plaintiff." He then sets up his alleged efforts to resume his marital relations and obligations, and further says: "And even now comes defendant and affirms his proffers to this plaintiff, and agrees to take her back and support her if she will come and live

with him; and that there is no necessity for her to work for a living, if she has done so, and no necessity for her to have to employ lawyers to get her the necessities of life, but that this defendant is now and has been since first making the proposition to her, ready, willing, and able to take her back as his wife." In her reply, filed June 13, 1910, she stated, in response to this renewed offer: First, that it was not made in good faith; second, "that there is such an incompatibility in the temperament, disposition, and purpose in life between the plaintiff and defendant that a renewal of the marriage relationship would result in a repetition of the same or similar indignities stated in the plaintiff's (her) petition."

There were two hearings had in the maintenance suit; the first ending June 15, 1910, and the second about November 9, 1910. At the end of the first hearing the court laid over the case or withheld its decision to give the parties an opportunity to become reconciled. Thereupon plaintiff, the husband, caused his wife's uncle, J. A. Vaughn, who was friendly to her, to go and ask her to come back and live with him. This was in June, 1910. She says that she does not remember what she told her uncle. The uncle testified that she answered, "Not yet, she couldn't." He asked her why, and she said: "You don't know it all. He has even had men to watch my house." (We may say here that this "watching" was done by a deputy sheriff on one occasion at plaintiff's instance to ascertain what lawyer defendant was conferring with. It was not intended as a reflection on defendant's conduct and was not so construed by any one.) Plaintiff testified that he sent defendant's pastor to see her in an effort to have her come back. She admits that the pastor called and said something about her coming back to her husband. That she said: "Brother Truex, you don't know all. He hired a man to watch me." She testifies that he told her that her husband had not sent him. When the pastor called is not disclosed.

Shortly after the first hearing of the maintenance suit the plaintiff made a two weeks' visit to Texas. Defendant admits that he called upon her before going, though it is not disclosed what occurred then. While in Texas he wrote her as follows: "Wortham, Texas, July 10, 1910. Mrs. Carrie Creasey, Mexico, Mo.—Dear Wife: In writing you at this time I hardly know how to commence or what to say under the circumstances. Now if I knew you would answer and be nice to me I would surely know better what to say and would feel better about it after I had said it. But I can and do hope for the best this is Sunday morning and it is nice and cool and all are well and happy but myself I will go to Sunday school as I haven't missed a Sunday this year this is a fine place good crops and plenty of everything peaches plums in fact fruit of all kinds as

well as fried chicken are ripe here and a mocking bird has a nest in fathers yard and the old bird came and sit in a tree close to my bedroom windo about day light this morning and sang to me for moore than an hour it was just grand and I am sure if you had of been with me you would of enjoyed it too. and I am sure it would of sounded much sweeter to me. For you are as usual on my mind all the time I do certainly wish you had come with me as I tried to get you to I am sure we both would be happier at least I know I would and I believe you would for I do not see how you can be happy the way things are now I am sure if you will come back to me and we both drop our past troubles and neither one of us never mention the past troubl to the other I am sure we can always get along and be happy for ever. Now don't you think so? Now write and tell me yes and that you will come to me for in spite of all that has been done and said I still love you. Now you just stop listening to others and come to me and see if I dont do as I said I would do. I hope you have been thinking over the two little talks I had with you before I left. Now you would not say if I could come to see you any more or that you would let me in or that you would talk to me if I did come and above all you would not say that you loved me not even a little bit. Now write me at once and say yes I do and will to all of them and I will come to you just as soon as I get to Mexico for I am always lonesome without you and I forgive you for all that has been said or done and I want you to do me the same way I know you said you never would be a wife to me any moore like you had been once but you surely did not mean that Now did you. Please answer this at once and say to me I was only joking and did not mean it Now I could and I would write you a long letter if I only knew you would receive it in the same spirit of earnestness which it was written and answer it. I know we are not going to live always so let us both live in the future so that when our time does come we will not be ashamed or afraid to go to be judged by him who will judge all of us according to the deeds done in the body and in closing this letter I want to say to you this much. you are the only little woman in this world I love and the only one I ever expect to love and I want you to believe me in all seariness and write to me so I can get your letter by saturday sure. Lovingly yours, with many kisses Mason. P. S. I have just been out in the county where they had plenty of watermelons muskmelons and fruit of all kinds We sure had a big time the girls ar canning fruit and making jelly and paservs to beat the band they all live on farms and have plenty of everything My appitite is good and everything tastes good to me I have gained six pounds since I talked with you

as there is plenty of melons fruit and fried chickens here I hope to continu to improve in flesh for some time yet. and I believe if you will only write me the right kind of a letter I will get fat I am going south of here next week a few days to look for a new location to go into business and hope to please you what ever I do anyone can do well here if he will only hustle and I always have hustled and can yet if you will love and encourage me for I know you should anyway and belve you will. M."

This she answered as follows: "Mexico, Mo., July 13, 1910. My Dear Husband: I have received your letter and have read and reread it so often that I can almost quote it, it seems to true that you have already forgotten the way you imposed on me, and I cannot help feeling that like the mocking bird you are writing your lesson in imitation of the bird rather than as the originator of the music. I am glad that your health is improving and you are gaining in weight and if you will keep that up for a few months longer, and continue your lesson it is possible you may perfect you plans. My heart is indeed broken and I feel that I am entitled to your love and affection and would give all the world for it, but somehow my intuition keeps telling me that it would never do, for you, have long since made up your mind to discard and humiliate me. I must close for I tremble so as I write this, and I do not want to say anything to discourage either of us in an honest effort to forget our differences Yours in haste Carrie."

He also wrote to her while there as follows: "Wortham, Tex., July 1910. My Dear Little Wife: Mysterious you are still as great a mystry to me as ever. Now don't you rember back in 1906 before we were married I wrote you a love letter and pictured to you three kinds of trouble 1st the trouble you had already had 2nd the trouble you have and 3rd the trouble you are looking for. Now havent you had trouble enough. I am sure I have. Now it always will be a mystery to me why you turned against me and treated me the way you have I am sure I was good to you and no man ever did love a woman any better and was moore affectionet than I was to you. and I have asked you to forgive me for any thing that I have done that displeased you now it seems you have no love for me at all not even a kind word and all this time you know I do love you with all my heart. Now you said you got my letter but you did not answer it at all you only mentioned the mocking bird Now mama you try it again and see if you cant answer this one with a long letter and tell me I can come and talk with you and you will say something encouragin to me when I do come. Now mama I am sure you will feel better over it if you do. Now you seem anxious for me to stay here several months longer how can you say that when

you know how anxious I am to see and love you. you spoke of the broken heart. yes my heart is broken and all for the love of you and you say you feel you are entitled to my love and affection and would give the world for it. When you know you had it every day yes every minute when you for some unknown reason to me threw it away just as if it was some uncard for toy. and even now when it is being offered to you again you are not only refusing it but seem to spurn it when you know it comes from an honest heart and with all searsness you did not say you would like to be with me or that you would like for me to be with you. I thank you for your promptness in writing me and do hope you will be as prompt in ansuring this one. Now mama as you did not ask me to answer your letter I am taking the liberty just as I did in writing you the first time and hope you will answer this one as promptly as you did the other one so you think you could give the world for my love and affection But your intuitions keeps telling you not to except either for it would never do Now you just listen to me and you come to me and stop listning to your intuitions and evry one else and we will both be happier I have always believed it was other talk and influence over you that was the cause of your doing the way you have. and I believe if others would let you alone even now you would come and be the sweet little wife to me you once was oh how I did love you and always will. you say you do not want to say anything to discourage either of us in trying to forget our differences are you trying to forget our difference if you are an honest effort will clear the way I have already made the honest effort and the way is clear. Now forget the past and writ me a long letter. so with lots of love and many kisses for you I am always your affectionally Mason."

While in Texas he also sent her a post card dated July 7, 1910, stating in substance that he had arrived the night before all right and had a nice trip, etc., and ending with "With love and best wishes to you." Under date of July 13, 1910, he sent her a post card containing the printed words, "I love but thee." From Mexico, Mo., he sent several post cards to her at Springfield. Among these, one dated August 10, 1910, bore the printed legend, "Please don't keep me waiting." Another, undated, had printed on it, "Some one longs for some one." On this card he wrote: "Better love and lost than never loved at all." Another, dated August, 1910, had printed on it, "If a body write a body and get no reply, may a body ask a body just the reason why?" On September 8, 1910, he sent her a post card from Colorado. About September 21, 1910, he sent her a post card on which was printed, "You're the only girl I ever loved—but I can't keep telling you so, all the time."

Across this he had written, "True as gospel." On September 25, 1910, he sent her a post card on which was printed a poem to the general effect that a man was his own best friend and that he should be good to himself. On August 13, 1910, she sent him a postal from Springfield on which was printed, "What's the use of loving if you can't love all the time?" On October 16, 1910, while he was in Mexico, Mo., he wrote a letter to her as follows: "Mexico, Mo., Oct. 16, 1910. My Dear Wife: I hope you will pardon me for taking the libirty of writing you at this time for my thoughts are continually of you. Now I know you do love me. or you would not put your arms around my neck and kiss me so sweetly and so many times and talk so loveing as you did to me last Sunday night. Now I have told you I would always love. Treat you right and do everything in reason for you go anywhere with you and that I would take you back here where I live or I would come to you where you live. Now what more can I do if you can think of anything moore please tell me what it is. you seemed just a little out of humor the other night when I walked home with you. Now I would like to have one moore private talk with you and if I cant induce you to become reconciled and live with me I will hafto give up for I have made so many personal appeals to you to come back and every time I have had to axcept no for an answer. Now if you will write and tell me I can. I will come and take you to lodge Tuesday night or I will take you home from lodge which ever you say Please write and tell me if either one suits you. We can then have a long talk togather and I do hope good results may follow please answer. Lots of love and many kisses for you. Yours Mason."

Plaintiff kept copies of the letters he wrote to the defendant. These letters were admitted in evidence over the objection of the defendant that they were privileged communications, on the theory that she had waived the privilege by withdrawing the objection to them at the trial of the maintenance suit. In addition to sending her these letters and post cards, he went to her house to talk to her 15 or 20 times. On the objection of her counsel that it was a privileged communication, plaintiff was not permitted to give his version of what was said at these interviews. She also wrote him several letters which were not permitted to be introduced in evidence because of the same objection advanced by her counsel. However, in her testimony she admits that on November 5, 1910, "he had been coming down there for months for me to go home with him"; that is, since in June, 1910. Being asked by her counsel what plaintiff said to her when he came to see her, she said: "Well, he would say, 'Come on and go with me, or let me stay with you.' The Court: And you declin-

ed, you refused to do that? A. No, I didn't come right out and refuse." There is no doubt, however, that she did not go back. She admits that at the time of the first hearing in the maintenance suit she could not see her way back to her husband, stating that this was because he treated her so cool when she "offered to return." It does not appear that she had ever offered to return, except that her attorneys in a motion for allowance of costs and attorney's fees had, stated as "grounds thereof * * * that she willingly forgives the defendant (now plaintiff) for those unhappy differences which impelled her maintenance of the present suit, and purposes to faithfully discharge all of her duties as the wife of defendant." The court had already allowed her attorneys \$150 as a fee. After the first hearing of the maintenance suit, and while the plaintiff was endeavoring to effect a reconciliation with her, her attorneys filed another motion in said suit which stated "that an honest effort is being made by plaintiff to secure an amicable adjustment of the differences now existing between the plaintiff and defendant, * * * that, in order that the question of costs in this case up to the present time and the fees of the attorneys therein may not be in any manner construed as operating in restraint of an amicable adjustment of said matters between the parties, the said attorneys respectfully ask the court" to allow the costs theretofore asked for and \$750 attorney's fees, and require the defendant (now plaintiff) to pay the same forthwith.

On October 6, 1910, both the parties went to Springfield, Ill., to attend the State Fair. She had previously told him that she was going. Though they went on the same train, they did not go in each other's company. He went alone; she went in the company of two ladies, one a Mrs. Botkins. Arriving at Springfield, he twice in the railroad station tried to get her to go with him to his sister's, who lived in Springfield, with whom they had stayed on a similar occasion two years before. She told him that the ladies were with her. He suggested that they go too; his sister having plenty of room. She refused. The next day he met her and her party at the fair grounds and talked to her again. While talking to her, Mrs. Botkins came up and said, "Mrs. Creasey, are you going with Mr. Creasey or with us?" to which she answered, "I am going with you." Mrs. Botkins then said, "If you are going with us, come on, and, if you are going with Mr. Creasey, let him take you like a man." Plaintiff said, "That's exactly what I am trying to do." Defendant would not go, though she says when he made these advances he was pleasant and gallant. She did say, however, that, though he asked her to go with him to his sister's that night, he did not then ask her to come and live

with him again. She says that after the Springfield incident and before the maintenance suit was finally determined he came to see her at least on two or three different occasions, spending as much as an hour alone with her. A single isolated instance of her personally offering to go with him is testified to by defendant as having occurred on November 5, 1910, four days before the maintenance suit was to be called for final hearing, and about 9:30 o'clock at night. She told the story of that night under the assumption that all she told occurred in the presence of her boy, and then disclosed that nothing was said in the presence of the boy except that plaintiff shook his finger in her face and said, "Not until you promise me you will go with me Monday morning." Going to the door then he kissed her and said, "Good-bye, I will be here Monday morning." The trial judge then indicated that he would consider only the fragment of the occurrence which the boy is said to have witnessed, following the theory which defendant had invoked, that overtures for reconciliation not made in the presence of a third person were privileged communications. We will, however, mention the excluded story here. She states that she offered to go home with him that night. At first he hesitated, asking her what made her take the notion. Then he said, "all right," he would go and see that the house was prepared for her coming. He returned in about 15 minutes and asked her whether she would go with him Monday morning to get the records clear of the maintenance suit. This she refused to do, and then he would not take her unless she would promise, which she would not do. Asked on cross-examination why she refused, she said that she "owed the man no promise." She did not explain how he came to kiss her good-bye and to promise to be back for her Monday, immediately after reaching this unpleasant deadlock. Plaintiff on cross-examination denied the occurrence and says that she only offered to go providing he "did certain things."

The separate maintenance suit was decided against the wife on November 9, 1910. Thereafter on three occasions plaintiff tried to talk with his wife and she avoided him. Once he called at her house, and she did not come to the door, though the indications were that she was in. He waited and tried to speak to her on the street as she came out of the house, but she passed on and refused to talk to him. Another time she avoided him when he asked to walk home from church with her. In the meantime she appealed from the judgment against her in the maintenance suit. We decided that appeal at this sitting. See *Creasey v. Creasey*, 151 S. W. 215. He filed this suit for divorce on December 14, 1910.

Fry & Rodgers, of Mexico, Mo., P. H. Oulen, of St. Louis, and J. D. Hostetter, of Bowling Green, for appellant. D. A. Murphy and Clarence A. Barnes, both of Mexico, Mo., for respondent.

CAULFIELD, J. [1] We approve of the action of the trial court in denying plaintiff a divorce. It is conceded that the plaintiff left his wife voluntarily, and the trial court has found that neither party had been guilty of misconduct sufficient to constitute a cause for divorce—a finding which we approve. It was incumbent upon him then, if he would justly charge her with statutory desertion, to seek a reconciliation and offer to return. Such an offer must have been made in good faith; that is, with the bona fide intention to bring about a reconciliation, and not merely as a device to defeat her in litigation. Nelson on Divorce & Separation, § 73; Messenger v. Messenger, 56 Mo. 329. If the plaintiff made such an offer in good faith, and she refused, and her refusal continued for the statutory period of one year, he would be entitled to a divorce; not otherwise. She must be taken, under the circumstances, to have been absent by his consent until he offered to return or take her back, and she must have been absent without his consent for the full period of one year before she became guilty of statutory desertion.

[2, 3] Now we are not satisfied from the evidence that from July 21, 1909, when he left her, until in June, 1910, when the maintenance suit was first heard, he made any offer with the bona fide intention to bring about a reconciliation; at least we are not inclined to disturb the finding of the trial court in that respect. During this period of more than 11 months he made but four offers, of which only two may be considered as such. The one said to have been embodied in the letter sent by registered mail must be disregarded because that letter is not preserved in the record and we have no means of judging of its value or effect as an offer. The one said to have been sent through Mr. Steele cannot be regarded as an offer because it was not transmitted to the defendant as such. Steele told her when he called that plaintiff had not sent him. This leaves but two, the one made in the presence of Mrs. Tucker and the one made in plaintiff's answer in the maintenance suit. When the first was made, the relations between the parties were necessarily strained. For several months they had lived jarringly together. He had then left her without warning. For three months his divorce suit had been pending and he had been vigorously endeavoring to obtain a dissolution of the marriage. That suit was still pending when he called. It was a delicate matter for these two to meet in an attempt to restore a broken home, not a matter for a third person to witness. The presence of a third per-

son was not calculated to relieve the strain or to allow of the frank, free avowals, confessions, and discussions so necessary to a successful reconciliation. Plaintiff must have known this, but nevertheless Mrs. Tucker was present, and there is some reason to believe that she was there by his connivance. Be that as it may, it was clearly divulged to him on this occasion that his wife believed that Mrs. Tucker was there by his prearrangement, and that she had considerable reason for so believing; Mrs. Tucker having called before her (Mrs. Tucker's) breakfast, avowedly to deliver a message from him coincidentally with his first visit of ostensible conciliation. This visit was clearly timed most unfortunately and, as he must have known, was more calculated to arouse suspicion and resentment in his wife than a spirit of conciliation. If he had been genuinely desirous to effect a reconciliation at this time, it seems that he would soon have followed this visit up with an offer made under more auspicious circumstances. He was silent for a month, when he registered a letter to her. This but tends to confirm the impression that he was trying merely to make evidence, not to effect a reconciliation. Thereafter he did nothing by way of communicating with his wife, except that he says he sent Steele to see her, and except for his answer in her suit for separate maintenance. As to his sending Steele, it does not appear that he sent Steele to plead with his wife on his behalf or to make her any offer, but merely to "get her decision" in response to his offer made in the presence of the witness Mrs. Tucker. Besides, the fact that he sent Steele is established only by his own uncorroborated testimony, which is in the face of the fact Steele disclaimed to her being sent by him. Steele was not called on as a witness. We see no reason for disagreeing with the trial court's conclusion that the offer made in the presence of Mrs. Tucker was made with a view to its being rejected and not accepted, as a mere device to aid him in litigation, not with a bona fide intention to bring about a reconciliation. The offer which he made in his answer in the maintenance suit is even more subject to objection. Presumptively it was addressed to the court and was intended primarily to defeat her action for separate maintenance. Necessarily it was not couched in terms of entreaty or persuasion, but was cold and formal promising and asking nothing by way of forgiveness. It was accompanied by the charge that his previous suit for divorce was brought on account of "her acts and conduct"; thus, by implication, at least, repeating his prior accusations. It was calculated to embitter, rather than to conciliate. It is clear then that the defendant did not refuse a proper offer of reconciliation a year or more before this suit was brought, and therefore was not guilty of de-

sertion under the statute, and the plaintiff is not entitled to a divorce.

Thus far we find ourselves able to agree with the learned trial court. We cannot agree that the defendant is entitled to a divorce as the court decreed: First, because we do not believe that under the evidence the efforts of her husband after the first hearing in the maintenance suit, to effect a reconciliation, should be denounced as insincere; and, second, because we are satisfied that subsequently to the original separation and within one year thereafter she showed by her conduct that she acquiesced in the separation. As to the first, we may say here that the fact that plaintiff had previously made insincere offers must be considered in weighing the integrity of his subsequent ones; but it does not conclude the matter. The "door of repentance and return" must have been kept open to him for a year, under the law. Now we find that, at the end of the first hearing in the maintenance suit, the trial judge (not the one before whom this case was tried) laid the matter over to give the parties a chance to become reconciled; the evidence, no doubt, suggesting to his mind the propriety and expediency of such a course. We find the plaintiff then resorting, with a surprising though commendable persistency, to all the known modes of effecting a reconciliation. The most that may be said against his sincerity in these subsequent attempts is that he kept copies of the three letters which he wrote. As to the offers contained in these, it may be said that he wished to preserve evidence of them for use in the then pending litigation. This was not conclusive that they were insincere, though it was a circumstance pointing in that direction. It well may be that he made the offers in good faith, intending to perform them if accepted, though at the same time desiring to place himself in the right, in case she refused, by preserving evidence of his offers. The defendant was not advised that he kept copies, so his action in doing so could have had no effect on her, and was not calculated to influence her to reject them. The trouble with his previous offers had been that they were made under circumstances not calculated to lead to their acceptance. Not so with those embodied in these letters. The letters are framed in the language of entreaty and persuasion and, considered as offers of reconciliation, appear to be unexceptionable. To communicate with her by letter was not improper. Indeed, that method of communication is much to be commended, because it gave him an opportunity to express himself calmly and deliberately and gave her an opportunity to consider his offer, without the embarrassment and possibility of renewing the old quarrel, which might attend a personal visit. We are not inclined to view the offers contained in these letters as being insincere, and are fortified in

that view by the evidence of the other offers which he made. His persistent following up of those letters with personal visits dispels any doubt in our minds of the sincerity of the offers they contained. The offer which plaintiff made through defendant's uncle was, it is true, made through a third person, who might be, and in fact was, used as a witness; but he was so friendly and close to defendant that it is improbable that plaintiff would have chosen him as a vehicle through which to convey a fraudulent and insincere offer of reconciliation. To communicate with her through her near and friendly relative was certainly unobjectionable and was calculated to conciliate.

The other offers which plaintiff made personally are not subject to the objection that he preserved evidence of them. Defendant herself testified that on November 5, 1910, "he had been coming down there for months for me to go home with him"; that is, since June. He had no witness on those occasions and did not try to have any. He made those offers privately, and nothing is suggested which affects their sincerity. It is the same with the post cards, which, though not offers, tended in that direction. He kept no copies of them. As we have already intimated, the very number of offers which this plaintiff made after the first hearing in the maintenance suit impresses us with their sincerity. Plaintiff forcefully exclaimed in his examination in the maintenance suit, "Do you suppose I would have gone down after this woman as many times as I have and talked to her the way I have and not take her back; would you have gone after anybody as many times as I have and her sit there and say, no, no, every time; would you have gone back like I have if you wasn't sincere? No, you wouldn't, and no other man." This expresses our impression exactly. It is inconceivable that, if he was then intending formal insincere offers to take her back, the man would have so persisted, and would have resorted to so much repetition. It is possible that the cause immediately moving plaintiff to endeavor to effect a reconciliation was the pendency of the suit for separate maintenance and the desire on his part to avoid a judgment coercing from him performance of the duty to support his wife. That does not diminish the legal effect of his offers to take his wife back, if he made them with the purpose of having her accept them if she would, and with intent, if she accepted, to take her back and treat her with kindness and respect and to perform his marital obligations. "No higher motives than those of convenience, it unfortunately must be allowed, have both induced and preserved multitudes of matrimonial unions." *McMullin v. McMullin*, 123 Cal. 653, 656, 56 Pac. 554, 555. In this case, as we have already indicated, we are satisfied that his offers were sin-

cere, at least in the sense just mentioned, though by no means do we believe that that was the only sense in which he was sincere.

[4] As to the alleged incident of November 5, 1910, when she says she offered to go back to him and he refused, nothing but a fragment of it is disclosed, if we observe the rule by which the case was tried. It is improper to consider that mere fragment without the explanatory matter which preceded, or to consider the explanatory matter now when the parties treated it as inadmissible at the trial. However, if we consider her version of the whole incident, what does it amount to? Almost on the eve of the resumption of the trial of the maintenance suit, at 9:30 o'clock at night, after refusing for months to go back to him, she suddenly offers to do so. After expressing some curiosity at her sudden change of front, but willingness to receive her, he asks if she will promise to clear the record of the maintenance suit, that suit in which they had already undergone one long hotly contested trial and were immediately threatened with another; in which her attorneys had a motion then pending for \$750 attorney's fees additional to the \$150 they had already received, and she was demanding an allowance for separate maintenance. She refused to promise to dismiss the suit, and he refused to take her back until she would promise to do so. She now claims that she "owed the man no promise." We are of the opinion that she did. By her constant refusals to go back to him she had by this time put herself in the attitude of the wrongful absentee, and it was incumbent upon her now to make a proper and sincere offer, and an offer coupled with a refusal to abandon the litigation and to live in peace with him was not sufficient. *Jenkins v. Jenkins*, 104 Ill. 134. And plaintiff's many previous offers to take her back are not to be stamped with insincerity because, when she finally consented, he insisted that she dismiss the litigation and live with him in peace. It was not improper that he should wish to get at least her promise to abandon the litigation against him before undertaking the difficult matter of taking up their lives together again. Offering peace, he was entitled to a promise of peace, and she is mistaken when she says that "she owed the man no promise." It is to be noted that he did not purpose to delay her coming back until the suit was dismissed, but was willing that she should come back then, though it was late at night, upon her mere promise to later abandon the litigation. It appearing then that this husband repented and made a genuine offer to return and renew cohabitation before the statutory period of desertion was complete, this was sufficient to break the desertion and is a bar to the wife's suit.

Defendant here suggests that at the trial of the maintenance suit the husband refused to tell his wife's counsel what he would do

in the matter of taking his wife back, saying, in substance, "that is a question for the future." We passed on that feature of the case in the maintenance suit, resolving that such answer on the part of the husband was more probably due to the fact that he had become aggravated and wroth at plaintiff's counsel and resented the manner of his cross-examination, rather than to a real indisposition to resume his marital relations, especially in view of his testimony as to his endeavors to make up with his wife and his declarations in the prior part of his testimony. *Creasey v. Creasey*, 151 S. W. 215. We see no reason for departing from the conclusion then formed. In fact, we are strengthened in it by the showing here that, immediately after the maintenance suit was finally determined in the husband's favor, he thrice attempted to resume negotiations with his wife.

[5] As to her alleged offers contained in the motions for attorney's fees, filed in the maintenance suit, they were not made as offers, but as excuses for demanding money, and were calculated to irritate without disclosing any conciliatory tendency. They should be disregarded. In saying this we do not mean to reflect upon the merits of those demands, nor to impugn the motives of the plaintiff or her attorneys in making them.

[6-8] The second reason which we have given for denying defendant a divorce is that subsequently to the original separation and within one year thereafter she showed by her conduct that she acquiesced in the separation. Although the husband's leaving was wrongful in the first instance, it did not constitute desertion within the meaning of this statute, if the wife by her subsequent words or conduct acquiesced in the separation. 1 *Nelson on Divorce & Separation*, § 91; *Davis v. Davis*, 60 Mo. App. 545; *Droege v. Droege*, 55 Mo. App. 481, 486. On the occasion of her husband's first offer in the presence of Mrs. Tucker we find defendant coldly inquiring what he will give her to come back and greeting with a scornful, "Oh, is that all?" his reference to himself. She further told him on that occasion and in the same connection that should she come back to him he would have to meet conditions "you don't think you will have to meet." In her answer in the maintenance suit she is not content with refusing his offer on the ground of insincerity, but goes further, and says in response to it that "there is such an incompatibility in the temperament, disposition, and purpose in life between the plaintiff and defendant that a renewal of the marriage relationship would result in a repetition of the same or similar indignities stated in the plaintiff's (her) petition." It thus appears that, while he was insincere in these two offers of reconciliation and may be taken to have desired the sep-

aration to continue, she too desired it to continue. Where the separation is acquiesced in by both, neither is entitled to a divorce on account of it. When her uncle came avowedly from her husband with a request for her to return, she answered that "not yet, she couldn't." He asked her why, and she said: "You don't know all. He has even had men to watch my house." Her letter to him disclosed the same inclination to bring up and dwell on his conduct before the separation as a reason for not going back to him. If we take her at her own word, it is clear that she was unwilling to go back to him because of his conduct before the separation. As that conduct was not sufficient to constitute cause for divorce, she could not, by remaining away in consequence thereof, "create for herself a cause for divorce, upon the theory that, by so electing to remain away from her husband, he incurs the guilt of deserting her. If the indignities themselves are not a sufficient cause for divorce, a new cause for divorce cannot be extracted from them by the voluntary conduct of the party seeking the divorce." *Dwyer v. Dwyer*, 18 Mo. App. 422. Her subsequent failure to go back, in the face of his personal appeals to her to do so, but emphasizes what had already been disclosed, that she was at least as eager to remain away from him as he was to remain away from her. She may have refused his first offers because she did not believe him sincere, but clearly that was not the only reason. The other reason, we are convinced, is that she did not desire to go back.

The judgment of the circuit court is reversed, and the cause remanded, with directions to the circuit court to enter its judgment that the plaintiff take nothing by his petition and that the defendant take nothing by her answer, the defendant, however, to have and recover her costs in this behalf expended. The matter of an allowance to defendant for attorney's fees for services here and in the circuit court we leave to the circuit court.

REYNOLDS, P. J., and NORTONI, J., concur.

LEDBETTER v. CITY OF KIRKSVILLE.

(Kansas City Court of Appeals. Missouri. Nov. 25, 1912.)

1. TRIAL (§ 203*)—INSTRUCTIONS—COMMENT ON ISSUES.

In an action against a city for damages for personal injuries sustained by a fall caused by a defective crossing, an instruction that defendant claims in her petition that the sidewalk was a public sidewalk, and that, while she was walking on it at night, she fell and sustained permanent injuries because certain planks had been allowed to become and remain in a loose and dangerous condition, is not erroneous as a comment on what plaintiff claimed in her peti-

tion, but is a mere statement of the basis of plaintiff's claims for recovery.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 477-479; Dec. Dig. § 203.*]

2. MUNICIPAL CORPORATIONS (§ 822*) — STREETS—ACTIONS FOR INJURIES—PRESUMPTION.

As it is presumed that a traveler along a city street has exercised ordinary care to protect himself from injury, and this presumption continues until the contrary is shown, an instruction, in an action against a city for damages for personal injuries caused by a defective sidewalk, that the city has entire control of the streets and is bound to exercise ordinary care to render them reasonably safe for all persons is not erroneous as in effect charging that the city is liable despite the contributory negligence of the traveler.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1758-1762; Dec. Dig. § 822.*]

3. APPEAL AND ERROR (§ 1066*)—REVIEW—HARMLESS ERROR—INSTRUCTION.

In an action against a city for personal injuries caused by a defective sidewalk, where there was no evidence of any contributory negligence on the part of the plaintiff, an instruction that the city was bound to use ordinary care to keep its streets in a reasonably safe condition was harmless, though conveying the impression that the city was liable regardless of the negligence of plaintiff.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4220; Dec. Dig. § 1066.*]

4. MUNICIPAL CORPORATIONS (§ 818*) — STREETS—ACTIONS—EVIDENCE.

Municipal corporations being under the absolute duty of using reasonable care to maintain their sidewalks in good and safe repair so as to render them reasonably safe for travelers, evidence of the financial ability of the city to meet all of its obligations and duties as a corporation is inadmissible in an action for personal injuries caused by defective sidewalk, being immaterial and irrelevant.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1726-1738; Dec. Dig. § 818.*]

Appeal from Circuit Court, Adair County; Nat. M. Shelton, Judge.

Action by Jacey E. Ledbetter against the City of Kirksville. From a judgment for plaintiff, defendant appeals. Affirmed.

A. Doneghy, of Kirksville, for appellant. Campbell & Ellison and Chas. E. Murrell, all of Kirksville, for respondent.

BROADDUS, P. J. This is an action for damages against the city of Kirksville, a city of the third class, caused by plaintiff falling through a defective culvert over a street crossing, whereby she was severely injured. The culvert was about four feet long and about the same width, and was a part of the crossing and connected the sidewalk on the west side of Sixth street with the brick part of the street crossing at the intersection of Filmore and said Sixth street. Sixth street runs north and south and is crossed by Filmore street, which runs east and west. The evidence showed that the crossing was constructed of boards and had been out of repair a sufficient length of time to charge the city with notice of its

condition. The injury occurred on a very dark night, and there were no street lights. The plaintiff was on her way home from a visit, and, when she reached Sixth street, she thought she had arrived at Osteopathy avenue, the street upon which she lived, and the one she intended to take on her way home. She turned south on the west side of Sixth street, and had only gone a short distance when she discovered that she was on the wrong street, and, instead of retracing her steps and getting onto Osteopathy avenue, she groped her way along the west side of Sixth street until she came to said crossing, where she was injured. She was familiar with the east side of Sixth street where the walk was reasonably safe, but it was not shown that she was familiar with the condition of the walk on the west side. Plaintiff, at the time she was injured, was walking along with her two little girls, one on each side. For the alleged purpose of showing ordinary care upon the part of defendant, the city offered evidence showing the number of such crossings to be maintained, the number of officers to be paid, and the amount of taxation of all kinds which it could levy to meet its duties. The court refused to admit the proposed evidence. The defendant denied that it was negligent and alleged that plaintiff's injuries were the result of her own negligence. The plaintiff recovered judgment for the sum of \$1,500. The defendant appealed.

[1] It is claimed that the giving of instruction No. 1 on the part of plaintiff was prejudicial error. It reads as follows: "Plaintiff in her petition claims that the sidewalk on the west side of Sixth street, at the intersection of Filmore street, in the city of Kirksville, was a public sidewalk, and that while she was walking along said sidewalk, at said intersection, on the night of August 8, 1910, she fell on said sidewalk and sustained serious and permanent injuries on account of certain planks in said walk, over a gutter, being negligently allowed to become and remain in a loose and dangerous condition, so as not to be reasonably safe for walking over the same. You are instructed that the defendant city has the entire control of the streets and sidewalks within its corporate limits, and is bound to use ordinary care and diligence to keep and maintain its sidewalks in reasonably good and safe repair, so as to render them reasonably safe for all persons passing on or over them by day or night. Therefore, if you believe from the evidence that a part of said sidewalk consisted of boards or planks laid lengthwise over a gutter at the intersection of said streets, and that the defendant city negligently permitted said boards or planks to become and remain in a loose, dangerous, or unsafe condition for persons traveling over said walk, either by night or day, in that said planks or boards, composing a part of said walk over a ditch or gutter, had become

rotten and decayed, and the nails holding said planks in position had become loosened and removed, so that said planks had become, and were permitted to remain, rotten and loosened and insecure, or that some of said planks had been and were pushed out of place, leaving holes in said sidewalk over said gutter, and that said planks, or such of them as remained in position, were loose or rotten and insecure, so that, by reason of such condition of said planks or boards, they were liable to turn and give way when stepped on by a person walking along said sidewalk, and that said condition was known to, or could have been known by, defendant as defined in these instructions, and that by reason of such conditions, if you find from the evidence they existed, said sidewalk at said place was not reasonably safe, and that said walk at the place was a public sidewalk of said city, and that plaintiff on the night of August 8, 1910, while walking over said sidewalk at said place, stepped upon said boards, and by reason of said boards being in such condition, if you find they were, she was caused to fall, and sustained personal injuries thereby, then your verdict should be for the plaintiff, unless you further find and believe from the evidence that the plaintiff was herself guilty of negligence directly contributing to her injury. The burden of proving such contributory negligence on the part of the plaintiff is on the defendant."

The first paragraph of the instruction is objected to for the reason that it is a comment on what plaintiff claimed in her petition, and that it restricted the issues of the case. We do not think the recitations in said paragraph amount to a comment on the allegations of the petition, but it appears to be a mere statement of what she claims as a basis for recovery. It was necessary for the jury to know authoritatively what the case was about. There could have been no harm, in order to avoid mistake, for the court to tell the jury what they had to try. It is true the paragraph does not cover all the allegations of negligence contained in the petition and put in issue, but it does cover all that is necessary for plaintiff to recover.

[2] The objection to the second paragraph "is that it imposes a greater burden on the city than the law has cast, as it told the jury that it was the duty of the city to use ordinary care to keep its sidewalks reasonably safe for all persons passing on or over the sidewalk, whether they were traveling in the ordinary way or not, and whether or not they were in the exercise of ordinary care." As a matter of course, the city should not be held for negligence if the street was reasonably safe for persons passing over it while in the exercise of reasonable care, for the city was not bound to guard against the acts of careless persons who might be on its streets. But the law does not presume that a person passing along a street is careless, but, on the contrary, the presumption is

that he will exercise ordinary care to protect himself from injury, and this presumption continues until the contrary is shown.

[3] As we view the testimony, there was no evidence that the plaintiff was guilty of any negligence whatever. It was not, therefore, necessary to submit the question of whether or not plaintiff was in the exercise of ordinary care at the time of her injury. Yet the instruction did submit to the jury the question whether or not plaintiff was guilty of any negligence that contributed to her injury. Upon the whole, defendant could not have been injured by any defect of the instruction.

[4] The question is raised as to whether it was competent for the city to show the extent of its financial ability to meet all of its duties and obligations as a corporation, and whether the same has anything to do with the degree of care it owed to the public with reference to the condition of its streets. So far as we are informed, the question has not before this instance been before the courts of this state. In the state of Massachusetts, the court has passed on the question and holds that: "In an action against a town for personal injuries caused by an alleged defect in a public way, evidence of the population of the town, the assessed valuation of the property therein, the rate of taxation, and the amount of the appropriation for highways, all in the year preceding that of the accident, and the number of miles of public ways therein, is competent on the question of reasonable care and diligence on the part of the town in preventing or remedying the alleged defect; its weight is for the jury in connection with all other circumstances." *Weeks v. Inhabitants of Needham*, 156 Mass. 289, 31 N. E. 8. See, also, *Sanders v. Palmer*, 154 Mass. 475, 28 N. E. 778; *Rooney v. Randolph*, 128 Mass. 580. The reason given for the ruling is peculiar to that state. A statute provides "that towns shall be liable for personal injury or damage to property caused by defects in a highway 'which might have been remedied, or which damage or injury might have been prevented by reasonable care and diligence on the part of the county, town, place or persons obliged by law to repair the same.'" The court holds that the statute "is a limitation on the former liability of towns, and it is now necessary, not only that the defect should have existed which was the sole cause of plaintiff's injury, but that such defect be one which might have been remedied by reasonable care and diligence on the part of the town." And that: "It is the intention of the statute to protect towns from liability where there has been no lack of proper diligence on their part, and in determining that it is important to know what was done, as well as the cost of what it is contended should have been done, to keep the way in a

suitable state of repair." *Rooney v. Randolph*, 128 Mass. 580.

In this state it is the absolute duty of a municipality to keep its streets in a reasonably safe condition for travel at all times and under all conditions, save and except for a reasonable time for repairing defects or for removing necessary temporary obstructions or those caused by the act of God. It would require legislation to put our streets on the same plane as those in the state of Massachusetts. The question would be one of expediency for the Legislature.

Finding no error in the record, the cause is affirmed. All concur.

LEGG v. SWIFT & CO.

(Kansas City Court of Appeals. Missouri. Nov. 11, 1912. Rehearing Denied Dec. 9, 1912.)

MASTER AND SERVANT (§ 78*)—EMPLOYEES' INSURANCE ASSOCIATION—LIABILITY OF EMPLOYER—PETITION.

Where an employer and its employees devised a scheme of insurance for the employees by deducting a part of their wages for the payment of sick and death benefits, and providing for trustees of the funds with power to authorize the employer to handle the funds and guarantee the payment of benefits, and with power to appoint a manager, the employer, under the arrangement, being bound to pay out of the funds only on the order of the trustees or the manager, was not liable in equity for sick or death benefits until the trustees or manager ordered payment thereof, and a petition for benefits claimed for injury to an employé was demurrable in the absence of any allegation that such order had been made, or of facts making it the duty of the trustees or the manager to adjust the claim and order payment.

[Ed. Note.—For other cases, see *Master and Servant*, Dec. Dig. § 78.*]

Appeal from Circuit Court, Buchanan County; Wm. D. Rusk, Judge.

Action by Elizabeth Legg against Swift & Co. From a judgment sustaining a demurrer to the petition, plaintiff appeals. Affirmed.

Fulkerson & Fulkerson and R. S. Newcomer, all of St. Joseph, for appellant. R. A. Brown, of St. Joseph, for respondent.

ELLISON, J. Plaintiff's deceased husband was in the employ of defendant, who conducts large beef packing establishments in several cities. Her husband took out a benefit certificate of insurance against disability from accidents and for the payment of a sum of money if an accident resulted in death. He was injured by the carcass of a beef falling upon him, and in about two years died from the injury. Suit was instituted by a bill in equity. Defendant demurred to the petition as not stating a cause of action and the trial court sustained the demurrer. Plaintiff declined to amend and appealed.

It appears that a scheme of insurance for its employes was devised by defendant, its

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

officers and employes generally, whereby defendant would deduct a certain amount from the weekly wage of the employe; the amount depending upon the class. The scheme was embodied in a deed of trust and an agreement, both of which are pleaded. The deed of trust is quite lengthy in detail, all of which need not be referred to. The parties of the first part are some 15 persons; and the parties of the second part are 5 persons, and it is recited that the parties of the first part are desirous of providing for themselves, and such other persons who shall come in under the deed, "benefits in case of sickness, accidents or death, and for that purpose are desirous of providing for the safe-keeping and management of all funds that may be obtained or contributed for that purpose." It then recites that the parties of the first part have requested the parties of the second part "to act as first trustees of the said funds," and that they have agreed to do so; and that the funds shall consist of contributions from members and interest thereon. It is then recited that the conduct of the business of the association shall be by an advisory committee of 15 members, who shall determine the requirement necessary for membership, fix the classes, and determine the amount of contributions and benefits. It is then recited that "the trustees of the association" (who are parties of the second part in the deed of trust) shall appoint a manager who shall have charge of all the business pertaining to the association and they shall also appoint a medical director. It is then provided that the trustees have full power and authority over all funds belonging to the association, without incurring any personal liability; and they are given authority to enter into an agreement with Swift & Co. (defendant) providing for the handling of all funds by that company, who are to pay interest thereon at 5 per cent. on all monthly balances, and are to "provide for the expenses of operating the association," and "guarantee the payment of all benefits as provided by the rules." The petition then alleges that by the aforesaid authority in the deed of trust the trustees therein named executed the agreement contemplated by the deed. The agreement is then set out, whereby it appears that Swift & Co. (this defendant) are to deduct from the pay rolls, out of wages due its employes who are members of the association, the requisite amounts from time to time for the purpose of making the contribution required by the rules, which they are to hold under the provisions of the agreement, and are to pay out of such funds the association liabilities upon the order of the trustees or the manager of the association. They likewise agree to pay interest and provide for the operating expenses and to make good any deficiency of funds to meet obligations to members.

There has been much said in the briefs

about the law of trusts and trustees, which we need not discuss. It seems clear the trial court was right in sustaining the demurrer. Swift & Co., the only party proceeded against by plaintiff, are not shown to be in default by the allegations of the petition. They are shown to be mere custodians of the fund for payment of such claims against the association as may come into existence by reason of a member getting hurt, or becoming sick, or dying. It clearly appears, as we have already stated, that the conduct of the business of the association is to be with the advisory committee which determines the amount of contributions, how collected, and the amount of benefits, and the trustees, into whose hands is lodged full power over the funds of the association with a duty of appointing a manager and medical director. Such manager is shown to have immediate management of the business; and the medical director decides when a member is disabled and when ready for work, reports the condition of the sick, etc. All that part of the association's business which relates to matters of admission of members, which passes upon the justness or propriety or legality of claims, are matters with which defendant has nothing to do. In short, defendant has no concern in any part of the grievances set forth by plaintiff. Defendant's duty, as shown by the pleading, is "to pay out of the funds the benefits required to be paid by the association, *upon the order of said trustees or the manager of the association,*" under the rules of the association.

The sole conditions which would cast a duty upon defendant and upon which a liability would arise are not stated. Nor is there any excuse alleged. There is no allegation of facts which would have made it the duty of the trustees or manager to order defendant to pay deceased, or plaintiff since his death. Nor is there anything alleged which would show that it became the duty of those officers whose acts preceded the duties of the trustees or manager. It is alleged that deceased presented himself to the medical examiner for examination and that he made claim for accident benefits; but it is not alleged that he was examined or was refused examination, or that he demanded an order on defendant for the money due him. It is alleged that proofs of death were made, but mere proof of death would not cast a duty upon defendant.

The whole amount claimed by plaintiff is \$1,424. Of this sum \$624 is for "accident benefits," accruing between the injury and the death two years afterwards, and yet there is no statement particularizing this. Indeed, the whole idea of plaintiff, as is clearly to be inferred from the petition, is to throw upon defendant the burden of defending an unascertained claim, when its only duty is the ministerial act of paying

out funds upon order of the association with which deceased had his contract.

We do not see why the mere stating of her complaint as in equity (in the circumstances here shown) should allow plaintiff any more privileges or relieve her of any of the necessities of stating a case than if the action had been at law. Nor do we see that plaintiff's petition is aided by the authorities cited. This defendant has not been guilty of a breach of trust. If deceased took such steps as to cause his claim for benefits to be adjusted and audited by the proper officers under the rules of the association, then it became the duty of the trustees or the manager to order its payment by defendant. So if plaintiff, after deceased's death, so far complied with the rules of the association as to entitle her to the sum for which the certificate of insurance called in case of death, it became the duty of those officers to order defendant to pay it. *Hammerstein v. Parsons*, 38 Mo. App. 332, 338. Otherwise it was not.

It seems to us the vital interest which the petition discloses that other parties have, and the predicament in which this defendant would be, as relating to those interests, have not been fully appreciated by plaintiff, as is evidenced by instituting her action against defendant alone. There are trustees of the fund, who are in control of it for the benefit of scores of others insured as deceased was. They are not made parties to this action and would not be bound by it. If plaintiff may proceed against this defendant alone, so may every other insured, and thus a hazard be put upon defendant which neither equity nor law will justify. Defendant has not been vested with any title to the fund by the deed of trust, the agreement, or the rules; its duty being, as already stated, merely to pay out the fund upon the presentation of a proper order. *Leyden v. Owen*, 150 Mo. App. 102, 129 S. W. 984.

The judgment should be affirmed. All concur.

WILHITE v. CITY OF HUNTSVILLE.

(Kansas City Court of Appeals. Missouri. Nov. 25, 1912.)

1. APPEAL AND ERROR (§ 999*)—REVIEW—QUESTIONS OF FACT.

A reviewing court is concluded by a determination of a jury upon a debatable issue of fact.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3912-3924; Dec. Dig. § 999.*]

2. MUNICIPAL CORPORATIONS (§ 768*)—INJURIES TO PEDESTRIANS—CARE REQUIRED.

A city engaged in carrying dangerous currents of electricity over public streets owes no duty to persons on the streets as an insurer, but must exercise the highest degree of care to safeguard them and their property

against vagrant currents escaping from its wires by keeping the same confined to the wires, and by exercising reasonable care to discover the escape of a current, and to use reasonable dispatch in relieving the danger.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1622, 1624, 1625; Dec. Dig. § 768.*]

3. MUNICIPAL CORPORATIONS (§ 768*)—INJURIES—HIGH CURRENT WIRES—LACK OF INSULATION—SLEET STORM.

Where a city operating electric light wires carrying dangerous current knew that its wires were located beneath telephone wires, and permitted one of such wires to remain uninsulated at a point where it was spliced, it must be charged with knowledge that such telephone wires might break in a severe sleet storm and was guilty of negligence which would charge it with the death of a horse killed by stepping on a telephone wire which broke during such a storm and fell across the uninsulated wire.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1622, 1624, 1625; Dec. Dig. § 768.*]

Appeal from Circuit Court, Randolph County; A. H. Waller, Judge.

Action by M. S. Wilhite against the City of Huntsville. From a judgment for plaintiff on a demurrer to evidence, defendant appeals. Affirmed.

E. J. Howard, of Moberly, for appellant. Aubrey R. Hammett, of Huntsville, for respondent.

JOHNSON, J. Plaintiff sued the city of Huntsville, a city of the third class, to recover damages for the loss of a horse which he alleges was killed by the negligence of defendant. The cause is before us on the appeal of defendant from a judgment recovered by plaintiff in the circuit court.

The horse was killed about 5:30 a. m. January 14, 1911, while being driven into a public street in Huntsville from a livery barn owned and operated by plaintiff in that city. A pole line carrying both telephone and electric light wires ran along the street in front of the barn, and the entrance to the barn was about midway in the space between two of the poles. The telephone wires were a part of a telephone system operated by a private corporation, and the electric light wires were owned and operated by defendant as a part of its municipal lighting system. The telephone wires were about seven feet above the electric light wires, and, being employed to carry only low and harmless currents of electricity, were uninsulated. The electric light wires carried a high and deadly current, and were insulated.

Some time before the night in question, one of these wires had been spliced at a point almost opposite the west side of the entrance to the barn, and there was no insulation on the wire in a space of four or five inches at the place of the splice. It is a fair conclusion from the fact and circumstances detailed in the evidence of plaintiff that the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

place had existed from the time of the splicing of the wire by defendant until the time of the injury. A heavy rain and sleet storm raged throughout the night of the injury, and incrustated telephone and electric light wires with a thick, heavy coating of ice. One of the telephone wires in front of the barn broke under its burden of ice, and one of its ends fell to the street in front of the barn. The wire crossed the electric light wire we have described and remained in contact with that wire at the place where there was no insulation, with the result that the electric light current was short-circuited by the broken and hanging telephone wire, and was grounded at a point nearly opposite the west side of the barn entrance. The breaking of the telephone wire occurred during the storm, and the presence of the loose wire in the street was first observed by a pedestrian about three hours before the injury. It appears that the agents and servants of defendant made no effort during the night to discover and repair dangerous defects caused by the storm, which was very severe and of a nature especially harmful to overhead wires; and, further, the evidence discloses that defendant had not equipped its power house with appliances commonly installed and used in such plants for detecting short circuits and material losses of electricity. A servant of plaintiff, who drove the horse out of the barn, had been warned by another servant to look out for a sagging wire to the right of the entrance and, heeding the warning, turned the horse to the left on emerging from the door. The night was very dark, and the driver could not see the fallen wire. The horse stepped on it with one of his forefeet and received a shock that threw him down. Defendant endeavored to show that the wire became wrapped around the horse's leg, and that the struggles of the animal were sufficient to tear off the insulation of the electric light wire at the place of contact between the two wires; but the witnesses for plaintiff say that the horse did not struggle, and was killed almost instantly.

[1] As we view the evidence, the issue of whether the insulation was removed from the place of the splice in the wire at the time the wire was strung or last repaired by defendant, or was removed by the chafing of the telephone wire, caused by the death struggles of the horse, is a debatable issue of fact, the solution of which was properly left to the jury; and in passing on the demurrer to the evidence we shall adopt the conclusion that the servants of defendant who spliced the wire left it bare of insulation at that place.

The petition alleges three grounds of negligence, viz.: First, the failure of defendant to maintain insulation on the electric light wire at the place described; second, the failure of the servants of defendant to exercise proper care in the inspection of the sys-

tem during the night of the storm to discover dangerous defects in its lines produced by the storm, and to protect persons and domestic animals rightfully on the public streets from their injurious consequences; and, third, the failure of defendant to equip its plant with appliances for detecting the existence of short circuits and truant currents. The answer traverses the several charges of negligence and pleads contributory negligence on the part of the driver of the horse.

[2] The only questions before us of serious moment are those arising from the demurrer to the evidence, which defendant argues should have been given. Defendant, in the prosecution of its business of carrying high and dangerous currents of electricity over the public streets, was not an insurer of the safety of persons lawfully using the streets, but owed them the duty of the exercise of the highest degree of care to safeguard them and their property against the assaults of vagrant currents escaping from its wires. This duty may be said to be composed of two main ingredients: First, care in keeping a force so subtle and dangerous confined to its prescribed course; and, second, reasonable care, which in such business means the highest care, to discover, as quickly as the circumstances of the given case will permit, the escape of a deadly current from captivity, and to move with reasonable diligence in the performance of the task of reducing the escaped foe to harmlessness, in order that the safety of the innocent wayfarer and his beast may not be imperiled. *Geismann v. Electric Co.*, 173 Mo. 654, 73 S. W. 654; *Winkelman v. Light Co.*, 110 Mo. App. 184, 85 S. W. 99; *Brown v. Light Co.*, 137 Mo. App. 718, 109 S. W. 1032; *Goodwin v. Telephone Co.*, 157 Mo. App. 596, 138 S. W. 940; *Freeman v. Telephone Co.*, 160 Mo. App. 271, 142 S. W. 733.

[3] In the exercise of the degree of care imposed on it by the rules just mentioned, defendant, in the construction and maintenance of its lines, was bound to anticipate the probable results of severe storms, and to employ reasonable prudence and foresight to guard against the dangerous possibilities of such storms. "Liability for negligence is measured by the consequences that could reasonably be anticipated to follow from the negligent act." *Strack v. Telephone Co.*, 216 Mo. 601, 116 S. W. 526. Knowing that telephone wires were strung on the pole line above its own high-power wires, and that such wires were likely to break under the strain and stress of a severe sleet storm, defendant should have anticipated the falling and grounding of a telephone wire across and in contact with its own wires as a natural result of a storm of such character, and was negligent in leaving an uninsulated place in its wire which, if brought into contact with a grounded telephone wire, would short circuit the high-power current and car-

ry it to the public street to menace the safety of people and domestic animals lawfully upon the street. The suggestion that, owing to the icy condition of the wires and the ground, insulation would not have prevented the escape of electricity through the grounded telephone wire cannot be allowed to excuse defendant, as a matter of law, from liability for the injury. That argument and the evidence on which it is based relates to the subject of proximate cause, and merely raises an issue of fact with the evidence of plaintiff, which tends to show that the injury could not and would not have occurred had defendant's wire been properly insulated at the point of contact with the telephone wire. The jury were entitled to infer that the negligence of defendant in maintaining an uninsulated wire was the proximate cause of the injury.

These considerations compel the conclusion that the learned trial judge did not err in overruling the demurrer to the evidence; and we do not deem it necessary to discuss the remaining grounds of negligence on which, in his petition, plaintiff bases a right to recover. We find the issues were fairly tried and submitted to the jury, and accordingly the judgment is affirmed. All concur.

BRADY et al. v. CITY OF ST. JOSEPH.

(Kansas City Court of Appeals. Missouri.
Nov. 11, 1912. Rehearing Denied
Dec. 9, 1912.)

1. MUNICIPAL CORPORATIONS (§ 803*)—INJURY TO PEDESTRIAN—CONTRIBUTORY NEGLIGENCE.

No one saw decedent, a boy 19 years of age, when he fell over an embankment in a street into a ravine. Decedent had known the street and ravine since childhood, and the action occurred in the daytime; and there was nothing to indicate that he stumbled and fell, and nothing to show that he may have run over the embankment to escape some other danger. *Held*, that decedent was guilty of contributory negligence, since he must have walked over the embankment without noting his surroundings, or lost his balance while doing something else.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1673, 1682; Dec. Dig. § 803.*]

2. NEGLIGENCE (§ 122*)—PRESUMPTION—ABSENCE OF CONTRIBUTORY NEGLIGENCE.

It cannot be presumed that a decedent exercised due care for his safety, where the unexplained facts show that he saw or should have seen the danger.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 221-223, 229-234; Dec. Dig. § 122.*]

3. MUNICIPAL CORPORATIONS (§ 816*)—INJURY TO PEDESTRIAN—PLEADING—CONTRIBUTORY NEGLIGENCE.

Whether decedent's fall over an embankment in daylight, without any apparent reason, was explainable by his having incipient

epilepsy cannot be considered, where that fact was not pleaded.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1711-1724; Dec. Dig. § 816.*]

4. APPEAL AND ERROR (§ 216*)—PRESENTATION BELOW—INSTRUCTIONS—ISSUES.

That decedent had incipient epilepsy cannot be relied on, on appeal, as an excuse to negative contributory negligence, where it was abandoned by not being mentioned in the instructions offered by plaintiff.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 216.*]

Appeal from Circuit Court, Buchanan County; Wm. D. Rusk, Judge.

Action by Nicholas Brady and others against the City of St. Joseph. From a judgment for plaintiffs, defendant appeals. Reversed.

W. B. Norris, O. E. Shultz, and Phil. A. Slattery, all of St. Joseph, for appellant. C. W. Meyer, of St. Joseph, for respondent.

ELLISON, J. Plaintiffs' action is to recover damages resulting to them from the death of their son, occasioned, as they allege, by the negligence of the city. The judgment in the trial court was for plaintiffs.

[1] It appears from the evidence that for a number of years, near where plaintiffs resided in the limits of the defendant city, a deep ditch or ravine, with steep banks, ran a short part of its course in one of defendant's streets. A roadway likewise ran in the street, at one place in a few feet, and others 20 or more feet, away from the ravine. There is considerable evidence as to just how the ravine ran and where the deceased was found, where his hat was discovered, etc. But for our purposes it may be conceded that deceased went over the embankment at a place within the limits of the street, and was thereby killed. No one saw him as he went over. The last seen of him was just before reaching the place, when he was proceeding on his way to perform some service for his mother. He was found dead at the bottom of the ravine, with his head and, perhaps, his shoulders under water.

Deceased was 19 years old, and had known this street and ravine since early childhood. The time of the accident was in the afternoon, in June, in full daylight. There were no obstructions to the foot or the eye. There was nothing to suggest that he stumbled over something in the road and was thereby thrown into the ditch. Nor was there anything occurred whereby he may have run into it in an effort to escape some other danger. Necessarily he must have walked into it while wholly oblivious to his surroundings, or of what he was doing; or else he was attempting, for some reason, to get down the bank and lost his balance. But whatever caused him to get into the place where found, it must have resulted from his contributory negligence.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Woodson v. Street Ry., 224 Mo. 685, 123 S. W. 820, 80 L. R. A. (N. S.) 931, 20 Ann. Cas. 1039; Wheat v. St. Louis, 179 Mo. 572, 78 S. W. 790, 64 L. R. A. 292; Kaiser v. St. Louis, 185 Mo. 366, 84 S. W. 19.

[2] There is no need to urge cases upon our attention where there were things which concealed the danger, or might shut it out of sight. Such cases have no bearing upon the conditions here presented.

In the stress of this situation plaintiffs call upon the ordinary presumption that he was in the exercise of ordinary care for his own safety. But that presumption does not arise. It is crowded out of the case by the fact that he saw the danger, or blindly refused to see. "There can be no presumption of ordinary care in the face of such facts to the contrary and without explanation." Huggart v. Railway Co., 134 Mo. 673, 679, 680, 36 S. W. 220, 221; Hayden v. Railway Co., 124 Mo. 566, 573, 28 S. W. 74.

[3.] The suggestion is made that the deceased had incipient epilepsy. But we need not deal with such solution of the mystery of his action; for it was not pleaded (Woodson v. Street Ry., supra), and, in addition, was abandoned by not having been mentioned in instructions offered by plaintiffs.

Plaintiffs' case being without legal support, the judgment must be reversed. All concur.

ADVANCE THRESHER CO. v. SPEAK et al.

(Kansas City Court of Appeals. Missouri.
Nov. 25, 1912. Rehearing Denied
Dec. 9, 1912.)

1. APPEAL AND ERROR (§ 544*)—NECESSITY OF EXCEPTIONS—DECISIONS NOT OTHERWISE REVIEWABLE—MATTER OF RECORD.

Where there is no bill of exceptions, the court can only determine whether the record proper discloses any legal cause for its interference.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2412-2426, 2478, 2479; Dec. Dig. § 544.*]

2. APPEAL AND ERROR (§ 544*)—RECORD—CONTENTS.

The record proper includes the verdict and judgment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2412-2426, 2478, 2479; Dec. Dig. § 544.*]

3. APPEAL AND ERROR (§ 544*)—MOTION IN ARREST OF JUDGMENT—MATERIAL ERRORS.

The rule that all matters constituting the record proper may be examined by an appellate court, though there is no bill of exceptions showing a motion in arrest, as modified, requires a motion in arrest for all immaterial errors, but, unless the errors complained of are formal or immaterial, they will be examined on appeal without a motion in arrest; and fatal errors in the verdict and judgment will entitle appellant to a reversal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2412-2426, 2478, 2479; Dec. Dig. § 544.*]

4. JUDGMENT (§ 248*)—TRIAL OF ISSUES—CONFORMITY TO PLEADINGS AND ISSUES.

Judgments and decrees must be responsive to the pleadings and issues.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 434; Dec. Dig. § 248.*]

5. TRIAL (§ 329*)—VERDICT—RESPONSIVENESS TO ISSUES.

A verdict must be responsive to the issues.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 774-776, 782; Dec. Dig. § 329.*]

6. APPEAL AND ERROR (§ 1070*)—HARMLESS ERROR—VERDICT—RESPONSIVENESS TO ISSUES.

In replevin for 13 head of live stock, a wagon, harness, and one horse power engine with a claim for damages for their detention, met by a counterclaim for defects in the engine, for damages for loss of contracts, and for other damages, with a prayer for an order to return the property and to surrender defendants' notes, a verdict for defendants for \$735 was not determinative of the issues, and was reversible error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4231-4233; Dec. Dig. § 1070.*]

Appeal from Circuit Court, Adair County; Nat M. Shelton, Judge.

Replevin by the Advance Thresher Company against Albert Speak and others, with counterclaim by defendants. Judgment for defendants, and plaintiff appeals. Reversed, and cause remanded.

Fugate & Son, of Novinger, and Campbell & Ellison, of Kirksville, for appellant. Smoot & Cooley and J. E. Rieger, all of Kirksville, for respondents.

ELLISON, J. Plaintiff's action is replevin, whereby it seeks to recover a lot of personal property. Defendants had judgment in the circuit court. Plaintiff appealed.

[1] There is no bill of exceptions, and we have only to ascertain whether the record proper discloses any legal cause for our interference.

The petition, answer, reply, verdict, and judgment, composing the record proper, are set out in the transcript, and we will confine our investigation to these. The petition is in replevin, and plaintiff seeks to recover from defendants' possession 13 head of live stock, a wagon, harness, and one "Advance 26 horse power steam engine with hose," with all appliances for plowing and harrowing, all of the value of \$1,040. Damages for the detention of the property, in the sum of \$500, is also claimed.

The answer is a general denial and a counterclaim. In setting forth the ground of the counterclaim, defendants have stated the cause of the controversy. It appears that defendants bought, at the price of \$2,000, the steam engine of plaintiff largely on credit, executing their notes for the purchase money, and giving a chattel mortgage on the engine and the other property to se-

cure their payment; that when they came to work it they found it would not do practical plowing, and was not worth to exceed \$700. It is alleged in the answer that defendants had contracted for breaking sod for others, whereby they could have made a profit of \$800, and that they could not do the work on account of the engine not working. It is also alleged that of the personal property mortgaged to plaintiff the sheriff took, by the replevin writ, the engine and two of the horses, valued at \$200, and turned them over to plaintiff. Payments on the notes, aggregating \$858, are alleged. Finally, it is alleged that defendants "are otherwise damaged in the sum of \$500." The prayer of the answer is that the court order a return of the property; that defendants' damages be ascertained; and that their notes be ordered surrendered.

The verdict was as follows: "We, the jury, find for the defendants and assess the amount due them at \$735." The judgment following the verdict, as set out in the record, was: "It is therefore considered and adjudged by the court that the defendants have and recover of and from the plaintiff the said sum of seven hundred thirty-five dollars (\$735) so found and assessed by the jury to be due them, together with costs in this behalf laid out and expended taxed at _____ dollars (\$_____), and that they have execution therefor."

[2] As we have stated, we have no guide as to what transpired in the trial court, except what is shown by the record proper, which includes the verdict and judgment. *Bateson v. Clark*, 37 Mo. 31; *Lilly v. Menke*, 126 Mo. 190, 212, 28 S. W. 643, 994.

[3] As we understand defendants' position, it is not claimed that the verdict is regular or proper, but that, plaintiff having failed to complain by filing a motion in arrest, it cannot now be noticed on appeal. The rule that all matters constituting the record proper may be examined by an appellate court, notwithstanding there is no bill of exceptions including a motion in arrest, has been so far modified as to require a motion in arrest for all immaterial errors not of a serious or fatal character. But, unless the errors complained of are formal, minor, or immaterial, they will be examined on appeal, though there is neither a motion nor bill of exceptions. *Sweet v. Maupin*, 65 Mo. 65; *McIntire v. McIntire*, 80 Mo. 470, 473; *State ex rel. v. Scott*, 104 Mo. 26, 31, 15 S. W. 987, 17 S. W. 11; *Land Co. v. Bretz*, 125 Mo. 418, 423, 28 S. W. 656; *State ex rel. v. Carroll*, 101 Mo. App. 110, 74 S. W. 468; *Nichols v. Lead & Zinc Co.*, 85 Mo. App. 584; *Bank v. McMullen*, 85 Mo. App. 142.

[4, 5] It follows that, if the errors in the verdict and judgment in controversy are of a material or fatal character, plaintiff is entitled to a reversal, notwithstanding there was no motion or bill of exceptions. It is said, in *Roden v. Helm*, 192 Mo. 71, 93,

90 S. W. 798, 805, a case without a bill of exceptions: "That judgments and decrees must be responsive to the pleadings in this state is no longer an open question." In *Schneider v. Patton*, 175 Mo. 684, 723, 75 S. W. 155, 166, it is said that "no principle is better settled than that, unless a judgment is responsive to the issues presented in the pleadings, it is erroneous." And in *State v. Modlin*, 197 Mo. 376, 379, 95 S. W. 345, 346, that in considering the sufficiency of a verdict "it must be borne in mind that it is well-settled law in Missouri that if the verdict, which is a part of the record, is not responsive to the issue, or is uncertain or indefinite, it is open for review on appeal or writ of error as a part of the record proper." In *State v. Rowe*, 142 Mo. 439, 442, 44 S. W. 266, it is held that the verdict must be so responsive to the issues as to afford the party protection against the same claim in another action. It is said, in *1 Graham & Waterman on New Trials*, 140, that "if the jury find only part of the issue, judgment cannot be entered on the verdict. It is void for the whole, and a venire de novo will be awarded." The authors then add a quotation from Lord Coke, that "a verdict that finds part of the issue, and finding nothing for the residue, this is insufficient for the whole, because they have not tried the whole issue wherewith they are charged. As if an information of intrusion be brought against one, for intruding into a messuage and one hundred acres of land, upon the general issue, the jury find against the defendant for the land, but say nothing for the house, this is insufficient for the whole, and so was it twice adjudged." *Alilson v. Darton*, 24 Mo. 343; *Pratt v. Rogers*, 5 Mo. 51; *Jones v. Snedecor*, 3 Mo. 390; 3 *Graham & Waterman on New Trials*, 1384, 1390; 2 *Thompson on Trials*, § 639; *Patterson v. United States*, 2 Wheat. 221, 4 L. Ed. 224; *Lyon, Cobb & Co. v. Stewart & Campbell*, 5 J. J. Marsh. (Ky.) 676.

[6] In view of these authorities, it seems to be clear that the verdict under consideration is materially improper and insufficient. It leaves the case near as much undetermined as before the trial. It, and the judgment following, do not make it known whether the horses and engine, or either of them, which were taken from defendants and delivered to plaintiff by the sheriff, are to be considered the property of plaintiff or defendants. It is not known whether the notes remaining in plaintiff's hands are to be considered as settled, or whether they are still due. The verdict is as though it were given in an action of assumpsit, or for general damages without any complications with other matters. So far as the record before us is concerned, may there not be future litigation over the title to the property? The verdict merely reads that the amount due defendants is \$735. Is that found as a general adjustment of all the issues, leaving

the property as belonging to plaintiff, or is it for the damages, alone, claimed by defendants, or is it for part recovery back of \$858 payments made on the notes?

We have been cited by defendants to several cases in which a reversal of judgments was refused, because the verdict was not materially wrong, and there was no motion in arrest; but none of them approach to the seriousness of this.

The judgment should be reversed and the cause remanded. All concur.

CUMBLE et al. v. ST. LOUIS, I. M. & S. RY. CO.

(Supreme Court of Arkansas. Oct. 28, 1912.)

1. PLEADING (§ 245*) — AMENDMENTS TO PLEADINGS—DISCRETION OF COURT.

The court did not abuse its discretion in refusing to allow amendments to the complaint several days after the action was dismissed.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 635, 653-675; Dec. Dig. § 245.*]

2. PLEADING (§ 246*)—TRIAL—AMENDMENTS.

The court did not err in refusing to allow an amendment which, in the court's view of the complaint, would have rendered it inconsistent and contradictory.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 676-683; Dec. Dig. § 246.*]

3. PLEADING (§ 218*) — DEMURRER — RULES AND REGULATIONS—HEARING.

Facts alleged must be taken as uncontroverted on demurrer, and it is a question of law whether they are sufficient to show that a provision in a bill of lading is unreasonable, and not an issue for the jury under the act of April 30, 1907 (Laws 1907, p. 558, § 3), requiring "the reasonableness or unreasonableness of such rules and regulations to be determined by a jury"; such provision having no application where the facts are undisputed.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 549-566; Dec. Dig. § 218.*]

4. CARRIERS (§ 159*)—INJURIES TO GOODS—NOTICE.

A provision in a bill of lading of fruit that a written notice of intention to claim damage should be presented to the carrier within 36 hours after notice to the consignee of arrival at the place of delivery is not unreasonable, as it is the consignor's duty to have either the consignee or an agent at the destination to ascertain the condition of the goods.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 668-671, 699-703½, 711-714, 718, 718½; Dec. Dig. § 159.*]

5. CARRIERS (§ 159*)—INJURIES TO GOODS—NOTICE OF INTENTION TO CLAIM.

Provisions in a bill of lading requiring a written notice of "intention to claim" damage or written notice "of loss or damage" are not limitations upon or exemptions from liability, but only conditions precedent to recovery, and such notice is not necessary where the carrier has examined and knows the condition of the goods after their arrival at their destination.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 668-671, 699-703½, 711-714, 718, 718½; Dec. Dig. § 159.*]

Appeal from Circuit Court, Crawford County; Jeptha H. Evans, Judge.

Action by R. C. Cumble and others against the St. Louis, Iron Mountain & Southern

Railway Company. Judgment for defendant, and plaintiffs appeal. Reversed.

This was a suit by the appellants against the appellee to recover damages for loss to a shipment of peaches which appellants allege in their complaint were delivered to the appellee at Greenwood, Ark., for shipment to St. Joseph, Mo., and that, through the negligence of appellee in carrying out its contract (which alleged acts of negligence are specifically set out in the complaint) plaintiffs were damaged, for which the appellants pray judgment. The complaint in the present case is, in all essential particulars except the amendment to paragraph 1, similar to that which was held sufficient in *St. Louis, Iron Mtn. & S. Ry. Co. v. Cumble*, 141 S. W. 939.

The amendment to paragraph 1 of the complaint is as follows: "That after said peaches were accepted for shipment by the defendant and had been loaded into said car for shipment, and without further consideration passing, the defendant issued and delivered a receipt or bill of lading therefor and delivered the same to R. C. Cumble. That a copy thereof is hereto attached and marked Exhibit A and B. That the defendant used no other form of receipt, and would not have given plaintiff a different one, and that plaintiff paid full rates upon said shipment. That said writing contained a clause providing that, in case of damage to said fruit, the consignee thereof should give notice to the delivering carrier of an intention to claim damage therefor within 36 hours after notice of arrival of the freight at the place of delivery. That said clause was inserted therein without the consent of plaintiff, of the owners of said peaches, or of the said J. B. Paine, consignee thereof. That said provision was unreasonable in this, to wit: That the owners of said fruit lived at Greenwood, Ark., when said peaches were shipped and when the same arrived at St. Joseph, Mo.; that it was more than 36 hours before the same could be examined in the regular course of business and the damages found; that the consignee thereof was at Van Buren, Ark., at the time, and had hundreds of cars of peaches in transit to different points of destination from Denver, Colo., to New York, N. Y., and was obliged to obtain the same from the delivering carrier to commission merchants who were mere selling agents and had no authority, and who, in this case, had no knowledge of the condition of said peaches when loaded by the initial carrier, and who had no knowledge or information that the same had been damaged in transit, and had been damaged through the fault and negligence of any of the carriers, and had no means of knowing of the intention of the consignee thereof or of the owners thereof to claim damage therefor; that the consignee could

not give said notice within said time for the reason that he did not know within said time that the same had been damaged, or of the real condition of the peaches when accepted for shipment, or upon arrival; that the time was unreasonably short; that the delivering carrier examined said peaches upon arrival and knew for itself the condition of the consignment on arrival; that the defendant, the general agent for fruit shipments, C. F. Carstarphen, and its local agent at Greenwood, Ark., L. W. Rhodes, knew all of the foregoing material matters; that, by reason of delay in arrival of said peaches at their destination as aforesaid, the market value thereof declined \$1 per crate before their arrival, and plaintiff was damaged said amount by reason thereof."

A demurrer was interposed to the complaint containing nine grounds, the sixth of which is as follows: "There is no allegation of a compliance with the terms of the written contract to any paragraph of plaintiff's complaint; that the bill of lading provided: 'Claims for damages must be reported by consignee in writing to the delivering line within 36 hours after the consignee had been notified of the arrival of the freight at place of delivery. If such notice is not there given, neither this company nor any of the connecting or intermediate carriers shall be liable.'" The seventh ground raised practically the same question as the sixth ground, copied above. The court sustained the demurrer, among others, on the sixth and seventh grounds, and dismissed the complaint. Several days after the complaint had been dismissed, the appellants offered certain amendments, which the court refused to allow, and appellants had their exceptions noted to the ruling of the court in refusing to allow these amendments. They also duly excepted to the ruling of the court in sustaining the demurrer and dismissing their complaint, and have duly prosecuted this appeal.

Robert A. Rowe, of Greenwood, Rowe & Rowe, of Ft. Smith, and C. A. Starbird, of Alma, for appellants. E. B. Kinsworthy and R. E. Wiley, both of Little Rock, W. V. Tompkins, of Prescott, and Thos. B. Pryor, of Ft. Smith, for appellee.

WOOD, J. (after stating the facts as above). [1] 1. Conceding, without deciding, that the amendments tendered contained subject-matter germane to the cause of action set up in the original complaint, the court nevertheless did not abuse its discretion in refusing to allow these amendments to be made at the time when they were offered. Appellants did not offer to amend the complaint until several days after the cause of action had been dismissed.

[2] The court, in sustaining the demurrer and dismissing the complaint for the reasons set forth in the sixth and seventh

grounds of the demurrer thereto, held that there was no allegation of a compliance with the terms of the written contract set up in the complaint. Having so decided, the court did not err in refusing to allow an amendment which, in the court's view of the complaint, would have rendered the same inconsistent and contradictory. The only question we now decide with reference to these amendments is that the court did not abuse its discretion in refusing to allow them at the time they were offered. As the case must be reversed for reasons herein-after stated, if counsel are so advised, they may offer and obtain a ruling of the lower court on these amendments at the next hearing.

2. The question presented by the court's ruling on the sixth and seventh grounds of the demurrer is whether or not appellants allege in their complaint facts sufficient to show a compliance on their part with the contract of shipment, as set up in their complaint, which provides that, "in case of damage to said fruit, the consignee thereof shall give notice to the delivering carrier of an intention to claim damages therefor within 36 hours after notice of the arrival of the freight at the place of delivery." The appellants did not allege in their complaint that they complied with this provision of the contract by giving the written notice specified therein, but they allege that the provision requiring written notice was unreasonable, and set out facts which they say show it to be an unreasonable provision.

[3] The facts as alleged must be taken on demurrer as uncontroverted. It therefore becomes a question of law as to whether these facts are sufficient to show that the provision is or is not unreasonable, and not an issue to be submitted to the jury under the provisions of the act approved April 30, 1907 (Laws 1907, p. 558, § 3), requiring "the reasonableness or unreasonableness of such rules and regulations to be determined by a jury." That provision can have no application in cases where the facts are undisputed upon which the issue of reasonableness or unreasonableness is predicated. See *Kansas & Arkansas Valley Ry. v. Ayers*, 63 Ark. 332, 38 S. W. 515.

[4] Without repeating here the facts alleged in the complaint to show that the provision for written notice was unreasonable, it is sufficient to say that, in our opinion, these facts are not sufficient to show that the provision was unreasonable. The fact that the owners of the fruit shipped lived at Greenwood, and the destination of the fruit was at St. Joseph and other distant points out of the state where the goods were consigned, would not show that the provision for notice was unreasonable, nor would the fact that the consignee was at Van Buren, Ark. The fact that the consignor and the consignee depended upon commission merchants at points of destination to

receive the shipments for them, and that these commission merchants had no knowledge of the condition of the peaches when loaded, and no knowledge that they had been damaged by the carrier in transit, would not be sufficient. If the consignor or the consignee could not themselves be at the points of destination so as to obtain the necessary knowledge of the condition of the peaches when delivered to enable them to give notice of an intention to claim damages therefor in case of damage or loss, they would have to have agents at such points of consignment, and could give such notice within the time prescribed. *Arkadelphia Milling Co. v. Smoker Mds. Co.*, 100 Ark. 37, 139 S. W. 680; *C. R. I. & P. Ry. Co. v. Neusch*, 99 Ark. 568, 139 S. W. 679; *St. L., I. M. & S. Ry. Co. v. Townes*, 93 Ark. 430, 124 S. W. 1036, 26 L. R. A. (N. S.) 572.

It would be the consignor's duty to have either the consignee himself at the point of destination or to have some agent there representing him to whom the delivery could be made, and who could ascertain the condition of the shipment when it arrived at its destination, and who could give the notice required by the contract. Thirty-six hours after notice of arrival for notice of a claim for damages is not an unreasonably short time for the consignee to receive all the information necessary as to the damage he has sustained, if any, and to give written notice of an intention to claim such damage to the delivering carrier. Mr. Hutchinson in his work on *Carriers* (3d Ed.) § 442, says: "The object of conditions of this character, it is said, is to enable the carrier, while the occurrence is recent, to better inform himself of what the actual facts occasioning the loss or injury were, and thus protect himself against claims which might be made upon him after such lapse of time as to frequently make it difficult, if not impossible, for him to ascertain the truth. It is just, therefore, that the owner, when the loss or injury has occurred, should be required, as a condition precedent to enforcing the carrier's liability, to give notice of his claim according to the reasonable conditions of the contract."

We quoted the above from Mr. Hutchinson in the case of *St. Louis & San Francisco Ry. Co. v. Keller*, 90 Ark. 308, 119 S. W. 254. In the latter case the contract for notice provided that: "No carrier shall be responsible for loss or damage of any of the freight shipped unless it is proved to have occurred during the time of its transit over the particular carrier's line, and of this notice must be given within 30 hours after the arrival of the same at destination. No carrier shall be responsible for loss or damage to property unless notice of such loss or damage is given to the delivering carrier within 30 hours after delivery." The court, in discussing this provision, made no distinction between the provision requiring no-

tice for loss or damage and one requiring notice of an intention to claim damage, but treated such provision as meaning the same thing, as shown by the authorities cited and the language of the opinion. In the above case it was held that such a provision in the contract is "a condition of recovery and not an exemption from liability." "Its effect," says Judge Frauenthal, speaking for the court, "is to require the one, who has the peculiar knowledge, to inform the other, who has not that knowledge, to seek the facts while they exist, so that the facts may be obtained and presented by both sides; its effect is therefore to uphold and enforce rights if they are founded on truth, and not to limit or defeat those rights." And, continuing, he says: "This court has uniformly upheld and enforced similar provisions in contracts of common carriers where the same, under the circumstances of the case, were reasonable and the damages occurred during the actual transportation of the goods"—citing many cases of this court where the provision of the contract required "notice of intention to claim damages" to be given in writing, etc.

[5] So, under our decisions, it makes no difference whether the provision of the contract requires written notice "of loss or damage" to be given, or whether the language of the contract provides for written notice of an "intention to claim" for loss or damage. Under our decisions, the purport of these provisions is the same, have the same legal effect, and are not limitations upon or exemptions from liability of the carrier, but are only conditions precedent to recovery. *St. L., I. M. & S. Ry. Co. v. Furlow*, 89 Ark. 404, 117 S. W. 517; *St. L. & S. F. Ry. Co. v. Keller*, supra.

It is alleged in the concluding portion of the amendment to the complaint that "the delivering carrier examined said peaches upon arrival and knew for itself the condition of the consignment on arrival. That the defendant, the general agent for fruit shipments, O. F. Carstarphen, and its local agent at Greenwood, Ark., L. W. Rhodes, knew all of the foregoing material matters."

In *Kansas & Arkansas Valley Railway v. Ayers*, supra, there was a shipment of cattle under a contract which contained a provision for notice similar to the one at bar. The proof showed that the notice in writing was not given. The agent at the depot where the cattle were delivered saw the cattle and knew that some of them were dead, and that they were in a bad shape generally, but he did not know, and was not informed, that any claim would be made for damages. The court, in passing upon the question as to whether written notice of damage for the dead cattle was required, said: "The cattle that were dead in the car before the stock was removed and mingled with other cattle were not within this provision of the contract

as to notice. The object of requiring the notice by the shipper of his intention to claim damages to be given before the cattle were removed and mingled with other cattle was to afford the railway company a fair opportunity to examine the cattle before they were removed and mingled with other cattle. As to those that were dead, the company had all the opportunity it could have had to examine them."

Under the doctrine of the above case, it was not necessary, as a condition of recovery, that the appellants give appellee written notice of an intention to claim for damages to the peaches if the delivering carrier, through its agents, examined and knew the condition of the peaches while in its possession after their arrival at their destination. The complaint alleged such knowledge on the part of the carrier, and hence, in this respect, stated facts sufficient to show that the written notice was unnecessary. Where the facts stated show that the delivering carrier has actual knowledge of all the conditions that a written notice could give it, then written notice is not required, and a provision requiring it under such circumstances would be unreasonable.

Appellee relies upon the recent case of Chicago, Rock Island & Pacific R. Co. v. Williams, 142 S. W. 826, to sustain its contention as to the alleged failure of the appellee to comply with provisions of the contract as to notice. But appellant fails to observe the distinction between the Williams Case and the cases of Kansas & Arkansas Valley Ry. v. Ayers, and St. L., I. M. & S. R. Co. v. Cumble. The present case is controlled by the rule in the latter cases. In the Williams Case the provision requires that the claim for the loss, damage, or delay should be made within four months. The language of the contract in that case contemplated the presentation of a formal claim for damages, specifying what was lost or damaged and the amount thereof, etc. But here, as we construe the language of the contract, it only requires that the consignee report that he has sustained loss or damage and his intention to claim therefor; but it does not contemplate the presentation within the short time of 36 hours, the formal claim as required in *Railway v. Williams*, supra. If such were the case, the provision as to time might be considered unreasonable. Whereas, as the provision is only for notice that damage has resulted, and requiring that the consignee report that fact, it is not unreasonable. The distinction between the cases is pointed out by the Chief Justice in *Railway v. Williams* as follows: "In the present case the requirement is not merely for notice to the carrier that damage has resulted, but it is that the claim for the loss, damage, or delay shall be presented within the stipulated time. The purpose of the requirement

is to give the carrier timely opportunity to investigate the claim for damage after the same has been presented. This involves the right to investigate the contents of lost packages, the value of lost articles, as well as the facts bearing upon the question of its liability. The distinction is clearly pointed out by Judge Riddick in the opinion of the court in *W. U. Telegraph Co. v. Moxley*, 80 Ark. 554 [98 S. W. 112], and we are of the opinion that that decision is conclusive of the present case."

The court therefore erred in sustaining the demurrer, and for this error the judgment is reversed, and the cause is remanded, with directions to overrule the demurrer and for further proceedings.

CUMBIE et al. v. ST. LOUIS, I. M. & S. RY. CO.

(Supreme Court of Arkansas. Nov. 4, 1912.)

1. CARRIERS (§ 40*)—CARRIAGE OF GOODS—FURNISHING CARS.

The statute requiring carriers to furnish, without discrimination or delay, sufficient facilities for the carriage of freight does not make the duty an absolute one, but is only declaratory of the common law, and does not require the carrier to provide in advance for any unprecedented and unexpected rush of business.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 120-122; Dec. Dig. § 40.*]

2. CARRIERS (§ 67*)—FURNISHING CARS—CONTRACTS.

A carrier who contracts to furnish all the cars necessary to transport the peach crop from a certain locality, on failure to do so, cannot defend on the ground that it was prevented from doing so by heavy and unprecedented traffic or other unavoidable casualties, but the contract does not relieve the shipper from ordering the cars for a specified time and place as required by law.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 224-229; Dec. Dig. § 67.*]

3. CARRIERS (§ 66*)—FURNISHING CARS—CONTRACTS—MUTUALITY.

A shipper's order calling for a specified number of cars for a specified day, when accepted by the carrier, is a contract binding the carrier to furnish the cars, and the shipper to furnish the goods to load the cars, but such contract does not render the carrier liable for failure to furnish cars to parties who did not authorize the order, but who would have used the cars if they had arrived.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. § 221; Dec. Dig. § 66.*]

Appeal from Circuit Court, Sebastian County; Daniel Hon, Judge.

Consolidated actions by R. C. Cumble and others against the St. Louis, Iron Mountain & Southern Railway Company. Judgment for defendant, and plaintiffs appeal. Affirmed.

Appellants instituted separate suits against appellee to recover damages for appellee failing to furnish them cars for the shipment of peaches. These cases were consolidated and tried together in the court below. The same

judgment was rendered in each case, and the issues involved in the appeal are the same. The evidence adduced by appellants tends to prove substantially the following state of facts: Quite a number of people were engaged in the business of growing peaches for sale and shipment, and some of them organized themselves into what they called a "Fruit Growers' Association." Mr. C. B. Carstarphen was the agent of appellee railway company to solicit shipments of freight over its line of railroad. In the spring of 1907 he went to Greenwood for the purpose of soliciting in advance the shipment of peaches over appellee's line of railroad. He talked with Mr. R. C. Cumble and others in regard to the matter. He asked them what they wanted, and Mr. Cumble told him they wanted a shed. Carstarphen said that it was too late to build a shed for that season, and, if it would suit the peach growers as well, the railroad company would keep iced cars there for the surplus left over, and it would be much better than a shed; that at that late day he would rather do that than to undertake to build a shed, and it was agreed that he was to do that. R. C. Cumble estimated that between 75 and 100 cars of peaches would be shipped from Greenwood, Ark. Carstarphen agreed to keep cars there at all times for the peaches to be loaded in. He said that the shippers could load the peaches direct from the wagon into the iced cars. When the season arrived for the shipment of the peaches, R. C. Cumble said: "The understanding was that I was to order cars orally. We agreed that it would be unnecessary to order cars by making a written order, because I was the agent and was supposed to be right there on the ground with the railroad agent; that is the plan we hit on, and the plan we worked on, and the plan we ordered on. The understanding over there was that I was to make the order by 5 o'clock in the evening so as to be sure we would get the cars."

We further quote from his testimony as follows: "Q. Then when would the cars be expected? A. We would be expecting them, if he ordered for the next morning, at 10 o'clock—that is, if they could get them here—they agreed to get them here, if they could, on the 10 o'clock train the next morning; if not, by 5 o'clock the next evening; get some cars for the next morning by 10 o'clock, ordering them at 5 o'clock this evening. Q. That is the understanding that they would bring part of the cars on the 10 o'clock train that you ordered for 5? A. Or bring them out on the evening train, would make the order for 10 o'clock, and they would get them, if they could; if not, they would get them on the evening train at 5 o'clock. Q. If you made the order for the 10 o'clock train they would bring them on the 10? A. Yes; they did not always do it. Q. It was the understanding they would? A. Yes, sir. Q. But didn't always do it? A. No, sir. Q.

You made the order for the evening train, it was the understanding they would get them that way? A. Yes; but they did not always do that. Q. I will ask you if the orders had come out as you made them, whether you made them in time for them to have had cars there for the peaches if they had filled your orders? A. I think practically so; of course anybody might make a mistake and order a car too many or might lack having enough, because you don't know this evening at 5 o'clock how many wagon loads come in, but we tried to ascertain those things about how many were gathered and about how many wagon loads came in, and tried to make an estimate at 5 o'clock about how many cars would be needed the next day and order that amount; I think, if we had got the cars we ordered, we would have had plenty of cars. Q. To have loaded them right off the wagons without having to stack them out there? A. Yes, sir. Q. Or on sheds or platforms. How long after the shipping season was it until they failed to fill your orders for cars? A. I am not sure; but my impression is that the first failure they made was about either Saturday or Sunday, and we began the first of the week, perhaps about the first of the week; I do not think it was more than three or four days. Q. I will ask you if, at the time the peaches there in controversy were left there on the shed, being no cars for them, I will ask you if you did not order plenty of cars then, if they had filled your orders, to have taken the peaches? A. Yes; I ordered cars every day—that is, right at the very beginning—I do not know whether I ordered cars the first day or began the next day, I think I did, but at one time might be a few peaches scattered around there and might need car to-day and would not need one a day or two—during the active part of the season I did."

The testimony on the part of the appellants tended to show that their peaches rotted because of the fact of appellee failing to furnish them cars in which to ship them. The testimony on the part of the railway company tended to show that, when the time arrived to ship the peaches, the matter of ordering cars was left to the railroad company's agent at Greenwood, and that his judgment as to the number of cars necessary from day to day was to be controlling. Other facts will be stated or referred to in the opinion. There was a verdict in favor of the railroad company, and the cases are here on appeal.

Rowe & Rowe, of Ft. Smith, and R. A. Rowe, of Greenwood, for appellants. Thos. B. Pryor, of Ft. Smith, for appellee.

HART, J. (after stating the facts as above). [1] Counsel for appellants first insist that the effect of the agreement made with Mr. Carstarphen, as detailed in the statement of facts, obviated the necessity of them ordering

cars for the shipment of their peaches, and that it was the duty of the railway company to have the cars there at all times for the shipment of peaches, whether ordered by appellants or not. We do not agree with them in this contention. We have held that our statute requiring carriers to furnish, without discrimination or delay, sufficient facilities for the carriage of freight is not intended to make the duty of carriers to furnish transportation facilities an absolute one, but is simply declaratory of one of the requirements of the common law, and therefore does not require the carrier to provide in advance for any unprecedented and unexpected rush of business. *St. L. S. W. R. Co. v. Clay County Gin Co.*, 77 Ark. 357, 92 S. W. 531.

In the case of *Mauldin v. Seaboard Air Line Ry. Co.*, 73 S. C. 9, 52 S. E. 677, it is held that the difference between the obligation to furnish cars imposed by law, and that imposed by a contract to furnish them, is that the contractual obligation is more onerous, for, while a railroad is not liable for nonperformance of its legal obligations, where it has a reasonable excuse to furnish cars, such as heavy and unprecedented traffic, it is not relieved from the obligations to perform its contracts by unexpected emergencies in its business.

In 4 *Elliott on Railroads* (2d Ed.) par. 1473, the author states the difference as follows: "Where a railroad company expressly undertakes by special contract to furnish cars at a specified time, it is bound to perform its contract. Where there is no express contract, then, as we have seen, an unusual press of business may excuse the company for a failure to furnish cars; but, where there is an express contract, the rule is that a press of business, although unusual and unexpected, will not relieve the company from liability. Where there is an express contract, of the character above indicated, to furnish cars at a specified time, the fact that an unavoidable accident prevents the company from performing its contract will not exonerate it from liability to a shipper who suffers an injury because of the failure to perform the contract." See, also, *Midland Valley R. Co. v. Hoffman Coal Co.*, 91 Ark. 180, 120 S. W. 390.

[2] In view of these principles, we think the effect of the contract, as stated in the statement of facts, was to preclude the railroad company from imposing, as a defense for failing to furnish cars, that it was prevented from doing so by heavy and unprecedented traffic or other unavoidable casualties, and that the contract did not relieve the shipper of the obligation of ordering cars for a specified time and place as required by law.

[3] It is next contended by counsel for appellants that, when the time for the shipment of the peaches was at hand, R. C. Cumble made an agreement for himself and all others who intended to ship peaches from the locality that he was to order cars orally; that, if the order was made on one afternoon, the cars were to be sent out on the first train the next morning, or, in default of that, on the afternoon train. Such a contract would be void for want of mutuality as to all parties except Cumble and those who had authorized him to make such a contract for them. It is well settled that a shipper's order calling for a specified number of cars for a specified day, when accepted by a common carrier, constitutes a contract binding the carrier to furnish the cars and the shipper to furnish the goods wherewith to load the cars. *Hutchinson on Carriers* (3d Ed.) vol. 2, par. 495; *Railway Co. v. Bundy*, 97 Ill. App. 202.

In the present cases there is no testimony that appellants authorized R. C. Cumble to make such a contract for them. Let us suppose that Cumble had ordered a given number of cars for a designated day and the railroad had furnished them in compliance with the order. Can it be said that the railroad company would have had an action against these appellants if a sufficient number of peaches had not been placed in the cars for shipment to fill them? There can be no doubt but that this question must be answered in the negative. A request to a carrier for cars carries with it, by implication of law, an agreement to make use of the cars, if the request is complied with, and a correlative promise to pay the railroad company whatever loss might be incurred by it in the event the cars were not used. The contract must be sufficiently definite to bind the carrier to furnish the cars and the shipper to use the cars when furnished. Under the facts of these cases, as detailed by appellants, if cars ordered by R. C. Cumble had been furnished by the railroad company and had not been used, the railroad company would have had a cause of action against R. C. Cumble, but none against these appellants, because they did not authorize him to order cars for them, and the jury could not have inferred a promise by them to do something which they had not agreed to do.

Indeed all of the appellants, except R. C. Cumble, expressly stated that they did not order any cars on the day in question, nor authorize any one else to order cars for them. They had brought their peaches to the town of Greenwood, and, failing to find a local market for them, then carried them to the depot and offered them for shipment.

Therefore the judgment will be affirmed.

EDWARDS v. BOND.

(Supreme Court of Arkansas. Nov. 18, 1912.)

1. MORTGAGES (§ 38*)—ABSOLUTE DEED AS MORTGAGE—PRESUMPTION AND BURDEN OF PROOF.

In a suit to declare a deed absolute on its face a mortgage, the law presumes that it was an absolute conveyance, and the burden is upon the complainant to show that it was a mortgage.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 95, 96; Dec. Dig. § 36.*]

2. MORTGAGES (§ 38*)—ABSOLUTE DEED AS MORTGAGE—SUFFICIENCY OF EVIDENCE—DEGREE OF PROOF.

In the absence of fraud or imposition, the proof to overcome the presumption that a deed absolute on its face is an absolute conveyance, and to establish its character as a mortgage must be clear, unequivocal, and convincing.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 108-111; Dec. Dig. § 38.*]

Appeal from St. Francis Chancery Court; Edward D. Robertson, Chancellor.

Suit by J. E. Edwards against Scott Bond. Decree for defendant, and complainant appeals. Affirmed.

J. F. Wills, of Argenta, and C. L. O'Daniel, of Little Rock, for appellant. S. H. Mann and J. W. Morrow, both of Forrest City, for appellee.

KIRBY, J. This is a suit in chancery to declare a deed, absolute on its face, a mortgage, for an accounting, and redemption of the land conveyed, and from a decree in favor of appellee refusing to grant the relief prayed this appeal comes. The testimony is in sharp conflict, and it may be there is a bare preponderance of it in favor of appellant.

[1, 2] The deed being absolute in form, the burden was upon appellant to show that it was a mortgage, the law presuming that an instrument is what appears on its face to be an absolute conveyance, and, in the absence of fraud or imposition, the proof to overcome this presumption and establish its character as a mortgage must be clear, unequivocal, and convincing. *Hays v. Emerson*, 75 Ark. 554, 87 S. W. 1027; *Rushton v. McIlvene*, 88 Ark. 301, 114 S. W. 709.

We are unable to say that the chancellor erred in holding the evidence insufficient to overcome the presumption arising from the deed of absolute conveyance, that it is what it purports to be, and the decree is affirmed.

ST. LOUIS, I. M. & S. RY. CO. v. WILLIAMS et al.

(Supreme Court of Arkansas. Nov. 18, 1912.)

1. APPEAL AND ERROR (§ 1002*)—VERDICT—CONCLUSIVENESS.

A verdict on conflicting evidence will not be disturbed merely because it appears to the Supreme Court to be against the preponder-

ance of the evidence; the jury being the sole judges of the credibility of the witnesses.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3935-3937; Dec. Dig. § 1002.*]

2. WATERS AND WATER COURSES (§ 63*)—OBSTRUCTING WATER COURSE—DAMAGES—INSTRUCTIONS.

An instruction, in an action against a railroad company for causing the waters of a creek to overflow the land of plaintiff, that, if the jury believe that any obstructions put into or negligently left in the creek by the company either caused the damage to plaintiff's land or contributed to cause damage, the verdict must be for plaintiff, does not permit the recovery of all damages caused by the overflow because they may have been increased by the obstructions, but only means that the company is liable for the part of the injury to which its negligent acts contributed, and, so construed, is not erroneous.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 51, 53; Dec. Dig. § 63.*]

3. APPEAL AND ERROR (§ 232*)—QUESTIONS REVIEWABLE—OBJECTIONS IN TRIAL COURT.

Where an objection raised below to an instruction was properly overruled, an objection on other grounds cannot be urged on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1351, 1368, 1426, 1430, 1431; Dec. Dig. § 232.*]

Appeal from Circuit Court, Saline County; W. H. Evans, Judge.

Action by W. M. Williams and others against the St. Louis, Iron Mountain & Southern Railway Company. From a judgment for plaintiffs, defendant appeals. Affirmed.

E. B. Kinsworthy, R. E. Wiley, and W. G. Riddick, all of Little Rock, and H. S. Powell, of Camden, for appellant. Mehaffy, Reid & Mehaffy, of Little Rock, for appellees.

McCULLOCH, C. J. The plaintiffs, three of them, are owners of small tracts of land in Saline county, Ark., and instituted this action against the railway company to recover damages alleged to have been caused by reason of injury to said lands from waters overflowing from Cliff's creek. It is alleged in the amended complaint that the overflowing of the lands was caused by the act of the defendant in allowing obstructions to be placed and to accumulate in the culvert where the railroad passes over Cliff's creek; the allegation being that within three years before the commencement of the action the agents and servants of the defendant, in repairing the culvert, dumped the old material, such as "guard rails, rotten ties, and ends of timbers cut off from fitting the material for said repairs, into the stream below," and that said timbers were allowed to remain in the stream below the culvert and dam it up, so that it caused the lands of plaintiffs to be injured by the overflow. It is also alleged that within three years next before the commencement of the action defendant's agents and servants, in repairing

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

the culvert, had put new piling thereunder, "placing said new piling between the ends of the fill * * * and the edge of said stream; that the old piling was sawed off about two feet above the top of the ground, the stumps of the old piling being left sticking up out of the ground and so near the channel of said stream that in times of high water drift would lodge against said stumps and assist in backing the water up and forcing it to flow out of the original channel." In the original complaint there was an allegation of negligence in narrowing the culvert; but this is alleged to have occurred five or six years before the commencement of the action, and no effort was made to recover under that allegation. The case was tried entirely upon the question whether the injury was caused by negligence of the defendant within three years before the commencement of the actions. The cases were consolidated, and on trial before a jury a verdict was rendered in favor of the plaintiffs assessing damages in the aggregate sum of \$70, and the defendant has appealed from the judgment.

[1] It is insisted, in the first place, that the testimony is not sufficient to support the verdict. Much space is given in the brief to the argument of the question whether damages could be recovered for the injury, if any, which resulted from the narrowing of the trestle or culvert; but plaintiffs concede that there is no right of recovery on account of that act, and the case was submitted to the jury entirely upon the right to recover upon alleged acts of negligence which occurred within three years. While the great preponderance of the testimony seems to be in favor of the defendant, we are of the opinion that there was enough to go to the jury, and that the verdict is sustained by the evidence. The trial jury was the sole judge of the credibility of the witnesses, and it is not our duty to reverse a case simply because the verdict appears to us to be against the preponderance of the evidence. Many witnesses testified that Cliff's creek frequently overflowed, and that the alleged obstructions in the culvert did not and could not have appreciable effect upon the flow of water; but there was some testimony to the effect that the stream did not overflow sufficiently to damage plaintiff's lands until these obstructions were allowed by the defendant to accumulate in the culvert.

[2] The following instruction was given over defendant's objection, and the ruling is now assigned as error: "If you believe from the evidence in this case that any obstructions put into the creek, or negligently left in the creek by the defendant, either caused the damage to plaintiffs' land or contributed to cause the damage, then your verdict must be for the plaintiffs." It is insisted that this instruction is erroneous, for the reason that

it permits the recovery of all damages caused by the overflow merely because the damage may have been increased by reason of the obstructions placed in the culvert. We scarcely think the instruction is open to that objection, as it is fairly susceptible only of the meaning that the defendant is liable for that part of the injury to which negligent acts of its servants contributed; but, even if this part of the instruction is not strictly accurate and is open to the objection now made to it, it is too late to complain for the reason that the defendant at the time based its objection upon an entirely different ground.

[3] It objected on the ground that the first part of the instruction was erroneous, and asked that the court strike out the following words: "Any obstructions put into the creek, or negligently left in the creek by the defendant." The use of those words was proper and was clearly within the issues, so the court did not err in refusing to sustain that objection, and it is now too late to urge any other objection.

There are several other assignments of error which we do not deem of sufficient importance to discuss.

Finding no error in the record, the judgment is affirmed.

NATIONAL PACKING CO. v. BOULLION. (Supreme Court of Arkansas. Nov. 18, 1912.) CORPORATIONS (§ 492*)—LIABILITY FOR TORTS—SLANDER OF AGENT—COURSE OF EM- PLOYMENT.

Defendant packing company's auditor, who was employed to investigate the accounts of its employés and ascertain any shortages and secure evidence as to the persons responsible therefor, but not to make any charges of crime in connection with any defalcations discovered, while making an investigation of the sales tickets sent out by plaintiff, a shipping clerk, which appeared to have been altered, stated that there had been some forgeries and it was "up to plaintiff to make settlement." Held, that the auditor's statement, even if slanderous, was not made in the course of his employment, or scope of his authority, so as to charge defendant therewith.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1903; Dec. Dig. § 492.*]

Appeal from Circuit Court, Pulaski County; John W. Blackwood, Special Judge.

Action by Frank L. Boullion against the National Packing Company. From a judgment for plaintiff, defendant appeals. Reversed, and cause dismissed.

The National Packing Company is a corporation of Illinois, doing business in Arkansas. The appellee brought suit against the Packing Company for slander, alleging that its auditor, "while acting in due course of his employment, committed an injury to the name and character of plaintiff by speaking the following words to plaintiff in the presence and hearing of divers persons:

'Boullion, the house has been robbed and there have been some forgeries. You acknowledge to signing these tickets, and it is up to you to make settlement.' That Boullion then said: 'Do you mean to charge me with robbery and forgery?' To which Fisher replied: 'You need not try to throw anything over my eyes. We are not asleep. You have acknowledged to the handwriting, and it is up to you to make settlement'—implying that Boullion had committed some species of larceny and forgery." Appellee prayed for \$10,000 actual damages and \$5,000 punitive damages. The appellant denied that its auditor meant any injury to the good name and character of appellee, and denied that he spoke the words set out in the complaint. It denied that its auditor used any language which either charged or implied that appellee had been dishonest or had committed any forgery, or had been guilty of appropriating to his own use any money belonging to appellant. It set up that, if the auditor used the language alleged, such language was not within the scope of his employment and was not authorized by appellant; and, further, that, if such language was used, it was without appellant's knowledge or consent, and it had not at any time adopted or ratified the same.

The testimony on behalf of the appellee tended to show that he was in the employ of appellant as shipping clerk. His duties were to see that the stock of meats was taken care of and to wait on the people, see that their orders were filled, and to send out merchandise on orders which came in. On the 19th of January, 1911, one Fisher, an auditor of the appellant, was in the office of the company checking up the office. On that occasion Fisher, in a conversation with appellee, in the presence of other employees of appellant, used the language, addressed to appellee, set out in the complaint. The language was used while the auditors were making an investigation of sales tickets which had been made out by the appellee, and which appeared to have been altered. The investigation showed that there was a shortage, and the appellee testified that the auditor of the appellant used the language above, intending to accuse him of forgery and larceny. The testimony on behalf of appellant tended to show that its auditor did not use the language set out in appellee's complaint. The auditor of the appellant, to whom the language was attributed, testified that the conversation he had with appellee was for the purpose of trying to find the guilty party. In so doing he was carrying out the business of the company intrusted to him. He denied that he used the language set up in appellee's complaint, but stated that whatever conversation he had with the appellee was with a view of "trying to locate who the guilty party was." It was his duty, not only to locate the short-

age, but to locate the responsible party. He was to find out who the guilty party was, and get all the evidence he could with reference to that matter. He was to gather all the evidence he could tending to reflect the guilt of the parties responsible and to report the same to the home office. He had authority to use his own judgment and methods in securing the evidence, but was not to have the guilty party arrested.

The appellant, among other prayers, asked the court to instruct the jury to find for the defendant, which the court refused, and appellant duly excepted.

The verdict and judgment were in favor of the appellee for \$250.

Rose, Hemingway, Cantrell & Loughborough, of Little Rock, for appellant. Gus Fulk, and Bradshaw, Rhoton & Helm, all of Little Rock, for appellee.

WOOD, J. (after stating the facts as above). In *Lindsey v. St. L., I. M. & S. Ry. Co.*, 95 Ark. 534, 129 S. W. 807, Lindsey sued the corporation for slander. He alleged that the slanderous words were spoken "by special agents in the employ of defendant for the purpose of finding said missing cotton and said charge was made by them in furtherance of the defendant's business, which they were employed to do for the purpose of ascertaining whether plaintiff was the guilty person or had guilty knowledge of the matter, and of inducing him, if guilty, to confess it," etc. Lindsey contended that the slanderous words uttered by the agents of the railway company while engaged in ferreting out the crime were within the scope of their employment and that the company was liable to him for slander. The court, in passing upon his contention, said: "Slander is unlike other torts. It is the individual act of him who utters it, and often arises entirely out of his momentary feelings and passions, without forethought on the speaker's part. It is such an act as cannot be anticipated, and for that reason cannot be impliedly authorized in advance. Hence it has been held that the utterance of slanderous words by an agent of a corporation must be ascribed to the personal malice of the agent who uttered them, 'rather than to the act performed in the course of his employment and in aid of the interest of his employer,' and the corporation must be exonerated 'unless it authorized, approved or ratified the act of the agent in uttering the particular slander.' Here proof of agency will not be sufficient to prove such authority or ratification."

In *Waters-Pierce Oil Co. v. Bridwell*, 147 S. W. 64, the plaintiff sued the oil company and its agents for slander alleged to have been committed by making defamatory statements in regard to the inspection and quality of the oil which plaintiff was engaged in selling. The plaintiff alleged "that the agents

of the Waters-Pierce Oil Company, while engaged in selling its oil, stated to the customers of the plaintiff that his oil would not stand the test prescribed by the inspection laws of the state of Arkansas, and that both plaintiff and his customers in selling said oil were acting in violation of the criminal laws of the state." It was alleged that the statements were made of and concerning plaintiff's business, and were injurious thereto. The court in that case used the following language: "There is some conflict of authority in respect to the liability of a corporation for slander, but, inasmuch as a corporation must transact its business and perform its duties through natural persons, it is now well settled that a corporation is liable in damages for slander as it is for other torts. To establish its liability, the utterance of the slander must be shown to have been made by its authority or ratified by it, or to have been made by one of its servants or agents in the scope of his employment and in the course of the business in which he is employed."

[1] The undisputed evidence in this case shows that it was the duty of appellant's auditor to investigate the accounts of its employes and to ascertain if there were shortages, and to gather the evidence tending to show who was responsible, but he did not have authority to accuse any one of crime in connection with such defalcations. He could select his own methods and use his own judgment in making his investigations and in getting up the evidence; but he was not authorized to make arrest or make criminal charges against any one. Conceding, therefore, that the language charged in the appellee's complaint was slanderous, there is no testimony to warrant the conclusion that this language was uttered by the agent of the appellant in the course of his employment or within the scope of his authority, nor was there any evidence tending to show that the alleged slanderous words were ratified by the appellant. The facts of this record are similar to the facts in *Lindsey v. St. L., I. M. & S. R. Co.*, supra. The agent in that case at the time of the alleged slanderous words was engaged in ascertaining who committed the crime of stealing or taking cotton from the railway company. Judge Hart, speaking for the court, in the case of *Waters-Pierce Oil Co. v. Bridwell*, supra, in approving the doctrine announced in *Lindsey v. Railway Co.*, supra, said: "In that case the railway company had sent a special agent to trace some cotton which was missing, and the special agent accused the station agent at Monticello of stealing it. The full measure of his duty was to trace the missing cotton, and his conduct in insulting the agent was entirely beyond any authority given him either expressly, or which could be fairly implied from the nature of

his employment or the duties incident to it."

Applying the doctrine of the above cases to the undisputed facts in this record, we must hold that the appellant was not liable. The court therefore erred in not granting appellant's instruction No. 1, asking an instructed verdict, and in overruling appellant's motion for a new trial.

The judgment is therefore reversed, and the cause dismissed.

CENTRAL RY. CO. OF ARKANSAS v. LINDLEY.

(Supreme Court of Arkansas. Nov. 18, 1912.)

1. RAILROADS (§ 233*)—INJURIES TO PERSON ON TRACK—STATUTES—NECESSITY OF KEEPING LOOKOUT—"TRAIN."

A motor car for passengers operated by a railroad company is a "train" within Acts 1911, p. 275, requiring persons running trains to keep a constant lookout for persons and property on the track.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. § 747; Dec. Dig. § 233.*]

For other definitions, see *Words and Phrases*, vol. 8, pp. 7066, 7067.]

2. RAILROADS (§ 441*)—INJURIES TO STOCK ON TRACK—DUTY OF KEEPING LOOKOUT—BURDEN OF PROOF.

Under Acts 1911, p. 275, requiring persons running trains to keep a constant lookout for persons and property on the track, and placing on the railroad the burden of showing, in an action for an injury, that such lookout was kept, proof by a plaintiff in an action for the death of and injury to horses on a railroad trestle which would justify an inference that such property had been injured in the operation of the train, and that the danger might have been discovered, and the injury avoided, had a lookout been kept, would cast upon the defendant the burden of showing that a lookout was kept.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1575-1585; Dec. Dig. § 441.*]

3. RAILROADS (§ 446*)—INJURIES TO STOCK ON TRACK—DUTY TO KEEP LOOKOUT—EVIDENCE.

Where, in an action for injury to horses on a railway trestle under Acts 1911, p. 275, requiring persons running trains to keep a constant lookout for property on the track, there was evidence that there was only one person beside the motorman in the motor car alleged to have caused the injury, testimony that at a point on the line near where the accident occurred there was loud talking and hallooing by the persons in the car was properly admitted to show that the motorman was not keeping a lookout.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1627-1641; Dec. Dig. § 446.*]

4. RAILROADS (§ 442*) — INJURY TO STOCK ON TRACK—ACTION—EVIDENCE.

In an action for injury to horses on a railway trestle, evidence held not to warrant directing a verdict for the defendant.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1596-1607; Dec. Dig. § 442.*]

Appeal from Circuit Court, Yell County; Hugh Basham, Judge.

Action by P. C. Lindley against the Central Railway Company of Arkansas. From

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

a judgment for plaintiff, defendant appealed. Affirmed.

P. C. Lindley sued the Central Railway Company of Arkansas in the circuit court for \$750 alleging that on the 15th of October, 1911, the defendant's servants engaged in running a motor car and train from Ola to Plainview so negligently ran and operated the car and train as to cause two mares to be killed and one to be injured. The answer denied negligence. The facts are substantially as follows: The railway company operated a motor car from Plainview to Ola for the purpose of carrying passengers. It was built with a deck with springs, and its capacity is six or eight passengers. The engine is a small type motor, slow speed, and is on the deck of the car. One man runs the car. On the 15th day of October, 1911, A. T. Reed, one of the servants of the company, ran the car from Plainview to Ola, and came back with a passenger. He arrived at Ola about 5 o'clock in the afternoon, and started back about 7 o'clock p. m. He had one passenger, who was also an employe of the railway company. On his return, when within about 150 yards of bridge No. 9, he discovered three horses on the bridge. The bridge or trestle was about 90 feet long, and the horses were on the end next to the approaching car. Reed was not able to extricate the animals from the bridge, and abandoned his car and walked on to Plainview, which was about two miles distance.

P. C. Lindley, the plaintiff, testified: "The next morning after the horses had become entangled in the bridge, I learned of the occurrence, and went to the scene of the accident. Two of the horses were found dead near the bridge, and I recognized them as my horses. Another one was found on the right of way nearby. Its feet and belly were badly scarred. It was also my horse. I examined the railroad track and found my horses' tracks on the railroad for about 300 or 400 yards back from the bridge. The tracks of my horses were going towards the bridge, and, when I got in about 150 or 200 feet of the bridge, it looked as if the tracks were plainer. The tracks appeared as if the horses were running faster, or at least that they had struck the ties, and in some places had torn pieces or splinters off of them. I have often had occasion to notice the tracks of horses going at a rapid rate of speed and tracks of horses walking along. The tracks as they got nearer to the bridge indicated that the horses were running faster. The ties on the railroad track where the horses went on the bridge were scarred and torn up, as if the horses were running. The ties were torn up for about 30 or 35 feet. The plaintiff also testified as to the value of the horses that were killed and the amount of damage to the one that was injured."

Another witness for the plaintiff testified

that he lived about one mile from Ola, and at a distance of about 250 feet from the railroad track; that he heard the car pass on its return to Plainview, and heard some persons on the car hallooing. He does not think the motor car was going faster than it usually did, and said that its usual speed was 14 or 15 miles per hour. On cross-examination he stated that he heard the hallooing about two miles from the bridge where the mares were killed and injured, and does not think it was loud enough to alarm the horses at the bridge.

Another witness testified that he lived about 200 yards from the railroad, and something over a quarter of a mile from the bridge where the mares were killed and injured. He heard the motor car go to Ola and back. On the return trip he heard some people on the car talking and laughing.

A. T. Reed, for the defendant, testified that he ran the motor car on the day in question. He says he was keeping a sharp lookout for persons and objects on the track, and did not discover the animals until they were on the bridge; that he was going at the rate of eight miles per hour when he discovered the horses; that he had no light on the car, but from the starlight he could see about 150 yards in front of the car; that he was looking straight ahead, keeping a close lookout for anything that might be in front, and that he was about 150 yards from the bridge when he saw the animals on it; that he shut off his power and let his car drift within 150 feet of the bridge; that he found it was impossible to do anything towards extricating the animals.

There was a verdict for the plaintiff in the sum of \$300, and from the judgment rendered the defendant has appealed to this court.

Hill, Brizzolara & Fitzhugh, of Ft. Smith, for appellant. Sellers & Sellers, of Morrilton, for appellee.

HART, J. (after stating the facts as above). [1] Counsel for the defendant say this action is based on the lookout statute, making it the duty of all persons running trains in this state to keep a constant lookout for persons and property on the track, and contends that a motor car is not a train within the meaning of the statute. In the case of Little Rock & Ft. Smith Ry. Co. v. Blewitt, 65 Ark. 235, 45 S. W. 548, the court held that an engine is a train within the meaning of the statute. See, also, Railway v. Taylor, 57 Ark. 136, 20 S. W. 1083. The motor car in question was run by the defendant company for the purpose of carrying passengers over its line of railroad, and we think was a train within the meaning of the statute.

[2] 2. It is next contended that the court erred in refusing to give instruction num-

bered "A" asked by the defendant. It is as follows: "The court instructs the jury that, if they find from the evidence that the horses whose death and injury are sued for were found dead or injured so near the roadbed of the defendant company as to indicate that they were thrown there by a passing train of the defendant company, then the presumption is that the killing or wounding was done by the defendant's train, and that it resulted from want of care, and the defendant would be liable unless this presumption is rebutted by evidence overcoming it, but this presumption does not attach if the evidence shows that the horses were not killed or wounded by contact with a train of defendant company. The jury is instructed that if they find that the horses whose death and injury is sued for herein were killed or injured on a bridge from falling therein, and were not killed or injured by the coming in contact with a train of the defendant, then there is no presumption of negligence on part of the defendant, and the plaintiff cannot recover unless he shows, by a preponderance of the evidence, negligence on part of defendant's employes causing the death or wounding of the horses sued for." It was not charged, or attempted to be proved, that the horses were killed and injured by a train striking them. The action was not brought under section 6776, Kirby's Digest, and that section has no application to the facts of this case. The suit was brought under the act of May 26, 1911, which is as follows: "It shall be the duty of all persons running trains in this state upon any railroad to keep a constant lookout for persons and property upon the track of any and all railroads, and if any person or property shall be killed or injured by the neglect of any employes of any railroad to keep such lookout, the company owning or operating any such railroad shall be liable and responsible to the person injured for all damages resulting from neglect to keep such lookout. Notwithstanding the contributory negligence of the person injured, where if such lookout had been kept, the employe or employes in charge of such train of such company could have discovered the peril of the person injured in time to have prevented the injury, by the exercise of reasonable care after the discovery of such peril, and the burden of proof shall devolve upon such railroad to establish the fact that this duty to keep such lookout has been performed." Acts 1911, p. 275. Under this section, that part of the instruction which tells the jury in effect that there is no presumption of negligence on the part of the defendant where the horses were not killed or injured by coming in contact with a train is too broad, and is not the law. The statute makes the railroad company liable for all damages resulting from negligence to keep a lookout for property upon its track, and imposes upon the railroad company the burden of proving that it has kept such look-

out. The statutory policy of imposing the burden of proof in this respect upon the railroad company doubtless had its origin in the fact that the company's employes would know whether they kept a lookout or not, and the owner of the property would not know whether they had performed their duty in this respect or not. In other words, the statute makes it the duty of railroad companies to keep a lookout for property upon its tracks, and makes it liable for all injuries that occur by reason of its failure to perform this duty. Under the lookout statute, when the plaintiff has proved facts and circumstances from which the jury might infer that his property had been injured on account of the operation of the train, and that the danger might have been discovered and the injury avoided if a lookout had been kept, then he has made out a prima facie case, and the burden is on the defendant to show that a lookout was kept as required by the statute. For the reasons here given, instructions numbered "B" and "2" asked by the defendant were properly refused by the court.

[3] It is finally insisted by counsel for the defendant that the court should have directed a verdict for it under the facts. While we do not agree with counsel in this contention, it must be admitted that the question is a very close one. It is true that the motorman and also the other occupant of the car testified that the motorman kept a sharp lookout and was looking straight ahead all the time, and that the horses were not seen until they were found on the bridge or trestle, but it cannot be said that their testimony in this respect was reasonable and consistent, and was uncontradicted by any other fact or circumstances adduced in evidence. It will be remembered that the motorman testified that he could see objects on the track 150 yards ahead, and was looking straight ahead all the time. The testimony of the plaintiff shows that the horses came upon the track 300 or 400 yards from the bridge and the impressions of their tracks made on the roadbed showed that soon after getting on the track they commenced running and continued to run faster as they approached the bridge.

[4] Then, too, testimony was introduced by the plaintiff tending to show that the persons in the car were heard hallooing and loudly talking and laughing. This testimony was not introduced, as counsel for the defendant seem to think, for the purpose of showing that the loud talking and laughing was calculated to frighten the horses, but was no doubt introduced for the purpose of showing that the motorman, being engaged in an animated conversation with the other occupant of the car, was not keeping the lookout required by the statute, and the testimony was competent for that purpose. It will be remembered that there were only two persons in the car and the motorman

would necessarily be a participant in the loud talking and laughing. Under all the facts and circumstances adduced in evidence, the jury were warranted in finding that the motorman was not keeping the lookout required by the statute, and that, had he been doing so, he would have seen the horses on the railroad track some distance before they reached the trestle, and would have observed that they were frightened by the approach of the motor car, and that they commenced to run and continued to run faster as the car approached them. Hence, the jury might have found that he was guilty of negligence in not stopping the car when he had reason to believe the horses would not leave the track before reaching the trestle, and, under such circumstances, should have anticipated as a natural and probable consequence of not stopping the car that the horses would run into the trestle and be killed or injured. *St. L., I. M. & S. R. Co. v. Rhoden*, 93 Ark. 29, 123 S. W. 798, 187 Am. St. Rep. 73, 20 Ann. Cas. 915.

The judgment will be affirmed.

BURNETT v. TURNER et al.

(Supreme Court of Arkansas. Nov. 18, 1912.)

1. APPEAL AND ERROR (§ 193*)—OBJECTION TO DECLARATION—JOINDER OF CAUSES OF ACTION.

Where there was no objection to an improper joinder of two causes of action, it will not be considered on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1226-1238, 1240; Dec. Dig. § 193.*]

2. APPEAL AND ERROR (§ 187*)—OBJECTIONS—JOINDER OF PARTIES.

Where there was no objection to a joinder of parties, it will not be considered on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1184-1189; Dec. Dig. § 187.*]

3. LIMITATION OF ACTIONS (§ 146*)—ACKNOWLEDGMENT OR NEW PROMISE—REQUIREMENT OF WRITING.

While, in the absence of a forbidding statute, an oral acknowledgment or promise will interrupt the statute of limitations, yet, under Kirby's Dig. § 5079, which provides that no verbal acknowledgment or promise shall be sufficient evidence to take any case founded on contract out of the operation of the statute, such acknowledgment or promise must be in writing, signed by the party to be charged.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 593-596; Dec. Dig. § 146.*]

4. LIMITATION OF ACTIONS (§ 15*)—AGREEMENT WAIVING LIMITATION—WRITING.

Under Kirby's Dig. § 5079, which provides that no verbal acknowledgment or promise shall be sufficient to take any action founded on contract out of the statute of limitations, an oral waiver of the statute, or promise not to plead it, need not be in writing; such promise, if based upon an additional consideration, constituting an original under-

taking, and not an acknowledgment or new promise.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 62-65; Dec. Dig. § 15.*]

5. LIMITATION OF ACTIONS (§ 15*)—PROMISE NOT TO PLEAD STATUTE—SUFFICIENCY.

The suspension of the statute of limitations by a promise not to plead it is based on the doctrine of estoppel; and such promise, to be effectual, must be an express promise not to plead the statute, or its language must clearly evince an intention not to do so, upon which the creditor has a right to rely.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 62-65; Dec. Dig. § 15.*]

6. LIMITATION OF ACTIONS (§ 145*)—NEW PROMISE—REQUISITES.

In order to constitute a new promise, based upon sufficient consideration, there must be an agreement on the one part to pay and an agreement on the other part to forbear; but an agreement to extend the time of payment to a future date, or to the happening of an event beyond the period of the statute of limitations, is sufficient consideration for a new promise.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 584-588, 590-592; Dec. Dig. § 145.*]

7. LIMITATION OF ACTIONS (§ 145*)—ACKNOWLEDGMENT OR NEW PROMISE—REQUISITES—CONSIDERATION.

A promise by a debtor, that as soon as he could get his father out of the penitentiary he would pay all of the account, upon which the creditor, without agreeing not to sue, forbore suit, was without the consideration necessary to make it an original promise.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 584-588, 590-592; Dec. Dig. § 145.*]

Appeal from Circuit Court, Mississippi County; Frank Smith, Judge.

Action by Dr. W. E. Turner, in which one Dr. Dunavant joined as party plaintiff, against H. H. Burnett. Judgment for plaintiffs, and defendant appeals. Reversed, and cause dismissed.

H. H. Burnett, pro se. J. T. Coston, of Osceola, for appellees.

MCCULLOCH, C. J. [1, 2] Appellees are practicing physicians, and instituted this action before a justice of the peace against appellant to recover an account for professional services rendered. The account which forms the basis of the action seems to embrace items alleged to be due the two physicians separately—that is to say, \$101.50 to Dr. Turner and \$50 to Dr. Dunavant—but no question is raised as to the improper joinder of the two causes of action. The suit was first instituted by Dr. Turner, and afterwards Dr. Dunavant was allowed to join as a party plaintiff; but no objection is made to this, and both of these questions pass out of the case.

Appellant does not dispute the items of the account, but relies entirely upon his plea of the statute of limitations. It is conceded

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

that the action was not instituted until more than three years after the services were performed; but appellees seek to take the case out of the operation of the statute on account of a special promise on the part of appellant to pay at a future date, or, rather, to pay in the future on the happening of a certain event. The facts of the case are very simple, and there is but slight conflict in the testimony. In October, 1906, appellant was wounded by a gun or pistol shot, and Dr. Turner was called to attend him. He did so, and gave appellant continuous attention for something like a month, when the condition of the wound rendered a surgical operation necessary. In this emergency Dr. Dunavant was called, and performed the operation, charging a fee of \$50 therefor. Dr. Turner's bill was \$101.50 for his entire services. Nothing has ever been paid on the account, and more than three years elapsed before the institution of this action. Dr. Dunavant testified that he frequently requested appellant to pay the bill, and on one occasion—the particular time not mentioned—appellant promised to pay the bill when his (appellant's) father should be released from the penitentiary in the state of Missouri, where he was then incarcerated. Dr. Dunavant states the transaction in the following language: "I never put the man's name on my books at all. I told Dr. Turner that I would charge him, and he looked after the collecting. I just left it with him to collect. In the meantime I had asked Dr. Turner about it, and he told me that Mr. Burnett was slow, and I saw him and got after him myself, and he says: 'My papa is in trouble up in Missouri, and as soon as I can get him out of it I will pay, it all'—and under that kind of a promise I held off."

In other parts of the testimony it is disclosed that appellant's father was in the penitentiary, and that he was released therefrom within three years from the commencement of this action. Was this promise sufficient to take the case out of the operation of the statute? It is observed that the testimony nowhere discloses any express promise not to plead the statute of limitations; nor does it show any agreement to postpone the date of payment to any future day. Dr. Dunavant merely states that appellant promised to pay when his father got out of trouble, and that upon that promise he did not sue until after the occurrence of that event. He states further in his testimony that he frequently thereafter demanded payment of appellant. Appellant denied that he ever made this promise to Dr. Dunavant, but says that when payment was repeatedly demanded he merely promised that he would pay as soon as he got able.

[3] The statutes of this state provide that "no verbal promise or acknowledgment shall be deemed sufficient evidence in any action founded on contract whereby to take any case out of the operation of this act, or to

deprive the party of the benefits thereof." Kirby's Digest, § 5079.

In the absence of a forbidding statute, an oral promise or acknowledgment will interrupt the statute of limitations; but it is seen from the above that we have a statute on that subject in this state, and, in order "to suspend the statute by promise or acknowledgment, such promise or acknowledgment must be in writing and signed by the party to be charged." The correct rule is thus stated, and is sustained by the great weight of authority. See 25 Cyc. 1351, and numerous authorities there cited.

[4] It is equally well settled by the authorities that an oral waiver of the statute of limitations, or promise not to plead it, does not fall within the statute above quoted, and need not be in writing. 19 Am. & Eng. Ency. of Law, p. 322; Bridges v. Stevens, 132 Mo. 524, 34 S. W. 555; Jordan v. Jordan, 85 Tenn. 565, 3 S. W. 896; 1 Wood on Limitations, p. 76.

[5] The suspension of the statute by reason of a promise not to plead it is based on the doctrine of estoppel; and, in order for it to be effective, the promise must be an express one not to plead the statute, or the language of the promise must be such as clearly evinces an intention not to do so, upon which the creditor has a right to rely. Otherwise it could not be said that he was estopped by the conduct of his debtor, and the rule does not apply. 19 Am. & Eng. Ency. of Law, pp. 286, 287; Hill v. Hilliard, 103 N. C. 34, 9 S. E. 639; State Bank v. Hill, 10 Humph. (Tenn.) 176, 51 Am. Dec. 698; Parks v. Satterthwaite, 132 Ind. 111, 32 N. E. 82.

[6, 7] A new promise, based upon an additional consideration, to pay at a future date constitutes an original undertaking, and does not fall within the terms of the above-quoted statute, requiring a promise or acknowledgment of a debt to be in writing (Sloan v. Sloan, 11 Ark. 29); and an agreement to extend the time of payment to a future date, or to the happening of an event which might carry it beyond the period of the statute of limitation, is sufficient consideration upon which to base a new promise. In order, however, to constitute a new promise, based upon sufficient consideration, there must be an agreement on the one part to pay and an agreement on the other part to forbear. The evidence in this case wholly fails to show facts which would suspend the operation of the statute of limitations. It shows neither an express promise on the part of the debtor not to plead the statute of limitations, nor an agreement on the part of the creditor not to sue. The most that the evidence shows is a bare promise on the part of the debtor to pay in the future on the happening of a certain event, and that the creditor did forbear suit until after the happening of that event. There was therefore no additional consideration, so as to make the new promise constitute an original

agreement; nor was there an express promise not to plead the statute of limitations, so as to work an estoppel. According to the undisputed evidence, the verdict should have been in favor of appellant, and, as the case has been fully developed, no useful purpose would be served by remanding it for a new trial.

The judgment is therefore reversed, and the cause is dismissed.

SMITH, J., not participating.

HENDERSON v. E. W. EMERSON CO.

(Supreme Court of Arkansas. Nov. 11, 1912.)

1. EQUITY (§ 409*)—FINDING OF MASTER—EFFECT.

A master's finding beyond the power delegated to him will not be considered as of any weight.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 904, 920-923; Dec. Dig. § 409.*]

2. PARTNERSHIP (§ 53*)—ACCOUNTING—SUFFICIENCY OF EVIDENCE.

In an action for a partnership accounting, evidence held to sustain a finding that the partnership contract was for buying and selling only two cars of cotton seed during the season.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 76, 79; Dec. Dig. § 53.*]

3. EVIDENCE (§ 91*)—BURDEN OF PROOF.

The burden is on plaintiff to prove the affirmative of a material fact alleged by him.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 113; Dec. Dig. § 91.*]

4. APPEAL AND ERROR (§ 1009*)—FINDINGS—EQUITY OF CASE.

The chancellor's finding will not be disturbed against the clear preponderance of the evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3970-3978; Dec. Dig. § 1009.*]

Appeal from Cleveland Chancery Court; John M. Elliott, Chancellor.

Action by J. H. Henderson against the E. W. Emerson Company for a partnership accounting. From a judgment as stated, both parties appeal. Affirmed.

The appellant sued the appellee E. W. Emerson Company, a corporation, alleging that it had entered into a partnership with him for the purpose of buying and selling cotton seed; the partnership beginning October 1, 1910, and to continue throughout the season. Appellee W. A. Tolson was the manager of E. W. Emerson Company, through whom it is alleged that the partnership agreement was made. He was made a party defendant. The appellant alleged that he had no means of ascertaining the status of the partnership or his rights therein and prayed for an accounting and for judgment for the amount found due after such accounting. The answer admitted a contract of partnership between appellant and appellees for the buying and selling of two cars

of cotton seed. They were to share the net profits as to these, but no further. A master was appointed with the following directions: "To make an accounting to ascertain the status of the partnership herein, which accounting shall be in the alternative, that is, he shall ascertain the relative rights of the parties upon the hypothesis that the contention of the plaintiff that the partnership continued throughout the season is correct, and he shall then ascertain the relative rights of the parties hereto upon the hypothesis that the answer of the defendant contending that the partnership was to last only until two car loads were bought and sold is correct, and submit his findings to the court in this alternative, and the said master is hereby vested with all the powers and intrusted with the performance of all the duties which by law and the rules of this court devolve upon a master in chancery." Depositions had been taken before the master was appointed and proof was also taken before him. Upon the testimony in the case he reported as follows: "After a careful review of all the proof submitted by both plaintiff and defendant, I am of the opinion that the contract between plaintiff and defendant ended when the first two cars were sold, and from the statements hereto appended it would seem that the credit given was in excess of the true amount due. Net profit on seven cars \$546.06. Net profit on two cars \$37.82." The court, on final hearing, approved the report of the master in all things and entered a decree, giving one-half of the net profits of \$37.82 to the appellant and one-half to the appellee E. W. Emerson Company, and adjudged the costs against the appellant. The appellant and appellees appeal.

J. H. Henderson, pro se. E. W. Emerson & Co., pro se.

WOOD, J. (after stating the facts as above). Appellees raise here, for the first time, the question of ultra vires as to the E. W. Emerson Company, which, in the view we have taken of the evidence, it is unnecessary to pass upon, for, conceding, without deciding, that the E. W. Emerson Company could have entered into a partnership with the appellant, we are of the opinion that the finding of the chancellor that such partnership "was for the purpose of buying two cars of cotton seed during said season" was not clearly against the preponderance of the evidence. It was a question of fact as to whether or not the contract was for the buying and selling of only two cars of cotton seed, or whether it was for the buying and selling of cotton seed for the entire season. It could serve no useful purpose to set out in detail and discuss the evidence tending to support the contention of the respective parties.

The appellant testified in substance that on or about the middle of October, 1910, a partnership was formed between W. A. Tolson and himself for the purpose of buying and selling cotton seed; that they were to share equally in the profits; the partnership to continue throughout the entire season. He states that eight or nine cars of seed were sold. He bought seed himself and also put his own cotton seed into the partnership. He was engaged in buying cotton, and when he bought the cotton he directed the parties from whom he bought to take the cotton seed they had for sale to E. W. Emerson Company who would settle for the same. He said he left \$400 or \$500 there during the season to buy cotton seed with. He asked Tolson, the manager of E. W. Emerson Company, as early as January, 1911, and then again in February, 1911, for an accounting. His understanding was that the partnership was to buy and sell seed for the season. He received no notice that the partnership had ceased or that it was limited to any certain time. The appellees had rendered him no statement of their partnership transactions up to the time of his bringing suit against them. After that they rendered him a statement showing that on the 2d of March, 1911, he had been given a credit of \$24 and some cents. After the contract was entered into appellant was taken sick, but he received no notice during the time of his illness that he was not complying with his contract. According to his understanding there was no definite amount of seed to be bought by him.

Appellant introduced certain exhibits, showing that on November 1, 1910, he had a balance of \$218.60 with E. W. Emerson Company; on December 1st, \$250.31; on January 2, 1911, \$189.86; and on February 1st, \$126.54.

The bookkeeper of the E. W. Emerson Company testified that during the fall of 1910 Tolson told him that "from now on John Henderson will be a partner in the seed business," and that at no time during the season did Tolson notify him that the partnership was ended. Later on in his testimony he stated that he could not say "for certain that Tolson used the words 'from now on.'" Tolson stated that they would buy seed together, and if he fixed any time limit on the business witness could not recall it.

A witness on behalf of appellant testified that he made a contract with appellant in October, 1910, by which he was to turn in to Henderson and his partner what seed that he might buy, and that in pursuance of this contract he turned into the E. W. Emerson Company all the seed that he bought.

Another witness testified that during the fall of 1910 he heard Tolson say "that John (Henderson) wanted to go in partners, but he was afraid to take him in for fear he would want to cut prices." Along in the

fall of 1910 "once in a while a man come in with cotton seed and would state that they were John Henderson's seed." He did not know whether he "heard any one after October 28th say that the seed which he brought in were John Henderson's." He heard Mr. Tolson say "he was afraid John Henderson would go to cutting prices."

Appellee Tolson testified that he entered into a contract with appellant Henderson in October, 1910, to buy and sell cotton seed. The partnership was only for the buying and selling of one or two cars. He kept Henderson in partnership for the buying and selling of two cars because they could not sell one car without the other. He says the car was shipped out on the 28th day of October, 1910. He got returns from the two cars in November. Henderson did not come around for a settlement, but drew on the 14th of November for \$450. He did not make Henderson a statement of it until March 2d. He stated that his books were at all times subject to the inspection of the appellant. He did not consider that Henderson was in the seed business after the two cars were shipped out. He never gave him any notice that the partnership had ceased because it was understood in the beginning that the contract was to continue until one or two cars were bought and was to end then.

[1] The master exceeded the authority given him in finding that the contract continued for only two cars of cotton seed. The reference made to him by the court did not require that he should make a finding as to how long the partnership was to continue. Therefore his finding in this regard cannot be considered as having any weight for any purpose as against appellant.

[2] But aside from this we are not able to say that the finding of the chancellor was clearly against the preponderance of the evidence.

[3] The issue as raised by the pleadings was whether or not the alleged partnership was to continue for the buying and selling of only two cars of cotton seed, or whether it was to continue for the entire business of the season of 1910. The burden was on the appellant on this issue. There was a sharp conflict in the evidence, and it was a question of fact.

[4] A chancellor's finding will not be disturbed unless against a clear preponderance of the evidence. *Carr v. Fair*, 92 Ark. 359, 122 S. W. 659, 19 Ann. Cas. 906, and cases cited; *Cunningham v. Toye*, 97 Ark. 537, 134 S. W. 962; *Cotton v. Citizens*, 97 Ark. 574, 135 S. W. 840. The appellant has not established his contention according to the above rule. This view makes it unnecessary to discuss other questions presented in appellant's brief.

The judgment is therefore correct, and it is affirmed.

ADCOCK v. COKER et al.

(Supreme Court of Arkansas. Nov. 4, 1912.)

1. STATUTES (§ 40*)—FORM OR ENACTING CLAUSE—CONSTITUTIONALITY.

Sp. & Priv. Acts 1911, p. 472, enacted by "the General Assembly of the state of Arkansas," instead of by "the people of the state of Arkansas," as required by the initiative and referendum amendment to the Constitution, is not thereby rendered unconstitutional.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 43, 44; Dec. Dig. § 40.*]

2. INJUNCTION (§ 187*)—TEMPORARY RESTRAINING ORDER—EFFECT—"INJUNCTION TO STAY PROCEEDINGS UPON A JUDGMENT OR FINAL ORDER."

A temporary restraining order is not "an injunction to stay proceedings upon a judgment or final order" of the county court, within Kirby's Dig. § 3998, providing that upon the dissolution of a judgment to stay proceedings upon a judgment or final order damages shall be assessed by the court.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 398, 406, 407; Dec. Dig. § 187.*]

3. INJUNCTION (§ 241*)—JURISDICTION—JUDGMENT FOR DAMAGES.

The court, on intervention of the prosecuting attorney in an injunction suit by the county treasurer to restrain the county judge from establishing a depository for county funds, asking judgment against the treasurer and his bondsmen on their injunction bond for damages on daily balances in the hands of the treasurer between certain dates, was without jurisdiction to render judgment on the injunction bond, since the determination of the amount of interest for which the collector was liable was within the exclusive jurisdiction of the county court.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 544-552; Dec. Dig. § 241.*]

Appeal from Drew Chancery Court; Zachariah T. Wood, Chancellor.

Injunction by H. H. Adcock, as Treasurer of Drew County, against W. A. Coker, as County Judge of Drew County, and others, in which the prosecuting attorney intervened in the name of the state and for the benefit of the county, asking to have the temporary restraining order set aside, and for a judgment against the plaintiff on his injunction bond. Injunction dissolved, and decree entered against complainant for damages in the sum of interest on daily balances and for further damages for delay, and complainant appeals. Decree modified and affirmed.

The appellant, as treasurer of Drew county, applied to the chancery court for a temporary injunction restraining the county judge of Drew county from establishing a depository for the funds of the county, under the provisions of Act No. 181, approved April 12, 1911; the enacting clause of which is as follows, "Be it enacted by the General Assembly of the state of Arkansas." The appellant executed a bond and obtained a temporary restraining order. Before the final hearing the prosecuting attorney intervened in the name of the state, for the use and benefit of Drew county, and filed a complaint against the appellant, asking that the temporary restraining order be set aside,

and that appellant be ordered to present a statement of the daily balances of all funds in his custody as treasurer since the restraining order was issued, and the amount of all the funds that he would have delivered to the depository had not the restraining order been issued, and prayed that judgment be entered against the appellant and his bondsmen on the injunction bond at the rate of 5½ per cent. on the daily balances. The court, on final hearing, dissolved the injunction and entered a decree against the appellant and his bondsmen "for damages in the sum of 5½ per cent. on daily balances in the hands of plaintiff, as treasurer, from and after October 2, 1911, until paid, and for all other and further damages that may arise by further delay and appeal from this decree until final settlement," etc. From this decree the appellant duly prosecutes this appeal.

Patrick Henry, of Monticello, for appellant. Williamson & Williamson and R. W. Wilson, all of Monticello, for appellees.

WOOD, J. (after stating the facts as above).

[1] 1. Act 181 of the General Assembly, approved April 12, 1911, is valid. It was recently held by this court that an enabling clause like the one under consideration does not render an act unconstitutional. Ferrell v. Keel, 151 S. W. 269. That case rules this.

[2] 2. The court erred in rendering judgment against the appellant and his bondsmen. The temporary restraining order was not "an injunction to stay proceedings upon a judgment or final order" of the county court. Section 3998, Kirby's Digest; Greer v. Stewart, 48 Ark. 21, 2 S. W. 251; Stanley v. Bonham, 52 Ark. 354, 12 S. W. 708.

[3] The complaint on the information of the prosecuting attorney did not state facts sufficient to give the chancery court jurisdiction to render judgment against appellant and his bondsmen on the injunction bond. In the case of State, for the Use of Columbia County, v. Nabors, 145 S. W. 550, the county brought suit against Nabors, the collector of Columbia county, and his bondsmen to recover interest on funds of the county, which were to be turned into the county depository. In that case the court held that suit could not be maintained against the collector and the sureties on his official bond for the interest that would have been earned until "a determination and adjudication fixing the liability" by the county court. In other words, the court held that the determining of the amount of interest, if any, for which the collector and his bondsmen were liable in that case was within the exclusive jurisdiction of the county court.

It follows from the application of the doctrine of that case to the facts of this record that the chancery court had no jurisdiction to

render the judgment herein for damages. To this extent the decree will be modified; and as thus modified it is affirmed.

COOLEY v. KSIR.

(Supreme Court of Arkansas. Nov. 18, 1912.)

1. USE AND OCCUPATION (§ 1*)—PERSONS LIABLE.

Where an attorney for creditors of a tenant took possession of the leased premises with the acquiescence of the landlord, he was liable for use and occupation, without any agreement as to the rent.

[Ed. Note.—For other cases, see Use and Occupation, Cent. Dig. §§ 1-11; Dec. Dig. § 1.*]

2. PRINCIPAL AND AGENT (§ 146*)—LIABILITY OF AGENT OF UNDISCLOSED PRINCIPAL.

A person who took possession of leased premises was not excused of liability for the rent by informing the landlord that he was merely acting as attorney for the tenant's creditors, where he did not disclose the names of the creditors, since an agent disclosing the fact that he is agent, but not disclosing the name of his principal, is personally liable.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 521-527; Dec. Dig. § 146.*]

Appeal from Circuit Court, Craighead County; W. J. Driver, Judge.

Action by Joe Ksir against H. M. Cooley. Judgment for plaintiff, and defendant appeals. Affirmed.

N. F. Lamb, of Jonesboro, for appellant. Hawthorne & Hawthorne, of Jonesboro, for appellee.

HART, J. Joe Ksir instituted this action against H. M. Cooley to recover compensation for the use and occupation of a certain brick storehouse situated in the town of Jonesboro, Ark. The jury returned a verdict in favor of the plaintiff, and from the judgment rendered the defendant has duly prosecuted an appeal to this court.

The facts adduced by the plaintiff are substantially as follows: Sam Bryan rented a storehouse from Ksir at \$55 per month, and was conducting therein a mercantile business. The defendant, Cooley, as attorney for certain creditors of Bryan, recovered judgments against him, and caused executions to be issued thereon. He threatened to have the executions levied on the stock of goods of Bryan, unless payment was made at once. It was finally agreed between them that Bryan should turn over the keys of the storehouse to Cooley, and let them remain in his possession pending negotiations for a settlement. In pursuance of this agreement, Bryan locked up the storehouse, and turned over the keys to Cooley. Bryan did not thereafter exercise any control over the stock of goods, but allowed them to remain in the storehouse in the possession of Cooley for about two months, at which time bankruptcy proceedings were instituted against him.

The plaintiff, Ksir, testified that about four or five days after Bryan was closed up he went to see Mr. Cooley about his rent, and that Cooley told him he would get dollar for dollar; that later on he went to see Mr. Cooley again, and asked him how long he was going to keep it; and that Cooley answered that he could not tell, it might take him 10 days or it might take him a month; that he again went to Cooley and told him he wanted his house; and that Cooley replied he could not get his house, but would get his rent. H. M. Cooley testified: "When the storehouse was locked up, the keys were handed to me, and my recollection is that I left the keys in the First National Bank, as it was the largest creditor. During the time the store was locked up I went in there several times to see about fastening up things, and to see if anybody was molesting the stock of goods. At the end of about two months a petition in bankruptcy was filed against Sam Bryan, and later on he was adjudged a bankrupt. Shortly after the keys were turned over to me, Mr. Ksir came to my office, and wanted to know about his rent. I told him I was only representing the creditors, and would not be responsible for the rent. Some time later he came back and demanded pay. I told him that I was only representing the creditors, and trying to make a settlement with Bryan, and told him I would not be responsible personally for the rent."

[1] It is undisputed that the storehouse belonged to Ksir, and that Bryan occupied it as his tenant. It is also undisputed that Bryan turned over the keys of the storehouse to the defendant Cooley, who represented certain creditors of Bryan. From this time on Cooley exercised sole control over the stock of goods, and kept possession of the storehouse in which the goods were situated. He admits that he went in there several times to see that the store was properly fastened, and to see if anybody was molesting the goods. Ksir, the owner of the store, acquiesced in him so holding it. From this evidence but one inference can be legitimately drawn, and that is that Ksir was the owner of the store, and that by his permission Cooley held possession of it for two months for the benefit of certain creditors of Bryan. In the case of *Dell v. Gardner et al.*, 25 Ark. 134, the court held: "Where the entry upon the lands of another is peaceable and the occupation acquiesced in, without any agreement, written or verbal, as to rent, the owner may bring an action for use and occupation." See, also, *Bright v. Bostick et al.*, 27 Ark. 55.

[2] But the defendant contends that he told the plaintiff that he would not be personally responsible for the rent; that he was only acting as the representative of certain creditors of Bryan in the matter. It

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

will be noted, however, that he did not disclose to the plaintiff the names of the creditors for whom he was acting. This it was his duty to do if he would excuse himself from responsibility on the ground of agency. The rule is that though the agent discloses the fact he is agent, but does not disclose the name of his principal, he may be held personally liable as principal. *Neely v. State*, 60 Ark. 66, 28 S. W. 800, 27 L. R. A. 503, 46 Am. St. Rep. 148, and cases cited. In this view of the case, it is not necessary to consider whether the circuit court erred in its instructions to the jury. The judgment upon the facts and the law upon the whole case is right, and will therefore be permitted to stand. *Gibbon v. Dillingham*, 10 Ark. 9, 50 Am. Dec. 233; *St. L. S. W. R. Co. v. Russell*, 64 Ark. 236, 41 S. W. 807.

The judgment will therefore be affirmed.

ST. LOUIS & S. F. R. CO. v. NEWMAN.

(Supreme Court of Arkansas. Nov. 11, 1912.)

1. RAILROADS (§ 398*)—INJURIES TO PERSONS ON TRACKS—POSSIBILITY OF STOPPING AFTER DISCOVERING PERIL—EVIDENCE.

In an action for the death of a person killed while riding a speeder on a railway track, evidence held to sustain a finding that the train could have stopped in time to have prevented the injury after the discovery of the deceased on the track.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1356, 1358-1363; Dec. Dig. § 398.*]

2. TRIAL (§ 252*)—INSTRUCTIONS—EVIDENCE TO SUSTAIN.

Though, in an action for the death of a person killed while on a railroad trestle, there was no evidence that he was intoxicated, an instruction that, if the railroad employes had reason to believe from the appearance of the decedent that he was suffering from drunkenness or other cause and was thereby insensible to his imminent danger, they must presume that he might or would not get out of the way, and it was their duty to use proper care to avoid injuring him, was not improper, where there was evidence that, from some cause or other, the decedent had stopped on the trestle with his back to the approaching train when the warning whistle was sounded, as such evidence warranted a finding that he was not aware of his danger; the fact that drunkenness was assigned as the cause of his insensibility being without prejudice.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 506, 596-612; Dec. Dig. § 252.*]

3. RAILROADS (§ 377*)—INJURIES TO PERSONS ON TRACK—DUTY OF EMPLOYÉS.

Employés who see a person on the track far enough ahead of the train to get out of the way, and who are not aware that he is deaf, insane, or from some other cause insensible to the imminent danger of his position, or unable to get out of the way, may presume that he will do so and may go on without checking the speed of the train until they see that he will not do so, when it is their duty to give extra alarm by bell or whistle, and, if that is not heeded, to stop the train in time to avoid injury.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. § 1280; Dec. Dig. § 377.*]

Appeal from Circuit Court, Crittenden County; Frank Smith, Judge.

Action by S. I. Newman against the St. Louis & San Francisco Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

See, also, 150 S. W. 560.

W. F. Evans and W. J. Orr, both of St. Louis, Mo., for appellant. A. B. Shafer, of Memphis, Tenn., for appellee.

MCCULLOCH, C. J. The plaintiff's intestate, Hans Nass, was run over and instantly killed by a freight train on a trestle of defendant's railroad near Tyronza, a station in Poinsett county, Ark., and this action was instituted to recover damages for the benefit of the widow and next of kin. Nass was a trespasser on the track, and the question in the case is whether or not the train operatives failed to exercise care, after making discovery of the perilous situation of deceased, to prevent injuring him. The case was tried upon this theory, and the trial resulted in a verdict in favor of the plaintiff assessing damages.

[1] The chief ground urged for reversal is that the evidence is not sufficient to sustain the verdict. Nass was a stranger in those parts, and had only been living at Tyronza for a short time. He was accustomed to using, on the railroad, a speeder which belonged to a timber inspector, but did so without permission of the railroad company. On the day that he was killed, he took the speeder and rode it to Deckerville, another station south of Tyronza, and was returning about sundown, when he was run over by the train. There is evidence tending to show that he went to Deckerville for the purpose of getting some whisky at a saloon located there. Only one person witnessed the occurrence except the trainmen themselves. This was a man named Leonard, who was a farmer living a short distance from Tyronza, and who was starting from his field towards his house when it occurred. He walked up on the track, started towards home, when a freight train came from the north, and he stepped off the track to allow the train to pass. As he did so he noticed a man riding a speeder on the trestle. He testified that the man appeared to have stopped. He afterwards measured the distance and found that he was about 2,220 feet from the north end of the trestle when the train passed him. He states that shortly after the train passed and obscured his view of the man on the trestle, the alarm signal was given from the engine by blowing the whistle, and was continued until the train reached the trestle and stopped. His measurement showed that the engine was 1,192 feet from the north end of the trestle when the alarm was first sounded. He did not go down to the trestle to see whether injury

had been inflicted, as he supposed, so he states, that the train had been stopped in time to prevent injuring the man; but, after he learned that the man had been killed, he examined the place and saw the evidences of the speeder being knocked from the trestle 94 feet from the end of the trestle. Another witness, who lived at Tyronza, testified that as soon as he heard of the accident he went down to the scene and found the broken speeder lying in the water near the trestle, 50 or 75 yards from the north end. The trestle was 635 feet long and about 30 feet high, spanning a shallow body of water called "Dead Timber Lake." The evidence justified the jury in concluding that Nass, when struck by the train, was sitting on his speeder on the trestle from 90 to 150 feet from the end, and that the trainmen could see that he had stopped. The evidence warranted the conclusion that the trainmen did see him from the fact that they began to give the alarm 1,192 feet from the north end of the bridge, which placed them at that time at a distance of about 1,300 feet from deceased's position on the trestle. There was also evidence to the effect that the train could have been stopped in a distance of from 100 to 200 yards, according to the favorable or unfavorable conditions with reference to the working of the air and the amount of tonnage in the train. In that state of the proof, it is our opinion that the jury were warranted in finding that the trainmen—that is to say, the engineer or fireman—discovered the perilous situation of this man in time to have avoided the injury. They could see him on the trestle, where he appeared to have stopped, and, as they approached him, should have known that he was in a position of peril of which he was insensible or from which it was impossible for him to extricate himself. He was facing north, and one who discovered his presence could see that he was unable to make his escape from the trestle. The fact that the alarm was continued down to the point where the train stopped shows that the trainmen were aware of his peril all during that time, and their failure to stop the train at an earlier moment is sufficient to sustain the charge of negligence. The evidence shows that the engine ran by him some distance before the train was stopped. None of the trainmen testified in the case; therefore it is not shown just how far the engine went by before it was stopped, and the jury were left to draw inferences only from the situation as described by the witness Leonard and the other witness who testified with reference to the place where the broken speeder was found. The defendant did not attempt to account in any way for the happening of the injury or to introduce evidence explaining how it occurred. We are of the opinion that the situation described by the witnesses warranted the infer-

ence that the engineer or fireman saw the man on the trestle and was aware of his perilous situation, but failed to exercise ordinary care to prevent injuring him. The verdict is therefore sustained by the evidence.

The court instructed the jury, upon defendant's request, that if the employees in charge of the train saw Nass on the trestle at a distance ahead sufficient to enable him to get out of the way before the train reached him, "and they were not aware that he was deaf or insane or from some other cause insensible of danger or unable to get out of the way, they had the right to rely on human experience and presume that he would act upon the principles of common sense and the motives of self-preservation common to mankind in general and get out of the way, and they had the right to go on without checking the speed of the train until they did see, if they did, that he was not likely to get out of the way," etc. The court, over the defendant's objection, modified the instruction by adding the following: "If, however, Nass was seen upon the track and was known to be or from his appearance gave the operatives of the train good reason for the belief that he was insensible of his danger or unable to avoid it, then they would have had no right to presume that he would have gotten out of the way, but should have acted on the hypothesis that he might not or would not, and then should have used the proper degree of care to avoid injuring him. Failing in this, the railroad company would be responsible in damages if by the use of such care they might have avoided injuring him, if they did injure him. There is no presumption that Nass was insensible of his danger, but that is a fact that would have to be established by the plaintiff by the greater weight of evidence."

[2, 3] The court also gave the following instruction, to which the defendant objected and saved its exception: "(4) The court instructs you further that if from the evidence in this case it has been shown that the decedent, Hans Nass, was upon a railroad bridge near Tyronza Station on the date mentioned, and if it be further shown that the employees of the railroad company operating its railroad train saw him on the track far enough ahead of the train to get out of the way, if you believe from the evidence that they were not aware that he was deaf, or insane, or from some other cause insensible to the imminent danger of his position, or unable to get out of the way, then the agents and servants of the railway company had a right to presume that he would do so, and to go on without checking the speed of the train until they saw he would not do so, it became their duty to give extra alarm by bell or whistle, and, if the agents or servants of the railroad company then saw that that was not heeded, it became their

duty to stop the train, if possible, in time to avoid the injury to him. However, if you believe from the evidence in this cause that the servants and agents of the railroad company had reason, from the appearance of the decedent, to believe that he was suffering from drunkenness or other cause, and thereby was insensible to the imminent danger, or was in such a situation as to be unable to avoid it, then the servants and agents of the railroad company must presume that he might or would not get out of the way, and it became their duty to use proper care to avoid injuring him, and, unless they did use proper care to avoid injuring him, the railroad company would be liable, and your verdict should be for the plaintiff." The particular part of this instruction to which objection is made is that which submits the question of the appearance of the deceased as to his insensibility of danger on account of drunkenness or other cause. It is argued that the evidence fails to show that he was in any state of intoxication, and therefore it was erroneous to submit that question. The instruction is abstractly correct. Railroad v. Wilkerson, 46 Ark. 513. It can scarcely be said that there is any testimony in the record that deceased was intoxicated at the time; but the point of the case for submission to the jury is whether or not he was in a position of danger which he failed to appreciate, or whether his position was such that he could not extricate himself from it. The evidence shows that he had stopped on the trestle, and this was sufficient to warrant the finding that he was not aware of his danger and was making no effort to extricate himself. The question was whether or not he was insensible of his danger, and not the cause of his insensibility. This question was submitted to the jury, and we fail to see how there could have been any prejudice from including drunkenness as the cause. Whatever the cause may have been, the jury necessarily found by their verdict, under these instructions, either that deceased was insensible of his danger and was making no effort to extricate himself from it, and that defendant's servants were aware of this, or that he was in a position where he could not extricate himself from the danger even if he knew of it, and the trainmen were aware of that and failed to exercise ordinary care to prevent injuring him. In either event defendant was liable, and there could not therefore have been any prejudice in submitting the question whether drunkenness was the cause of decedent's insensibility to danger, if such was his condition.

Our conclusion is that the case went to the jury upon instructions which fairly submitted the issues and which were in no wise prejudicial to defendant. The judgment is therefore affirmed.

SMITH, J., did not participate.

ST. LOUIS, I. M. & S. RY. CO. v. STEED.
(Supreme Court of Arkansas. Oct. 28, 1912.)

1. MASTER AND SERVANT (§ 270*)—INJURY TO EMPLOYÉ—NEGLIGENCE—EVIDENCE—REPAIR OF APPLIANCE AFTER ACCIDENT.

Evidence of repair of the appliance by the master after the accident is incompetent to show negligence of a master in furnishing a defective appliance by which an employé is injured.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 913-927, 932; Dec. Dig. § 270.*]

2. APPEAL AND ERROR (§§ 1031, 1032*)—PRESUMPTION—HARMLESS ERROR—INTRODUCTION OF EVIDENCE.

Prejudice from introduction of incompetent evidence is presumed; so the party introducing has the burden of showing none resulted.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4038-4046, 4047-4051; Dec. Dig. §§ 1031, 1032.*]

3. APPEAL AND ERROR (§ 1050*)—HARMLESS ERROR—ADMISSION OF EVIDENCE.

Evidence of repairs after an accident resulting from a defective appliance is prejudicial error, especially where counsel for the prevailing party refers to such evidence in his argument.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4153-4160, 4166; Dec. Dig. § 1050.*]

4. TRIAL (§ 253*)—INSTRUCTIONS—OMITTING ISSUES.

An instruction that, if the jury found certain facts, plaintiff should not be regarded as having assumed any danger from the defective appliance, and the jury should find for him if he was injured as he claims, is erroneous, as leaving out defendant's claim of contributory negligence.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 613-623; Dec. Dig. § 253.*]

5. MASTER AND SERVANT (§ 293*)—DUTY TO FURNISH SAFE TOOLS—INSTRUCTIONS.

Refusing an instruction to the effect that the master is only required to use ordinary or reasonable care to furnish safe tools and appliances for use of employes, and giving one that it was defendant's duty to furnish safe tools and appliances for its employes to work with, was error.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1148-1161; Dec. Dig. § 293.*]

6. DAMAGES (§ 210*)—INSTRUCTIONS.

An instruction in a personal injury case authorizing the jury to find such sum as "in your opinion and judgment" will compensate him is erroneous in not limiting their judgment and opinion to being based on the evidence.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 537, 538; Dec. Dig. § 210.*]

Appeal from Circuit Court, Lawrence County; R. E. Jeffery, Judge.

Action by T. H. Steed against the St. Louis, Iron Mountain & Southern Railway Company. Judgment for plaintiff. Defendant appeals. Reversed and remanded for new trial.

This was a suit by appellee for damages for personal injuries sustained, it was alleged, on account of the negligence of the

railway company in furnishing defective appliances with which to perform his work. The answer denies the allegations of the complaint, and pleaded appellee's contributory negligence and assumed risk as a bar to the action.

The facts substantially are that T. H. Steed, a man 72 years of age, was in the employ of the railway company in its roundhouse at Hoxie, Ark., classed as a "wiper," and on April 1st he, with others, was told to clean up the roundhouse, and remove the scrap iron therefrom. This they proceeded to do, and in loading a barrel filled with chips and dust and bits of brass from the lathe he claims to have been injured. He and two others picked up this barrel, which weighed anywhere from 150 to 700 pounds according to the different witnesses, and carried it about 10 feet and set it on the edge of a push car, intending to roll it out to the yards. They did not push the barrel far enough onto the edge of the car to balance, and one of the men desired to change his hold, and asked Steed if he thought he could hold it until he changed. Steed replied, "Yes," and the other turned loose, and the plank in the edge of the car gave down, throwing the entire weight of the barrel against him, and in lifting and holding it he was ruptured. He was at the time earning 16 cents per hour, and was 72 years old. He suffered pain from the injury, which is permanent, and still is unable to work. The push car was about 20 inches high, and had been in use around the roundhouse for some time, had been used by the appellee before, and there was one plank broken, or shivered, rather, not broken entirely in two where the barrel was placed upon it and two broken at the other end. These broken planks were plainly visible to any one seeing the car. During the introduction of the testimony the plaintiff and other witnesses were allowed to state that the car was repaired after the injury, and that it was broken entirely down later by loading a small boiler upon it, and a new top thereafter put on it.

Appellant's counsel objected to all the testimony relating to the subsequent repairing of the car and moved to exclude it from the jury, stating that it made no difference what was done with the car after the accident, to which appellee's counsel replied: "Mr. Campbell is right, but it relates back to the probable condition of it at the time of the injury, and is a recognition on the part of the company that it needed repairing. I would have a right to show that to show that it was broken as my client says it was at the time of the injury, by the means of which he received the injury, I would be permitted to show that to corroborate my client; but I am offering it to show that it was a defective car that was afterwards broken down in the loading of it." The court overruled the objection, to which exceptions were saved.

The court instructed the jury, giving instructions numbered 1, 2, and 4 for plaintiff, as follows:

"No. 1. You are instructed that if you find that plaintiff, T. H. Steed, was engaged in loading the barrel of iron in question on to the push car, and that he was acting under orders of his foreman in so doing, and that the work was such as was his duty to do when so ordered, and that the loading of the barrel on to the car was done in the usual natural and customary manner, and that plaintiff, by reason of his position and place with reference to the barrel, the push car, and those helping him, he could not see or observe any patent or latent defects in the floor of the said car at the point where the floor broke, if you find it did break under the weight of the barrel, he should not be regarded as having assumed any danger risk by reason of the defective plank in the flooring of the car, and you should find for him, if he was injured as he claims he was.

"No. 2. It is the duty of the defendant company to furnish safe tools and appliances for its employes to work with, and if you find that the car floor was defective by reason of its being of too thin or weak plank, or otherwise insufficient to sustain the weight placed upon it, or that there were other latent or patent defects in the floor of the car, and that the defendant with reasonable and ordinary care and diligence could have known of them, or, knowing them, did not apprise plaintiff, and he was injured and damaged thereby, the defendant is liable to plaintiff in damages, unless you should believe from the evidence that the plaintiff also knew of such defects in the floor of the car where it broke under the weight of the barrel, if you find it broke."

"No. 4. If you find for plaintiff, he is entitled to damages for bodily pain and suffering, and upon that point you are authorized to find such sum as in your opinion and judgment will compensate him therefor."

And refused defendant's requested instruction numbered 6, as follows:

"No. 6. The defendant was not an insurer of the plaintiff's safety, and there is no duty resting upon it to guarantee that the machinery, tools, and instrumentalities furnished by it to the plaintiff to work with may not prove defective. The defendant was only required to use reasonable care to that end."

The following statement of appellee's attorney, in argument was also objected to: "It (the push car) had been used for this purpose before and even subsequently it, perhaps, did not break at this particular point, but in loading some other heavy stuff on it, which it ought to have been strong enough to hold, it broke in two in the middle entirely. Said one of the witnesses, 'The whole floor gave away.' It was seen out of commission by this, and later on was seen with new beams and new floor, and used again."

The jury returned a verdict, and from the judgment thereon this appeal comes.

E. B. Kinsworthy, of Little Rock, and S. D. Campbell and Fred Suits, both of Newport, for appellant. T. H. Steed, pro se.

KIRBY, J. (after stating the facts as above). [1-3] The court erred in permitting the introduction of the testimony relative to the repairing of the car after the accident and injury and the argument of counsel complained of thereon. It has often been held that evidence of the subsequent repairing of the defective appliance, after an injury has occurred from its use, is incompetent and not permissible to show negligence of the master in furnishing it. *Prescott & N. W. R. Co. v. Smith*, 70 Ark. 179, 67 S. W. 865; *St. L. S. W. R. Co. v. Plumlee*, 78 Ark. 147, 95 S. W. 442; *Ft. Smith L. & T. Co. v. Soard*, 79 Ark. 388, 96 S. W. 121; *Bodcaw Lbr. Co. v. Ford*, 82 Ark. 555, 102 S. W. 896; *St. L., I. M. & S. R. Co. v. Walker*, 89 Ark. 556, 117 S. W. 534. "When incompetent evidence is introduced, prejudice is presumed, and the burden is upon the party introducing it to show that no prejudice resulted." *Railway v. Courtney*, 77 Ark. 431, 434, 92 S. W. 251; *Railway v. Walker*, supra. It is not shown in this case that no prejudice resulted from the introduction of the incompetent testimony, but the prejudice was rather increased by the argument of counsel in relation to it.

[4] Instruction numbered 1, given by the court for appellee, was erroneous in leaving out entirely the appellant's claim of contributory negligence upon his part, and concluding, after a statement, that, if they should find certain facts, he "should not be regarded as having assumed any danger risk by reason of the defective plank in the flooring of the car, and you should find for him if he was injured as he claims he was." We do not think this conclusion amounts to directing the jury, as appellant claims, that they should find for appellee in any event, if he was injured as he claimed to be, but only that, if they found certain facts, then appellee had not assumed the risk, and was entitled to recover. It was erroneous, however, in directing them that they could find for appellant under certain conditions if he did not assume the risk without taking into account the defense of contributory negligence. *Helena Hardware Co. v. Maynard*, 99 Ark. 377, 138 S. W. 469.

[5] The second instruction is confusing and incorrect, as was the suggestion in the latter part of the instruction numbered 1 given on the court's own motion in saying "it is the duty of the defendant to furnish safe tools and appliances for its employes to work with." This was attempted to be remedied later on in the instruction, but ineffectually. The law only requires that the master shall

use ordinary or reasonable care to furnish safe tools and appliances for the use of employes (*Railway v. Gaines*, 46 Ark. 567; *Railway v. Rice*, 51 Ark. 479, 11 S. W. 699), and instruction numbered 6, as requested by appellant, was a correct statement of the law on this point, and amounted to a specific objection to the incorrectness of instruction numbered two on that account, and the court erred in refusing to give the one and in giving the other as requested.

[6] Instruction numbered 4 left the jury to their opinion and judgment as to the amount of damages they should award for bodily pain and suffering, instead of limiting their judgment and opinion to being based upon the testimony, which they could not, of course, arbitrarily disregard.

We have not examined the other instructions with a view to approving them.

For the errors indicated, the judgment is reversed, and the cause remanded for a new trial.

KEOPPLE & McINTOSH v. DELIGHT LUMBER CO.

(Supreme Court of Arkansas. Nov. 11, 1912.)

1. LOGS AND LOGGING (§ 3*)—SALE—CONTRACT—BREACH—RIGHT OF RECOVERY.

Plaintiff, who contracted to furnish timber, and who attempted to avoid the contract by selling the same timber to third persons at a time when the defendant was satisfactorily discharging the contract, could not recover a sum deposited to secure the fulfillment of the contract, as one who commits the first substantial breach can have no action for the opposite party's subsequent failure to perform.

[Ed. Note.—For other cases, see *Logs and Logging*, Cent. Dig. §§ 6-12; Dec. Dig. § 3.*]

2. LOGS AND LOGGING (§ 3*)—CONTRACTS—BREACH—WAIVER.

Though the purchaser of timber failed to comply with provisions of the contract in regard to the inspection of logs and the making of weekly payments for logs delivered, and the seller gave notice of an intention to consider the contract at an end, such provisions were for the benefit of the seller, and where after such notification it shipped logs, and during the whole life of the contract accepted payment in a method different from that specified, there was a waiver of such terms, and the failure to comply with them cannot be relied on as a breach.

[Ed. Note.—For other cases, see *Logs and Logging*, Cent. Dig. §§ 6-12; Dec. Dig. § 3.*]

Appeal from Pike Chancery Court; James D. Shaver, Chancellor.

Action by Keopple & McIntosh against the Delight Lumber Company. From a judgment for defendant, plaintiff appeals. Reversed and rendered.

The appellants and the appellee Lumber Company entered into a contract whereby the Lumber Company agreed to sell to the appellants "all the white oak and hickory timber owned by them on nine forties of land" in Pike county of certain kinds and di-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

mensions specified in the contract. The contract, among other things, provides as follows: "The purchasers agree to keep a man in the woods to pass on all logs as they are being cut and to accept all logs which are offered by the company that will meet the specifications and to reject any logs that may be offered which will not meet the above specifications, and said inspection shall be final. The company agrees to cut and deliver all of said timber as above described f. o. b. cars of the St. Louis, Iron Mountain and Southern Railway Company at Delight, Ark. The purchasers agree to pay \$20 per thousand feet for all white oak and hickory timber. Said purchasers agree to pay for all logs delivered at Delight, f. o. b. the cars by the company, on Monday morning of each week, for all logs delivered in the past week, and to keep on deposit with the Bank of Delight \$1,000 as a guarantee that they will carry out the terms of this contract, said \$1,000 to be turned over to the company upon the failure of the purchasers to comply with the terms of this contract, otherwise to be subject to the orders of the purchasers. The said company agrees to begin the execution of this contract within thirty days from this date, and to continue as rapidly as is consistent without interfering with the regular operation of their sawmill. All timber as herein agreed upon shall be delivered within twelve months from this date. Logs to be scaled with 'Doyle's scale stick.' The contract was executed on the 29th day of March, 1910. The appellants deposited \$1,000 in the Bank of Delight in pursuance of the contract, and the parties entered upon its performance.

This suit was instituted by the appellants against the appellees in the chancery court of Pike county to recover the \$1,000 that had been deposited by the appellants with the Bank of Delight. The appellants in their complaint set up the contract, and alleged that the same had been complied with by the parties to it until September 19, 1910; that on that day the appellee Lumber Company notified the appellants that it considered the contract void, and thereafter would refuse to comply with or perform the contract on its part. The appellants set up that the Lumber Company had declared the sum of \$1,000 forfeited, and had demanded payment of the same; that appellants had made demand on the Bank of Delight for the \$1,000, which it had refused to pay, and they prayed that the sum be adjudged to be a special deposit to guarantee the performance of the contract by appellants that the same be declared a penalty; and that the receiver of the bank be instructed to pay the same to them. The Lumber Company, in its answer, set up that the notice given to appellants on the 19th day of September, 1910, that it would consider the contract void was sent out long after appellants had

violated the contract "by refusing to inspect and receive logs in the woods," and by refusing at various times "to pay for logs loaded on cars at Delight," and by notifying the Lumber Company that it could not accept logs until such time as the appellant might be in position to handle same. The Lumber Company also denied that the appellants had complied with the conditions of the contract in any manner. The Lumber Company also denied that the deposit of \$1,000 was a penalty, and alleged that it was intended by the parties as liquidated damages in case of breach of the contract on the part of appellant, and the Lumber Company therefore prayed that the receiver of the bank be directed to pay the \$1,000 to it. The court found that the Lumber Company "in all things complied with its part of the said contract; that the plaintiff failed and refused to comply with the terms of the said contract by their failure and refusal to receive logs after they had been notified and requested by the defendant Delight Lumber Company to do so," and further found "that the said \$1,000 was intended by the parties, at the time they entered into the said contract, to be liquidated damages in case the contract was breached by the plaintiff."

Carmichael, Brooks & Powers, of Little Rock, for appellant. Geo. A. McConnell and Sam T. Poe, both of Little Rock, for appellee.

WOOD, J. (after stating the facts as above). The appellee Lumber Company is not in a position to insist on a forfeiture to it of the \$1,000 in controversy, for the reason that a clear preponderance of the evidence shows that it committed the first substantial breach of the contract. The contract required the Lumber Company "to sell to appellants all hickory owned by them ten inches in diameter and up" on the land mentioned in the contract. The appellants both testified that, after the Lumber Company had cut a car and a half of hickory, they positively refused to cut any more. Bowers, the agent representing the Lumber Company, in charge of the woods where the cutting was done and "whose authority was recognized in all working departments," told appellants that he never intended to deliver the balance of the hickory logs under the contract. Appellants stated that they thought there must have been some 250,000 feet left standing on the ground after the delivery of the car and a half that had been cut, containing about 7,300 feet. This testimony of appellants was corroborated by another witness, who testified that he heard a conversation between Keopple and Bowers concerning the hickory as follows: "They asked me how many feet I had and I told them a little bit over 7,300 feet, and Bowers said, 'Is that all?' and I told him it was, and he said 'We can't get out any more at that

price." Bowers in his testimony denied this, but the preponderance of the evidence on this issue was in favor of appellants.

[1] This conversation according to the undisputed testimony took place some time early in May, 1910. The testimony shows that the Lumber Company never shipped any more hickory after that time. At the time this breach of the contract occurred there was no complaint on the part of the Lumber Company that appellants were not complying with the contract on their part. On the contrary, the president and general manager of the Lumber Company testified that appellants carried out their contract "fairly well for a period of something over four months." The testimony shows that the first car load of logs under the contract was shipped on April 16th. Four months from that day would be August 16th. Therefore, according to the testimony of the president and general manager of the Lumber Company, appellants were performing their contract fairly well up until after August 16th. Yet as early as August 5th the Lumber Company was conducting negotiations with Nickey & Sons Company, at Memphis, Tenn., for the sale of the timber which it had already contracted to appellants. On the above date August 5, 1910, the Lumber Company wrote Nickey & Sons Company as follows: "We have 500,000 feet or more of extra fine white oak timber. We would like to sell you this," etc. Again on August 9th: "We stated that we had 500,000 feet or more of fine white oak. We have possibly a great deal more than this. Please let us hear from you with reference to smaller sizes by return mail," etc. The manager of the Lumber Company testified that the logs referred to in the above letters were the same timber that was included in the contract with the appellants. The above testimony shows, at least, an attempt on the part of the Lumber Company to avoid its contract with appellants at a time when it is conceded by the Lumber Company that appellants were satisfactorily discharging the contract on their part. The law is well settled that "he who commits the first substantial breach of a contract cannot maintain an action against the other contracting party for a subsequent failure on his part to perform." *National Surety Co. v. Long*, 125 Fed. 887, 60 C. C. A. 623, and cases there cited; *National Surety Co. v. Long*, 79 Ark. 528, 96 S. W. 745.

[2] The appellees claim that the appellants had breached the contract by failing "to keep a man in the woods to pass on all logs as they were being cut and to accept all logs," etc., and by "failing to pay on Monday morning of each week for all logs delivered in the past week." These provisions of the contract were for the benefit of the appellee Lumber Company, and the testimony shows that whatever technical breach-

as there may have been in these particulars were waived by the appellee Lumber Company. Bowers, the agent of the Lumber Company to make the inspection, testified concerning this as follows: "After the first week, Mr. Keopple and myself had a talk, and we agreed that I knew about what he wanted, and it was not necessary for him to stay there. He didn't have anything else there to do, and I thought I could get the logs out to suit him. We agreed that he would take up the logs once a week. He agreed to come and take the logs up as often as we needed to get them out of the way. He didn't always do that; failed two or three times." Concerning the subject of payment under the contract, the president testified that "it was satisfactory to the Delight Lumber Company for these invoices to be rendered to the firm of Keopple & McIntosh as the logs were loaded out and for them to mail a check on receipt of these invoices for the amount thereof." And, again: "It was understood that they were to mail us checks for them as soon as the invoices and bills of lading were received. That was perfectly satisfactory when they did that." The above testimony shows that a literal compliance with the provisions of the contract as to the inspection and as to the manner of payment was not insisted on by the Lumber Company, but that a different arrangement from that stated in the contract was made and pursued with the Lumber Company's express consent.

On the 12th of September, 1910, the appellants received from the Delight Lumber Company the following telegram: "Mr. Keopple did not come to take logs to-day as promised. If you fail to come or send a man to arrive here to-morrow to take logs, also pay for those shipped last week, we will consider contract void and make no further shipment of logs. Shipped two cars to-day." Yet, after sending this telegram, the testimony shows that the Lumber Company shipped out logs under the contract on September 14th and 15th, as shown by the invoices in evidence which the Delight Lumber Company rendered to the appellants. There is an agreement in evidence to the effect that the appellants were not indebted to the Lumber Company for logs shipped under the contract. Therefore the Lumber Company must have received payment for the logs as shown by the invoices of the 14th and 15th of September. As late then as the above dates, and after the Lumber Company had telegraphed the appellants that it would consider the contract void, we find it acting under and recognizing the existence of the contract. The testimony on behalf of the appellants tended to show that as early as possible after receiving the telegram one of the appellants went to Delight to make the inspection and take up the logs. Witness says: "When I got that telegram, I was

at home. My family was sick. I went down there the next day."

All the conduct of the Lumber Company as revealed by the testimony shows that there was a waiver of any breach of the contract that there might have been upon the part of the appellants. After the Lumber Company gave notice by the telegram that it would consider the contract as void, it continued to recognize it as binding by making shipments of timber under it, and accepting the payments for those shipments. On the 19th of September, 1910, the Lumber Company wrote to appellants as follows: "This is to again notify you that owing to your persistent and continued failures to come and receive our logs, as per terms of contract, as well as violations of the contract by you in other respects, we are compelled to hereafter treat the contract as void, and govern our actions accordingly." But, before the Lumber Company gave the appellants this notice of a final intention on their part to treat the contract as rescinded for alleged breaches thereof on the part of the appellants, it had already breached the contract on its part and abandoned same by selling the timber included in the contract to Nickey & Sons Company of Memphis, Tenn., as evidenced by correspondence of the Lumber Company with Nickey & Sons Company in the record which it is unnecessary to here set forth.

We are therefore of the opinion that the court erred in its finding of fact and in declaring a forfeiture. The conclusion we have reached makes it unnecessary to determine whether the provision in the contract for the deposit of \$1,000 was in the nature of a penalty or liquidated damages. The judgment is therefore reversed, and judgment will be entered here in favor of appellants for \$1,000.

OAK LEAF MILL CO. v. LITTLETON.

(Supreme Court of Arkansas. Oct. 21, 1912.)

1. MASTER AND SERVANT (§§ 101, 102, 278*)—DUTY AS TO APPLIANCES AND PLACE TO WORK.

On the question of negligence of the master in furnishing appliances and a place to work, the test is what a reasonably prudent person would ordinarily have done in like circumstances; and what was the custom of others under like conditions and circumstances is evidence, but not conclusive, of what such a person would ordinarily do.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 135, 171, 174, 178, 179, 180-184, 192, 954-972, 977; Dec. Dig. §§ 101, 102, 278.*]

2. MASTER AND SERVANT (§§ 286, 289*)—INJURY TO SERVANT—NEGLIGENCE—EVIDENCE.

Evidence, in an action for injury to a log scaler in a sawmill from logs rolling against him while on the log deck, held to make a question for the jury as to negligence because of the log deck being constructed with two un-

fastened planks in it, and also as to contributory negligence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1001, 1006, 1010-1050; Dec. Dig. §§ 286, 289.*]

3. MASTER AND SERVANT (§ 129*)—INJURY TO SERVANT—PROXIMATE CAUSE.

Leaving two planks unfastened in the floor of a log deck in a sawmill was the proximate cause of the injury to the log scaler, where, when he was on the deck in the course of his duty, a knot in a log rolled down, struck the lower end of one of the planks, throwing up the other end, striking against other logs, and causing them to roll down on him; the result being one a person of ordinary experience and sagacity could foresee.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 427-435, 437-448; Dec. Dig. § 129.*]

4. MASTER AND SERVANT (§ 219*)—ASSUMPTION OF RISK.

A servant does not assume, as incident to his employment, risks from latent defects in appliances or place of work.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 610-624; Dec. Dig. § 219.*]

5. TRIAL (§ 296*)—INSTRUCTIONS—IGNORING EVIDENCE.

Where, in other instructions, the jury had been expressly told that their finding of negligence, or not, must be based on the evidence, an instruction explaining what constituted negligence, and stating that if they believed a certain thing was done, and was negligence, and caused plaintiff's injury, he, unless guilty of contributory negligence, was entitled to recover, is not objectionable as leaving the jury to believe defendant negligent, regardless of the evidence.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 705-713, 715, 716, 718; Dec. Dig. § 296.*]

6. DAMAGES (§ 132*)—PERSONAL INJURIES—EXCESSIVE VERDICT.

A verdict of \$1,500 for injury to the ankle of a log scaler was not excessive; he having been confined to his room a month, and at the trial, four months later, testifying his ankle was still stiff, and that he suffered great pains, and that it still pained him; and there being evidence that the injury was permanent.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 372-385, 396; Dec. Dig. § 132.*]

Kirby, J., dissenting.

Appeal from Circuit Court, Hot Springs County; W. H. Evans, Judge.

Action by William Littleton against the Oak Leaf Mill Company. Judgment for plaintiff, and defendant appeals. Affirmed.

This is an action by a laborer against his employer to recover damages for injuries received in the course of his employment. The facts in the case are substantially as follows:

The Oak Leaf Mill Company is a corporation engaged in the operation of a sawmill, and is the defendant in this action. The plaintiff, William Littleton, was a log scaler for the company, and his duties required him to pull the logs up into the mill from the millpond, scale them, kick them out on the log deck, and keep them down against the saw carriage, where the sawyer could throw

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

them on his carriage by a mechanical appliance call a "trip." Littleton's duties made it necessary for him to go at times to all parts of the log deck to keep the logs down where the sawyer could reach them. He was injured on the 20th day of September, 1911, and had been at work in the position of scaler for about one year before he was injured. About one month before his injury, the mill company constructed a new log deck. This log deck is situated in the east end of the sawmill. The log deck is an inclined platform, sloping from north to south, with a gradual fall of 3 feet from the highest to the lowest point. It is 18 feet long from north to south, and between 24 and 26 feet wide from east to west. Attached to the log deck, and running north and south the length of the deck and parallel to one another, were skid rails, along which the logs were rolled from the upper to the lower side of the deck. These skids were placed at a distance of about 6 feet apart, and were between 6 and 8 inches higher than the deck floor. The deck was floored with planks 2 inches thick and 12 inches wide. The planks were nailed down upon heavy sills, which are 8 inches thick and 8 inches wide. All of the planks in the floor are nailed down, except two at the lower side of the deck. The two unfastened planks are between 5 and 6 feet in length, and have the same width and thickness as the other planks in the deck floor. They are situated something like halfway between the east and west side of the deck, and are located on the lower side of the deck. An appliance, called the "nigger bar," is situated directly beneath these two unfastened planks. The two unfastened planks rest upon the first and second sills, and their upper ends are supported by the second sill and fit up against the end of the other planks of the floor, which are nailed to the sill. Their lower ends are supported by the first sill, and extend over the sill from 5 to 6 inches. The two unfastened boards are made to fit the other parts of the floor. To keep them in place and prevent their slipping, cleats of wood are nailed upon the under side of the two planks at both ends and fit up against the sides of the two sills, which support the boards. In this way the two planks are fitted into the floor of the deck, so that they can be taken out and placed back without delay and inconvenience. The purpose of this is to enable the operatives to get to the bolts and other attachments of the nigger bar, which are located under the deck floor at this place, and by means of which the nigger bar is adjusted. Parallel with the south or lower side of the log deck, and adjacent to it, is the carriage track, along which the saw carriage runs. The logs were loaded from the deck on the saw carriage by means of a loading appliance, which

is situated at the lower end of the deck and operated by a lever in the sawyer's stand. This loading appliance consists of what is called a "trip," or "nigger bar," and the loader. The nigger bar is a perpendicular iron bar set back in the log deck some 3 feet from the edge of the deck which is next to the carriage track. It is about halfway from the east and west side of the deck. The trip or nigger bar is secured by means of bolts and other attachments beneath the deck floor. South of the nigger bar, and between it and the edge of the log deck, is the loader. This is a cylindrical shaft of iron, some 4 inches in diameter, running east and west across the deck floor, and attached to the floor in such a manner as to enable the sawyer to operate a lever and make the loader seize the logs and throw them on the carriage. Attached to the loader, and extending at right angles with it, are iron arms, or knives, about 2½ feet long, which reach out and take hold of the logs on the deck which are to be loaded on the carriage.

William Littleton testified: "I had been working as log scaler for the defendant company about one year before I was injured. My duties made it necessary for me to go at times to all parts of the log deck to roll the logs down to where the sawyer could reach them. On the day I was injured, I had pulled up from the pond and kicked out on the log deck enough logs to make the deck about half full. Some of the logs had knots on them and stopped on the inclined platform, so there were no logs nearer the saw carriage than about four feet. This made it necessary for me to move the logs down where the sawyer could get to them with his trip. The log nearest to the sawyer's carriage had a knot in it, and I took my cant hook and shoved the log down at its east end. I then went to the west end and pushed the other end of the log down. This left the other logs standing between four and five feet from the lower end of the log deck. They were stationary because of the small knots in the logs, which kept them from rolling on down the log deck. After I had shoved the first log down, I started to go back across the deck from the west to the east, and walked between the log I had already shoved down and those which were stationary under the deck above me. While walking back across the deck, and just as I got about midway and stepped on one of the unfastened planks, the sawyer, being ready for the log which I had pushed down next to the carriage, worked his trip, and, the log being by the trip turned forcibly, it fell, with a knot striking the projecting end of one of the unfastened planks with such force that it caused the upper unfastened end to fly up. The upper unfastened end, when it flew up, struck one of the logs with such force that it jarred the logs loose and caused them to roll down towards me. Be-

cause of the fact that I was on the unfastened plank that flew up, I became unbalanced, and in jumping towards the east to get clear of the logs I was caught by one of the logs rolling down on my foot before I could get in the clear, and my foot was badly crushed. The old log deck had all of the planks on it nailed down. The deck floor was habitually covered with bark and trash, and the fact that the two planks were not nailed to the floor was not noticeable, and I did not know that they were not nailed down like the rest of the floor."

Another witness for the plaintiff testified that he was a scaler for the mill company, and that a day or two before he had seen the loose planks kick up by having a log roll over and strike the lower end of them. He said the upper end of the loose planks would jump up when the logs struck the lower end.

The sawyer for the mill company testified that just before Littleton was hurt it was not necessary for him to operate the trip and throw a log on the carriage, because he already had one on there. He said that he did not operate the trip. He said that he never operated the trip until he was ready to place another log on the carriage; and that when he was ready to do this he made a fuss with the trip to give the scaler notice.

The dogger on the saw carriage testified that he was looking at Mr. Littleton when the injury occurred. He said it was his duty to watch him so he did not roll the logs so far that they would run on the carriage; that when Mr. Littleton was hurt he was rolling down the logs himself; that he had his shoulder against the handle of his cant hook, trying to roll a log down; that the log he was prying at broke loose from the other logs, and the one just behind it rolled down on Mr. Littleton before he could get out of the way.

W. N. Mosley testified: "I am the foreman of the defendant's mill, and have been engaged in the sawmill business about 17 years. For the first 10 years I was engaged in construction work, and during the last 7 years in the operation of sawmills. During my employment in construction work, I have built log decks for sawmills. I know what is considered a good log deck. I have examined log decks at other sawmills. The log deck at the mill of the defendant, where Mr. Littleton was hurt, is about the same as other log decks. I constructed it, and left the two planks unfastened in order that we might get down where the nigger bar was and adjust the bolts when it became necessary. It is necessary very frequently to adjust the bolts of the nigger bar. The logs do not, as a usual thing, roll down and cause the planks to kick up. They could not kick them up on account of the shaft on the other side of the mill. They go under the shaft,

and I do not see how anything could go higher than that shaft. It could not go higher than four inches. It only extends about three inches over the shaft, and the logs rolling down there could not knock them and make them go higher than the shaft. It is the customary method of constructing log decks to have loose planks, like the ones in question, so as to take them out. I have not worked in any mill where they did not have the loose boards in the log deck. I never saw any mill that did not have the loose boards in the log deck, as we have them here. I do not see how the boards would kick up if a rolling log with a knot on it were to roll down and strike the end of the boards, because the shaft extends over the sill, as I have already indicated. The planks go under the skids and extend over the sill. If a log rolls down with a knot on it, the knot would not strike the two planks on account of the shaft. You would have to take the shaft out before it would."

William Littleton, recalled, testified: "Q. Mr. Littleton, you heard what Mr. Mosley there testified with reference to that shaft preventing that plank from kicking up. Under the circumstances, I wish you would explain to the jury just how that is—I will ask you, first, is he, or is he not, mistaken about what he says? A. Well, I will make my statement, and they can say for themselves. Now, this shaft runs across under there for these rollers to hang on. It is about five inches above the floor, and when a log has a knot on it it runs down and strikes under that shaft, and when it strikes down there this plank flies up. The knot can go in between this shaft and the end of these boards, and that throws that up, like that. (Indicating.) Q. There is nothing, then, to prevent a knot from striking that plank there and kicking that plank up, just like that, or just like it did do? A. No; there is nothing to prevent it from doing that; and he can describe it just like I can, and he knows it done it."

Other facts will be stated or referred to in the opinion.

The jury returned a verdict for the plaintiff, and from the judgment rendered the defendant has appealed.

T. D. Wynne, of Fordyce, for appellant.
J. C. Ross, of Malvern, for appellee.

HART, J. (after stating the facts as above). [1] The defendant adduced evidence tending to show that the log deck in question was built like those in common use by other sawmills. Counsel for the defendant insists that, inasmuch as the master is not bound to use the newest and best appliances, he performs his duty when he furnishes those which are in common use and are reasonably safe; and that the former is the test of the latter. There is an irreconcilable conflict of opinion upon the question whether or not the master,

in furnishing appliances for the servant, has fulfilled his duty in this regard by furnishing those which are ordinarily used in the business. An extended discussion and citation of authority on both sides of the question will be found in the case note to *Niko Wilta v. Interstate Iron Company*, 103 Minn. 303, 115 N. W. 169, 16 L. R. A. (N. S.) 128.

A careful consideration of the question leads us to the conclusion that the contention of the defendant is not sound. It is true that a master is only bound to exercise ordinary care to furnish his servant a safe place in which to work. *Holmes v. Bluff City Lumber Co.*, 97 Ark. 180, 133 S. W. 819; *Ozan Lumber Co. v. Bryan*, 90 Ark. 223, 119 S. W. 73.

In the case of *Wilcox v. Hebert*, 90 Ark. 145, 118 S. W. 402, we held: "A master is only held to the exercise of ordinary care, proportionate to the danger to be incurred, in the selection of reasonably safe machinery and appliances, and in keeping them in proper condition; and it is not an insurer of the safety of the appliances furnished, nor bound to supply any particular kind of machinery, nor to use any particular character of safeguard against danger." But the controlling test of the exercise of reasonable care is not what has been practiced by others in like situation, but what a reasonably prudent person would have ordinarily done in such a situation. A bad custom may have grown up through ignorance or selfishness.

The jury were required to test the character of the defendant's conduct by what a reasonably prudent person would ordinarily have done in the like circumstances, as disclosed by all of the evidence, including that relating to the conduct and practice of others. What was the custom of others under like conditions and circumstances is evidence of what a reasonably prudent man would ordinarily do; but it is not conclusive evidence of that fact. Prof. Wigmore, in discussing this phase of the question, says: "The distinction is, in itself, a simple one:

(1) The conduct of others evidences the tendency of the thing in question; and such conduct—e. g., in using brakes on a hill, felt shoes in a powder factory, railings around a machine, or in not using them—is receivable with other evidence showing the tendency of the thing as dangerous, defective, or the reverse. But this is only evidence. The jury may find from other evidence that the thing was in fact dangerous, defective, or the reverse, and that its maintenance was, or was not, negligence in spite of the above evidence. (2) Meanwhile the substantive law tells them what the standard of conduct for negligence is; and this standard is a fixed one, independent of the actual conduct of others. To take that conduct as furnishing a sufficient legal standard of negligence would be to abandon the standard set by the substantive law, and would be

improper. This conduct of others, then, (1) is receivable as some evidence of the nature of the thing in question, because it indicates what is the influence of the thing on the ordinary person in that situation; but (2) it is not to be taken as fixing a legal standard for the conduct required by law. This distinction is patent enough; but it is sometimes judicially ignored. Such evidence is sometimes improperly excluded on the erroneous supposition that the mere reception of it implies that it is to serve as a legal standard of conduct. The proper method is to receive it, with an express caution that it is merely evidential, and is not to serve as a legal standard." *Wigmore on Evidence*, vol. 1, par. 461. See, also, *Labatt on Master and Servant*, vol. 1, par. 50; *Chicago Great Western Ry. Co. v. McDonough*, 161 Fed. 657, 88 C. C. A. 517; *Chicago, M. & St. P. R. Co. v. Moore*, 166 Fed. 663, 92 C. C. A. 357, 23 L. R. A. (N. S.) 963.

[2] It is next insisted by counsel for defendant that there was no negligence on its part, and that the court erred in refusing to take the case away from the jury. As we have already seen, it is the duty of the master to exercise ordinary care in seeing that the servant is provided with a reasonably safe place in which to work, and in default thereof he is guilty of negligence. Where a master furnishes, or causes to be built under his direction and control, a platform, scaffold, staging, or like structure for the use of his servant in the prosecution of his work, it is his duty to exercise ordinary care to see that it is reasonably safe for the purpose contemplated. 26 Cyc. 1115. The general rule is that, where the facts are such with respect to the negligence of the parties that reasonable minds might differ with respect thereof, the case should go to the jury.

The alleged defect in the log deck was a structural one. The evidence on the part of the plaintiff shows that in the discharge of his duties he was required at times to go on all parts of the deck; that frequently when the logs were started by him down the deck they would stop rolling on account of the knots in them, pinning them to the floor; that in such cases he was required to go down and take a cant hook and roll them down to the foot of the deck near the saw carriage; that the deck in question had two loose boards, which had cleats on the under side to keep them in place, but which were not nailed down to the sills like the other planks in the floor; that these unfastened planks fitted closely into the other parts of the flooring; and that on this account, and because of the accumulation of shavings on the deck floor, he was not aware that the planks were not nailed down. On the day he was injured, a lot of logs had accumulated on the upper part of the deck, and failed to roll down to the lower end of it because of some knots in the logs. The plaintiff took

his cant hook and rolled one of these logs down the deck next to the saw carriage. He says that on his way back from the west to the east end of the deck he had occasion to walk across these unfastened planks, and that just as he stepped on one of them the sawyer worked the trip, and this caused the log at the lower end of the deck to strike the unfastened plank and make it fly upwards. The plank, as it flew upwards, struck the mass of logs piled above them on the floor of the deck with such violence as to dislodge them, and they rolled down and crushed his foot. The evidence on the part of the defendant shows that it was necessary to construct the log deck with these unfastened planks, in order to go down under the deck to adjust the nigger bar, when it became necessary. Evidence was also adduced by it tending to show that this was the usual and customary way to construct log decks. It will be observed that the two planks had cleats nailed on their under side to keep them in place, so that the planks were constructed in the nature of a trap-door. At but little cost, hinges or other fastenings could have been put on them, so that when a log with a knot on it struck the lower part of the planks they would not fly up. The evidence for the defendant also tends to show that the injury did not happen as testified to by the plaintiff himself, but that the plaintiff himself started the logs to rolling by pulling on them with his cant hook.

It is also insisted by counsel for defendant that the case should have been taken from the jury, because the physical facts are opposed to the testimony given on the part of the plaintiff. We cannot agree with him in this contention. The plaintiff himself testified that the injury occurred as detailed above. Another witness for the plaintiff testified that he was a log scaler at the defendant's mill, and had seen the unfastened planks fly up by reason of a log with a knot on it striking the lower end thereof. He said this had occurred only a day or two before the day he testified. The undisputed testimony shows that the unfastened planks extended about five inches over the sill next to the saw carriage, and, according to the testimony of the plaintiff, there was sufficient room for a log with a knot on it to strike the lower end of these unfastened planks and cause them to fly up. The shaft extended in a parallel direction to the lower end of the deck floor. The plaintiff said that a knot could go between this shaft and the end of the unfastened plank; that there was nothing to prevent the knot from striking the plank and kicking the plank up.

Under all the facts and circumstances adduced in evidence, we think both the question of the defendant's negligence and the plaintiff's contributory negligence were properly submitted to the jury. As bearing on

the question, and as illustrative cases, we cite the following: *Oak Leaf Mill Co. v. Smith*, 98 Ark. 34, 185 S. W. 333; *Doyle v. Missouri, K. & T. Trust Co.*, 140 Mo. 1, 41 S. W. 255; *Rice & Bullen Malting Co. v. Paulsen*, 51 Ill. App. 123; *Burnside v. Peterson*, 43 Colo. 382, 96 Pac. 256, 17 L. R. A. (N. S.) 76.

[3] It was contended by counsel for defendant that the leaving of the two loose boards in the log deck floor was not the proximate cause of the accident; but we cannot agree with his contention. It is a fundamental rule of law that to recover damages on account of unintentional negligence of another it must appear that the injury was the natural and probable consequence thereof, and that it ought to have been foreseen in the light of the attending circumstances. *St. L., I. M. & S. R. Co. v. Bragg*, 69 Ark. 402, 64 S. W. 226, 86 Am. St. Rep. 206; *St. L., I. M. & S. R. Co. v. Buckner*, 89 Ark. 58, 115 S. W. 923, 20 L. R. A. (N. S.) 458; *Pulaski Gas Light Co. v. McClintock*, 97 Ark. 576, 134 S. W. 1189, 1199, 32 L. R. A. (N. S.) 825.

From the evidence it appears that it was the duty of the plaintiff to go at times on all parts of the deck floor. The logs, by reason of having knots on them, frequently lodged on the deck floor, and the plaintiff was required to pry them apart and roll them down next to the saw carriage. According to the testimony of the plaintiff, it would sometimes happen that when the sawyer worked the trip on a log with a knot on it the knot would strike one of these loose boards and cause the upper end to fly up. That the end which flew up might strike logs which had lodged just above it and cause them to roll down was an occurrence which might reasonably have been anticipated and regarded as likely to happen.

Inasmuch as the plaintiff's duty required him to be on all parts of the log deck, and as, according to his testimony, he had no notice, and could not be charged with notice, that the planks were not nailed down to the floor, the injurious consequences of such an accident as did happen might have been avoided if the defendant had nailed the unfastened planks to the floor, or had warned the plaintiff that they were not nailed down. When the situation of the plaintiff with reference to his work is considered, we are of the opinion that a man of ordinary experience and sagacity could foresee that the result which did happen might ensue.

[4] Little need be said on the question of the assumption of risk. The alleged defect was a structural one, necessarily known to the master. A servant is bound only to see patent defects, and he does not assume the risks arising from latent defects or dangers in the machinery, appliances, or place furnished for his use by the master. *Archer-Foster Construction Co. v. Vaughan*, 79 Ark. 20, 94 S. W. 717. As we have already seen,

the deck floor was nailed down, except the two short planks, and, according to the testimony of the plaintiffs, these planks fitted up closely to the other part of the deck floor, and the whole floor was habitually covered with bark and trash, so that the fact of the two planks not being nailed down was not apparent. Therefore the risk was not an obvious one, and for that reason was not one assumed by the plaintiff as an incident to his employment, and the question of assumed risk was properly submitted to the jury.

[5] It is next insisted by counsel for defendant that the court erred in giving the following instruction to the jury: "The court instructs the jury that it was the duty of the plaintiff, in the performance of his duties of employment, to exercise ordinary care for his own safety; and it was also the duty of the defendant company to exercise ordinary care in furnishing plaintiff a reasonably safe deck floor on which to perform his duties and work. If, in the construction of said deck floor, defendant left unfastened planks so fitted up against the ends of other planks as not to be noticeable, and if you believe this was negligence, and further believe such negligence caused plaintiff's injuries to his foot and ankle, as charged in the complaint, then, unless the plaintiff was guilty of negligence causing or contributing to his own injury, or assumed the risk of injury, he is entitled to recover in this case."

Counsel for the defendant insists that the instruction leaves out of consideration entirely the evidence in the case, and, in fact, tells the jury to find for the plaintiff if they believe that defendant was negligent in the construction of its log deck, regardless of the testimony in the case. We do not think the instruction is susceptible of that construction. The court in another instruction had told the jury what the relative duty of the plaintiff and defendant to each other was, and had expressly told them that their finding of negligence, or not, must be based upon the evidence. The court explained to the jury what constituted negligence on the part of the defendant, and manifestly, by the language used in this instruction, did not intend to tell the jury it might set up an arbitrary standard of negligence of its own, but, on the contrary, meant to tell the jury that negligence on the part of the defendant must be found by them from the evidence introduced in the case, under the law as given them by the court.

[6] Finally, it is contended by counsel for defendant that the verdict is excessive. The jury returned a verdict for the plaintiff in the sum of \$1,500. The plaintiff was confined to his room for one month. He testified that his ankle was still stiff, and that he could only walk with difficulty. Other evidence was introduced by him tending to show that his injury was permanent. The

plaintiff testified that he suffered great pain from the injuries, and that his foot pained him at the time of the trial, which was nearly four months after the injuries were received by him. Therefore we do not think the verdict is excessive.

The judgment will be affirmed.

KIRBY, J., dissents.

RIVER, RAIL & HARBOR CONST. CO. v. GOODWIN.

(Supreme Court of Arkansas. Nov. 11, 1912.)

1. EVIDENCE (§ 243*)—DECLARATIONS.

Declaration of a coemployee, immediately after a servant's injury, that if he had done his duty and made them as he should it would not have happened is inadmissible against the master, not being part of the *res gestæ*, but a mere narrative of a past occurrence.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 908-915; Dec. Dig. § 243.*]

2. MASTER AND SERVANT (§ 218*)—ASSUMPTION OF RISK—PATENT DANGERS.

On the question of assumption of risk by a mature but inexperienced employé, bringing poles to be bent into hoops, by one end being put between two pieces of wood three or four feet long driven in the ground, and the other end then being pulled over and placed between two like pieces, *held*, under the evidence, that, while the danger of the pole breaking or slipping from between the pieces of wood, when being pulled down, was obvious and patent, the danger of one of the pieces of wood pulling up was not; so that he did not assume the risk thereof, unless he was warned or appreciated the danger.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 601-609; Dec. Dig. § 218.*]

Appeal from Circuit Court, Pulaski County; F. Guy Fulk, Judge.

Action by R. F. Goodwin against the River, Rail & Harbor Construction Company. Judgment for plaintiff; defendant appeals. Reversed, and remanded for new trial.

Appellee instituted this action against appellant to recover damages for personal injuries received by him while working for appellant. Appellant was engaged in the work of preventing banks of rivers from caving. It used the Gabion system. The system is patented, and is so arranged that it changes the current of the river where it is washing. As a part of the system, poles of wood, bent in the form of a half circle and fastened together, are used. They are called hoops. The hoops are made in the following manner: Two stobs of wood, 3 or 4 feet long, are driven in the ground about 12 or 14 inches. They are placed far enough apart to put between them one end of the poles which it is desired to bend. Men then take hold of the other end of the pole and pull it around and place it between other stobs similarly driven in the ground, so that the pole forms a half circle. The men are required to pull, instead of push, the end of the pole around, because it is less dangerous. For instance,

if the men were at work on the outside pushing the pole around, and it should break or slip from between the stobs, they would be more likely to be injured than if they stayed on the inside and pulled the pole around. For this reason those engaged in making the hoops were required to work on the inside. On the day appellee was injured, other servants of appellant were engaged in making hoops in the manner above described. Appellee and another servant of appellant were engaged in carrying poles from a boat, tied to the river bank, to a place in front of the hoops. He was injured by one of the poles flying out from its fastening and striking him on the leg, just as he was passing along there with one end of a pole on his shoulder.

Appellee details the circumstances attending his injury as follows: "I was a farmer, and had never been engaged in any other occupation. I am 45 years of age. I did not want to work for appellant, because the business was new to me, and I was afraid I would get hurt. They first engaged me to dig holes in the ground and bury logs in them, for the purpose of securing the Gabions thereto. After I had worked on this for a few days, I was told to assist in carrying poles and placing them in front of the hoops, which were being made by other servants of the company. We had only carried three or four poles at the time I was injured. The pole we were carrying at the time I was injured was 5 or 6 inches thick at the butt, and about 18 or 20 feet long. We had carried it from the boat, and were traveling along a beaten path to place it in position at the side of and somewhat in front of the hoop that was being made. Just as we came opposite the stobs they had driven in the ground, and started to make the turn, one of the stobs pulled out of the ground. This released the pole which was being bent into the hoop, and the end flew around and struck me on the leg, breaking it. I did not know it was dangerous to go in front of the hoops when they were making them. I thought the stakes were put in the ground deep enough to hold them. I saw the men at work making the hoops, and saw that they were staying inside the hoops while making them, but supposed they did so because they could pull more on the inside than they could push if they were on the outside. It did not occur to me that standing on the inside and pulling was safer than standing on the other side and pushing. I was in about 4 or 5 feet of the stob when it pulled out of the ground. At the time I got hurt, they had not fastened the pole. They had just got it to the stake, and were fastening it down when the stob pulled out. I was not warned of the danger of working around the hoops." Other evidence was adduced by appellee tending to corroborate his testimony and to show the character and extent of his injuries.

Appellant adduced evidence tending to show that appellee, in carrying the poles out

at one time, stepped over the hoops in the performance of his task, and had been warned not to do that any more, because it was dangerous. Other evidence for appellant tends to show that the stob did not pull out but that the pole slipped from between the stobs and flew back and struck appellee breaking his leg. Other evidence will be referred to in the opinion.

The jury returned a verdict for appellee and the case is here on appeal.

Coleman & Lewis, of Little Rock, for appellant. Jas. A. Gray and Geo. A. McConnell, both of Little Rock, for appellee.

HART, J. (after stating the facts as above). [1] Appellee testified that a Mr. Taylor was a servant engaged in the making of hoops, and was standing about 10 or 15 feet away when he was injured. Appellee said that Taylor came to him at once when he was injured, and when asked, "What did he say?" answered: "He said, if he had been doing his duty and making them like he should have made them, it wouldn't have happened, and he wouldn't have had it happen for a hundred dollars; and I was in so much pain I didn't pay any attention." This testimony was permitted to go to the jury over the objections of the appellant, and the action of the court in this respect is now assigned as error. We think the assignment is well taken.

Counsel for appellee seek to uphold the ruling of the court by the decision in the case of Beale-Doyle Dry Goods Co. v. Carr, 85 Ark. 479, 108 S. W. 1053, 14 Ann. Cas. 48. There the excited declarations of a child to his father, while plaintiff was lying injured at the bottom of the elevator shaft, and before he had been discovered, that a man had pushed the elevator door open and walked in, were held to be admissible on the issue of whether the door was left open or not. The remark of Taylor was not competent. It did not illustrate or explain how or what caused the accident. His statement was not so connected with the transaction as to characterize and be a part of it. What Taylor said could give character to nothing that happened. It could neither qualify nor explain it. It was a mere narrative of a past occurrence depending for its force and effect solely on the credit of Taylor, unconnected with the act done, and receiving no credit or significance from the accompanying circumstances. It was not therefore competent as original evidence in the matter of *res gestæ*. *Ft. Smith Oil Co. v. Slover*, 58 Ark. 168, 24 S. W. 106; *Little Rock Traction & Electric Co. v. Nelson*, 66 Ark. 494, 52 S. W. 7; *Stecher Cooperage Works v. Steadman*, 78 Ark. 381, 94 S. W. 41; *St. L., I. M. & S. R. Co. v. Pape*, 100 Ark. 269, 140 S. W. 265; *Caldwell v. Nichol*, 97 Ark. 422, 134 S. W. 622.

The declaration was not made by an officer

in the appellant company having the right to break for it and bind it by declarations of that kind. It follows from the authorities appealed to that we have already cited that the declaration was improperly admitted, and was prejudicial to the appellant. In Jones on Evidence, § 357, the rule is stated as follows: "The declaration of an employé or officer as to who was responsible for an accident, or as to the manner in which it happened, when made at the time of the accident or soon after, have been held incompetent, as against the company, on the ground that his employment did not carry with it authority to make declarations or admissions at a subsequent time as to the manner in which he had performed his duty; and that his declaration did not accompany the act from which the injuries arose, and was not explanatory of anything in which he was then engaged, but that it was a mere narration of a past occurrence."

[2] It is next contended by counsel for appellant that the evidence did not warrant the verdict. In the case of Arkansas Midland Ry. Co. v. Worden, 90 Ark. 407, 119 S. W. 823, the court said: "When an employé takes service with his employer, he impliedly agrees to assume all the obvious risks of the business, including the risks of injury from the kind of machinery then openly used, as well as the method of operating the business then openly observed. * * * This is the rule which applies to an employé of mature years and experience in the particular work or business; for there is no duty on the part of the master to warn an experienced servant of obvious dangers, as they are among the ordinary incidents of the service, and he is bound to take notice of these, and must be presumed to have realized and appreciated such dangers. * * * But the rule is different as to a servant who, by reason of youth or inexperience in the particular work, does not fully realize and appreciate the danger. In that case it is the duty of the master to give proper instructions, and to warn the inexperienced servant of patent as well as latent dangers. * * * And before the inexperienced servant can be presumed to have realized the danger and assumed the risk it must be shown that he was instructed and warned of it."

Appellee was 45 years of age, and was in possession of all of his faculties. He had lived in the country all his life, and was a farmer. The danger from a pole breaking as it was being pulled around, in order to fashion it into a hoop, was patent and obvious to any one. It may also be said that the danger arising from one end of the pole slipping out from between the stobs while the pole was being bent was an obvious and patent danger. The rule is that the master is not required to explain patent dangers which are ordinarily incident to the services, and which it may be reasonably expected, under

all the circumstances, the servant can see and appreciate. But we do not think that the danger arising from one of the stobs pulling up was an obvious and patent one, under the evidence detailed by appellee. He says that he had never seen any work of that kind done, and was wholly without experience as to the method of doing it; that he informed appellant of his ignorance and inexperience before he commenced to work for it; that appellant put him to work carrying poles and placing them in front of and a little to one side of the hoops. The stob in question, which pulled up, had only been driven down that afternoon, and was pulled up while the first hoop was being made. Under these circumstances, the jury might have found that it was the duty of appellant to have informed appellee of the way he should travel to place the poles in the position where he was directed to put them, and to have instructed and to have cautioned him sufficiently to have enabled him to comprehend the danger of the stob pulling out. If the circumstances were such that the appellant owed it as the duty to appellee to instruct him, and it failed to do so, and appellee was injured on account of its failure to do so, appellant was liable in damages for the injury. On the other hand, the appellant testifies that on one trip, in carrying a pole, appellee walked over the hoop, and that he was warned of the danger of so doing. Whether appellee knew or ought to have known what caution was necessary for him to use, while walking along the path in the performance of his work of carrying the poles, in order to avoid the injury that he received, or appreciated the danger of the failure to use such caution, or had received the necessary instruction and warning before the injury, was properly a question for the jury.

Other assignments of error are pressed upon us for a reversal; but the views we have already expressed render it unnecessary to discuss them. The assignment in regard to the arguments of appellee's counsel before the jury is not likely to arise on a retrial of the case, and the principles of law that we have already announced will be a sufficient guide for the court in instructing the jury.

For the error in admitting the declaration of Taylor, the judgment will be reversed, and the cause remanded for a new trial.

FERRILL et al. v. KEEL et al.

(Supreme Court of Arkansas. Oct. 15, 1912.)

1. STATUTES (§ 40*)—ENACTMENT—STYLE OF BILL.

Const. art. 5, § 19 (Kirby's Dig. § 18), provides that the style of the laws shall be, "Be it enacted by the General Assembly of the state of Arkansas," and article 5, § 1, provides that the legislative powers shall be vested in the General Assembly, which shall con-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

sist of the Senate and House of Representatives. The latter section was amended by the initiative and referendum amendment to the Constitution so as to provide that the legislative powers shall be vested in the General Assembly consisting of a Senate and House of Representatives, but reserving to the people the power to propose amendments to the Constitution, and the powers of initiative and referendum with reference to statutes and, after defining such powers, the amendment provides that "the style of all bills shall be, 'Be it enacted by the people of the state of Arkansas.'" *Held*, that the provision as to the style of bills referred only to bills initiated by the people under the amendment, and did not repeal section 19, so that all bills initiated and enacted by the General Assembly are still properly styled, "Be it enacted by the General Assembly of the state of Arkansas."

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 43, 44; Dec. Dig. § 40.*]

2. CONSTITUTIONAL LAW (§ 18*)—CONSTITUTIONAL AMENDMENTS—CONSTRUCTION.

In determining the intention in framing a constitutional amendment, the court must keep in view the Constitution as it existed before it was amended, the evil to be remedied by the amendment, and the terms of the amendment.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 13, 17; Dec. Dig. § 18.*]

3. CONSTITUTIONAL LAW (§ 18*)—AMENDMENTS—CONSTRUCTION.

Any interpretation of a constitutional amendment which would conflict with any other provision or is not absolutely necessary to effectuate the amendment should not be indulged.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 13, 17; Dec. Dig. § 18.*]

4. CONSTITUTIONAL LAW (§ 24*)—AMENDMENT—ABROGATION OF PRIOR PROVISIONS.

In order that a constitutional provision may be abrogated by another provision, there must be an irreconcilable conflict between the purposes of the two provisions.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 21-29; Dec. Dig. § 24.*]

5. CONSTITUTIONAL LAW (§ 24*)—REPEAL BY IMPLICATION.

Repeals by implication are not favored even in case of statutes, and certainly not in case of long-enacted constitutional provisions.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 22; Dec. Dig. § 24.*]

6. STATUTES (§ 47*)—CERTAINTY—CREATION OF DRAINAGE DISTRICTS—DESCRIPTION OF BOUNDARIES.

Act approved March 9, 1911 (Sp. & Priv. Laws 1911, p. 184), creating the Village Creek and White River levee district, in defining the boundaries of the district failed to locate the stopping point of the district line in section 2, township 10 north, range 3 west, which was the end of the first call, and insufficiently defined the course through sections 1, 2, 11, 10, 9, and 16 in township 9 north, range 3 west, and did not fix the line along White River, but left it to be placed where deemed most practical. *Held*, that a statute creating a levee district must define its boundaries with certainty or provide for that being done by some other agency, and the act in question was invalid for not describing the territory proposed to be embraced with sufficient certainty.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 47; Dec. Dig. § 47.*]

Hill and McCollum, Special Justices, dissented in part.

Appeal from Jackson Chancery Court; Geo. T. Humphries, Chancellor.

Action by John W. Ferrill and others against John H. Keel and others. From a judgment sustaining a demurrer to the complaint, plaintiffs appeal. Reversed and remanded, with directions to overrule demurrer and grant relief.

McCaleb & Reeder, of Batesville, and Jno. W. & Jos. M. Stayton, of Newport, for appellants. Stuckey & Stuckey, of Newport, and Morris M. Cohn, of Little Rock, for appellees. T. S. Osborne, of Fort Smith, amicus curiae.

HARROD, Special Judge. The judges of the Supreme Court having certified to the Governor their disqualification to determine the validity of the enacting clause of the act involved in this suit, this special court was appointed by the Governor under section 9 of article 7 of the Constitution to determine this cause. The General Assembly of this state, at the 1911 regular session, created the Village Creek and White River levee district by an act approved March 9, 1911 (Sp. & Priv. Laws 1911, p. 184). The commissioners of the district organized, selected assessors and engineers, and proceeded to assess the lands of the district for the levee tax. Various landowners commenced suit in the Jackson chancery court to enjoin the proceedings. A demurrer was interposed to their complaint, and it was sustained, and, electing to stand on their complaint, their suit was dismissed, and they appealed to this court to reverse that decree.

The appellants urge here, among others, the following grounds for reversal: First. That the act is void because its enacting clause is, "Be it enacted by the General Assembly of the state of Arkansas." Second. That the boundaries of the district are so indefinitely described by the act that the land subject to the tax could not be definitely ascertained, and that the act was therefore void.

[1] The style of the act in question is, "Be it enacted by the General Assembly of the state of Arkansas." Is that style of bill or enacting clause valid since the adoption of the initiative and referendum amendment? The amendment is as follows: "That section 1, article 5, of the Constitution of the state of Arkansas be amended so as to read as follows: 'Section 1. The legislative powers of this state shall be vested in a General Assembly, which shall consist of the Senate and House of Representatives, but the people of each municipality, each county and of the state, reserve to themselves power to propose laws and amendments to the Constitution and to enact or reject the same at the polls as independent of the Legislative Assembly, and also reserve power at their own option to approve or reject at the polls any

act of the Legislative Assembly. The first power reserved by the people is the initiative, and not more than 8 per cent. of the legal voters shall be required to propose any measure by such petition, and every such petition shall include the full text of the measure so proposed. Initiative petitions shall be filed with the Secretary of State not less than four months before the election at which they are to be voted upon.' The second power is a referendum, and it may be ordered (except as to laws necessary for the immediate preservation of the public peace, health or safety) either by the petition signed by 5 per cent. of the legal voters or by the Legislative Assembly as other bills are enacted. Referendum petitions shall be filed with the Secretary of State not more than ninety days after the final adjournment of the session of the Legislative Assembly which passed the bill on which the referendum is demanded. The veto power of the Governor shall not extend to measures referred to the people. All elections on measures referred to the people of the state shall be had at the biennial regular general elections, except when the Legislative Assembly shall order a special election. Any measure referred to the people shall take effect and become a law when it is approved by a majority of the votes cast thereon and not otherwise. The style of all bills shall be, 'Be it enacted by the people of the state of Arkansas.' This section shall not be construed to deprive any member of the Legislative Assembly of the right to introduce any measure. The whole number of votes cast for the office of Governor at the regular election last preceding the filing of any petition for the initiative or for the referendum shall be the basis on which the number of legal votes necessary to sign such petition shall be counted. Petitions and orders for the initiative and for the referendum shall be filed with the Secretary of State, and in submitting the same to the people he and all other officers shall be guided by the general laws and the acts submitting this amendment until legislation shall be specially provided therefor."

The amendment proposes to amend section 1 of article 5 of the Constitution. That section is as follows: "The legislative powers of this state shall be vested in a General Assembly, which shall consist of the Senate and House of Representatives." No other section or article of the Constitution of 1874 is mentioned in the amendment. Section 19 (section 18 in Kirby's Digest) of article 5 of the Constitution reads as follows: "The style of the laws of the state of Arkansas shall be: 'Be it enacted by the General Assembly of the state of Arkansas.'"

The question is, Was this provision of the Constitution abrogated by the initiative and referendum amendment? Is this specific provision of our organic law to be treated as no

longer in force? It is claimed that it was annulled by this provision of the initiative and referendum amendment: "The style of all bills shall be, 'Be it enacted by the people of the state of Arkansas.'" So the question we are to consider involves the construction of the initiative and referendum amendment in relation to the enacting clause of this act. Two constructions are open to the court. It may be held that section 18 is abrogated by the amendment, or it may be held that it remains in force as not affected by the amendment. The correct decision of the case involves nothing but the application of rules of law that must govern the court in the construction of the amendment.

[2, 3] By what rules of law should we be governed? More than 60 years ago, in the case of *State v. Scott*, 9 Ark. 270, Mr. Justice Walker, in a case involving the construction of an amendment to the Constitution, said: "In determining the intentions of the framers of the amendment, we must keep in view the Constitution as it stood at the time the amendment was made, the evil to be remedied by the amendment, and the amendment proposed, by which the evil is to be remedied. No interpretation should be allowed which would conflict with any other provision of the Constitution, or which is not absolutely necessary in order to give effect to the proposed amendment. On the contrary, such construction should be given as will, if possible, leave all the other provisions in the Constitution unimpaired and in full force." These rules of construction were laid down at an early day, when the jurisprudence of our state was in its infancy, but none better have been proposed at any time or any place. Let us try this case by these rules of construction and see what the result will be. How did the Constitution stand when the amendment was adopted? It provided that all legislative power was in the General Assembly (section 1, art. 5), and that the style of all laws should be, "Be it enacted by the General Assembly of the state of Arkansas." Section 19, art. 5. Now what was the evil the initiative and referendum amendment was designed to remedy? It is well known that it was the failure of the legislative department of the state government to respond to the will and wishes of the people. This failure sometimes took one form and sometimes another. Sometimes it was the failure or refusal to enact laws the people wanted; sometimes it was in passing laws the people did not want passed. Now, how were these evils to be remedied? By adding to existing legislative power—the power of the people to pass the laws they wanted—and by diminishing the legislative power to the extent of permitting the people to pass upon and approve or reject laws enacted by the General Assembly. The evil to be remedied was not the style of the bills, but the substance of the bills. The people

were not specially concerned with the style of enacting clause, but they were profoundly interested in the provisions of the laws. The initiative and referendum amendment was not intended to interfere with the ordinary processes of legislation, nor was it intended in any manner to entirely abolish the legislative power of the General Assembly. It was intended as a supplement to the existing legislative power, on the one hand, and as a curb or restraint on that power, on the other hand. The amendment was not intended in any sense as an abandonment of representative government, but rather its very aim and purpose was to make government representative.

In construing this amendment, it is our duty to keep constantly in mind the purpose of its adoption and the object it sought to accomplish. That object and purpose was to increase the sense of responsibility that the lawmaking power should feel to the people by establishing a power to initiate proper, and to reject improper, legislation. If the adoption of this amendment creates in the minds of Senators and Representatives a true sense of their responsibility to the people, and thereby makes the legislative department of the government truly representative, its wise and beneficent purpose will have been accomplished if no bill is ever initiated and no legislative act is ever referred. But a new method of legislation being provided for by the amendment—that is, the right of the people to initiate legislation—it became both important and necessary that the style of laws enacted by the people should be provided for in the amendment. Was the style of any bills or laws except those to be initiated by the people contemplated, considered, or in any manner thought of, by the framers of the initiative and referendum amendment? Why should we suppose that they were thinking of anything else except the business they had in hand. The business they had in hand was to establish a power in the people to legislate and to provide a manner of exercising that power. Was the style of laws enacted by the General Assembly material to the procedure of the people in enacting laws? We are sure that the people knew, when they adopted the initiative and referendum amendment, that the great bulk of legislation would continue to be enacted by the General Assembly; that the initiative would only be used and the referendum invoked on great and important questions. When they spoke of the style of bills, were the framers of the amendment thinking about the exercise of the old legislative power of the General Assembly, or were they thinking about the exercise of the new power they were creating? We are told that no interpretation should be allowed that would conflict with any other provision of the Constitution. If we hold that the words of the amendment that the style of all bills shall be, "Be it enacted by

the people of the state of Arkansas," apply to bills passed by the General Assembly as well as to bills initiated by the people, the interpretation will be in direct conflict with section 19, art. 5, which says that the style of laws of the state of Arkansas shall be, "Be it enacted by the General Assembly of the state of Arkansas." Is an interpretation that will cause a conflict between section 19, art. 5, and the amendment necessary to give full effect to the amendment? Not at all. The fullest possible effect is given to the amendment when it is said that bills initiated by the people shall be styled, "Be it enacted by the people of the state of Arkansas." So far as the introduction or presentation of bills is concerned, the amendment refers only to laws initiated by the people, and necessarily, when it speaks of the style of bills, it means bills for the introduction and presenting of which it is providing. From the object to be attained, the mischief to be remedied, the language used, its position in the text, and its relation to other language used, we entertain no doubt that this conclusion is sound.

Now it is our duty to construe the amendment, if possible, so as to leave other provisions of the Constitution unimpaired and in full force. Why not leave section 19, art. 5, in full force? It is said that if this construction is adopted, bills enacted by the General Assembly will have one style, "Be it enacted by the General Assembly of the state of Arkansas," and that bills initiated by the people will have another style, "Be it enacted by the people of the state of Arkansas." This, of course, is true, but what of it? Is that a matter of such importance that it will justify us in disregarding the provisions of the Constitution? Is there anything out of the way, unusual, unreasonable, or extraordinary in having one style for laws enacted by the General Assembly and a different style for laws initiated and enacted by the people? Instead of being unreasonable, it seems to us wholly reasonable and logical. What is the object of the style of a bill or enacting clause anyway? To show the authority by which the bill is enacted into law; to show that the act comes from a place pointed out by the Constitution as the source of legislation.

It is clear, from the canons of construction we have taken for our guide, that section 19 of article 5 must stand, unless it is expressly repealed, or unless it is in conflict with or repugnant to the amendment. Of course it was not expressly abrogated, for it was not referred to. It is equally true that it is not in conflict with or repugnant to the initiative and referendum amendment. They are not in conflict because one relates to legislation by the General Assembly and the other relates to legislation initiated by the people. They could only be repugnant if the initiative and referendum amendment covered the whole scope of legislation. This,

in our judgment, it did not do. The amendment not only does not deal with the whole scope of legislation, but it shows on its face, affirmatively, that it is only creating an additional legislative power and regulating the manner of its exercise. Instead of dealing with the whole scope of legislation, the initiative and referendum amendment leaves absolutely untouched the many provisions of the Constitution contained in article 5 that relate to the exercise of legislative power by the General Assembly.

[4] Before any court would be justified in holding a provision of the Constitution abrogated on account of repugnancy to some other provision, it must appear that there is an irreconcilable conflict between the purposes of the provisions that are claimed to be repugnant. Surely there is nothing of that kind here.

[5] Repeal by implication is not favored, even in the construction of ordinary acts of the General Assembly, and certainly such repeal should not be favored when applied to long-established provisions of the organic law. It is said that the words "all bills," in the initiative and referendum amendment, mean "all bills," from whatever source they emanate. In our opinion they mean all bills that were being considered, that were in the minds of the proposers of the amendment; that is to say, bills that were to be initiated by the people.

We have endeavored to follow rules of construction that have been formulated by the wisdom of ages, and they lead us irresistibly to the conclusion that section 19, art. 5, of the Constitution of 1874, is still unimpaired and in full force as to all bills not initiated by the people. The principles of law and rules of construction that support the view we have reached are so elementary and well established that citation of authority is deemed unnecessary. In our judgment, any other conclusion would do violence to the language used and would violate all cardinal rules of construction. In these views Mr. Special Justice HOUSE and Mr. Special Justice WALKER concur, and we unite in holding that the style of the bill in question in this case is proper and that the act is not invalid because of the style of its enacting clause.

Mr. Special Justice HILL and Mr. Special Justice McCOLLUM dissent from the foregoing opinion wherein it holds that the act with the style, "Be it enacted by the General Assembly of the state of Arkansas," is valid, for these reasons: This was the style prescribed by the successive Constitutions of the state from 1836 to 1874, inclusive, and is still the necessary style unless the initiative and referendum amendment has changed it. The initiative and referendum amendment re-enacts section 1, art. 5, of the Constitution, vesting the legislative power of the state in the General Assembly, consisting

of the Senate and House of Representatives, and adds thereto a reservation to the people of the right to legislate themselves through the initiative and referendum therein incorporated into the organic law. This court has recently held that the initiative and referendum amendment suspended the operation of all acts passed by the General Assembly until 90 days after its adjournment, and, if within that time a proper referendum petition was filed against any act (except emergency acts), it is suspended until adopted by the affirmative vote of the people, and also that the referendum extends to all acts passed by the General Assembly (except the emergency bills permitted it to exercise free of this right), even extending unto local bills. The amendment prescribes the number of votes necessary to adopt any measure submitted to the people, and provides that the people or the General Assembly may submit amendments to the Constitution, or measures, for adoption or rejection, at general elections, or special elections to be called to vote thereon. The lawmaking power of the state is thereby revolutionized, and all of it vested, affirmatively or negatively (save, alone, a limited class of emergency acts), in the people themselves. The power of the referendum may not be exercised, but the people have a given time in which to exercise it, and the absence of its exercise is as certainly an approval of an act as active exercise of it by its adoption at the polls. It is similar to the veto power of the Governor. He has a given number of days after the adjournment of the Legislature to approve bills, and, if he fails to do so, the bill becomes a law without his approval, and he, by his nonaction, when he has a right to act, as positively approves a measure as if he signed it. And thus the people have the right to determine all legislation, either affirmatively or negatively. In the amendment carrying to the people this power is the clause in question, "The style of all bills shall be, 'Be it enacted by the people of the state of Arkansas.'" As long ago as 1871, this court, in *Vinsant v. Knox*, 27 Ark. 266, held that the constitutional provision that the style of all bills should be, "Be it enacted by the General Assembly of the state of Arkansas," was mandatory, and that a bill without this style (or substantially this style) was void, although otherwise regularly passed and approved. Therefore the people knew that the style of a bill could not be disregarded, and it was vital before they incorporated this clause in the initiative and referendum amendment. When they provided in this amendment that the style should be, "Be it enacted by the people," they deliberately changed a vital part of bills from the style prevailing since the state was admitted into the Union.

It is argued that this applies only to initiated bills, but the law is not so written. It plainly says "all bills." Moreover it is

found in the sections specially dealing with the referendum and, from context and position, necessarily applies to referred bills. The amendment deals with initiated and referred measures and becomes a substitute for the pre-existing law wherever the old provisions are inconsistent with the new. It makes radical changes in the existing Constitution, and one of the provisions of the existing Constitution prescribes that the style should show enactment by the General Assembly. Both clauses cannot stand—one applying to bills enacted by the General Assembly, and the other applying to bills initiated or referred—because any bill may be referred (with the exceptions noted), and it will not be known until after the adjournment what bills are referred. Every act passed might be referred and every one adopted, and their adoption would be by the people, not the General Assembly; and every act might be defeated and none become laws. No act might be referred, in which event, by negative action, the people permitted acts of the General Assembly to become laws after 90 days from its adjournment. Thus it is seen that it is consistent with the new order of things for the source of the power to be disclosed in the face of an act, and not consistent with that power for the old source of authority—the General Assembly—to appear on the act when, in fact, it was no longer concerned in the enactment except, in the few instances of emergency, legislation permitted the General Assembly free of the control of the people by direct action. The wisdom of making the formal part of an act vital may well be questioned, but that is not for the court to determine. The adoption of this amendment determines that the people themselves are the source from which all legislation emanated directly, and no longer remained in their Representatives other than as they, after examining their work, concluded to approve it by nonaction. This new style of a bill was to give emphasis to the new method of legislation, and it is an outward form and expression of this concrete fact.

The Oregon court, in considering the effect of a constitutional amendment upon provisions in the existing Constitution not consistent with it, said: "There is no express repeal; they simply cease to exist by reason of new provisions on the subject being substituted for them." *Ex Parte Prindle* (Cal. App.) 94 Pac. 871. That is exactly the situation in regard to section 19, art. 5, of the Constitution of 1874. By reason of this new provision prescribing the form of enacting clause for all bills, it ceased to exist, and this new style was then substituted therefor. Therefore we conclude that an enacting clause, running in the name of the General Assembly, is invalid since the adoption of the initiative and referendum amendment, and all bills, before they can become laws, must have an enacting clause substantially

as prescribed in the amendment. "Be it enacted by the General Assembly" cannot be substantial compliance with "Be it enacted by the people." Each has a definite meaning. Each indicates the source of power giving force to the act. Each represents its day and the stage of popular government of that day. They are not interchangeable; they present different thoughts, different views, different hopes, and, mayhap, different illusions. The use of one is not equivalent to the use of the other so as to fulfill the rule of substantial compliance.

With the conclusion of Special Justices HILL and McCOLLUM as to the validity of bills enacted by the Legislature, upon its own initiative, bearing the style, "Be it enacted by the people of the state of Arkansas," Special Justices HOUSE and WALKER concur, but for reasons different from those expressed by Justices HILL and McCOLLUM; Justices HOUSE and WALKER holding that the style of such bills is a substantial compliance with the provisions of section 19 of article 5 of the Constitution, and that therefore any bill bearing the title, "Be it enacted by the people of the state of Arkansas," is a valid enactment, whether it be enacted by the General Assembly or initiated and enacted by the people. *Vinsant v. Knox*, 27 Ark. 266; *Jackson v. State*, 142 S. W. 1153. With this view I do not concur, as I do not think the enacting clause, "Be it enacted by the people of the state of Arkansas," is a substantial compliance with section 19, art. 5, of the Constitution.

[6] That leaves for our consideration the question as to whether or not the district is invalid because of the alleged uncertainty of the description of the territory proposed to be embraced therein. We understand the law to be that, when the Legislature creates a levee or other improvement district, it must define its boundaries with certainty, or provide for the same being done by some other agency. The Legislature undertook to define the limits of this district. We have carefully considered the act, and hold that it fails to define the limits of the district with sufficient certainty to determine what lands are included therein. Among other defects in the description are these: The stopping point of the line of the district in section 2, township 10 north, range 3 west, being the end of the first call, is not located. The course through sections 1, 2, 11, 10, 9, 16, in township 9 north, range 3 west, is not sufficiently defined. The line along White River is not fixed, but is left to be placed where it is deemed most practical. There are other defects in the description, but we do not discuss them, as those already mentioned are sufficient to defeat the act for uncertainty in the description of the territory proposed to be embraced therein. We hold the act invalid for this reason.

The cause is therefore reversed and re-

manded, with directions to the court below to overrule the demurrer and grant the petitioners the relief prayed.

ALF BENNETT LUMBER CO. v. WALNUT LAKE CYPRESS CO.

(Supreme Court of Arkansas. Nov. 11, 1912.)

1. CONTRACTS (§ 147*)—INTERPRETATION.

The purpose of the interpretation of a contract is to ascertain the intent of the parties as shown by the circumstances surrounding the making of the contract, its subject, the relation of the parties, and the sense in which the words would be commonly understood.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 730, 743; Dec. Dig. § 147.*]

2. PRINCIPAL AND AGENT (§ 33*)—TERMINATION OF AGENCY—EXPIRATION OF TERM.

A contract between a manufacturer of cypress lumber and a company engaged in the business principally of selling pine lumber, and which had to make some changes in the conduct of its business to enable it to successfully sell cypress lumber, making such company the manufacturer's exclusive sales agent and providing that it should remain in force as long as the manufacturer was operating its plant and until the lumber it then owned and should in the future purchase should have been cut into lumber, did not authorize the manufacturer to terminate it at any time by ceasing to operate its mill, but required that it should not be terminated until the lumber owned by the manufacturer, tributary to its mill, should have been cut into lumber.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 54; Dec. Dig. § 33.*]

3. PRINCIPAL AND AGENT (§ 41*)—FALSE REPRESENTATIONS—EVIDENCE—SUFFICIENCY.

In an action against a manufacturer of lumber for breach of its contract making plaintiff its exclusive sales agent, evidence held insufficient to show that plaintiff's representations as to its ability to sell lumber were false, assuming that they amounted to more than a mere expression of opinion.

[Ed. Note.—For other cases, see Principal and Agent, Dec. Dig. § 41.*]

4. PRINCIPAL AND AGENT (§ 33*)—BREACH—WAIVER.

Where the president of a corporation, which had made another company its exclusive sales agent and had also borrowed money from such company, with knowledge of breaches of the contract by such other company, requested the cancellation of the agency contract and, upon a refusal, solicited and received a further loan, it waived the breaches of the contract.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 54; Dec. Dig. § 33.*]

5. DAMAGES (§ 40*)—BREACH OF CONTRACT—PROSPECTIVE PROFITS.

A party agreeing to perform work for another and prevented from so doing by the other may recover the profits which the evidence makes it reasonably certain that he would have made if permitted to carry out the contract.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 72-88; Dec. Dig. § 40.*]

6. DAMAGES (§ 163*) — BURDEN OF PROOF — PROFITS.

The party suing to recover profits lost through defendant's breach of a contract has the burden of proving the amount of its damages therefrom.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 454-459; Dec. Dig. § 163.*]

7. CORPORATIONS (§ 628*) — DISSOLUTION — PAYMENT OF DEBTS.

Under Kirby's Dig. § 958, providing that, when a corporation surrenders its charter, the chancery court shall have jurisdiction to pay its debts and distribute its assets, a liability of the corporation arising from its wrongful cancellation of a contract is a debt of the corporation for which the assets are liable.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 628.*]

Appeal from Jefferson Chancery Court; Jno. M. Elliott, Chancellor.

Action by the Alf Bennett Lumber Company against Walnut Lake Cypress Company. Judgment for defendant, and plaintiff appeals. Reversed and rendered.

Appellee, Walnut Lake Cypress Company, was a corporation organized under the laws of the state of Arkansas on February 16, 1907. Its stockholders were E. P. Ladd, C. S. Bacon, W. B. Craft, and R. E. Schulze. Mr. Ladd was president, and Mr. Craft was secretary and treasurer and was in the active management of the business. It does not appear that the other two stockholders took any active part in the business. The corporation was organized for the purpose of owning and operating a sawmill for the manufacture of cypress lumber. The company owned about 25,000,000 feet of cypress lumber situated near Walnut Lake, Ark., and the mill was built and operated at that point. The sawmill had not been built at the time of the incorporation of the company, and it did not commence to operate until May, 1908. In the fall of 1907 the company, being pressed for money to finish the erection of the mill, opened negotiations for a loan with the appellant, Alf Bennett Lumber Company, located at St. Louis, Mo. The latter company was engaged in the business of selling the output of various lumber mills. Alf Bennett was the president of the company, and Mr. Ladd, president of the Walnut Lake Company, had known him for several years. Ladd gave Craft a letter of introduction to Bennett. Craft then went to St. Louis and asked Bennett for a loan of a sum of money, which it was afterwards agreed to be \$15,000. The indebtedness was to be evidenced by short-time notes which were to be extended from time to time until the Walnut Lake Company began to sell its output. As an inducement to the Alf Bennett Company to make this loan, Craft proposed that the two companies should enter into a contract by which the Bennett Company should have the entire charge of selling the output of the Walnut Lake Company. Such a contract was finally agreed upon. It was dated October 16, 1907, and is as follows: "This agreement, made and entered into on the 16th day of October, 1907, between the Walnut Lake Cypress Company, a corporation organized and doing business under the laws of the state of Arkansas, par-

ty of the first part, and the Alf Bennett Lumber Company, a corporation organized and doing business under the laws of the state of Missouri, party of the second part, witnesseth: Whereas, the party of the first part is operating a sawmill for the manufacture of cypress, oak and gum lumber and lath at Walnut Lake, Arkansas; and, whereas, it is deemed mutually advantageous for the party of the second part to be the exclusive sales agent for the party of the first part for its entire cypress, oak and gum manufactured products aforesaid, for the period of time hereinafter set out in this contract, and upon the terms and conditions set out; now, therefore, to that end it is agreed between the parties hereto as follows: First. The party of the first part agrees that, during the life of this contract, the party of the second part shall be its exclusive sales agent for the sale and marketing of the entire cypress, oak and gum manufactured products of its sawmill and plant as aforesaid. Second. As such sales agent, the party of the second part shall fix the selling price of said manufactured products, subject to the approval of the party of the first part, and shall pay the party of the first part the same price that they obtain for such products. Third. In the event that the party of the first part receives orders for any of its cypress, gum and oak lumber products direct from proposed purchasers or through any sources other than the party of the second part, such orders shall be filled upon the direction and order of the party of the second part. Fourth. All shipments shall be made and billed and invoiced to the persons and as directed by the parties of the second part. Fifth. The party of the second part agrees to guarantee the payment of the net amount (after deducting commissions of the party of the second part) upon all shipments sold and delivered through orders secured by the party of the second part, within fifteen (15) days from the date of invoice or invoices for such shipments. Sixth. In the event that upon shipments paid for by the party of the second part the purchaser shall make deductions on account of the grade of the lumber shipped, or because of damage in transit, the party of the second part shall be credited by the party of the first part with the amount of such deductions, and adjustments shall be made between the party making such deductions and the party of the first part. Seventh. The party of the second part for its services shall be entitled to, and may retain out of any settlements made with the party of the first part, a commission of 5 per cent. upon the net amount of invoices for all shipments, after deducting freight, in addition to the regular 2 per cent. discount for cash. Eighth. In view of the fact that settlements between the parties hereto on account of shipments will often be made on estimated freight

charges, it is agreed that monthly corrections and adjustments of the accounts of the parties hereto shall be made on or before the 10th day of each calendar month throughout the year. Ninth. This contract shall be and remain in force and effect as long as the party of the first part is operating their plant at that point, and until all the timber they now own and shall in future purchase shall have been cut into lumber. Tenth. It is further agreed that the party of the first part shall have the right to inspect all orders on the books of the party of the second part whenever they may desire, and the party of the second part obligates itself at all times to secure the highest market price, which it is their ability to obtain. Eleventh. It is understood that any local sales of lumber by the party of the first part in less than car load lots shall be exempt from the commission of the party of the second part."

After the contract had been entered into, the Bennett Company proceeded to lend the Walnut Lake Company the sum of \$15,000, as had been verbally agreed upon. The loan was made during the winter of 1907 and 1908. As the notes became due they were renewed from time to time, and the accruing interest was by agreement between the parties entered on the books of the Bennett Company as an open account charged against the Walnut Lake Company. The Walnut Lake Company commenced cutting lumber in May, 1908, and the Bennett Company, as its agent, began to sell the output under the terms of the contract. The testimony shows that it requires from three to four months for lumber to become sufficiently dry to ship, and that none of the stock of the Walnut Lake Company was in condition to ship until about the middle of July. On October 26, 1908, Mr. Craft wrote to the Bennett Company and canceled the contract between the two companies. The letter stated that the Bennett Company had failed to make sales according to the contract and to advise truthfully in regard thereto, and that for these and many other violations of the contract the Walnut Lake Company canceled the contract and refused to permit the Bennett Company to make any further sales of lumber for it.

On October 28, 1908, a meeting of the stockholders of the Walnut Lake Company was held, and a resolution to dissolve the corporation was adopted. On October 30, 1908, a petition was filed in the chancery court praying for the appointment of a receiver to take charge of the assets of the company. This was done in pursuance of section 958, Kirby's Digest, which provides that, when any corporation has surrendered its charter, the chancery court shall have jurisdiction to pay its debts and to distribute its assets among the stockholders according to their several interests. A receiver was duly appointed and subsequently filed a re-

port showing assets amounting to \$229,388.55 and liabilities in the sum of \$87,866.67. On December 5, 1908, the Alf Bennett Company filed an intervention in the nature of a claim for damages in the sum of \$32,000, which it is alleged it would have earned under the contract had it been permitted to have carried it out. In its intervention it alleged that it had complied with its part of the contract and that the notification of the abrogation of the contract, the surrender of the charter, and the appointment of a receiver were in pursuance of a conspiracy entered into by the stockholders of the Walnut Lake Company for the purpose of evading the obligations of the contract between that company and the Bennett Company. On January 20, 1909, the court ordered the receiver to sell the assets of the Walnut Lake Company at public sale. This was done on February 28th following, and the entire property was bought in by Mr. Craft for \$115,000. Craft gave bond to secure the deferred payments, with Mr. Bacon and Mr. Ladd as his sureties. Mr. Craft in purchasing the assets of the receiver acted for himself, for Mr. Ladd, Mr. Schulze, and Mr. Guthrie. Mr. Bacon had already sold his interest to Mr. Ladd. Immediately after the sale, the mill and all the assets were turned over to the new company, which had been organized with the same stockholders, except Mr. Bacon, who had sold his interest to Mr. Ladd, and Mr. Guthrie, who had subscribed for \$5,000 stock in the new company. The new company, called "the E. P. Ladd Cypress Company," took up the indebtedness of the Walnut Lake Company and proceeded to operate the sawmill. It operated it for the next three years, and during the time cut about 18,000,000 feet of lumber.

The testimony in the case is very voluminous; and, that the opinion may not be too long, the remaining facts in the case will be stated and referred to under appropriate headings in the opinion. The chancellor found in favor of appellee, Walnut Lake Cypress Company, and the case is here on appeal.

Charles A. Houts, of St. Louis, Mo., and A. H. Rowell, of Pine Bluff, for appellant. Bradshaw, Rhoton & Helm, of Little Rock, and Danaher & Danaher, of Pine Bluff, for appellee.

HART, J. (after stating the facts as above).

[1] The right of appellant to recover in this case depends upon the construction of the ninth clause of the contract, which is as follows: "This contract shall be and remain in force and effect as long as the party of the first part is operating their plant at that point, and until all the timber they now own and shall in future purchase shall have been cut into lumber." The purpose of all interpretation is to ascertain and give effect to the intention of the parties to the contract

as expressed by their writing, and in doing this it is necessary to consider the circumstances surrounding the making of the contract, its subject, the situation and relation of the parties, and the sense in which, taking these things into consideration, the words used would be commonly understood; for it fairly may be assumed that the parties used and understood them in that sense.

[2] Applying this fundamental rule of construction, it is contended by counsel for appellee that the Walnut Lake Company in making this contract foresaw that it might wish to sell or be forced to quit business at any time, and therefore embodied in the contract the provision that the contract should remain in force only so long as it was "operating their plant at that point." They insist that the further words, "and until all the timber they now own and shall in the future purchase shall have been cut into lumber," were added to cover the possible contingency that the Walnut Lake Company, in case of fire or other casualties to its plant, might wish to rebuild at some other point and cut the timber at a new mill site. They contend that the evident intention of the parties, as expressed by the language of the contract, was that the contract should be in force only so long as both of the conditions may continue to exist, viz., while the Walnut Lake Company operates its plant at Walnut Lake and its timber remained uncut. We cannot agree with their contention. The Bennett Company was not engaged in the business of loaning money, but was engaged in the business of selling lumber for those who manufactured it. The lending of money to its customers was merely an incident to its principal business. It was principally engaged in the business of selling pine lumber at the time the contract was entered into, and, in order to carry out the contract with the Walnut Lake Company, it was necessary to make some changes in the conduct of its business in order to enable it to successfully sell cypress lumber. Under these circumstances, it is unreasonable to suppose that the parties to the contract contemplated an agreement which could be terminated by the Walnut Lake Company ceasing to operate its mill at Walnut Lake before its timber was sawed into lumber. Such a construction would not give any meaning to the clause, "and until all the timber they now own and in the future shall purchase shall have been cut into lumber." We are of the opinion that the contract, as made, clearly indicates that it was not intended that the contract should be terminated until the timber owned by the Walnut Lake Company, tributary to the site of the mill at Walnut Lake, should have been cut into lumber. As illustrative cases sustaining our contention we cite the following: Mississippi River Logging Co. v. Robson, 69 Fed. 773, 16 C. C. A. 400; Lewis v. Atlas Mutual Life Insurance Co., 61 Mo. 534; Ford Hardwood Lum-

ber Co. v. Clement, 97 Ark. 522, 135 S. W. 343.

[3] 2. The next question we shall consider is whether or not the Walnut Lake Company was induced to make the contract by the fraudulent representations of the Bennett Company. To sustain the finding of the chancellor in behalf of the appellee, it is claimed that Bennett misrepresented his ability to sell cypress lumber. Concerning this matter, Ladd testified that some time before the contract was entered into he met Mr. Bennett on the train and they got into a conversation in regard to making a contract to give Bennett the exclusive sale of the output of the sawmill when it was erected and put in operation. Nothing definite was arranged about the contract at that time. Bennett explained to Ladd that his company had a large selling force, and that they understood the handling of cypress lumber to good purpose; that they could handle it to better advantage than the manufacturers of the lumber. Craft conducted the negotiations leading up to the making of the contract. In regard to this he testified as follows: "We were desirous of a line of credit, and I went to see Mr. Bennett, and he represented that he had special ability to sell our stock for the reason that he had a large selling force and had experience in selling cypress, and represented that he would be able to help us out to the extent that we would probably need money until such time as we could make other arrangements. We insisted on his going into the matter thoroughly, and he explained that he had had some four or five years' experience in selling cypress, and that, while he did not have any one in his office that had had more experience than he had, he would give the matter his personal attention. He related the experience he had had and stated why he wished to make this contract with us; said that he had found our stock—that is, the stock that the old concern had turned out—to be a very superior grade; that he had found us hard competitors to get over; and for these reasons he especially desired the selling contract. In view of these representations, and believing that he had the ability, we considered making the contract with Mr. Bennett, and Mr. Bennett and I went into the terms of the contract together. I made the contract with him under the representations made by him."

In addition, it is shown that, after the Bennett Company began to sell the lumber for the Walnut Lake Company, Ladd and Craft at different times each went to St. Louis and assisted Bennett in making sales of some lumber. At none of these times, however, did they go to St. Louis for that purpose. They went there for the purpose of borrowing money with which to run the mill, and while there went with Bennett to some old customers of Ladd who had bought

lumber from him while he was engaged in the sawmill business prior to the time the Walnut Lake Company was organized. There is nothing in the testimony to indicate that Bennett's corporation was not competent to handle, as sales agent, the output of the Walnut Lake Company's sawmill. The testimony shows that Alf Bennett, the president of the company, had had several years' experience in the sale of cypress lumber, and that he employed another person to take charge of a department of the company for the sale of cypress lumber, and that the man so employed had had several years' experience in selling cypress lumber. If it can be said that the representations made by Bennett amounted to anything more than a mere expression of opinion as to his company's ability to act as sales agent for the Walnut Lake Company in the sale of the output of its mill, certainly it cannot be said that the testimony is sufficient to sustain the charge of false representations as to the ability of the Bennett Company to act as sales agent under the contract.

[4] 3. It is also claimed that the decision of the chancellor should be upheld because the appellant company committed certain breaches of the contract. One of these is that it failed to make certain remittances of the proceeds of the sales within the time specified in the contract. Another is that a customer who had purchased lumber put in a claim for damages due to the fact that the lumber shipped to it did not correspond with the grade mentioned in the order. The Bennett Company allowed this customer a reduction, but the deduction was not large enough, according to the contention of the Walnut Lake Company. It claimed that the Bennett Company damaged its reputation for fair dealing by not allowing the claim in full. Another alleged breach of the contract is that the Bennett Company did not sell the lumber in all instances according to the grades of the Walnut Lake Company. The testimony shows that the Walnut Lake Company graded its lumber according to its own rules, and that its grading did not correspond with the grading rules of the Southern Cypress Manufacturers' Association, which were considered standard throughout the territory in which the Walnut Lake Company's stock was sold. To illustrate: The Walnut Lake Company's No. 3 common was equivalent to the association's grade of No. 2 common. In other words, the Walnut Lake Company graded its lumber one grade higher than the association's corresponding grades. Old customers of Ladd understood this difference in the grading and purchased accordingly. New customers did not understand the difference in the grading, and on that account it was difficult to sell them. So in some cases the Bennett Company, in order to make sales to new companies, billed the lumber to them according to the grades

of the association, but remitted the full amount of the proceeds, less its commission, to the Walnut Lake Company. Still another alleged breach of the contract is that at one time the Bennett Company employed a sub-agent to sell some lumber and endeavored to charge up the Walnut Lake Company with his commission in addition to its own, but the testimony shows that, when the Bennett Company's attention was called to the matter, it rectified the mistake. In regard to these alleged breaches of the contract but little need be said for the reason that, if it be conceded they were breaches of the contract, the Walnut Lake Company waived them. The testimony shows that in the latter part of September, 1908, Mr. Ladd made a trip to St. Louis for the purpose of inducing Mr. Bennett to cancel the contract. At that time Mr. Ladd was in possession of all of the facts and circumstances connected with these alleged breaches of the contract. He told Mr. Bennett that he had not been living up to his contract, and that he wanted him to cancel it. He told Bennett that they needed more money. Bennett refused to cancel the contract, but offered to secure for the Walnut Lake Company \$5,000 in addition to the \$15,000 already loaned it. Ladd told Bennett that they had to have the money and that, if he would not release them from the contract, they would take that. Bennett afterwards did arrange it, and raised the \$5,000 for the Walnut Lake Company as he had agreed to do. Thus it will be seen that Ladd acted with the full knowledge of all the facts and circumstances connected with the alleged breaches of the contract and will be deemed to have waived them. *Grayson-McLeod Lumber Co. v. Slack-Kress Tie & Stave Co.*, 143 S. W. 581; *Thomas-Huycke-Martin Co. v. Gray*, 94 Ark. 9, 125 S. W. 669, 140 Am. St. Rep. 93.

[5] 4. Can the appellant recover its prospective profits as damages? In the case of *Ford Hardwood Lumber Co. v. Clement*, 97 Ark. 523, 135 S. W. 343, it is held: "Where plaintiff agreed to perform certain work for defendant; which he was prevented from doing by defendant's fault, he is entitled to recover the profits which the evidence makes it reasonably certain that he would have made had defendant carried out its contract." See, also, *Singer Mfg. Co. v. W. D. Reeves Lumber Co.*, 95 Ark. 363, 129 S. W. 805; *Spencer Med. Co. v. Hall*, 78 Ark. 336, 93 S. W. 985.

[6] The burden was on the appellant to prove the amount of its alleged damages. *Gay Oil Co. v. Muskogee Refining Co.*, 97 Ark. 502, 134 S. W. 639. In the present state of proof, as abstracted, the testimony for the appellant does not aid us in arriving at a correct conclusion as to the amount of damages suffered by appellant. It is true

that Alf Bennett, the president of the company, testified as to the gross amount of profits his company would have earned, but, according to the terms of the contract, this would not be the compensation due it. In arriving at the prospective profits, we must look principally to the testimony of Mr. Craft, who was the secretary of the Walnut Lake Company, and who was introduced as a witness by it. Section 7 of the contract is the one which provides for the amount of commissions to be paid. Craft testified that, considering the invoices, appellant would not have made more than a gross profit of 80 cents per thousand feet. He also testified that it would cost appellant 50 cents per thousand feet to sell the lumber. This would leave it a net profit of 30 cents per thousand feet. Under clause 11 of the contract, local sales of lumber in less than car load lots were exempt from the commission. Lumber used by the Walnut Lake Company in the erection of its building was also exempt. Then, too, it will be remembered that appellant had been paid for the lumber sold by it up to the time that the Walnut Lake Company refused to permit it to continue to act as sales agent. Again Craft says that, in sawing up lumber, a certain amount of stock is always accumulated, which cannot be shipped at a profit. When all of these matters are considered, he estimates that no more than 13,000,000 feet of lumber could have been shipped by the Walnut Lake Company after the time it canceled the contract. The net profits that would have accumulated to appellant from the sale of this lumber would be 30 cents per thousand feet on 13,000,000 feet, which amounts to \$3,900, and this is the amount appellant is entitled to recover as damages in this case.

[7] 5. Section 958, Kirby's Digest, provides that, when any corporation has surrendered its charter, the chancery court shall have jurisdiction to pay its debts and to distribute its assets among the stockholders according to their several interests. Pursuant to this section of the digest, a receiver was appointed for the Walnut Lake Company when it surrendered its charter. During the pendency of the proceedings to wind up its affairs, appellant filed its intervention, claiming damages for the breach of the contract with it. Inasmuch as we have held that the Walnut Lake Company had no right to cancel the contract, and that appellant was entitled to recover damages under it, it follows that the claim of appellant for damages was a debt of the corporation, and the assets of the corporation in the hands of the receiver are liable for the amount of this claim.

The decree of the chancellor will therefore be reversed, and judgment entered here for appellant in the sum of \$3,900.

PUBLISHERS: GEORGE KNAPP & CO. v. WILKS et al.

(Supreme Court of Arkansas. Nov. 11, 1912.)

1. GUARANTY (§ 54*)—DISCHARGE OF GUARANTOR—ALTERATION OF INSTRUMENT.

A contract guaranteeing the payment of the price of newspapers furnished by a publisher to a third person was executed by the guarantor at a time a blank space for the date in the contract between the publisher and the third person existed. Subsequently the third person inserted a date in the contract which was a date subsequent to the date of the contract of guaranty, and which merely fixed a time for the commencement of the liability of the parties. *Held*, that the guarantor was not relieved from liability since the act done did not increase his liability.

[Ed. Note.—For other cases, see Guaranty, Cent. Dig. § 65; Dec. Dig. § 54.*]

2. GUARANTY (§ 54*)—DISCHARGE OF GUARANTOR—ALTERATION OF INSTRUMENT.

Where a contract of guaranty, guaranteeing the payment of the price of newspapers furnished by a publisher to a third person, was executed at a time the contract between the publisher and the third person contained a blank space as to the number of newspapers to be supplied daily, and the guarantor knew that fact, the filling in of the blank space did not relieve the guarantor from liability; the guarantor giving implied authority to fill up the space necessary to complete the contract.

[Ed. Note.—For other cases, see Guaranty, Cent. Dig. § 65; Dec. Dig. § 54.*]

3. GUARANTY (§ 20*)—DISCHARGE OF GUARANTOR—FRAUD.

One induced to execute a guaranty of the payment of the price of newspapers furnished by a publisher to a third person, by the fraudulent representations of the third person, may not escape liability to the publisher innocent in the transaction and acting on the contract of guaranty in good faith.

[Ed. Note.—For other cases, see Guaranty, Cent. Dig. § 22; Dec. Dig. § 20.*]

Appeal from Circuit Court, Benton County; J. S. Maples, Judge.

Action by the Publishers: George Knapp & Co. against E. S. Wilks and another. From a judgment for defendants, plaintiff appeals. Reversed and rendered.

One Walter R. Isbell entered into a written contract with appellant, dated Ft. Smith, Ark., April 30, 1910, whereby he agreed to buy 100 copies per day of the St. Louis Republic at a certain price named in the contract. The papers were to be delivered in St. Louis, Mo. To guarantee the performance of the contract the appellees executed to appellant the following instrument: "We, the undersigned, hereby become sureties, individually and collectively, for W. R. Isbell, and hold ourselves responsible to you for the prompt payment by him for all copies of the St. Louis Republic furnished him by you. We further guarantee that such payment shall be made at your office in St. Louis, Mo., and that whenever there shall be default in such payment we guarantee to pay the amount due on demand."

Appellant sued appellees on account for papers furnished Isbell, and for which he had

not paid, amounting to the sum of \$178.17. The appellees answered, setting up the following: First, fraud in securing the execution of the contract sued on; second, that the contract sued on had been materially altered in this: that the words "Ft. Smith, Arkansas, April 30, 1910," and the words "one hundred" had been inserted in contract with Isbell after the contract of guaranty was signed by appellees, and the contract of guaranty was therefore void; third, that the agreed place of performance was at Bentonville, when the contract designated "Ft. Smith." The testimony of the appellees tended to show that at the time they executed the contract of guaranty the words "Ft. Smith, Arkansas, April 30, 1910," and the words "one hundred" were not in the contract. That the places where these words now occur were blank spaces. The appellees lived at Bentonville, Ark. Isbell had been selling papers there. He brought the contract of guaranty to appellees and told them that he was going to continue to sell papers in Bentonville, and upon that representation appellees executed the contract. They would not have executed the contract, as they stated, if they had known that Isbell was going to sell the papers at Ft. Smith instead of at Bentonville. He was a one-legged boy, and they were willing to sign the bond, thinking that he was going to continue the sale of papers in Bentonville. They never had any correspondence with the appellant before signing the guaranty.

The court refused to direct a verdict in favor of the plaintiff for the amount in suit, and the jury returned a verdict in favor of appellees, and from this judgment in their favor this appeal is duly prosecuted.

Dick Rice, of Bentonville, for appellant.

WOOD, J. (after stating the facts as above).

[1] Conceding that the blank spaces in the contract were filled in by inserting in the blank for the date the words "Ft. Smith, Arkansas, April 30, 1910," and in the blank space left for the number of copies of the paper the words "one hundred," and that these insertions were made by Isbell after the contract of guaranty was executed by the appellees, still we are of the opinion that these were immaterial alterations that did not affect the liability of appellees under their contract of guaranty. Under the undisputed evidence, the only object of inserting the date in the contract between Isbell and the appellant was to fix a time when the liability of Isbell and the appellees for the papers furnished should begin. The contract between Isbell and appellant contained this provision: "This contract will be in effect when duly approved." It was immaterial, under the provisions of the contract, as to the date that the contract bore; for the liability of the appellees would commence, under the provision above quoted, from the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

time of its approval. The contract, under its terms, took effect from that date. The contract between Isbell and appellant does not show on its face the date when it was approved, nor is there any evidence allunde as to when it was approved; but the approval, of course, could not have been before the contract was executed, and in the absence of proof it must be assumed that the contract was approved on the day of its execution.

The contract of guaranty was dated April 22, 1910, eight days prior to the date of the contract between Isbell and appellant. Therefore the liability of appellees is not increased by the insertion of the date in the contract between Isbell and appellant subsequent to the date of the contract of guaranty upon which they are sued. The appellees, under their contract of guaranty, became responsible to the appellant "for the prompt payment by him for all copies of the St. Louis Republic furnished him."

[2] So far as the contract is concerned, the number of papers was not specified, and there is no evidence to show that the number was agreed upon. On the contrary, a blank space was left in the contract between Isbell and appellant to be filled in, according to the undisputed evidence. Therefore the filing in of the number of copies of the paper to be furnished Isbell by appellant was not an alteration which appellant was not authorized to make. "If a party to an instrument intrusts it to another for use with blanks not filled, such instrument, so delivered, carried on its face an implied authority to fill up the blanks necessary to perfect the same, and the person to whom the instrument is so intrusted must be deemed the agent of the party who committed the instrument to his custody." 2 Cyc. 159. See *White-Wilson-Drew Co. v. Egelhoff*, 96 Ark. 105, 131 S. W. 208. Here the appellees executed the bond in suit, agreeing to be liable to appellant for all the papers it furnished Isbell, and this bond was delivered to the obligee. This was authority for the appellant to insert the number of papers furnished in the contract between it and Isbell. See *Inhabitants of South Berwick v. Huntress*, 53 Me. 89, 87 Am. Dec. 539.

The uncontradicted evidence showed that appellees knew when they executed the bond in suit that there were blanks in the contract between Isbell and appellant to be filled by the appellant. The filling in of these blanks, therefore, did not relieve the appellees of liability on their contract.

[3] If Isbell, by making false representations to appellees, perpetrated a fraud upon them which induced them to sign the instrument in suit, the appellant was in no manner responsible for that fraud, for there is nothing to show that appellant at the time it entered into the contract with Isbell to furnish the papers had knowledge of the facts

which appellees claim constituted a fraud upon them. Appellant was innocent in the transaction, and it approved the contract of guaranty in suit and acted upon it in good faith. The appellees, by signing the instrument of guaranty, enabled Isbell to procure the papers from appellant under his contract. The appellees, therefore, are not in a position to defeat appellant's claim by a charge of fraud. They are estopped from setting up any charge as against the claim of appellant. "It is no defense to an action upon a bond that the sureties were ignorant as to the extent of the obligation assumed or were misled by the principal in reference thereto, in the absence of proof that the obligee was a party to the fraud." *Western N. Y. Life Ins. Co. v. DeWitt W. Clinton*, 66 N. Y. 326; *Powers v. Clarke*, 127 N. Y. 417, 28 N. E. 402; 20 Cyc. 1419; *Bascom v. Smith*, 164 Mass. 61, 41 N. E. 130; *Lucas v. Owens*, 113 Ind. 521, 16 N. E. 196; *McWilliams v. Mason*, 31 N. Y. 294, cited in appellant's brief.

The court should have directed a verdict in favor of the appellant. For the error in refusing to do so the judgment is reversed, and judgment will be entered here in favor of appellant for \$178.17, the amount of its claim, with interest at 6 per cent. per annum from April 25, 1911, the date of the filing of suit.

FREEO VALLEY R. CO. v. HODGES,
Secretary of State.

(Supreme Court of Arkansas. Nov. 18, 1912.)

1. RAILROADS (§ 32*)—RAILROAD COMPANIES—DISSOLUTION—"ANY CORPORATION"—"SUCH."

Kirby's Dig. § 957, provides that any corporation may surrender its charter by a resolution, on filing a certified copy of the resolution with the Secretary of State and the clerk of the county in which "such corporation" is organized. When that section was adopted as a part of the act of April 12, 1893 (Laws 1893, p. 265), railroad corporations could be organized by filing the articles of association with the Secretary of State, while manufacturing and other business corporations were required by Kirby's Dig. § 845, to file their articles of association and certificate with the clerk of the county in which they were to have their principal place of business and also with the Secretary of State. *Held*, that section 957 does not apply to railroad corporations "such" meaning, previously mentioned or specified, and the phrase "in which such corporation is organized" limiting "any corporation" to those required to file their articles and certificate with the clerk of the county in which they are to have their principal place of business.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 63-69; Dec. Dig. § 32.*

For other definitions, see *Words and Phrases*, vol. 1, p. 419; vol. 7, pp. 6750-6754; vol. 8, p. 7808.]

2. CORPORATIONS (§ 596*)—DISSOLUTION—RIGHT TO DISSOLVE.

In the absence of statute, strictly private corporations may surrender their charters and

dissolve voluntarily except so far as creditors have a right to object.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2386, 2387; Dec. Dig. § 596.*]

3. RAILROADS (§ 18*)—RAILROAD COMPANIES—POWERS AND DUTIES.

Railroad corporations have powers not enjoyed by strictly private corporations and are required to perform public duties which such private corporations do not owe.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 39-44; Dec. Dig. § 18.*]

Appeal from Circuit Court, Pulaski County; Guy Fulk, Judge.

Petition by Freeo Valley Railroad Company for a writ of mandamus against Earle W. Hodges, Secretary of State. From a judgment sustaining a demurrer to the petition, the petitioner appeals. Affirmed.

Gaughan & Sifford, of Camden, for appellant. Hal L. Norwood, Atty. Gen., and Wm. H. Rector, Asst. Atty. Gen., for appellee.

HART, J. Appellant, Freeo Valley Railroad Company, is a railroad corporation organized under the laws of the state of Arkansas and, as such, presented to the Secretary of State a certified copy of a resolution adopted by its stockholders for the purpose of surrendering its charter, claiming that it had a right to do so under section 957, Kirby's Digest. The Secretary of State declined to file the resolution. Appellant then filed a petition in the Pulaski circuit court asking for a writ of mandamus against the Secretary of State to compel him to do so. To this petition the appellee filed a demurrer which was sustained by the circuit court. The case is here on appeal.

[1] The only issue raised by the appeal is: Can appellant surrender its charter by complying with section 957, Kirby's Digest? It is as follows: "Any corporation may surrender its charter by resolution adopted by the majority in value of the holders of the stock thereof and a certified copy of such resolution filed in the office of the Secretary of State, and a copy thereof filed in the office of the county clerk of the county in which such corporation is organized, shall have effect to extinguish such corporation."

[2] It is contended that the words "any corporation" as used in the act includes railroad corporations. In the absence of a statute on the subject, the decided weight of authority is that strictly private corporations may surrender their charters and dissolve themselves except so far as creditors have a right to object.

[3] On the other hand, railroad corporations are invested with certain powers not enjoyed by strictly private corporations, and they also are required to perform certain duties to the public which the latter do not

owe. Elliott on Railroads, vol. 1, par. 608.

It will be presumed that the Legislature had knowledge of the state of the law as it existed at the time the act in question was passed. The section of the act under consideration is a part of an act of the Legislature in regard to the dissolution of corporations. The act was passed April 12, 1893 (Laws 1893, p. 265). At that time there was no board of railroad incorporation. Railroad corporations could be organized by the persons desiring to form such corporations complying with the requisites of the statute and filing their articles of association with the Secretary of State. Manufacturing and other business corporations were required to file their articles of association and certificate with the county clerk of the county in which the corporation was to have its principal place of business, and then to file said articles and certificate bearing the indorsement of the county clerk in the office of the Secretary of State. The act provides that said certificate shall be recorded by the county clerk and Secretary of State in books kept by them for that purpose. Kirby's Digest, § 845. The section of the act under consideration provides that any corporation may surrender its charter by filing a certified copy of the resolution with the Secretary of State and a copy thereof with the county clerk of the county in which such corporation is organized.

"Such" is defined by Webster as "having the particular quality or character specified; certain; representing the object as already particularized in terms which are not mentioned." That is to say, it is used in the sense of previously mentioned or specified. It is evident then that the word "such" has reference solely to any corporation which was authorized and directed to file its articles of association with the county clerk by the act under which it was incorporated. As we have seen, manufacturing and business corporations alone are required to file their articles of association and certificate with the Secretary of State and, also, with the clerk of the county court of the county in which they are organized. Therefore, the phrase "in which such corporation is organized" limits the words "any corporation" to corporations which are required to file a copy of their articles and certificate with the clerk of the county in which the incorporation is to have its principal place of business, and such corporations, being corporations formed for manufacturing and other business purposes, alone have the right to surrender their charters without the consent of the state, and the act in question was passed for the purpose of providing a method by which voluntary dissolution should be made.

The judgment will be affirmed.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

McPHERSON v. CONSOLIDATED CASUALTY CO.

(Supreme Court of Arkansas. Nov. 18, 1912.)

1. APPEAL AND ERROR (§ 113*) — SETTING ASIDE DEFAULT JUDGMENT—APPEALABILITY.

An appeal from an order setting aside a default judgment must be dismissed as premature.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 758-785; Dec. Dig. § 113.*]

2. APPEAL AND ERROR (§ 417*) — SETTING ASIDE DEFAULT JUDGMENT—APPEALABILITY.

Under Kirby's Dig. § 1188, providing that no appeal from an order granting a new trial shall be effectual unless the notice of appeal contains an assent by appellant that, if the order be affirmed, judgment absolute shall be rendered against him, an appeal from an order vacating a default judgment and granting a new trial made in the term at which the judgment was rendered must be dismissed, unless the notice of appeal contains appellant's assent to a judgment against him on the affirmance of the order.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2140-2143; Dec. Dig. § 417.*]

Appeal from Circuit Court, Craighead County; W. J. Driver, Judge.

Action by J. M. McPherson, administrator of Albert McPherson, against the Consolidated Casualty Company. From an order setting aside a default judgment, plaintiff appeals. Dismissed.

J. M. McPherson, as administrator of the estate of Albert McPherson, deceased, sued the Consolidated Casualty Company and the sureties upon the bond which it gave to do business in this state in the Craighead circuit court upon a certain policy of insurance set out in the complaint. It was alleged that plaintiff's intestate was entitled to certain indemnities on account of his illness prior to his death. The defendant failed to answer or otherwise plead, and on the fourth day of the term the court awarded judgment for the want of an answer for the amount sued for. Defendant's attorney, who lived at Pine Bluff, filed an affidavit in which he stated that he had never practiced in the Craighead circuit court, and was unacquainted with the terms of that court; that he had made inquiry, and had been misled as to the date of this court. The plaintiff, however, was in no manner responsible for this misapprehension. On the day of filing this affidavit, the defendant also filed an answer controverting all the material allegations in the complaint and specially pleaded as a bar to any recovery the intestate's failure during his illness to have reports made as, it alleged, was required by the terms of the policy of insurance. It also alleged that in the lifetime of the intestate it had paid to him all sums of money for which it could be liable under the policy. The court below treated this answer as a motion to vacate, and set aside the default judgment, and en-

tered an order to that effect. Plaintiff excepted to the action of the court setting aside the default judgment and prayed an appeal, which was granted.

Basil Baker, of Jonesboro, for appellant. Hawthorne & Hawthorne, of Jonesboro, and Danaher & Danaher, of Pine Bluff, for appellee.

SMITH, J. (after stating the facts as above). [1] This appeal must be dismissed for the reason that it was prematurely taken. Cases cannot be tried by piecemeal, and one cannot delay the final adjudication of a cause by appealing from the separate order of the court as the cause progresses. When a final order or judgment has been entered in the court below determining the relative right and liabilities of the respective parties, an appeal may then be taken, but not before. No such final judgment has been entered here, and the appeal must be dismissed.

[2] In the case of Ayers v. Anderson-Tulley Co., 89 Ark. 162, 116 S. W. 200, it was said: "It is only from final judgments and decrees which conclude the rights of the parties with respect to the subject-matter of the controversy that appeals may be taken to this court, and it must be conceded that an order vacating a judgment or granting a new trial made in the term at which the judgment was rendered is not appealable, except on the terms prescribed by the statute." The statute referred to is section 1188, Kirby's Digest. And in this case, even if the action of the court below was equivalent to the granting of a new trial, that action of the court could not be reviewed on an appeal, "unless the notice of appeal contains an assent on the part of the appellant that if the order be affirmed, judgment absolute shall be rendered against appellant." The language quoted is from the second subdivision of section 1188, Kirby's Digest. No such notice was filed in this case, and for this reason, if for no other, this appeal must be dismissed. And in the case last cited the following language was used in quoting from the case of Huntington v. Finch, 3 Ohio St. 445: "The Ohio court in construing a statute similar to the one prevailing in this state, with reference to appeals said: 'The court of common pleas has ample control over its orders and judgments during the term at which they are rendered and the power to vacate or modify them in its discretion. But this discretion ends with the term, and no such discretion exists at a subsequent term of the court.'" See, also, 1 Crawford's Digest, "Appeal and Error," I, d; Womack v. Connor, 74 Ark. 354, 85 S. W. 783; Gates v. Solomon, 73 Ark. 8, 83 S. W. 348; Osborn v. Le Maire, 82 Ark. 490, 102 S. W. 372; Sanders v. Plunkett, 40 Ark. 507; Mallett v. Hampton, 94 Ark. 119, 126 S. W. 92. Appeal dismissed.

KEITH v. WHEELER.

(Supreme Court of Arkansas. Nov. 18, 1912.)

1. TRUSTS (§ 89*)—PURCHASE-MONEY TRUST—SUFFICIENCY OF EVIDENCE.

Evidence, in ejectment for land purchased by complainant's father and which he caused to be conveyed in part to defendant, a step-daughter, *held* not to overcome the presumption that the land was conveyed to her as a gift, so that there was no resulting purchase-money trust in the father's favor.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 134-137; Dec. Dig. § 89.*]

2. TRUSTS (§ 72*)—PURCHASE-MONEY TRUST.

A trust results in favor of one purchasing land with his own money and taking title in another's name, unless the nominal purchaser occupies a fiduciary relation such as wife or child.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 102, 103; Dec. Dig. § 72.*]

3. TRUSTS (§ 89*)—PURCHASE-MONEY TRUST—EVIDENCE.

A purchase-money trust can only be established by clear, convincing, and satisfactory evidence.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 134-137; Dec. Dig. § 89.*]

4. TRUSTS (§ 86*)—PURCHASE-MONEY TRUST—BURDEN OF PROOF.

While it is presumed that a purchase-money trust results in favor of one paying the price for land purchased in another's name, the burden of proof on the whole case is upon the one claiming the existence of a trust.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 128; Dec. Dig. § 86.*]

5. TENANCY IN COMMON (§ 15*)—COTENANTS.

The possession of a tenant in common is not regarded as adverse to his cotenant so as to start limitations running against him.

[Ed. Note.—For other cases, see Tenancy in Common, Cent. Dig. §§ 42-52; Dec. Dig. § 15.*]

Appeal from Pulaski Chancery Court; John E. Martineau, Chancellor.

Action by Alex M. Keith against Amella L. Wheeler. From a judgment for defendant, plaintiff appeals. **Affirmed.**

Appellant brought suit in ejectment against appellee for the possession of lot 4, block 94, in the city of Little Rock, claiming to be the owner thereof, and that appellee had been in unlawful possession of same since September, 1908. Appellee answered denying that appellant was the owner of the property and that he was in unlawful possession thereof. Alleged that the property was purchased by his father, James Keith, and paid for with his own money, but for some reason, unknown, the deed was taken in the name of appellee; that his father continued in the undisputed and adverse possession of the property, claiming it as his own, until his death, on September 14, 1908, and pleaded the seven-year statute of limitations. Appellant replied, denying that James Keith purchased the property for his own use and benefit, alleged that it was purchased out of his consideration and love and affection for her and given to her on that account and for services rendered and to be rendered for him by her; that he was

never in the adverse possession thereof, and at all times acted in the control of said property as her agent and made no adverse claim thereto. The cause was, by agreement, transferred to the chancery court, where appellant filed an amended answer and cross-complaint, reiterating his claim of equitable ownership as in the first answer and praying that the legal title to one-half of the property be divested out of plaintiff and vested in him and his title quieted thereto. Appellee replied to the cross-complaint, alleging that in 1850, when she was a small child, her mother, Elizabeth Wheeler, married James Keith, father of appellant, from which marriage he was born; that from that time until the death of James Keith she was a member of the family of said James Keith and lived at his home a greater part of the time and was treated by him as his daughter and looked upon him as her father, waited upon him as a daughter should, and that he advised her and attended to business matters for her, as a father would in such relations; that she was paid no regular sums for her services in the house or in his office, where she worked, but given various sums at different times, but nothing like what her services were reasonably worth; that he was from March, 1889, until the time of his death, a man of large property, and gave her a one-half undivided interest in the lot in controversy at that time in recognition of the services rendered by her in looking after business matters in St. Louis and elsewhere and for her services in waiting upon himself and plaintiff's mother, in consideration for love and affection. Denied that James Keith bought the lot in controversy for his own benefit, and that he held exclusive possession of the same and that appellant ever acquired a beneficial ownership in said lot, and that she never knew of the existence of the deed to said lot until after the death of James Keith. Denied that she had no possession of same until after June 2, 1910, nor any possession thereafter until by virtue of the commissioners' deed of June 22, 1910, conveying the other undivided half interest. Denied that the trust resulted to him in favor of James Keith, or that he became the equitable owner of the lot and that she held the title for him, and alleged that he acted solely as her agent in all matters in regard to the control of said property and the collection of the rents.

It appears that James Keith married Elizabeth Wheeler in St. Louis in 1850, who, at the time, was the mother of Amella Wheeler, appellee, and another daughter, who later became Mrs. Pierce, and that appellant is the only surviving child of said marriage. After the marriage, they lived in St. Louis, until 1874; the daughters by the former marriage living with the family as their children

and were treated by James Keith as daughters and looked upon him as the head of the family and as their father and so recognized him. In 1874, James Keith and his wife moved to Little Rock, and the daughters, at the time being grown and working in St. Louis, did not come to Little Rock, although urged to do so by Mr. Keith, but remained in St. Louis in their dressmaking business for some years. The relations between the parties continued intimate and close through the years, and in 1891 Mrs. Pierce, in response to frequent invitations, came to Little Rock and made her home again with Mr. and Mrs. Keith, and two years later appellee also came in response to like invitations and did likewise. Appellee, before her coming to Little Rock, attended to the business interests of James Keith, still retained in St. Louis, and performed various and sundry services for him in relation thereto, without any charge for such services, being given presents by him and advice in regard to investments and matters of business. On March 9, 1899, James Keith purchased the lot in controversy, and had the deed thereto made to his wife, appellee's mother, and to appellee jointly. This was before she came to Little Rock to live with them. After her arrival, he told her, in the presence of her mother, that he had purchased the lot and had it deeded to herself and her mother as a present to them, and she later went into his office and helped to attend to his affairs in business, as well as to take care of his household and personal belongings, and attend to the wants of her mother, his wife, who was sick. He paid her \$30 a month for two or three months after she went into his office, and thereafter, although she continued to work in his office and care for his affairs at home, for about 15 years and until his death, he paid her no stated salary, but gave her money along as she requested it.

Before his death, when he was an old man and during his visit to the old world, he frequently wrote to her about matters of business, his own feeling and health, and sent messages of affection to her, his son, Alex Keith, and appellee's sister. Appellee stated that he never, at any time, claimed to be the owner of the property after he told her he had it conveyed to her and her mother as a gift, and that he consulted her with reference to having another house placed upon the lot after its purchase, and approved her idea and had a house moved thereon. He collected the rent and paid the taxes, during the life of his wife and on up to the time of his death, and did not account to appellee for rents, but made no claim of ownership to the lot. It is not disputed that the conveyance was intended as a gift to the other undivided half of the lot to appellee's mother, nor that appellee became the

owner thereof at the partition sale. Appellant was a man of large means and property on the date of the conveyance to his wife and daughter in March, 1899, and continued so until his death. The house testified to by appellee as having been moved upon the lot in controversy by James Keith after consultation with her and her approval of the plan was put there in 1904.

The court found that appellee was the owner of the lot and had been the owner of the undivided one-half interest in same since March 2, 1899, and was entitled to the rents and profits collected by appellant and rendered a decree for the recovery thereof, for the possession of the lot and said rents, from which judgment appellant appealed.

James Coates and John W. Blackwood, both of Little Rock, for appellant. Ratcliffe & Ratcliffe, of Little Rock, for appellee.

KIRBY, J. (after stating the facts as above). [1] It is insisted for appellant that a trust resulted to James Keith, appellant's father, by operation of law, upon the purchase of the lot in controversy, and that appellee's claim is barred by laches and limitations.

[2] "When a man buys an estate and takes the deed in the name of a stranger, a trust results by operation of law to him who advances the purchase money. If, however, the nominal purchaser is the wife or the child of the person from whom the money comes, it is presumed to have been an advancement or a gift. But this presumption is not conclusive. It may be rebutted by antecedent or contemporaneous declarations and circumstances which tend to prove the intention of the person who furnished the money to buy the estate that the grantee should hold as trustee and not beneficially for himself." *Milner v. Freeman*, 40 Ark. 67; *Foster v. Treadway*, 98 Ark. 452, 136 S. W. 934; *Spradling v. Spradling*, 142 S. W. 850. "But a determination of the question as to whether or not such trust resulted from the transaction depends entirely upon the intention of the parties themselves. When a husband pays the purchase money and takes the deed in the name of his wife, the law presumes that it was his intention to make a gift to her of the land, because he is under obligations to provide for her." *Spradling v. Spradling*, 142 S. W. 850.

[3] Such a trust cannot be established by a slight preponderance of the testimony, nor anything short of evidence that is clear, convincing, and satisfactory. *Foster v. Beldler*, 79 Ark. 425, 96 S. W. 175; *Crosby v. Henry*, 76 Ark. 615, 88 S. W. 949; *Chambers v. Michael*, 71 Ark. 373, 74 S. W. 516; *Tillar*

¹ Reported in full in the *Southwestern Reporter*; reported as a memorandum decision without opinion in 76 Ark. 615.

v. Henry, 75 Ark. 451, 88 S. W. 573; 3 Pom. Eq. Jur. § 1040.

[4] "And although there is a presumption of the trust resulting to the party paying the consideration, the burden of proof on the whole case is upon the one who seeks to establish a resulting trust. 1 Perry on Trusts, § 139; cases last cited, *supra*.

Appellee was a child at the time of her mother's marriage and lived for years in the family with her stepfather, treating him as a father and being treated by him as a child, and after many years away from the family home, which had been transferred to Little Rock, upon his invitation and solicitation, resumed her place in the family, where the same relations continued, she assisting him at the office and caring for him and being cared for by him in the family, until his death, and her stepfather under these circumstances stood in loco parentis to her, and the conveyance is presumed to have been a gift. It is undisputed that the conveyance to herself and her mother was a gift to her mother of the property conveyed and always so regarded, and there is no sufficient reason to regard the conveyance to her otherwise, nor is the testimony sufficient to overcome the presumption that it was intended as a gift. From the purchase of the lot to the death of appellee's mother, James Keith looked after the lot for his wife, who was tenant in common with appellee until her death and from thence to the time of her death, being himself, during such last period, a tenant by the curtesy and in common with appellee. It is true he controlled the property, paid the taxes, collected the rents therefrom, and did not account to appellee therefor; but he did not dispute appellee's title thereto, nor make any claim of title in himself, inconsistent with her ownership, and such action was referable to his duty to his wife and appellee in the relation occupied by him and could not amount to adverse possession.

[5] Appellee was being cared for in the family and supported by her stepfather, and there was no reason why she should demand an accounting of the rents, and there was no knowledge of any adverse claim on his part brought home to her; and he had theretofore acknowledged her right upon the making of the gift and never thereafter disputed it. Under such circumstances, his possession, if he had been a stranger, being a tenant in common, could not have been regarded adverse to appellee, nor set the statute in motion against her. *Singer v. Naron*, 99 Ark. 451, 138 S. W. 958. It is not claimed that her suit was too long delayed after the death of her father, and possession taken by appellee.

The decision of the chancellor was right and is affirmed.

DEANE v. MOORE.

(Supreme Court of Arkansas. Nov. 18, 1912.)
ADVERSE POSSESSION (§ 87*)—CONSTRUCTIVE POSSESSION—STATUTES.

Act March 18, 1899 (Laws 1899, p. 117), now Kirby's Dig. § 5057, providing that unimproved or uninclosed land shall be deemed to be in the possession of the person who pays the taxes thereon if he shall have color of title thereto, but that no person can have the benefit of this act, unless he and those under whom he claims shall have paid such taxes at least seven years in succession, at least three payments to be subsequent to the enactment of the statute, while retroactive, is not so as to persons under disability at the time of its enactment, and so will not create an adverse possession sufficient to bar by three payments the rights of the owner of realty who, at the time of the enactment of the statute and thereafter, was a married woman, but was not when plaintiffs began their payments under color of title under coverture.

[Ed. Note.—For other cases, see *Adverse Possession*, Cent. Dig. §§ 504-532; Dec. Dig. § 87.*]

Hart and Kirby, JJ., dissenting.

Appeal from Jefferson Chancery Court; John M. Elliott, Chancellor.

Action by G. A. A. Deane against Mary K. Moore. From a judgment for defendant, plaintiff appeals. Affirmed.

B. S. & J. V. Johnson, of Little Rock, and Danaher & Danaher, of Pine Bluff, for appellant. Crawford & Hooker, of Pine Bluff, for appellee.

*SMITH, J. This suit was commenced in the chancery court of Jefferson county by P. C. Dooley against Mary K. Moore to confirm his title to the S. W. $\frac{1}{4}$, S. W. $\frac{1}{4}$, section 35, township 4 S., range 7 W., situated in that county. Afterwards, upon petition of G. A. A. Deane, suggesting the death of P. C. Dooley, and stating that before his death he had by his warranty deed conveyed said land to said Deane, an order was made substituting G. A. A. Deane as plaintiff.

There are no controverted facts which it will be material to consider, and the pleadings and proof present this state of case. During all the time herein mentioned plaintiff and his predecessors in title had color of title to the above-described tract of land, and the same was unimproved and uninclosed. With this color of title plaintiff and those under whom he claimed commenced paying taxes on the land for the year 1887, and, without a break in the payments, paid the taxes continuously until the year 1902, when he paid the taxes for the year 1901. The taxes for the year 1902 were paid in the year 1903 by the defendant, since which time neither party has paid taxes continuously for the statutory period. The defendant has been twice married; her first marriage having been to one John P. Murphy, April 7, 1875, but he died December 6, 1892. Thereafter she was a widow until June 11, 1895.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

when she was married to her present husband, since which time she has been, and is now, a feme covert.

Both parties concede this case must turn upon our answer to the question: "Was the void apparent title of the plaintiff made good by limitation against Mrs. Moore, the holder of the original and valid title by reason of the Act of March 18, 1899 (Laws 1899, p. 117), and payment of taxes, notwithstanding Mrs. Moore's coverture?" This act is carried into Kirby's Digest as section 5057, and its provisions are as follows: "Unimproved and uninclosed land shall be deemed and held to be in the possession of the person, who pays the taxes thereon, if he have color of title thereto, but no person shall be entitled to invoke the benefit of this act, unless he and those under whom he claims, shall have paid such taxes for at least seven years in succession and not less than three of such payments must be made subsequent to the passage of this act."

This act has frequently been before the court, but this particular question has never been decided, although it was raised in the case of *Taylor v. Leonard*, 94 Ark. 122, 126 S. W. 387. However, the facts of that case were such that the decision of that point was unnecessary. Here the concession is made that plaintiff has paid such taxes as entitles him to have his title confirmed if this right is not defeated by the defendant's coverture. What, therefore, is the proper construction of the act under the facts stated? In determining the legislative intent, these propositions are urged upon our consideration: That while the act itself is not one of limitation it becomes so by reference to section 5056, Kirby's Digest, for, as Judge Frauenthal said in *Taylor v. Leonard*, above referred to: "This statute in itself is not a statute of limitation. It only declares that the land shall be deemed to be in the possession of the person paying taxes thereon under color of title. It only makes the payment of taxes under the conditions named in the act a constructive possession, and it is only by applying thereto the general statute of limitations contained in section 5056 of Kirby's Digest that such possession like actual possession can ripen into title by limitation. In order to make effective this act as a statute of limitation, it must be considered in connection with and a part of section 5056, Kirby's Digest, so that, in addition to the actual adverse possession required by that section, the constructive adverse possession, declared by this act, may also result in a complete bar by limitation. And in becoming thus a part of section 5056 of Kirby's Digest the provisos of that section relating to those laboring under disability apply also to this act." That where the seven consecutive payments of taxes have been made, at least three of which were subsequent to March 18, 1899, the date of the

passage of the act, that the constructive possession, resulting from these payments, related back to the beginning of the seven-year period of payment, and gave the same title by defeating any proceeding to recover possession that seven years' actual possession gave under section 5056. This possession, whether actual, *possessio pedis*, for seven years or constructive from the payment of taxes for that time, defeats a recovery of possession by any one, except infants, married women, and insane persons. That, although this act was retroactive in its operation, the first case which construed it, that of *Towson v. Denson*, 74 Ark. 302, 86 S. W. 661, held it was not invalid on that account, for the reason that it gave reasonable time after its enactment in which an interested party could prevent the consequences of the act falling upon him. This constructive possession may therefore in a proper case relate back for a period of four years prior to the passage of the act, and it does so in this case if that result is not prevented by the coverture of the defendant at the time of its enactment.

If this act can be said to be retroactive as to persons who were under the disabilities mentioned at the time of its passage, then plaintiff's constructive possession relates back to a time prior to the defendant's present marriage, to a time when she was not under disability of coverture, and the statute was thus set in motion when she was under no disability, and its running was not arrested by her subsequent marriage. To sustain this view we are cited to those cases which hold that, where the statute is set in motion in the lifetime of the ancestor, its running is not arrested by the subsequent infancy of his heir during the remainder of the period of limitation; and to those cases which make the same holding where there is actual entry upon and adverse occupancy of the lands of a person, who subsequent to such entry and adverse occupancy becomes insane, and we are reminded, also, of the rule that subsequent marriage does not toll the statute, where it is set in motion during discoverture. And we also have before us the rule that, where the Legislature makes no exception in a statute of limitation, the court can make none, whatever be the hardships in individual cases. *Hill v. Gregory*, 64 Ark. 317, 42 S. W. 408.

These principles are here set out that it may appear that we have considered them, and because they explain the views of the two members of the court, who are of the opinion that the decree of the chancery court, refusing to confirm and quiet plaintiff's title, should be reversed. The view of a majority of the court is that, while the act is retroactive, it was not the legislative intent to so make it retroactive as to cut off the right to sue of persons under the disability of either insanity, infancy, or coverture at

the time of its passage. To hold otherwise would be to say that the Legislature intended that one who was an infant or non compos mentis at the passage of the act could be defeated by three payments of taxes subsequent thereto, because in the lifetime of the infant's ancestor or during a same period of one who subsequently becomes non compos mentis taxes were begun to be paid by some one who had only color of title, and whose mere payments, for even an indefinite period, could never have ripened into title without this act; yet at the passage of the act and during all the time subsequent thereto, which was necessary for this constructive possession to ripen into title, these persons who are thus being shut off from their right to sue were without capacity to sue. It does not answer this argument to say that a married woman is *sui juris*, and may sue and was given a reasonable time to do so before she was barred after the passage of the act, and therefore should be held to be barred if she did not sue, because the statute gives a married woman exactly the same exemption it gives an infant or one non compos mentis, and, as we have reached the conclusion that the Legislature never had the intention of barring an infant or one non compos mentis by allowing only a period to sue for the recovery of his land during all of which time he had no capacity to sue, we have also concluded that there was no such intention in regard to women, who were under the disability of coverture at the time of the passage of the act and who have remained so since.

Affirmed.

HART and KIRBY, JJ., dissenting.

RAMSEY v. ST. LOUIS, I. M. & S. RY. CO.
(Supreme Court of Arkansas. Nov. 18, 1912.)
EVIDENCE (§ 584*)—WEIGHT.

Affirmative evidence which was reasonable and consistent could not arbitrarily be disregarded by the jury.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2424, 2426, 2427; Dec. Dig. § 584.*]

Appeal from Circuit Court, Faulkner County; Eugene Lankford, Judge.

Action by E. A. Ramsey, administrator, against the St. Louis, Iron Mountain & Southern Railway Company. From a judgment for defendant, plaintiff appeals. Affirmed.

J. H. Harrod, of Little Rock, for appellant. Thos. B. Pryor, of Ft. Smith, for appellee.

WOOD, J. This is a suit by the administrator of the estate of S. J. Calhoun, deceased,

to recover damages for the death of Calhoun, who was locomotive engineer on the appellee's train, alleged to have been killed by the appellee's negligence in permitting a switch on the main line of its railroad to be left open. This is the second appeal in the case. The case on the first appeal is reported in 96 Ark. 37, 131 S. W. 44, Ann. Cas. 1912B, 383. The cause was reversed on the former appeal because the evidence was insufficient to support the verdict. At the last trial, after the evidence was heard, the court directed a verdict in favor of the appellee. The facts are fully stated in the opinion on the former appeal, and it is unnecessary to reiterate them here.

The appellant accounts for the open switch which is shown to have been the cause of the death of Calhoun by saying "there must have been a freight train on the siding that pulled out of the switch, after the fast mail passed, and went on to Diaz and took the side track there before Mr. Calhoun's train reached Diaz from Newport, where it met the fast train; that some of the employes on this train that was on the side track at that time must have left the switch open." But we are of the opinion that the uncontradicted evidence shows, on the part of the appellee, that there was no such train on the side track at Campbell as appellant contends.

Appellant's contention involves the theory that there was a freight train being operated on the main line of appellee's road on the day of the injury of which appellee's train dispatchers, whose duty it was to keep a record of the movement of the trains, had no knowledge. This contention is merely speculative and is directly in conflict with the affirmative evidence of witnesses who must have known if there had been such train as appellant contends. Their testimony was reasonable and consistent, overcoming the presumption of negligence, and could not be arbitrarily disregarded. See former opinion.

The testimony of the men who made the train sheets and kept the record of the movements of the train was introduced at the last trial, and their testimony shows conclusively that appellant's contention is unreasonable. There was testimony to the effect that the train sheets were the most important records of the appellee company; that the entire safety of all the trains and passengers depended on these records; and that the train sheets showed accurately the number of trains that passed over that part of the track where Calhoun was killed from 12 o'clock at night until the wreck occurred in which he was killed.

The judgment of the court instructing a judgment in favor of the appellee is therefore correct, and it is affirmed.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

EDWARDS v. ST. LOUIS SOUTHWESTERN RY. CO. OF TEXAS.

(Supreme Court of Texas. Nov. 27, 1912.)

1. APPEAL AND ERROR (§ 361*)—APPEAL FROM INTERMEDIATE COURT — STATEMENT OF GROUNDS OF JURISDICTION.

A statement of grounds of jurisdiction in the Supreme Court on writ of error from the Court of Civil Appeals, to the effect that, the verdict and judgment of the trial court having been reversed and remanded, plaintiff in error asked the Supreme Court to take jurisdiction under subdivisions 5, 7, and 8 of article 941 of Sayles' Ann. Civ. St. 1897, did not comply with the Supreme Court rules, not pointing out the statutory grounds of its jurisdiction, as that the decision of the Court of Civil Appeals overruled the decision of another such court, etc.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1941-1959; Dec. Dig. § 361.*]

2. APPEAL AND ERROR (§ 1094*)—APPEALS TO THE SUPREME COURT — JURISDICTIONAL GROUNDS.

An application for writ of error to the Supreme Court, upon the grounds, as provided by Sayles' Ann. Civ. St. 1897, art. 941, § 8, that the decision of the Court of Civil Appeals practically settled the case, admits the correctness of the facts found as the only facts provable, and merely challenges the law as applied by the Court of Civil Appeals.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4322-4352; Dec. Dig. § 1094.*]

3. RAILROADS (§ 419*)—INJURIES AT CROSSINGS—CARE REQUIRED.

A railroad company may move its train at farm crossings with the usual and necessary noise, without keeping a lookout for frightened teams.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1489-1500; Dec. Dig. § 419.*]

4. RAILROADS (§ 244*)—CROSSING ACCIDENTS—BLOWING WHISTLE.

Rev. Civ. St. 1911, art. 6564, requiring a bell to be rung and whistle to be blown at the distance of 80 rods from a highway crossing, and that the bell be kept ringing until the engine has crossed, only requires the whistle to be blown at such a point beyond such 80 rods from the crossings as would give reasonable notice of the train's approach, and does not require it to be blown at any particular distance beyond such 80 rods.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 755; Dec. Dig. § 244.*]

Error to Court of Civil Appeals of Fifth Supreme Judicial District.

Action by George Edwards against the St. Louis Southwestern Railway Company of Texas. Judgment of the Court of Civil Appeals (134 S. W. 264) reversing a judgment for plaintiff and remanding the case, and he brings error. Affirmed.

B. Q. Evans and Evans & Carpenter, all of Greenville, for plaintiff in error. Templeton, Craddock, Crosby & Dinsmore, of Sulphur Springs, and E. B. Perkins, of Dallas, for defendant in error.

BROWN, C. J. We copy from the opinion of the Court of Civil Appeals the following statement of the case: "This suit was brought

by George Edwards against the railway company to recover damages for personal injuries to his wife, alleged to have been sustained by her by reason of being jumped against and knocked down by a cow she was leading becoming frightened at the blowing of the whistle of a passing train of the defendant at a private crossing over defendant's track, inside the inclosure of a farm on which plaintiff lived. Defendant pleaded the general issue, and specially that the train was properly operated and in the usual manner; that plaintiff's wife knew that the train was coming before she reached the gate that led to the crossing, and, after going through said gate, had ample time to have reached a place of safety; that she knew how trains were usually operated at said place; and that she assumed the risk and was guilty of contributory negligence. A trial resulted in a verdict and judgment for plaintiff, from which the railway company appeals."

The verdict and judgment in the district court for plaintiff in the sum of \$1,500 was reversed and the case remanded by the Court of Civil Appeals.

[1] To show jurisdiction in this court, the petitioner stated that, "the verdict and judgment of the trial court having been reversed and remanded, we ask this court to take jurisdiction in this case under subdivisions 5, 7, and 8 of article 941, Sayles' Civil Statutes." Article 1522, Rev. Stat. 1911.

The statement of the grounds of jurisdiction are not in compliance with the rules of this court. Subdivision 5 of article 941 reads: "Cases in which a Civil Court of Appeals overrules its own decisions or the decision of another Court of Civil Appeals or of the Supreme Court." The application does not point out any decision overruled in this case. Subdivision 7 of said article is in this language: "Cases in which any two of the Courts of Civil Appeals may hold differently on the same question of law." Subdivision 8 of said article reads: "Where the judgment of the Court of Civil Appeals reversing a judgment practically settles the case, and this fact is shown in the petition for writ of error, and the attorneys for petitioners shall state that the decision of the Court of Civil Appeals practically settles the case, in which case, if the Supreme Court affirms the decision of the Court of Civil Appeals, it shall also render final judgment accordingly."

[2] The application was granted, for the reason that the decision of the Court of Civil Appeals practically settles the case. Such an application admits the correctness of the conclusion of facts, and that the applicant cannot, upon another trial, prove anything additional that would change the result. The application challenges the correctness of the law as applied by the Court of Civil Appeals in this case.

We copy the findings of fact: "Plaintiff's

wife testified, in effect: That said crossing had been used frequently and for a long time by persons on the farm, and that persons might reasonably be expected to be on or about the crossing, intending to use it. That the track was fenced, with gates on either side, and the right of way was about 100 feet wide. That she was leading a cow, intending to cross the track to give her water. That when she approached the gate she heard a train, but paid no attention to it. She led the cow through the gate, and just as she reached the inside thereof the train passed and sounded the whistle at the crossing, which frightened the cow, causing her to jump against plaintiff's wife, injuring her."

Does the evidence show that the servants of the railroad company were negligent in operating the train, and that Edwards' wife was injured in consequence thereof?

[3] The injury having occurred at a farm crossing, the diligence required of the railroad employes is clearly stated by Judge Gaines, in *Texas Central Ry. Co. v. Boesch*, 103 Tex. 256, 126 S. W. 8, thus: "It is the right of the servants of a railroad company to move their trains with the usual and necessary noises, without keeping a lookout for frightened teams along the track." *Hargis v. Railway Co.*, 75 Tex. 19, 12 S. W. 953.

Mrs. Edwards knew more of the cow's traits than the trainmen could know; and, she having led the animal to a place near to the railroad track, the operatives of the train could presume, and would naturally conclude, that the cow would not be frightened by the ordinary noises of the trains.

[4] Nothing occurred before the whistle was blown to give notice to the railroad employes that the cow would probably be alarmed by the sounding of the whistle. But counsel for plaintiff in error assert that the sounding of the whistle was unnecessary at that place. Article 6564, Revised Statutes 1911, contains this language: "A bell of at least thirty pounds weight and a steam whistle shall be placed on each locomotive engine, and the whistle shall be blown and the bell rung at the distance of at least eighty rods from the place where the railroad shall cross any public road or street, and such bell shall be kept ringing until it shall have crossed such public road, or stopped." The evidence shows there was a crossing of the railroad track over a public road west of the farm crossing in the direction the train was going. The whistle that frightened the cow was blown as a signal for that public crossing; therefore it was necessary, because required by law. But it is claimed that the farm crossing at which the whistle was sounded was more than 80 rods from the public crossing. The statute quoted above requires that the whistle must be sounded "at least" 80 rods, and, being sounded in obedience to that law, it was nec-

essary and usual. It need not have been blown at any particular distance from the crossing, if not less than 80 rods, and at such point as would give notice of the train's approach to persons who might be near to and intending to use the public crossing.

The evidence fails to show negligence on the part of the employes of the railroad company; therefore plaintiff shows no right of recovery. It is accordingly ordered that the plaintiff take nothing, and that defendant go hence without day and recover of plaintiff all costs.

DAVIS v. VIDAL

(Supreme Court of Texas. Dec. 4, 1912.)

1. LANDLORD AND TENANT (§§ 208, 209*)—ASSIGNMENT—SUBLEASE—RIGHTS OF LANDLORD.

A lessor may recover the rent due from an assignee of the lessee, but not from a subtenant, since in the first case there is privity of estate and contract, while in the latter case there is neither.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 821-831, 832-834; Dec. Dig. §§ 208, 209.*]

2. LANDLORD AND TENANT (§ 79*)—SUBLESEE—NATURE OF INSTRUMENT.

An instrument executed by a lessee, whereby he conveys the entire term and parts with all reversionary estate in the premises, is an assignment; but, where there remains to him a reversionary interest, the instrument is a sublease.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 235, 244-253; Dec. Dig. § 79.*]

3. LANDLORD AND TENANT (§ 79*)—ASSIGNMENT—"TERM."

The word "term," in the rule that a tenant who parts with the entire term in his lease is an assignor and the instrument is an assignment, means something more than the mere time for which the lease is given, and the instrument must convey not only the entire time for which the lease runs, but the entire estate conveyed by the lease.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 235, 244-253; Dec. Dig. § 79.*]

For other definitions, see *Words and Phrases*, vol. 8, pp. 6916-6918.]

4. LANDLORD AND TENANT (§ 79*)—SUBLETTING—"ASSIGNMENT."

An instrument whereby a lessee for a fixed term "sublets, assigns and transfers" the premises to a third person, subject to a contingent reversionary interest in the estate, on the failure of the third person to pay rent, and whereby the lessee reserves the right to pay the rent to the lessor, thereby reserving the right to forestall the lessor, on the failure of the third person to pay rent, from exercising the right to re-enter, is a subletting and not an "assignment"; an assignment being properly a transfer or making over to another of the right one has in any estate.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 235, 244-253; Dec. Dig. § 79.*]

For other definitions, see *Words and Phrases*, vol. 1, pp. 566-571; vol. 8, p. 7584.]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Error to Court of Civil Appeals, Fourth Supreme Judicial District.

Action by Mrs. Antoinette W. Davis against Lewis Vidal. There was a judgment of the Court of Civil Appeals (133 S. W. 1074) affirming a judgment for defendant, and plaintiff brings error. Affirmed.

A. H. Goldstein and Jno. L. Dyer, both of El Paso, for plaintiff in error. Beall & Kemp, of El Paso, for defendant in error.

DIBRELL, J. [1] This is a suit by Antoinette W. Davis brought in the district court of El Paso county against Lewis Vidal, to recover the sum of \$1,200 alleged to be due her by Vidal for the use of certain premises situated in the city of El Paso, of which Vidal was in possession as the assignee of the Dallas Brewery. The sole question of law involved in the case is whether a certain instrument of writing executed by the Dallas Brewery to the defendant, Vidal, on October 1, 1907, was an assignment of its lease from the plaintiff, Antoinette W. Davis, of date April 26, 1907, or a subletting of the premises in question. If the instrument referred to was an assignment of the lease, then plaintiff was authorized to recover of the defendant the rent due on her contract of lease with the Dallas Brewery, by virtue of the privity of estate and contract that subsists between them; but if, on the other hand, the instrument was a subletting of the premises to Vidal by the original lessee, the plaintiff could not recover against defendant as a subtenant, since in such case there is neither privity of estate nor of contract between the original lessor and the undertenant. *Harvey v. McGrew*, 44 Tex. 415; *Legerse & Co. v. Green*, 61 Tex. 131; *Taylor's Landlord & Tenant*, § 16.

The instrument in question was construed by the trial court and the Court of Civil Appeals to be a subletting of the premises by the Dallas Brewery to the defendant, Vidal, and in accordance with that holding judgment was rendered for the defendant. Upon appeal of the case to the Court of Civil Appeals the judgment of the lower court was affirmed.

That the question involved and decided may be fully understood we embody the instrument executed by the Dallas Brewery to Vidal: "Know all men by these presents, that, whereas, on the 26th day of April, 1907, Mrs. Antoinette W. Davis, acting by her agents, A. P. Coles & Brother, did lease to the Dallas Brewery the following parcel of land with the tenements thereon in the city of El Paso, county of El Paso, state of Texas, to wit, being the one-story and adobe composition roof building situated on lot 1 and south 24 feet of lot 2, block 135, Campbell's addition to the city of El Paso, Texas, known as Nos. 415-419 Utah street, same being leased from the 1st day of May, 1907, for three years, to be ended and completed

on the 30th of April, 1910 and in consideration of same lease the said Dallas Brewery yielding and paying therefor during said term the sum of \$100.00 per month, payable in advance on the first day of each and every month; and, whereas, said lease provides that said premises or any part thereof may be sublet by said Dallas Brewery without the consent of said Mrs. Davis; and, whereas, it is desired to transfer, assign and sublet all of said above premises so leased by the said Mrs. Davis to said Dallas Brewery to Lou Vidal: Now, therefore, in consideration of the premises and the sum of \$300.00 to it in hand paid, the receipt whereof is hereby acknowledged, said the Dallas Brewery does hereby sublet, assign and transfer the said above premises and does assign and transfer the above said lease, to the said Lou Vidal, and in consideration thereof the said Vidal does well and truly agree and promise to pay the rents in said lease agreed to be paid, to wit, the sum of one hundred (\$100.00) dollars per month, each and every month hereafter ensuing, beginning on the first day of November, 1907, in advance on the first day of each month so hereinafter ensuing. And the said Vidal does agree and bind himself and obligates himself to in all respects indemnify, save and hold harmless said Dallas Brewery by reason of any of the terms or conditions in said lease contained, including the payment of rent therein provided to be paid, and should the said Dallas Brewery elect to pay any rent therein provided, or be called upon to pay any rent therein provided, upon same being done the said Vidal agrees to pay the same with interest at the rate of ten per cent. per annum; or if the said Vidal neglects or fails to pay said rent promptly, as in said lease provided to be paid, then and in such event the Dallas Brewery can and may at its option declare this transfer null and void, and thereupon oust the said Vidal, and assume possession thereof, and this without notice of any character or kind to the said Vidal; and the failure to pay any rent as in said lease provided to be paid, at the election of the said Dallas Brewery, can and may authorize it without notice to re-enter and repossess said premises."

[2] In construing the effect of the foregoing instrument it is not conclusive as to its form, since it may be in form an assignment and yet be in effect a sublease. The question is one of law to be determined from the estate granted by the instrument. As a general proposition, if the instrument executed by the lessee conveys the entire term and thereby parts with all of the reversionary estate in the property, the instrument will be construed to be an assignment; but, if there remains a reversionary interest in the estate conveyed, the instrument is a sublease. The relation of landlord and tenant is created alone by the existence of a reversionary interest in the landlord. Out of this fact arises

the distinction made between assignments and subtenancies. To state the test slightly different from that already stated, if the instrument is of such character by its terms and conditions that a reversionary interest by construction remains in the grantor of the property, he becomes the landlord and the grantee the tenant. The tenant who parts with the entire term embraced in his lease becomes an assignor of the lease, and the instrument is an assignment; but where the tenant by the terms, conditions, or limitations in the instrument does not part with the entire term granted him by his landlord, so that there remains in him a reversionary interest, the transaction is a subletting and not an assignment. *Forrest v. Durnell*, 86 Tex. 647, 26 S. W. 481; *G. C. & S. F. Ry. Co. v. Settegast*, 79 Tex. 263, 15 S. W. 228; 24 Cyc. 974, 975; *Wood on Landlord & Tenant* (2d Ed.) § 65. It will be observed that, in stating the general rule as to what constitutes an assignment of a lease as distinguished from a sublease, the requirement is that the instrument must convey the whole *term*, leaving no interest or reversionary interest in the grantor.

[3] By the word "term," as used in the statement of this principle of law, is meant something more than the mere *time* for which the lease is given, and the instrument must convey not only the entire time for which the lease runs, but the entire estate or interest conveyed by the lease. Mr. Blackstone in his *Commentaries* (book 2, p. 144), in commenting on the significance of the word "term," when used in leases, says: "Thus the word, *term*, does not merely signify the time specified in the lease, but the estate also and interest that passes by the lease; and therefore the *term* may expire, during the continuance of the *time*, as by surrender, forfeiture and the like." The meaning of the word "term," as defined by Blackstone above, was adopted by the Supreme Court of Massachusetts in the case of *Dunlap v. Bullard*, 131 Mass. 162, and by a number of text-writers on the subject of assignments and subleases.

[4] Mr. Blackstone, in his *Commentaries* (book 2, p. 327), defines an assignment to be, and draws the distinction between an assignment and a lease of property, as follows: "An *assignment* is properly a transfer, or making over to another, of the right one has in *any* estate; but it is usually applied to an estate for life or years. And it differs from lease only in this: That by a lease one grants an interest less than his own, reserving to himself a reversion; in an assignment he parts with the whole property, and the assignee stands to all intents and purposes in the place of the assignor." If we may accept this definition from so eminent authority upon the common law, which definition and distinction so concisely stated and drawn seems to have met the approval of this court in other cases, and apply it to the facts of the case at bar, the conclusion must be reached

that the instrument executed by the Dallas Brewery to Vidal was a sublease and not an assignment. The instrument speaks for itself. By its terms the whole estate granted to the Dallas Brewery by its lease from Mrs. Davis is not conveyed, for the reason there is reserved to the Dallas Brewery a contingent reversionary interest in the estate, to be resumed summarily upon the failure of Vidal to pay rent. More than this, and of equal significance, by the terms of the instrument the Dallas Brewery reserved the right to pay the rent to the original lessor, and thereby the right was reserved to forestall Mrs. Davis, upon the failure of Vidal to pay the rent, from exercising the right to re-enter and possess the premises. That right was reserved to the Dallas Brewery and gave it the power to control the estate in the premises upon failure by Vidal to pay it the rent.

If the instrument was an assignment of the lease, the Dallas Brewery must of necessity have parted with all its estate and interest in said premises, and could therefore exercise no right in or control over the premises. If the instrument was an assignment of the lease, the legal effect was to substitute Vidal in lieu of the Dallas Brewery. But this was not the case. By the terms of the instrument the Dallas Brewery retained the control of the possession of the leased premises, thereby denying the legal effect of an assignment, which would have given Mrs. Davis the right of re-entry and possession of the property upon Vidal's failure to pay the rent.

We are aware that there is great conflict of authority upon this subject, and that it would be futile to attempt to reconcile such conflict. Many of the authors of the text-books on the subject of the assignment of leases and subletting under leases, and the decisions of a great many of the states in this Union, hold that the fact that the right of re-entry is reserved in the assignment to the assignor upon failure of the assignee to pay rent does not change the instrument of assignment from such to a sublease. The holding of such authors and decisions is based upon the theory that the right of re-entry is not an estate or interest in land, nor the reservation of a reversion. They hold that the reservation of the right of re-entry upon failure to pay rent is neither an estate nor interest in land, but a mere chose in action, and when exercised the grantor comes into possession of the premises through the breach of the condition and not by reverter.

Those authorities which hold the contrary doctrine base their ruling upon the idea that the reservation in the instrument of the right of re-entry is a contingent reversionary interest in the premises resulting from the conveyance of an estate upon a condition subsequent where there has been an infraction of such condition. This view of the law is strongly presented in the opinion in the case

of Dunlap v. Bullard, 131 Mass. 163, as follows: "Where an estate is conveyed to be held by the grantee upon a condition subsequent, there is left in the grantor a contingent reversionary interest. It was said in Austin v. Cambridgeport Parish, 21 Pick. (Mass.) 215, 223, that the grantor's contingent interest in such case was an estate which was transmissible by devise and passed under a residuary devise in the will of the grantor. It was declared to be a contingent possible estate, which, united with that of the tenants, 'composed only the entire fee-simple estate, as much so as the ordinary case of an estate for life to A., remainder to B.' In Brattle Square Church v. Grant, 3 Gray (Mass.) 142, 147 (63 Am. Dec. 725), it was said that when such an estate is created 'the entire interest does not pass out of the grantor by the same instrument of conveyance. All that remains, after the gift or grant takes effect, continues in the grantor, and goes to his heirs. This is the right of entry, which, from the nature of the grant, is reserved to the grantor and his heirs only, and which gives them the right to enter as of their old estate, upon the breach of the condition.' These considerations are equally applicable whether the estate subject to the condition subsequent is an estate in fee, or an estate for life or years. They apply where, by the terms of an instrument which purports to be an underlease, there is left in the lessor a contingent reversionary interest, to be availed of by an entry for breach of condition which restores the sublessor to his former interest in the premises. The sublessee under such an instrument takes an inferior and different estate from that which he would acquire by an assignment of the remainder of the original term; that is to say, an interest which may be terminated by forfeiture on new and independent grounds long before the expiration of the original term. If the smallest reversionary interest is retained, the tenant takes as sublessee, and not as assignee."

We are not able to discern why there may not be a contingent reversionary estate or interest in land, as well as any other contingent estate or interest. It certainly cannot be contended upon sound principle that, because the right of re-entry and resumption of possession of land is contingent, it is thereby any the less an estate or interest in land. The very definition of a contingent estate as distinguished from a *vested* estate is that "the right to its enjoyment is to accrue on an event which is dubious and uncertain." 1 Washburn on Real Property, 38.

That the right of re-entry is an estate or interest in land seems to have been recognized by Platte, in his work on Leases (volume 2, p. 318): " * * * a right of re-entry, whether immediate or future, and whether vested or *contingent*, into or upon any tenement or hereditament in England, of any tenure, may now be disposed of by deed."

We think it deducible from respectable authority that where the tenant reserves in the instrument giving possession to his transferee the right of re-entry to the premises demised, upon failure to pay rent, he necessarily retains a part of or an interest in the demised estate which may come back to him upon the happening of a contingency.

The instrument under consideration does not convey the entire estate received by the Dallas Brewery by its lease from Mrs. Davis, but retains by the right of possible re-entry a contingent reversionary interest in the premises. That the interest retained is a contingent reversionary interest does not, it seems to us, change the rule by which an assignment may be distinguished from a sublease. If by any limitation or condition in the conveyance the entire term, which embraces the estate conveyed in the contract of lease as well as the length of time for which the tenancy is created, may by construction be said not to have passed from the original tenant, but that a contingent reversionary estate is retained in the premises the subject of the reversion, the instrument must be said to constitute a subletting and not an assignment.

The following test may be applied to determine whether the instrument in question is an assignment of the original lease, or a subletting of the premises: If it is an assignment, its legal effect must be a transfer of the right of possession of the property conveyed to Vidal and the creation of a privity of estate and contract between Mrs. Davis, the original lessor, and Vidal, to whom the possession was granted by the Dallas Brewery. This would be essential to constitute the instrument an assignment, and if it was an assignment Vidal obligated himself to pay the rent to Mrs. Davis, and the Dallas Brewery had no further connection with or interest in the transaction. But such a result can by no fair or reasonable construction of the language and provisions of the instrument be deduced therefrom. On the contrary, the Dallas Brewery reserved the privilege of paying the rent to its lessor, and upon nonpayment of rent by Vidal it reserved the right to declare the instrument forfeited and to repossess the premises without notice to or the consent of Vidal. There can be but one theory upon which the Dallas Brewery considered itself interested in seeing that the rent was promptly paid by Vidal, and that is that it desired to control the property in question, and therefore intended, and by the language and reservation in the instrument made, it a sublease.

We do not think the proposition tenable that by the express terms of the agreement between the Dallas Brewery and Vidal, or by implication, Vidal obligated himself to pay the rent to Mrs. Davis. The provision of the contract relied upon to establish the fact that Vidal obligated himself to pay the rent to the lessor in the original lease is

the following, "and in consideration therefor the said Vidal does well and truly agree and promise to pay the rents in said lease agreed to be paid, to wit, the sum of one hundred dollars per month." Under the uniform rule of construction the latter part of the above sentence explains and qualifies the preceding part. The obligation of Vidal was to pay the rents in said lease agreed to be paid, that is, the sum of \$100 per month, payable on the 1st day of each month in advance. There is nothing in the agreement from which it may be inferred that Vidal obligated himself to pay the rents directly to Mrs. Davis.

Having reached the conclusion that the instrument executed by the Dallas Brewery to Vidal conveying the premises in question was a sublease and not an assignment, by reason of the provision reserving to the Dallas Brewery the right of re-entry, which had the effect to withhold a part of the term granted by the original lease, or which retained an interest in said estate, and because by the other terms of the instrument reserving to the Dallas Brewery the discretion to pay the rents upon its own responsibility and upon the failure of Vidal to pay the same to it, the right to declare the instrument forfeited and to re-enter and take possession of the premises indicate the intention and purpose of the parties to enter into a subletting of the premises and not to assign the original lease, we conclude there exists no privity of estate or contract between the plaintiff, Mrs. Davis, and the defendant, Lewis Vidal, and that Mrs. Davis has no cause of action authorizing her to recover judgment against Vidal.

Other questions presented in briefs of counsel are not discussed, for the reason their disposition is not essential to the decision of the case, in consequence of the view we have taken of its merits.

The court is of opinion the judgments of the Court of Civil Appeals and of the trial court should be affirmed, and it is, accordingly, so ordered.

EDWARDS v. STATE.

(Court of Criminal Appeals of Texas. Nov. 13, 1912.)

1. CRIMINAL LAW (§ 814*)—INSTRUCTIONS—APPLICABILITY TO EVIDENCE.

Where the evidence tended to show that, when accused killed deceased, deceased was approaching him with an iron rod of sufficient length and dimensions to have inflicted serious bodily injury or death, an instruction that anger and insulting words coupled with sudden gestures as if to draw a deadly weapon well calculated to inflict serious bodily injury would constitute adequate cause was improper because inapplicable to the evidence; there being no claim that a weapon was drawn.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1821, 1833, 1839, 1860, 1865, 1883, 1890, 1924, 1979-1985, 1987; Dec. Dig. § 814.*]

2. HOMICIDE (§ 300*)—TRIAL—INSTRUCTIONS—SELF-DEFENSE.

An instruction that if, at the time accused killed deceased, deceased was making an attack on him with a piece of iron, or was about to do so, which, viewed from accused's standpoint, placed him in danger of death or serious bodily injury, the jury should acquit, should have been given, where it was justified by the evidence, and the charge given was in the abstract with no pertinent application to the facts.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 614-632; Dec. Dig. § 300.*]

3. CRIMINAL LAW (§ 829*)—HOMICIDE (§ 300*)—TRIAL—INSTRUCTIONS—SELF-DEFENSE.

An instruction that when a killing takes place to prevent murder, if the weapons and means used by the party attempting such murder are such as would have been calculated to produce that result, it is presumed that the person so using them designed to inflict the injury, and that if, at the time accused struck and killed deceased, deceased was making an attack upon him which, under the circumstances, reasonably indicated an intention to murder, maim, or disfigure him, with a piece of iron, and the weapon and manner of its use were calculated to produce murder, maiming, or disfiguration, the law would presume that deceased intended to murder accused, and that if under these circumstances, viewed from accused's standpoint, he killed deceased, he should be found not guilty, should have been given, and was not covered by an instruction that, if accused believed his life was in danger, the jury should acquit, since under White's Ann. Pen. Code 1911, art. 676, providing that when homicide takes place to prevent murder, maiming, etc., if the weapons or means used by the party attempting such murder, etc., are such as would have been calculated to produce that result, it is presumed that he intended to inflict the injury, there is a legal presumption that the attacking party under the circumstances mentioned intends to kill or inflict serious bodily injury.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. § 829; Homicide, Cent. Dig. §§ 614-632; Dec. Dig. § 300.*]

4. HOMICIDE (§ 300*)—TRIAL—INSTRUCTIONS—SELF-DEFENSE.

Where the evidence showed that accused and deceased had some trouble, but that they made friends, and went to deceased's room to spend the night, an instruction that the difficulty having been settled, and accused having abandoned further trouble, his right of perfect self-defense revived, and, if deceased became the aggressor, he had such right, should have been given.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 614-632; Dec. Dig. § 300.*]

Appeal from District Court, Knox County; Jo. A. P. Dickson, Judge.

J. W. Edwards was convicted of manslaughter, and he appeals. Reversed and remanded.

C. E. Lane, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted of manslaughter; his punishment being assessed at two years confinement in the penitentiary.

This is the second appeal; the first being found reported in 60 Tex. Cr. R. 323, 131 S. W. 1078. The salient features of the case as shown by the facts are fairly well stated in the decision on former appeal.

[1] This record shows that the court gave all the definitions of murder in the first and second degree. The first 14 clauses of the charge were devoted to the definition of these two degrees of homicide. In the fifteenth section of the charge the court instructed the jury that they could not find defendant guilty of murder either in the first or second degree, and then proceeded to give a charge with reference to manslaughter. The nineteenth section of the charge is criticised. It is in the following language: "Anger and insulting words, coupled with sudden gestures as if to draw a deadly weapon well calculated to inflict serious bodily injury on the part of the person killed, would constitute adequate cause, in view of the case." This section of the charge is criticised upon several grounds. It is inaptly expressed to say the least of it. The theory upon which this charge was given is found substantially in the following testimony: Appellant and deceased had had a little difficulty in the evening in which appellant seems to have been the aggressor. They had made friends, and appellant had gone to the room of deceased at his request and invitation to spend the night. While in the room the trouble was renewed; the state's theory being that appellant was the aggressor. Appellant's testimony both from his *res gestæ* statement, his own testimony, and the evidence of other witnesses is to the effect that while they were in the room the deceased brought about and occasioned the difficulty, and approached appellant with an iron bar or rod of iron of sufficient length and dimension to have inflicted serious bodily injury or death; that appellant warned the deceased three different times to stop and not come upon him; that he was unarmed at the time, and backed away from the deceased. Finally, in reaching around in the dark, he picked up something which proved to be a piece of wood or scantling, and, as deceased came upon him, he struck him with it. On account of this lick the deceased subsequently died. Upon another trial the language complained of might be more guardedly expressed. The contention is that deceased had not drawn a deadly weapon as the jury was left to infer from this language, but appellant was being threatened with an assault from deceased with an iron rod, and not the drawing of a weapon, and the charge should be pertinently applied to the facts in instructing the jury in reference to adequate cause as suggested by these facts.

[2] Appellant asked several charges, which were refused by the court. The first reads as follows: "If you believe from the evidence that at the time defendant killed deceased the deceased was making an attack on defendant with a piece of iron or was about to do so, which, viewed from defendant's standpoint, placed him, defendant, in

danger of death or serious bodily injury, and to save himself therefrom defendant struck and killed deceased R. L. King, you will acquit," etc. We are of opinion this charge should have been given. The court's charge was given in the abstract with no pertinent application of the law to the facts. It is the safer and better rule always in charging the jury to apply the law to the facts of the given case. The charge given by the judge in the trial court would have fitted any case in which there was danger or apparent danger, and made no application directly to the facts of the case. We call attention to the above matters, so that they may not occur on another trial.

[3] Another charge requested by appellant submitted article 676 of White's Penal Code. This the court refused to give. It is unnecessary to repeat this charge. The substance of it is the jury was instructed that if they believed, at the time the defendant struck deceased, the deceased was making an attack upon him, which, under the circumstances, reasonably indicated an intention to murder, maim, or disfigure him, etc., with a piece of iron, and the weapon and the manner of its use were such as were calculated to produce either murder, maiming, or disfiguration, etc., then the law would presume that the deceased R. L. King intended to murder defendant, and, if under these circumstances and they to be viewed from the defendant's standpoint defendant killed deceased, they would find him not guilty. That portion of the charge was preceded by the further charge that the jury is charged, as a matter of law, that when a killing takes place to prevent murder, etc., if the weapons and means used by the party attempting or committing such murder, etc., are such as would have been calculated to produce that result, it is to be presumed that the person so using them designed to inflict the injury. This charge should have been given, and its omission is fatal to this conviction. The court charged the jury that if the defendant believed his life was in danger, etc., they should acquit, but under the facts the deceased was approaching appellant with an iron bar which was capable of producing death or inflicting serious bodily injury. These acts viewed in the light of self-defense, under the terms of article 676, *supra*, called for and demanded that this phase of the statute be given, because it was a legal presumption made so by the statute that under such circumstances the attacking party designed to kill or inflict serious bodily injury. The facts being shown that the deceased was making such an attack, or about to make such an attack with such weapon, the law required the jury to presume that he did intend to kill or inflict the mentioned injury. It has always been held under such circumstances a fatal omission for the court not to so

charge, and wherever the exception has been properly presented for such failure a reversal has followed. The statute so provides, and it should be followed.

[4] There is another matter presented by special charges, and not given in the court's charge. In the evening there had been some trouble between the parties not of a serious nature, in which appellant was the aggressor. Appellant it seems had assaulted the deceased, which amounted to a simple assault, striking him with his fist or hat. The parties made friends and deceased invited appellant to spend the night with him, and he had gone to the room with deceased for that purpose when the tragedy occurred. Appellant insisted by special charge, which was refused, that the jury should have been instructed that under these circumstances, the difficulty having been settled, appellant having abandoned any further trouble, and friendship renewed, his right of perfect self-defense revived, and, if deceased became the aggressor under those circumstances, he would have the right of perfect self-defense. It is not undertaken here to copy the charges, but only the substance is stated. Upon another trial of the case this phase of the law should be given to the jury.

The judgment is reversed, and the cause is remanded.

WOODS v. STATE.

(Court of Criminal Appeals of Texas. Nov. 6, 1912.)

1. CRIMINAL LAW (§ 1091*)—APPEAL—BILL OF EXCEPTIONS—SUFFICIENCY.

On appeal from a conviction for making sales of intoxicating liquor on Sunday, bills of exception reciting that defendant excepted to a question whether the witness issued defendant a liquor license on the ground that the license would be the best evidence, but that the question was answered in the affirmative and to testimony that he issued a license to one J. F. W., although the evidence had not shown J. F. W. and accused to be the same person, are insufficient to require a review.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2803, 2815, 2816, 2818, 2819, 2823, 2828-2833, 2843, 2931-2933, 2943; Dec. Dig. § 1091.*]

2. CRIMINAL LAW (§ 1092*)—APPEAL—BILLS OF EXCEPTION.

Where an exception in a prosecution for the illegal sale of intoxicants was reserved to a question as to whether witness issued a retail license to one J. F. W. on the ground that he and defendant were not shown to be the same person, the court's approval of the bill of exceptions, reciting the objection, is not a certificate of the fact on which the objection was based, but merely of the exception.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2834-2861, 2919; Dec. Dig. § 1092.*]

3. INTOXICATING LIQUORS (§ 234*)—PROSECUTIONS—EVIDENCE—ADMISSIBILITY.

Whether or not a license to sell intoxicants had been issued to accused is a fact which may be proved otherwise than by the exhibition

of the license, this being particularly true in view of Acts 31st Leg. (1st Ex. Sess.) c. 17, § 14, requiring the posting of licenses in some prominent place in the building in which the sale of intoxicants is carried on.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 298; Dec. Dig. § 234.*]

4. CRIMINAL LAW (§ 1091*)—APPEAL—MATTERS PRESENTED FOR REVIEW.

In a prosecution for violating the liquor laws, a bill of exceptions reserved to the reading of an entry in a stub book kept by the officer issuing licenses for the sale of intoxicating liquor shows no error, where it does not show that the stub book or its contents were introduced in evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2803, 2815, 2816, 2818, 2819, 2823, 2828-2833, 2843, 2931-2933, 2943; Dec. Dig. § 1091.*]

5. CRIMINAL LAW (§ 665*)—TRIAL—RECEPTION OF EVIDENCE—PUTTING WITNESS UNDER RULE.

It is within the discretion of the trial court to permit a witness who was placed under the rule and who heard the testimony to testify.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1519-1566½; Dec. Dig. § 665.*]

6. CRIMINAL LAW (§ 1168*)—APPEAL—HARMLESS ERROR.

Where a witness who was improperly permitted to testify was unable to answer the question propounded, the error was harmless.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3129-3136, 3144; Dec. Dig. § 1168.*]

7. INTOXICATING LIQUORS (§ 227*)—EVIDENCE—ADMISSIBILITY.

In a prosecution for illegal sales of intoxicating liquors, it is proper to allow witness to testify that accused was engaged in the saloon business, even if it had not been shown that the retail license introduced in evidence was issued to accused.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 237; Dec. Dig. § 227.*]

8. CRIMINAL LAW (§ 1169*)—APPEAL—HARMLESS ERROR.

In a prosecution for illegal sales of intoxicating liquors, where accused's own witness stated that he owned the saloon, the improper allowance of evidence showing that he was engaged in the saloon business was harmless.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3088, 3137-3143; Dec. Dig. § 1169.*]

9. INTOXICATING LIQUORS (§ 233*)—OFFENSES—EVIDENCE—ADMISSIBILITY.

In a prosecution for sale of intoxicants on Sunday, it is not error to ask a witness whether he saw the side door of accused's saloon open on a stated Sunday.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 293-297, 298½; Dec. Dig. § 233.*]

10. CRIMINAL LAW (§ 1170½*)—APPEAL—BILL OF EXCEPTIONS.

A bill of exceptions complaining of the allowance of a question whether the witness remembered when the grand jury was summoned, and how long before this it was that accused's saloon was open, shows no error, where it appears that his answer was in the negative.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3129-3135; Dec. Dig. § 1170½.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

11. CRIMINAL LAW (§ 1091*)—APPEAL—BILL OF EXCEPTIONS.

In a prosecution for sales of intoxicating liquor on Sunday, a bill of exceptions complaining of the admission of testimony by a witness that he got a pint of whisky for a sick man, taken by itself, shows no error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2803, 2815, 2816, 2818, 2819, 2823, 2828-2833, 2843, 2931-2933, 2943; Dec. Dig. § 1091*]

12. INTOXICATING LIQUORS (§ 224*) — OFFENSES—PRESUMPTIONS.

There is no presumption that local option laws are in effect in a given territory, and hence in a prosecution for sales of intoxicants on Sunday made by a licensed dealer, the state having introduced his application for a license in which he made affidavit that prohibition was not in effect in the place in which he carried on his business, is not bound to show that the local option law had not been adopted.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 275-281; Dec. Dig. § 224*]

Appeal from Burleson County Court; R. J. Alexander, Judge.

Frank Woods was convicted of an illegal sale of intoxicating liquor, and he appeals. Affirmed.

Buchanan & Stone, of Brenham, and T. J. Carter, of Somerville, for appellant. C. E. Lane, Asst. Atty. Gen. for the State.

PRENDERGAST, J. Appellant was prosecuted and convicted under article 615, P. C., which is section 14 of the act approved April 17, 1909 (Acts 31st Leg. [1st Ex. Sess.] c. 17), commonly known as the "Fitzhugh-Robertson Liquor Law," and his penalty fixed at a fine of \$100.

This article of the statute is as follows: "Every person or firm having a license, who may be engaged in or who may hereafter engage in the sale of intoxicating liquors to be drunk on the premises (in any locality of this state, other than where local option is in force), shall close and keep closed their houses and places of business and transact no business therein or therefrom from and after twelve o'clock midnight until five o'clock a. m. of each week day, and shall close and keep closed their houses and places of business and transact no business therein or therefrom from and after twelve o'clock midnight Saturday until five o'clock a. m. of the following Monday of each week; and any such person or firm, or his or their agent or employé who shall open or keep open, or permit to be opened or kept open, any such house or place of business for the purpose of traffic, or who shall sell or barter any intoxicating liquor of any kind, or who shall transact or permit to be transacted therein or therefrom any such business, between the hours aforesaid, shall be deemed guilty of a misdemeanor, and, on conviction, shall be punished by a fine of not less than twenty-five dollars nor more than two hundred dollars, or by imprisonment in the county jail for not

more than three months, or by both such fine and imprisonment."

The information charged that appellant on or about April 23, 1911, was a retail liquor dealer having a license as authorized by said act of the Legislature, and was then engaged in the sale of intoxicating liquors to be drunk on his premises where sold in a locality of the state other than where local option was in force, and that he did then and there unlawfully, after 12 o'clock midnight on Saturday, April 22, 1911, and before 5 o'clock a. m. of the following Monday, April 24, 1911, open and permit to be opened his place of business for the purpose of traffic, and did then and there barter and sell intoxicating liquor, to wit, whisky and beer in quantities of less than one gallon, and did transact therein and therefrom business between said hours. The evidence clearly shows that appellant violated said law, and was amply sufficient to sustain the verdict and judgment.

[1] Appellant has a large number of bills of exceptions. Most, if not all, of them are very meager, and do not show sufficiently what the record shows nor the case to require this court to pass upon them. The first is that upon the trial of the cause "while the witness for the state Wondrash was upon the stand, upon direct examination, counsel for the state asked him the following question: 'Q. Did you issue a retail liquor dealer's license to Mr. Frank Woods?' To which question the defendant objected on the ground that said evidence would be secondary, and, if such license had been issued, the license would be the best evidence thereof, which objection was by the court overruled, and the witness was permitted to answer said question, which he did, as follows: 'A. I issued a retail dealer's license to Mr. J. F. Woods.' To which action of the court the defendant, by counsel, then and there excepted, and here now tenders this bill of exception, and prays that it may be examined, approved, etc." which was done.

His second bill is fully as meager as the one above. It shows that while said same witness was on the stand the state asked him: "Q. Did you issue a retail liquor dealer's license to Mr. Frank Woods? A. I issued a retail liquor dealer's license to Mr. J. F. Woods. Here is Mr. J. F. Woods' application for a permit, his permit, his bond—[producing the instruments]." To which answer of the witness the defendant, by counsel, objected on the ground that the application, permit, and bond of J. F. Woods were not admissible in evidence against Frank Woods, and that J. F. Woods and Frank Woods had not been shown to be one and the same person, which objection the court overruled and the answer was permitted to go before the jury, to which appellant excepted. See section 857, p. 557, and section 1123, p. 732, White's Ann. C. C.

P., for the rules about bills of exception, and some of the cases there collated. *Conger v. State*, 140 S. W. 1112.

[2] It will be seen by each and both of these bills that there is no such statement made of the case as that this court can tell therefrom whether the questions and answers of the witness shown by these bills were admissible or not. It will be further noticed that the second bill shows that it was appellant's objections and not stated as a fact by the court in the bill in approving it or otherwise that J. F. Woods, to whom the license was issued and the application, bond, etc., were made, was not Frank Woods, the defendant in this case. It has too often been decided by this court to need a citation to the cases to show that the uniform holding of this court is that an objection made to evidence asserted as a fact in the objection only is not a certificate by the judge, in approving the bill, that such was a fact. It is a mere objection. In this case even if we could consider this bill, and we could look to the record to ascertain whether or not the evidence showed that J. F. Woods and the defendant, Frank Woods, were other than the same person, we might find ample evidence to show that that was a fact.

[3] The first bill does not show that the contents of the license itself was attempted in any way to be proven—simply and solely whether or not the clerk had issued to appellant a license. Whether or not the said clerk had issued a license to appellant was an independent fact, which could be proven by him without the introduction of the license or proving its contents. Besides, section 28 of said act of 1909 requires that such license shall be posted in some conspicuous place in the house where the business for which license is necessary is carried on, and, of course, it must be kept posted there. Again, the information in this case itself charges that the appellant had such license, and upon all these grounds said testimony was admissible. So that, even if we could consider appellant's bills on these grounds, no error is presented. If it had been attempted, and these bills had shown that the contents of said license was testified to by this witness, then quite a different question might be presented, but this is not the case.

The evidence in this case shows that on June 15, 1910, appellant applied to the Comptroller of this state for a license to engage in the retail liquor business at Clay, in Burleson county, Tex., in a sworn application, complying in every particular with the requisites of such an application as prescribed by said act of 1909; that the Comptroller passed upon the same, and, after stating that his application in every way complied with the law and that he was qualified under the law as shown by his application to receive such license, permitted him to so apply for such license; that on June 23, 1910, he prop-

erly filed his petition before the county judge of Burleson county for such license, his petition therefor containing all the allegations prescribed under the law therefor, and that he desired to engage in the retail liquor business in said town of Clay; that the county judge properly, upon hearing his petition with all the necessary requisites alleged therein, granted the same; that he executed bond with the conditions and in the amount and strictly in accordance with said law; that he paid to the tax collector of Burleson county the amount of the tax fixed by law to entitle him to a license, and to engage in such business at said place. All these papers are those which are required by law, and which are required to be kept by the county clerk, and were produced by such clerk and introduced in evidence on the trial of this cause. The testimony further shows that said town of Clay was a very small place, and a very few inhabitants therein; that the appellant was engaged in the saloon business in said town at the time it was charged he violated said Sunday law. By the testimony of several witnesses, it was shown that on the Sunday charged in the indictment appellant's saloon was open and kept open for some time for the business of selling intoxicating liquor, and that many sales were made of such liquor at the time; that a large crowd was in there, going back and forth, bringing out bottles of liquor and drinking, carousing around, making considerable noise and disturbance, and all drinking, and some more or less intoxicated; that appellant was in his house and place of business while this was going on on that date. One witness swore that he himself bought such liquor from appellant personally on that day and occasion. Others show that he was present, and saw and could have seen what was then done.

Appellant himself did not testify, but his only clerk did, introduced by him. He testified that he was appellant's clerk during said month of April, 1911, and worked in appellant's store and saloon, sold groceries and dry goods, as well as liquors, and shows that he himself on that day as well as other Sundays, had appellant's place of business open and sold liquor repeatedly on Sunday therein while working for appellant; but he claims that he did this against appellant's instructions, and without his knowledge or consent; that he had the saloon open on Sunday, April 23, 1911, some five or six times that day, not longer than 30 minutes at a time, and that at these times he sold intoxicating liquor; that he attended to all of the saloon business for appellant, but that appellant got the money therefor.

From all of the facts and circumstances in this case the jury were clearly justified in believing and finding that a license to sell intoxicating liquors at retail was issued and delivered to appellant.

Appellant's next bill shows that while this

same witness Wondrash was on the stand he produced the original permit to apply for a retail liquor dealer's license, an application therefor, his bond, petition to the county judge, his annual tax receipt therefor, all in accordance with the requirements of said act of the Legislature which are all copied in full in the bill, and that they were introduced in evidence; that appellant objected to all of them for the reason that J. F. Woods had not been shown to be the same person as Frank Woods, the appellant in this case. What we have said in discussing the other bills applies to this, and shows that no error is shown.

[4] Appellant's next bill, No. 4, has the same heading as the above bills. Then states:

"While the state's witness Joseph Wondrash was upon the stand, upon direct examination he produced a stub book kept by him, and started to read therefrom, which said stub book from which the witness read is in words and figures as follows, to wit:

"Retail { liquor
 ~~malt~~
 Individual } Dealer's License.

"For the sale of spirituous, vinous or malt liquors or medicated bitters. No. 48. Burleson County, Issued to J. F. Woods. For the sale of spirituous, vinous and malt liquors and medicated bitters in quantities of one gallon, and less than one gallon, to be drunk on the premises, at No. ——— St. Clay, Burleson County, Texas.

"Date July 12, 1910. State Tax, \$375.00. County Tax, \$187.50. City Tax, \$——.

"Note. The Clerk will retain this stub."

"To which reading the defendant, by counsel, then and there objected on the grounds:"

Then follow six separate and distinct grounds of objection. Then the bill proceeds: "Which objections were, by the court, overruled, and the defendant then and there excepted to the action of the court, and here now tenders this bill of exception, and prays that the same may be examined, signed, and by the court approved and ordered filed as a part of the record in this cause. This the 6th day of October, A. D. 1911. This was after the introduction of the different papers by the county clerk showing his authority to issue liquor dealer's license to J. F. Woods. Allowed with the above explanation. R. J. Alexander, County Judge Burleson County."

If we could consider this bill, it would show no error whatever, for it states that, when said witness started to read from said stub book, the appellant objected to the reading, and the bill nowhere shows that the said stub book or what it is shown above to have contained was in any way or anywhere introduced in evidence.

[5, 6] Appellant's next bill shows: That, when the state introduced its witness J. W. Woods, it asked him this question: "Mr.

Woods, is J. F. Woods and Frank Woods one and the same person?" That the appellant objected to this for the reason that at the commencement of the trial all the witnesses in the case were placed under the rule, but that this witness, although present in the courtroom, was not placed under the rule, but was sitting in the courtroom listening to all the testimony. That the court overruled appellant's objections and the witness answered: "I cannot say." To this action appellant excepted. It was within the sound discretion of the court to permit a witness, although he had not been placed under the rule, to testify in the case, and this bill does not show any such abuse of this discretion as would authorize this court to hold his action reversible error. Besides, the answer of the witness, as shown, did not, and could not, injure the appellant.

[7, 8] Appellant has nine bills of exceptions to this effect: That while the witness for the state, naming him, was upon the stand, upon direct examination, counsel for the state asked him this question: "What business is Mr. Woods engaged in at Clay? A. He is in the saloon business at Clay." To this question and answer appellant objected because said testimony was inadmissible; that ownership of a mercantile business could not be proven by general reputation; that the evidence was secondary, and not the best evidence to prove his occupation; that it was a mere opinion of the witness, and tended to prove an issuable fact by illegal method. The court overruled the objection, and in approving the bill qualified it by stating that it was allowed with the explanation that it was after the introduction of the papers by the county clerk showing the issuance of a liquor dealer's license to J. F. Woods. This is, in substance, the full of each of said bills. No error is shown thereby. It was not attempted by this to show ownership, but simply and solely, as the questions and answers show, that the appellant was running a saloon business at Clay, which was entirely proper. Besides, appellant introduced his clerk and barkeeper, and had him testify as shown above that appellant was engaged in the retail liquor business at said place on the date charged in the indictment; that he clerked for him, ran the business, etc., and appellant got all the proceeds of his Sunday sales.

[9] Neither does the appellant's bill complaining that the witness John Scott was asked the question, "Did you see the side door of Mr. Woods' saloon open on the Sunday in April you were in Clay?" and his answer that he saw it open on Sunday, but did not recollect whether it was church Sunday or not, show any error whatever.

[10] Nor does appellant's bill complaining that the state was permitted to ask the witness Jeff Morgan if he remembered when the men were summoned before the grand jury,

how long before this it was he saw the saloon open, and his answer that he did not know, show any error whatever.

[11] Nor does appellant's last bill, which shows that the state asked the witness McKinney, "Did you get any whisky from Mr. Woods?" and to which he replied, "I went out to Mr. Woods' house and told him that Mark was sick, and sent me to get him a pint of whisky. Mr. Woods went with me to the saloon and got the whisky for Mark. Mark did not pay anything for the whisky"—show any error. The bill does not disclose what the status of the case was, nor what bearing this question and answer had on the case, and therefore we cannot tell from the bill that it was in any way incompetent.

[12] Appellant contends that the state failed to prove that local option was not in force at Clay where this offense is charged to have been committed. It has uniformly been held in this state by this court that we cannot presume, and do not judicially know, and cannot judicially know, that the prohibition law is in force in any county or subdivision thereof anywhere in this state; that such laws while general so far as being laws of the state are nowhere in operation or effective, unless and until a proper election is held therefor, carried and the law declared to be in force, and all this must be proven as a matter of fact where necessary in order to show that prohibition is effective in any given county or subdivision thereof. It has also been uniformly held by this court that the legal presumption is that prohibition is not in force in any given locality, but that every county and subdivision thereof in the state is presumed to be in what is ordinarily denominated "wet" territory. This being the case, we think it was not incumbent upon the state to prove that prohibition was not in force in the locality in Burleson county where appellant ran his retail liquor business. All the evidence and the uncontradicted evidence in this case introduced by both the state and the appellant showed that appellant was in the retail liquor business at the time and place in which this offense was charged, and that he applied for license, and obtained license, to conduct such business as a retail liquor dealer and had a license therefor, which could not have been issued without the location was in "wet" territory and prohibition not in force therein. Besides, the appellant, in his application for license, expressly swore that there was no statute or ordinance in force in said territory prohibiting the retail sale of intoxicating liquor, and that he had been engaged in such business for the past two years. So that we hold there is nothing in this contention by appellant, even if it was incumbent upon the state to make such proof.

There is no bill of exceptions to appellant's complaint of the claimed argument of the

county attorney. So that we cannot consider appellant's assignment on that subject.

The judgment will be affirmed.

WHORTON v. STATE.

(Court of Criminal Appeals of Texas. Nov. 13, 1912.)

1. BURGLARY (§ 41*)—SUFFICIENCY OF EVIDENCE.

Evidence in a prosecution for burglary held sufficient to sustain a conviction.

[Ed. Note.—For other cases, see Burglary, Cent. Dig. §§ 94-103, 109; Dec. Dig. § 41.*]

2. CRIMINAL LAW (§ 1169*)—HARMLESS ERROR—ADMISSION OF EVIDENCE—CURE BY VERDICT.

In a prosecution for burglary, error, if any, in permitting evidence that defendant was 20 years of age, and that his companion was only 18, was harmless, where the jury assessed the minimum punishment.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3088, 8130, 3137-3143; Dec. Dig. § 1169.*]

3. CRIMINAL LAW (§ 532*) — CONFESSION—ADMISSIBILITY OF EVIDENCE—TIME.

In a prosecution for burglary, the testimony of the owner of the store entered that he heard that his store had been burglarized, given preliminary to proving a confession by defendant to witness, made the next morning, was admissible as fixing the time.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1218; Dec. Dig. § 532.*]

4. CRIMINAL LAW (§ 829*) — TRIAL — REQUESTED CHARGES.

Requested charges, which are fully covered by the main charge, are properly refused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. § 829.*]

5. BURGLARY (§ 28*)—PROSECUTION—ISSUES AND PROOF—OWNERSHIP.

Under an indictment for burglary of a store alleged to belong to the prosecuting witness, proof that it was the store of the witness and his son was not error, where the witness testified that he was in charge of it.

[Ed. Note.—For other cases, see Burglary, Cent. Dig. §§ 67-78; Dec. Dig. § 28.*]

6. BURGLARY (§ 22*)—PROSECUTION AND INDICTMENT—OWNERSHIP.

Where property is owned in common or jointly by two or more persons, an indictment for burglary may allege ownership to be in either or all of them.

[Ed. Note.—For other cases, see Burglary, Cent. Dig. §§ 55-61, 66; Dec. Dig. § 22.*]

7. CRIMINAL LAW (§ 784*) — TRIAL — INSTRUCTIONS—CIRCUMSTANTIAL EVIDENCE.

Where a witness in a burglary trial testified that defendant admitted to him that he was guilty of the offense, it was not necessary to charge on circumstantial evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1883-1888, 1922, 1960; Dec. Dig. § 784.*]

Appeal from District Court, Parker County; J. W. Patterson, Judge.

O. L. Whorton was convicted of burglary, and he appeals. Affirmed.

Hood & Shadle, of Weatherford, for appellant. C. E. Lane, Asst. Atty. Gen., for the State.

HARPER, J. Appellant was indicted and convicted of burglary, and his punishment assessed at two years' confinement in the penitentiary.

[1] The evidence on behalf of the state would show that appellant and one Ben Davis burglariously entered the store of J. F. Elam & Son, and J. F. Elam testifies that appellant approached him, the morning after his boys claimed to have detected them, and said: "Uncle Jim, I got in your store last night, and that it was not the first time; but he had never taken anything but little things, candy, cigars, tobacco, etc., about four or five dollars' worth, and that if the matter was not reported he would give anything." This statement is not denied, and this, with the testimony of S. D. and Roy Elam, who claimed to have witnessed the burglarious entry, amply supports the verdict.

[2] The appellant claims the court erred in permitting it to be shown that appellant was 20 years of age, while Ben Davis was only 18. As the punishment assessed against appellant is the minimum fixed by law, this testimony could not have been hurtful to appellant; but the youth of both seems to have been considered by the jury in making the penalty so light. The matter presents no error.

[3] While J. F. Elam was testifying, he was permitted to state he had heard that his store had been burglarized. This was objected to; but as the record discloses that this was but preliminary to proving the statement of appellant above referred to, and that it was the next morning when the statement was made to him by appellant, it was admissible as fixing the time, and the bill presents no error.

[4] The special charge, peremptorily instructing the jury to find appellant not guilty, should not have been given; and the other two special charges requested were fully covered by the main charge of the court.

The court did not err in charging on who are principals under the testimony of S. D. and Roy Elam, and the charge given was an admirable presentation of the law in this respect.

[5, 6] The indictment alleged that the house burglarized belonged to J. F. Elam, while the proof showed it was the store of J. F. Elam & Son. As J. F. Elam testified he was in charge of the store, this presents no error. Branch's Criminal Law correctly states the rule to be that, where property is owned in common or jointly by two or more persons, the ownership may be alleged to be in either or all of them, citing *Samora v. State*, 4 Tex. App. 508, and numerous other cases; and in section 789 the same author states that the state is not required to prove the want of consent of a person not mentioned in the indictment, citing *Burt v.*

State, 7 Tex. App. 590, and numerous other cases.

[7] As J. F. Elam testified that appellant admitted to him he was guilty of the offense, it was not necessary to charge on circumstantial evidence. *Heard v. State*, 24 Tex. App. 111, 5 S. W. 846, and Branch's Crim. Law, § 203.

The judgment is affirmed.

QUENTES v. STATE.

(Court of Criminal Appeals of Texas. Nov. 20, 1912.)

CRIMINAL LAW (§ 1097*)—APPEAL AND ERROR—STATEMENT OF FACTS.

In the absence of a statement of facts in a criminal case, a question, raised by motion for new trial, on whether the verdict and judgment were contrary to the law and evidence, cannot be reviewed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2862, 2864, 2926, 2934, 2938, 2939, 3041, 2942, 2947; Dec. Dig. § 1097.*]

Appeal from Criminal District Court, Harris County; C. W. Robinson, Judge.

Louis Quentes was convicted of burglary, and he appeals. Affirmed.

C. E. Lane, Asst. Atty. Gen., for the State.

PRENDERGAST, J. The appellant was convicted of burglary, and given the lowest penalty.

There is no bill of exception and no statement of facts. The only question raised is by a motion for new trial, to the effect that the verdict and judgment is contrary to the law and the evidence. Of course, this cannot be passed upon without a statement of facts.

The judgment is affirmed.

CUBINE v. STATE.

(Court of Criminal Appeals of Texas. Nov. 6, 1912. Rehearing Denied Dec. 4, 1912.)

CRIMINAL LAW (§ 214*)—PRELIMINARY COMPLAINT—AMENDMENT—ERROR IN JURAT—LACK OF DATE.

Where by mistake the officer, in affixing his jurat to a criminal complaint, left off the year, the court, on request of the county attorney before trial, properly permitted the jurat to be amended to show the exact date upon which it was made.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 483½; Dec. Dig. § 214.*]

Appeal from Fannin County Court; Rosser Thomas, Judge.

Will Cubine was convicted of violating the local option law, and appeals. Affirmed.

Will Cubine, in pro. per. C. E. Lane, Asst. Atty. Gen., for the State.

HARPER, J. Appellant was prosecuted and convicted of violating the local option

law, and his punishment assessed at a fine of \$80 and 30 days' imprisonment in the county jail.

There is no statement of facts accompanying the record. Consequently there is but one question presented that we can review, and that is presented in bills of exception Nos. 1 and 2. It appears that, when complaint was filed, the officer in affixing his jurat left off the year; the jurat reading: "Subscribed and sworn to before me this 31st day of August, A. D. 190—." The county attorney, before trial, requested the permission of the court to have the officer amend and correct his jurat, which leave was granted by the court, and the officer before whom the complaint was sworn to amended his jurat to read as follows: "Subscribed and sworn to before me this 31st day of August, 1911." This was permissible, and the court did not err in permitting the jurat to be amended. *Scott v. State*, 9 Tex. App. 434; *Allen v. State* (App.) 13 S. W. 998; *Neiman v. State*, 29 Tex. App. 361, 16 S. W. 253; *Sanders v. State*, 52 Tex. Cr. R. 156, 105 S. W. 803.

The judgment is affirmed.

LYSTER v. STATE.

(Court of Criminal Appeals of Texas. Nov. 20, 1912.)

CRIMINAL LAW (§ 1101*)—APPEAL AND ERROR—DISPOSITION—FAILURE TO FILE STATEMENT OF FACTS WITHOUT FAULT.

Where a failure to file a statement of facts in a criminal cause within the time granted was due to no negligence of the appellant's counsel, but rather to a failure of the state's attorney to agree to one prepared, and his refusal to do anything in the way of getting such a statement, when requested to do so by the court, appellant was deprived of a statement without his fault, and a reversal is warranted.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3204; Dec. Dig. § 1101.*]

Appeal from Morris County Court; C. M. Henderson, Judge.

T. C. Lyster was convicted of unlawfully carrying a pistol, and appeals. Reversed and remanded.

Moore & Hart and Henderson & Bolin, all of Daingerfield, for appellant. C. E. Lane, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted of unlawfully carrying a pistol; his punishment being assessed at a fine of \$100.

The county court that tried him adjourned on the 26th of August. There was a 20-day order entered, granting time to file statement of facts and bills of exception. The statement of facts was prepared by appellant's counsel. The county attorney kept the statement of facts until the 5th of September, when he returned same to appellant's attorneys with verbal disagreement. One of the attorneys for appellant then took the statement of facts to the county judge, and ex-

plained to him the disagreement, with a request that he make up a statement of facts. This the judge did not do. The statement of facts was carried to the county judge on the 8th of September. It is further stated that the county judge did not prepare a statement of facts, but, without approving the statement of facts prepared by appellant's counsel, it was filed by the county judge with the county clerk; that appellant had nothing to do with its filing, and had no connection with it. It is further shown by the affidavit that appellant did what he could, or his attorneys for him did, to secure a statement of facts approved and filed within the time required by law. The county judge does not make an affidavit, but writes a letter, which is found with the record, and makes about this statement: That the statement in the affidavit by Hon. G. D. Hart, the party making the affidavit above referred to, in regard to statement of facts, is practically correct; that he could not, from memory, give the exact dates of the different actions in regard to the statement of facts, but he states Judge Hart brought him the statement of facts on the 8th of September, 1911, and at the same time informed him that the county attorney, who tried the case, had refused to agree with him; that immediately afterwards he saw the county attorney, and inquired of him what the trouble was, and the county attorney informed him that he did not think the facts were correctly stated, and would not agree, and also said that there was a letter that had been offered in evidence that he specially wanted in the statement. He told the county attorney that the attorneys had left a place for the letter to be copied in, and were willing that it be inserted; that he found out from the county attorney that the letter was in possession of a Mr. Jones, who lived in the country, and afterwards he got the letter himself, but too late for the statement of facts to be filed in time, as required by law. "I asked the county attorney to get this letter himself, and put it in, if that was all that was the matter with the statement. He never did; in fact, he refused to do anything in the way of getting a statement of facts, except to refuse to agree on the one as prepared by the defendant's attorneys, and as result of this the statement of facts was not filed within the time required by law." The county judge signs the letter officially.

The transcript shows the following: "Statement of facts delivered to C. M. Henderson [County Judge] September 8, 1911. Filed 1—30—1912. J. W. Cason, County Clerk Morris County, Texas." The statement of facts is not signed by the judge. Under the showing made by the affidavit of Mr. Hart, one of the attorneys for appellant, and the statement made by the county judge in his letter, the appellant was not at fault. We

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

are of opinion appellant has been deprived of a statement of facts without fault on his part. There are numerous decisions upholding this conclusion. Some of them are of very recent date. These commence with *Trammell v. State*, 1 Tex. App. 121, and end with *Rawls v. State*, 150 S. W. 431, decided at the present term of the court, and are unbroken to date.

Because appellant was deprived of a statement of facts on appeal, the judgment is reversed, and the cause is remanded.

SIMPSON v. STATE

(Court of Criminal Appeals of Texas. Nov. 20, 1912.)

1. CRIMINAL LAW (§ 1028*)—APPEAL AND ERROR—PRESENTATION AND RESERVATION OF GROUNDS—PROCEEDINGS ON MOTION TO QUASH INDICTMENT.

Where a motion to quash an indictment was verbal, and it was not argued by the defendant's attorney and the county attorney in open court, and ruled on by the court in open court, no question of its insufficiency is presented for review.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2619, 2620; Dec. Dig. § 1028.*]

2. INTOXICATING LIQUORS (§ 236*)—CRIMINAL PROSECUTIONS—GIFT OF LIQUOR TO MINOR—EVIDENCE.

In a prosecution for giving intoxicating liquor to a minor without the consent of his parent or guardian, evidence held insufficient to sustain a conviction.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 300-322; Dec. Dig. § 236.*]

Appeal from Scurry County Court; Fritz R. Smith, Judge.

Whitcomb Simpson was convicted of giving intoxicating liquors to a minor, and appeals. Reversed and remanded.

C. E. Lane, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. [1] The indictment charged appellant "with unlawfully giving and delivering, and causing to be given and delivered, and was concerned in the gift and delivery of, spirituous, vinous, malt, and intoxicating liquor to Jenkins De Shazo, the said Jenkins De Shazo then and there being a person under the age of 21 years, without the written consent of the parent or guardian of the said," without mentioning the name of the minor after the word "said." Verbal motion was made to quash the indictment. The court signs the bill with the statement that defendant made his motion orally, and same was not argued by his attorney and the county attorney in open court, and ruled on by the court in open court. We deem it unnecessary to review this question in the light of this record.

[2] The serious question is the want of sufficient evidence to justify the conviction. The alleged minor testified: "I live near

Camp Springs, in Scurry county. I was at Mr. Jones' on or about the 1st day of March, 1911; was there at a gathering. While there I met and saw the defendant. While there the defendant and I went out in the yard, and outside of the yard gate. The defendant had a bottle of whisky. He went to where there was a post near the yard gate, picked up something and held it to his mouth, and then set it down by a post and stepped back some distance. I picked up what proved to be a bottle of whisky and took a drink out of it and set it back where I found it. We were standing near each other when we drank the whisky. The defendant did not give me any intoxicating liquor. He did not tell me where I could find any. When he set whatever it was down and stepped off, I just went and picked it up and got a drink and set it back down where I found it. He did not ask me to have a drink; nor did he tell me where it was." The father of the minor testified that he was under 21 years of age, at least was on March 1, 1911, but would soon be 21 years of age. These were the only witnesses who testified in the case; defendant offering no evidence. We are of opinion, under this state of facts, that this conviction cannot be sustained.

The judgment is reversed, and the cause is remanded.

MAYFIELD v. STATE

(Court of Criminal Appeals of Texas. Nov. 20, 1912.)

GRAND JURY (§ 7*)—DISMISSAL.

An order of court directing the summoning of grand jurors for the three succeeding terms of court is without authority of law, and a prosecution commenced under an indictment returned by a grand jury summoned for the second term after the order was made must be dismissed.

[Ed. Note.—For other cases, see Grand Jury, Cent. Dig. §§ 2, 16, 21; Dec. Dig. § 7.*]

Appeal from District Court, Harrison County; H. T. Lyttleton, Judge.

Beulah Mayfield was convicted of crime, and appeals. Reversed, with order to dismiss.

Jones, Bibb & Scott, of Marshall, for appellant. C. E. Lane, Asst. Atty. Gen., for the State.

HARPER, J. In this case the court at the November term ordered the jury commissioners to summon grand jurors for the three succeeding terms of court, and appellant was indicted by a grand jury summoned for the second term after the order was made.

The questions presented on this appeal are so thoroughly discussed in the case of *Woolen v. State*, 150 S. W. 1165, decided at this term of court, we do not deem it necessary to do so again. There is no authority in law

for the court to order a jury commission to summon a grand jury for any other than the next or succeeding term of court. As said in the Woolen Case, it may be more convenient and less expensive to have a jury commission to draw jurymen for several terms of court, but until the law authorizes or sanctions that method we cannot do so.

The judgment is reversed, and the prosecution ordered dismissed.

KELLY v. STATE.

(Court of Criminal Appeals of Texas. Oct. 16, 1912. Rehearing Denied Nov. 27, 1912.)

1. CRIMINAL LAW (§ 1092*)—BILLS OF EXCEPTION—APPROVAL—TIME OF FILING.

Where the judge refused to sign defendant's bills of exceptions because not full and correct, and prepared his own bills, and defendant did not have his bills proved by bystanders, they could not be considered.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2829, 2834-2861, 2919; Dec. Dig. § 1092.*]

2. HOMICIDE (§ 166*)—EVIDENCE—ADMISSIBILITY.

In a homicide case, evidence that the sheriff had made statements as to defendant's defeat in an election, loud enough for the latter, who was 15 or 20 feet away, to hear, was admissible to show motive, where it appeared that immediately afterwards he went to where deceased, who had opposed him in the election, was sitting, and the difficulty resulted.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 320-331; Dec. Dig. § 166.*]

3. CRIMINAL LAW (§ 404*)—EVIDENCE—ADMISSIBILITY—DEMONSTRATIVE EVIDENCE.

There was no error in admitting in evidence a bullet found on the ground where the killing occurred, where the position of deceased at the time he was shot was a contested issue, on which the finding of the bullet would have a strong bearing, and the bullet was shown to be of a size that fitted defendant's pistol, and was in a pool of blood that must have come from deceased.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 873, 891-893, 1457; Dec. Dig. § 404.*]

4. HOMICIDE (§ 166*)—EVIDENCE—ADMISSIBILITY.

In a homicide case, evidence elicited by the state on cross-examination that the witness was arrested by defendant at a given time was properly admitted where its only purpose was for the fixing of the time and place, and was followed by proof by the witness that appellant at that time told the witness he would let him go if he would tell on the deceased, since it tended to show his state of mind toward the deceased.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 320-331; Dec. Dig. § 166.*]

5. CRIMINAL LAW (§ 472*)—EVIDENCE—OPINIONS.

In a homicide case, where defendant contended that deceased had cut him immediately before the shooting, an answer by a qualified witness to the question, "If a man so cut should get up and walk 15 feet and turn around, would the presence of blood have appeared on his face?" was admissible.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1059; Dec. Dig. § 472.*]

6. CRIMINAL LAW (§ 608*)—EVIDENCE—ADMISSIBILITY.

Where the defendant filed an application for a continuance, naming a number of witnesses, which the court overruled, it was an error at the close of the evidence to allow the state to show the presence of the witnesses in court in order to preclude a new trial or reversal for denial of the continuance.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1364-1368; Dec. Dig. § 608.*]

7. WITNESSES (§ 392*)—IMPEACHMENT—CONTRADICTORY STATEMENTS.

Where defendant's witness on cross-examination was asked if he had not at the prior term made an affidavit to secure a change of venue for defendant, and he at first denied, but subsequently admitted, doing so, but denied he knew what was in the application, it was proper to show that in his affidavit he had stated he had "been fully informed of and had read the contents of the application and that the facts stated therein were true," since it went to his credibility as a witness.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1249-1251, 1257; Dec. Dig. § 392.*]

8. CRIMINAL LAW (§§ 419, 420*)—EVIDENCE—ADMISSIBILITY—HEARSAY.

In a homicide case, it was not error to refuse to permit defendant to testify that C. had told him that he had seen two cattle in S.'s brand, and not the brand of deceased, in a certain pasture; it appearing that deceased had sold cattle to the man who placed the cattle in the pasture, the testimony being hearsay.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 973-983; Dec. Dig. §§ 419, 420.*]

9. WITNESSES (§ 347*)—CREDIBILITY—CONDUCT OF WITNESS.

Where a witness for defendant testified, among other things, that deceased had confessed to him that he had stolen a head of cattle, the state could properly prove that deceased was not indicted for the offense, and that the witness was a member of the grand jury that investigated the case, and had not called the attention of the grand jury to the fact of such confession, since it affected his credit.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 1134; Dec. Dig. § 347.*]

10. WITNESSES (§ 277*)—CROSS-EXAMINATION OF ACCUSED—EVIDENCE—PRIOR CONVICTION.

Though, when a former crime is admitted, the circumstances attendant upon it cannot be gone into, yet when a defendant himself brings it into a case and seeks to arouse sympathy for himself by showing that he was led into crime as a mere boy by older persons, then the state may show the real facts, and, if on cross-examination of such defendant it develops that defendant committed another crime, which the state's attorney immediately asked the court to instruct the jury not to consider, there is no error.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 925, 979-984; Dec. Dig. § 277.*]

11. CRIMINAL LAW (§ 824*)—MURDER IN THE SECOND DEGREE—INSTRUCTIONS.

The words "mitigate, excuse or justify," used in a charge defining murder of the second degree, have a well-understood meaning, and, in the absence of a request, it is not necessary for the court to define them.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1996-2004; Dec. Dig. § 824.*]

2. HOMICIDE (§ 309*)—MANSLAUGHTER—INSTRUCTIONS.

Where the state showed only a case of murder, and the defendant as justification alleged an assault with a knife by deceased, and threats on occasions other than when the assault was made, a charge on manslaughter which dealt only with such assault was proper, since every charge must be viewed in the light of the evidence adduced in the case.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 649-656; Dec. Dig. § 309.*]

13. HOMICIDE (§ 39*)—MANSLAUGHTER—ADEQUATE CAUSE.

Manslaughter is predicated upon adequate cause, and, unless such cause exists, the homicide will not be reduced from murder, although committed under the influence of sudden passion, rendering the mind incapable of cool reflection.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 59-61; Dec. Dig. § 39.*]

14. HOMICIDE (§ 116*)—SELF-DEFENSE—THREATS.

Threats of themselves alone will not justify a killing, but if deceased raised from his seat with a knife, and defendant thought he was going to carry into effect previous threats to kill him, the right of self-defense arose.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 158-163; Dec. Dig. § 116.*]

15. CRIMINAL LAW (§ 761*)—INSTRUCTIONS—ISSUES—HOMICIDE.

A criticism of an instruction on self-defense, in that it "required the jury to believe the threats were made," is without merit, where it was not disputed that such threats were made.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1731, 1738, 1754-1764, 1771; Dec. Dig. § 761.*]

16. HOMICIDE (§ 116*)—MANSLAUGHTER—THREATS.

Threats of themselves alone will not reduce a killing to manslaughter, but, though an assault by deceased later was such as would not reasonably cause one to believe that he was in danger of losing his life or of serious bodily injury, yet the conduct at the time was such, considering the previous threats, as to cause such a degree of anger or terror as to render the mind incapable of cool reflection, the offense would be only manslaughter.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 158-163; Dec. Dig. § 116.*]

17. HOMICIDE (§§ 300, 340*)—JUSTIFIABLE HOMICIDE—ABANDONMENT OF DIFFICULTY—INSTRUCTIONS.

In an instruction on the abandonment of the difficulty, the use of the words "in good faith abandoned," etc., was improper, in that the jury might infer that the defendant intended at some future time to renew the difficulty, but it is harmless error in a case where there is no evidence from which such an inference could be drawn.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 614-632, 715-720; Dec. Dig. §§ 300, 340.*]

18. CRIMINAL LAW (§ 728*)—REMARKS OF COUNSEL—REQUESTS FOR INSTRUCTION.

In the absence of a requested charge, remarks of the counsel for the state excepted to present no error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1699-1691; Dec. Dig. § 728.*]

19. HOMICIDE (§ 116*)—JUSTIFIABLE HOMICIDE—PROVOCATION—THREATS.

Threats made by one against another with the intention of provoking a difficulty on that

occasion would not justify the other in killing him on another and different occasion before an act is done or word spoken.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 158-163; Dec. Dig. § 116.*]

Appeal from District Court, De Witt County; John M. Green, Judge.

Henry Kelly was convicted of murder in the second degree, and he appeals. Affirmed.

Proctor, Vandenberg & Crain, of Victoria, S. C. Lackey, of Cuero, and W. T. Bagby, of Hallettsville, for appellant. Davidson & Bailey and Waldeck & Hartman, both of Cuero, and C. E. Lane, Asst. Atty. Gen., for the State.

HARPER, J. Appellant was indicted, charged with murder, tried and convicted of murder in the second degree, and his punishment assessed at five years' confinement in the penitentiary.

Appellant's first assignments relate to the action of the court in overruling his application for a change of venue. It appears from the record that on the last day of the term at which appellant was tried he presented to the court for approval his bills of exception, in regard to the overruling of this plea, and the court on that day indorsed thereon a refusal of same because they were not full and correct bills, and stated he would prepare and file his own bills, and later the court did make and file bills of exception. Appellant insists we should consider his bills. Read in the light of the bills prepared and filed by the court, it is manifest that the bills prepared and presented by appellant were not complete, and, as presented in these bills, there is no error in overruling the application for a change of venue.

[1] Appellant is not entitled to have his bills considered, the law pointing out the method for him to pursue in case the court declines to approve a proper bill. When the court rejected the bills on the day presented on the grounds he did, appellant should have proven them by bystanders, if they were correct, and, when he fails to do so, we will consider the bills prepared by the court.

[2] There was no error in permitting witnesses to state what the sheriff said in regard to the result of the election. The witnesses testify that appellant was in 15 or 20 feet of the sheriff when he made the statement, and the statement was made loud enough for a man to hear it at that distance. The evidence is conflicting as to whether or not defendant knew he had been defeated for constable at the time of the difficulty. The defendant's evidence would present the theory he thought he was elected by a small majority; while the evidence for the state would show that he knew he was defeated,

in fact had so stated himself to a witness, and that he went shortly thereafter to a point where deceased was sitting and the difficulty resulted. It was a material inquiry as tending to show motive, and all evidence which would tend to show that defendant knew the result would be admissible.

[3] There was no error in admitting in evidence the bullet found in the blood on the ground where the killing occurred. The bullet that killed deceased entered the right breast of deceased between the nipple and collar bone, passed through and made its exit on the left side. The doctor testified that, if not deflected, it passed through the lungs, and near or through the heart. The position of deceased at the time he was shot was a contested issue, and the finding of this bullet at the place it was found would have a strong bearing on this issue. The bullet was shown to be of a size that fit defendant's pistol, and was in a pool of blood that must have come from deceased.

[4] While Wm. Hoffman was on the witness stand he was permitted to state that he had been arrested by appellant at a given time charged with theft of cattle. This was objected to by appellant, and, if this was all his testimony, the objection would be well taken. State's counsel stated this was only for the purpose of fixing time and place, and followed it with proof by the witness that appellant at that time made Hoffman the proposition if that, "if he would tell on George Thomas (deceased), he (appellant) would turn him loose." Under the record in this case this testimony was decidedly admissible, for the evidence would show that the cause of the trouble between appellant and deceased was occasioned by appellant's insistence on prosecuting deceased for cattle theft, and, if he were willing to release another person charged with the same character of offense, if he would give evidence against deceased, it had a tendency to show the state of his mind towards deceased, and who really was in fact responsible for the bad state of feeling between the two men (theretofore friends), and which finally culminated in the death of one of them. The state was further permitted to show that this witness had been summoned by defendant. Taking into consideration the cross-examination of this witness, this presents no error.

[5] Defendant, when he arrived at home, called Dr. Hartman to attend the wound on his face. Appellant's contention was that this wound was inflicted by deceased just prior to the time he shot him. The state's contention was that deceased had no knife in his hand, and did not cut appellant, and that he was not cut at the time he left the scene of the difficulty. Dr. Hartman testified to the nature and character of the wound, and he then was asked the question: "If a man were lying on the ground, and that

wound inflicted while in that position, and after the infliction of the wound the man drew a pistol and fired a shot, and then got up and walked 10 or 15 feet and turned and looked back, would the presence of blood have appeared on his face at that time?" To which question the witness answered that it would, and enough would have flowed from this wound for it to have gotten down on his clothing. This testimony was objected to by appellant, and a proper bill reserved. Dr. Hartman had qualified as an expert, and stated he was a graduate of a well-known medical college, explained the wound and the blood vessels necessarily severed, and the knowledge he demonstrated he possessed rendered the testimony admissible.

[6] Defendant filed an application for a continuance, naming a number of witnesses, which was by the court overruled. At the close of the testimony, the state proved by the sheriff that the presence of all these witnesses had been secured but one, and the testimony of the wife of this absent witness was introduced to show that he was in such a mental condition, if present, he would not be a competent witness. When the state offered to prove the presence of these witnesses, defendant objected, when the state's counsel stated his only purpose was to prove their presence in answer to the application for a continuance. It was merely shown they were present. This presents no error. If the counsel thought it would injure his client to merely show their presence, if he had requested the retirement of the jury, doubtless the court would have granted the request. Since appellant had filed an application for a continuance, on account of their absence, it was necessary to make it known to the court that they were present, otherwise, in case of conviction, the court might feel compelled to grant a new trial, or this court reverse the case, when, in fact, no just ground for complaint would exist if it were known that the witnesses attended court, and yet were not called by appellant. The application for continuance was not introduced before the jury, nor the witnesses called to the stand. The sheriff was merely permitted to state they were in attendance on court, without stating who had them summoned.

[7] When the witness W. S. Smythe was on the stand and had testified to material facts in behalf of defendant, on cross-examination he was asked if he had not, at the prior term of court, made an affidavit to secure a change of venue for defendant. He at first denied doing so, but subsequently admitted doing so, but denied he knew what was in the application made by appellant. The state was permitted to show that in his affidavit he had stated he had "been fully informed of the contents of and had read the application for a change of venue filed by appellant, and that the facts therein stated

were true." This testimony properly went to the interest and bias of the witness, and would aid the jury in passing on his credibility, and was so limited by the court in his charge.

[8] There was no error in refusing to permit appellant to state while on the witness stand that Mr. Corcoran had told him that he had seen two cattle in Steinemann's brand (and not the brand of deceased) in a certain pasture, it appearing that deceased had sold cattle to the man who placed the cattle in the pasture. In so far as this record discloses, Mr. Corcoran was living and within reach of the process of the court, and, if this testimony was desired, he should have been summoned and placed on the stand. The testimony offered was hearsay and inadmissible.

[9] Marcus Morrow, a witness for defendant, had testified in behalf of defendant, and, in addition to testifying to threats made by deceased, had testified that deceased, Thomas, had admitted to him that, in fact, he had stolen the one head of cattle, and got him to go and see Joe Bennett; that deceased had told him that Bennett was the only man who could hurt him, and wanted him, witness, to find out if Bennett was going to tell it. The state proved that deceased was not indicted for the offense; that witness Morrow was a member of the grand jury that investigated the case, and had not called the attention of the grand jury to the facts he knew (the alleged confession of deceased), and had not had Bennett summoned before the grand jury. As a person who becomes a member of the grand jury is required to take an oath that he will leave no person "unpresented for love, fear, favor, affection or hope of reward, but shall present things truly as they come to his knowledge," this testimony was admissible as affecting the credit to be given by the jury to his testimony, and the court so limited it.

[10] While the state was developing its case, on cross-examination, appellant elicited the fact that deceased had used abusive epithets towards him, and said he was an ex-convict. He also introduced witnesses to show that deceased had approached them and requested them not to vote for appellant for the office he was seeking, and had told such witnesses that appellant was an ex-convict, and some had said appellant was a double ex-convict. Appellant when he took the stand in his own behalf testified: That he was raised in De Witt county, and when he was about 18 years of age he left with three grown men, and went to Harris county, and was subsequently arrested charged with committing the offenses of theft of a horse, and being concerned in a conspiracy to rob a train. That, on advice of friends, he had pleaded guilty to both offenses. He further stated that while in the penitentiary he was granted so much time "for good behavior." It is thus seen that appellant brought into the case the fact he was an ex-convict and

in extenuation claimed while he was a young man he had been led astray by older men, and had made a good prisoner. The state on cross-examination attempted to show that he knew the character of the men when he joined them, and by going into the details, as far as appellant was concerned, to show there were no extenuating circumstances. As appellant brought these offenses, and his conviction of them into the case, and then to soften the effect of such evidence, and to really turn it so that it would create sympathy for him in the minds of the jury, there was no error in the court permitting the state to show the real circumstances by cross-questioning appellant. It is true that, when testimony of a former crime is admitted, the circumstances attendant upon it cannot be gone into. That case will not be tried. But when a defendant himself brings it into a case, and seeks to arouse sympathy for himself thereby, then the state will be permitted to show whether or not under the real facts he is entitled to such sympathy. He having injected the issue, he cannot object that the state attempts to meet it. However, in this cross-examination, the state developed that appellant had at that time stolen another horse in Lavaca county, and for which he had never been prosecuted. State's counsel at once stated to the court that it had not sought to develop that fact and the answer was a surprise to them, and they asked the court to instruct the jury not to consider this fact in their deliberations, which request the court promptly complied with, and then in his charge again instructed the jury they could not consider that fact for any purpose. Under these circumstances, we do not think the court erred in permitting this cross-examination of appellant.

This disposes of all the bills of exception in so far as they relate to the testimony, but a number of exceptions were taken to the charge of the court, and a brief résumé of the testimony may render the opinion more intelligible.

In 1908 appellant was elected constable of Cuero precinct, and at that time deceased was a warm supporter. In 1909 appellant's half-brother rented land from deceased, and during that year trouble arose between them. A portion of the testimony would indicate that the relations became strained also between appellant and deceased over this matter, but no real bitterness was manifested until later, when appellant learned some facts that led him to believe that deceased had stolen some cattle from Mr. Steinemann, and, when he communicated what he had heard to Mr. Steinemann, the latter swore out a search warrant, and the sheriff, appellant, and Mr. Steinemann went to deceased's pasture and searched it, finding none of Steinemann's cattle in deceased's pasture, but in an adjoining pasture found one head in Steinemann's brand and which Steinemann claimed. Deceased had purchased some cat-

tle from Steinemann on two occasions, and also claimed this animal. Deceased was arrested, charged with theft of this animal. An examining trial was held and deceased discharged. He claimed that appellant did not swear the truth on this trial, and the feeling between the two men became intense. Appellant became a candidate for re-election, and deceased vigorously opposed him, and it is said that during the campaign used abusive epithets, charged him with being an ex-convict, and some witnesses testified that deceased said, if appellant was elected, it would do him no good, for he would kill him. Appellant, on the other hand, was also active; went to Victoria and voluntarily went before the grand jury in an effort to have deceased indicted; went to Duval county in an attempt to fasten a charge of theft against deceased. In these efforts he failed, but he also at times made remarks about deceased uncomplimentary. On one occasion they met in a saloon, high words ensued, and a personal combat followed. Election day, July 23, 1910, both were on the streets of Cuero, and after the polls closed both were around the courthouse, but finally deceased took a seat on some steps to a business house in the town with four or five citizens of the town. While seated there appellant approached them; got out of his buggy, and walked up to them with a buggy whip in his hand. He says to talk to his uncle (who was in the crowd) about the election. As he approached, he says deceased raised up with a knife in his hand, when he reversed the whip in his hand and struck deceased twice, when Mr. Pridgen interfered and pushed him back. He says he got loose and struck at deceased again, when deceased clenched him, and he fell with deceased on him, and while in that position deceased inflicted a dangerous wound on him with his knife, when he pulled his pistol and shot him. The state's witnesses would have appellant jumping out of his buggy, advancing rapidly on deceased, who was sitting down with nothing in his hands, striking him twice with the butt end of the whip, without a word being spoken; that he was then pushed off, when he ran around and got back to deceased, again striking him with the whip; that deceased then got up and started toward appellant, when appellant fell over an obstruction in the street, and deceased fell over him; that appellant raised up on his elbow and fired at deceased while he was on the ground, killing him. Numerous threats are shown, some by both men, and the state's contention is that, learning of his defeat, appellant went direct to deceased, attacked him with his whip, and, when deceased resented, appellant shot and killed him.

[11] The first complaint of the charge is that the court should have defined the meaning of the words "mitigate, excuse, or justify" in the charge defining murder of the second degree. These words have a well-

understood meaning, and, in the absence of a request, it was not necessary for the court to define them, and this paragraph is drawn in language frequently approved by this court. *Barton v. State*, 53 Tex. Cr. R. 445, 111 S. W. 1042; *McGrath v. State*, 35 Tex. Cr. R. 423, 34 S. W. 127, 941; *Smith v. State*, 45 Tex. Cr. R. 553, 78 S. W. 694; *Carson v. State*, 57 Tex. Cr. R. 398, 123 S. W. 590, 136 Am. St. Rep. 981; *Harris v. State*, 8 Tex. App. 90.

[12] Appellant also complains of the charge on manslaughter. Every charge must be viewed in the light of the evidence adduced in that case; and while in some of the opinions you find criticisms of a charge which are just and proper under the facts in that case, yet these would be wholly inapplicable to a different state of facts. What does defendant rely on in this case to raise the issue of manslaughter? The state's evidence would make a case of murder, embracing almost all the elements of express malice, without excuse or mitigation at the time of the killing. The appellant says the difficulty occurred as follows: Says he drove over to the place of the difficulty to see his uncle, Mr. Goodson; that he did not know deceased was there. He desired to ask his uncle if he had any returns from the election, and adds: "As I walked around to see Goodson, Thomas was there and he came up with that knife, and from the threats I heard and the abuse I heard I thought he was going to carry out the threats he made, and I hit him with the whip. I hit him to keep him off. I do not know how many licks I struck him—some two or three. He had not risen to any great extent, but was in the act of rising. Then Mr. Pridgen tried to shove me off, and I pulled my pistol out. When Mr. Pridgen turned me loose, I put my pistol back, and hit at Thomas again with the whip. Some one stepped between us and I started to my buggy, and Thomas ran around to the right and ran into me, and cut at me with a knife, and I jerked back and fell, and Thomas got on me. During the difficulty he cut me in the face after I fell and there were some other cuts on my coat and shirt, and I then shot him." This briefly gives appellant's contention as he tells it. The court instructed the jury: "By the expression 'adequate cause' is meant such as would commonly produce a degree of anger, rage, resentment, or terror in a person of ordinary temper sufficient to render the mind incapable of cool reflection. The following are deemed adequate causes: (1) An assault and battery by deceased, causing pain or bloodshed. (2) A serious personal conflict in which a great injury is inflicted by the person killed by means of a weapon or by means of great superiority of personal strength although the person guilty of the homicide were the aggressor, provided such aggression was not made with intent to bring on a conflict for the purpose of killing. Any condition or circumstance which

is capable of creating and does create sudden passion, such as anger, rage, sudden resentment or terror, rendering the mind incapable of cool reflection, whether accompanied by bodily pain or not, is deemed adequate cause. And where there are several causes to arouse passion although no one of them alone might constitute adequate cause, it is for you to determine whether or not all such causes combined, might be sufficient to do so." This apparently is applying the law to the facts made by the testimony, and, if adequate cause existed in the case, it is made by this evidence, and, if the jury believed any part of it, they would necessarily find under it that deceased did make an assault causing pain and bloodshed; therefore the complaints of this charge would not present material error.

[13] Our decisions hold that manslaughter is predicated upon "adequate cause," and, unless adequate cause exists, the homicide will not be reduced from murder, although committed under the influence of sudden passion, rendering the mind incapable of cool reflection. *McKinney v. State*, 8 Tex. App. 626; *Hill v. State*, 11 Tex. App. 456; *Neyland v. State*, 13 Tex. App. 536; *Clore v. State*, 26 Tex. App. 624, 10 S. W. 242; *Blackwell v. State*, 29 Tex. App. 195, 15 S. W. 597; *Treadway v. State*, 144 S. W. 686, 687.

[14] If, when appellant approached deceased, he began to arise with the knife in his hand, and appellant thought he was about to carry the threats into execution, this would render appellant justifiable in his conduct. On this issue the court charged the jury: "If you believe that at the time of the killing, if any, the deceased by his acts and conduct, or by his acts coupled with his words, if any, reasonably induced the defendant to believe that he was about to attack the defendant with a deadly weapon, or a weapon which would probably cause the defendant's death or some serious bodily injury; or if by the acts of the deceased, or his acts coupled with his words, if any, it reasonably appeared to defendant at the time from his standpoint that the deceased was then about to attack him, defendant, with a deadly weapon, or a weapon which would probably cause the defendant's death or some serious bodily injury, and if the same was reasonably calculated to create in the mind of the defendant, and did create in his mind a reasonable expectation of fear of death or some serious bodily injury, and you further believe that the defendant then and there moved and actuated by such reasonable expectation or fear of death or serious bodily injury, if any, shot and killed the deceased, then, under such circumstances, the same would be in his lawful self-defense, and, if you so believe from the evidence, you will acquit the defendant; and if the deceased was armed at the time he was killed, and was making such attack on defendant, and

if the weapon used by him and in the manner of its use were such as were reasonably calculated to produce death or serious bodily harm, then the law presumes the deceased intended to murder or aimed to inflict serious bodily injury upon the defendant." The court followed this paragraph with the following charge: "Where a defendant accused of murder seeks to justify himself on the ground of threats against his own life, he may be permitted to introduce evidence of the threats made, but the same shall not be regarded as affording a justification for the offense, unless it be shown that at the time of the homicide the person killed by some act then done manifested an intention to execute the threats so made. If you believe from the evidence in this case that the deceased did make such threats against the life of the defendant, and it reasonably appeared to the defendant at the time of the killing that deceased made such an act or demonstration as reasonably to produce in the mind of defendant a belief that deceased then and there intended to take the life of defendant, or do him some serious bodily harm, you will acquit; and if the defendant at the time of the killing did reasonably believe from some act or demonstration then and there made by the deceased, as it reasonably appeared to him, the defendant, judging from his own standpoint that the deceased did then and there intend to kill defendant or to do him some serious bodily harm, then you should acquit the defendant. You are instructed that it is not essential to the right of self-defense that real danger should exist. If from the defendant's standpoint, taking into consideration all the facts and circumstances surrounding the parties, it reasonably appeared to the defendant that he was in danger of death or serious bodily injury, under the law, he had the right to defend against such apparent danger to the same extent as if the danger were real."

[15] This we think properly presented the case as made by the testimony offered in behalf of the defendant. The criticism that it "required the jury to believe the threats were made" is without merit, as this was not a contested issue in the case. No jury could be misled in that respect for the proof was beyond dispute that ill-feeling existed, and deceased had made threats.

[16] To justify, however, there must have been manifested at the time in some way an intention to carry the threats into execution or cause defendant to so believe. Threats of themselves alone will justify no one in slaying a person, nor reduce the offense to manslaughter. If at the time of the fatal difficulty, by his acts or conduct, he leads one to believe that he is about to put the threats into execution and thereby cause the death of the person threatened, or do him some serious bodily injury, the right of self-defense arises, but if the acts and conduct

are not such that would reasonably cause one to believe that he was in danger of losing his life or suffering serious bodily injury, yet the acts or conduct at the time were such, taking into consideration the previous acts and conduct of deceased, as to cause a degree of anger, rage, resentment, or terror as to render the mind incapable of cool reflection, the offense would be only manslaughter. In this case, however, there were no acts or conduct on the part of deceased at the time of the killing as to cause anger, or enrage defendant, unless it was the assault, and this was fully covered by the charge of the court. As before said, if deceased attempted to arise with the knife described in the evidence drawn in a threatening attitude, this would present the issue of self-defense, and not manslaughter, and the court fully covered both phases of the case in his charge. If, in addition to testifying that deceased attempted to arise with a knife in his hand, appellant had also shown that deceased used language, or was guilty of conduct, that would enrage a man of ordinary temper, his criticism of the charge might be well taken, but as it is not attempted to be shown that deceased said a word, or did any other act before the difficulty began than to attempt to arise with a knife in his hand (and this is disputed by all the testimony, except that of defendant and his uncle), the criticism of the charges on manslaughter and self-defense are without merit. In addition to the charges on manslaughter and on self-defense, the court also instructed the jury on the law of provoking the difficulty in language frequently approved by this court and in as favorable light as the law authorizes. White's Ann. Pen. Code 1911, art. 708, provides, if a person provokes a contest with the apparent intention of killing or doing serious bodily injury to the deceased, the offense does not come within the definition of manslaughter. The state's evidence would have defendant drive up in front of deceased, get out of his buggy, reverse ends of his buggy whip, directly walk up to where deceased was sitting, and strike him over the head with the butt end of the whip, the lick being so severe as to part the skin of the scalp, deceased at the time doing or saying nothing. This would show a manifest intention to do serious bodily injury, if not to kill, and the court correctly applied the law to the evidence. On the other hand, defendant denied this state of facts, and said deceased committed the first overt act by drawing his knife and raising his arm in a threatening attitude, and the court also fully charged on this theory, among other things telling the jury: "But if you do not find from the evidence and beyond a reasonable doubt the existence of the facts which would qualify the defendant's perfect right of self-defense under the law as it is given you in this paragraph of

the charge, you will decide the issue of self-defense in accordance with the law on that subject contained in paragraph 19 of this charge, and without reference to the law on the subject of provoking the difficulty."

[17] All the other criticisms of the charge of the court are equally without merit, unless it be those paragraphs relating to abandonment of the difficulty. In this paragraph of the charge the court applies the law if defendant "in good faith" abandoned the difficulty. The use of these words in a charge on abandoning the difficulty has been frequently condemned by this court. See *Renow v. State*, 49 Tex. Cr. R. 281, 92 S. W. 801; *Thornton v. State*, 65 S. W. 1105; *Wills v. State*, 22 S. W. 969. In these cases it is held erroneous, in that the jury might infer that the defendant intended at some future time to renew the difficulty, if not at that time. In this case there is no evidence and circumstances from which the jury could draw such an inference. If appellant turned to go to his buggy, which he claimed was an abandonment of the difficulty, there was nothing said or done at this time, nor at any time during the difficulty, that could or would probably lead the jury to believe that at some future time he might renew it, so as applicable to the evidence in this case, if error, it would be harmless error. However, we do not believe under the evidence that this issue was raised and the charge in this respect was more favorable to defendant than he was entitled. The evidence shows one continuous difficulty. As appellant himself states it, when he struck deceased two or three times with his whip, Mr. Pridgen shoved him back. When released, he again renewed the attack, a third person getting between them. He says he then turned to go to his buggy, when deceased ran into him, and he stumbled and fell, deceased getting on him, when he shot; the whole transaction taking place in a few seconds of time. The state's evidence would have appellant pointing out deceased just a few seconds before the difficulty, and saying, "If he was defeated, deceased was the big belled son of a bitch that done it;" and, when he learned he was defeated, going direct to the place where Thomas was sitting, and before a word was uttered began an assault on him, which transaction was continuous, except when interrupted by others, until the fatal shooting, the distance from the place of beginning to where deceased lay not being over 15 to 20 feet. This question is discussed at length in the case of *Roberts v. State*, 30 Tex. App. 291, 17 S. W. 450, and cases there cited, and the rule laid down is: "But it is a rule, equally well settled and established, that, though the defendant may have provoked the conflict, yet if he withdraws from it in good faith and clearly announces his desire for peace, then, if he be pursued, his right of self-defense

revives. The further rule is that the conduct of the deceased relied on to sustain such a defense must have been so marked in matter of time, place, and circumstances as not only clearly to evince the withdrawal of accused in good faith, but such also as fairly to advise his adversary that his danger had passed, and make his conduct thereafter the pursuit of vengeance rather than measures to repel the original assault." In this case there was nothing in the acts or conduct of the defendant, nor the circumstances of the case, to apprise the deceased that he had withdrawn from the difficulty; and, if the witnesses present are to be given credence, there was nothing said or done to apprise them the difficulty was over in so far as appellant was concerned, consequently the matter complained of in this paragraph of the court's charge would not present reversible error, yet we would not be understood as giving our sanction to the phrase in the charge that the abandonment must be "in good faith." In a proper case, calling for a charge in abandonment of the difficulty, it is better that these words not be used, although in cases it has been held not to be error. *Puryear v. State*, 56 Tex. Cr. R. 240, 118 S. W. 1042.

[18] In regard to the remarks of counsel for the state excepted to, no charge was requested, and, in the absence of a requested charge, it would not present error. *Clayton v. State*, 149 S. W. 119, and cases there cited. However, if a request had been made, we would not feel authorized to hold that the remarks complained of were not legitimate under the evidence.

[19] The two special charges requested were properly refused. It is not the law of this state that if a person makes threats against another on one occasion, even if done with the intention of provoking a difficulty on that occasion, on another and different occasion such threats would justify one in slaying his adversary before an act is done or word spoken on such subsequent occasion.

We have carefully considered all the assignments. This is a voluminous record, but we have carefully read and digested it to understand the various contentions advanced by both the state and defendant, and, after doing so upon mature reflection, we are of the opinion no such error is presented as should cause a reversal of the case, and it is therefore affirmed.

COGGINS v. STATE

(Court of Criminal Appeals of Texas. Nov. 20, 1912.)

1. BURGLARY (§ 41*)—PROSECUTIONS—EVIDENCE—SUFFICIENCY.

In a prosecution for burglary, evidence held sufficient to sustain a conviction.

[Ed. Note.—For other cases, see *Burglary*, Cent. Dig. §§ 94-103, 109; Dec. Dig. § 41.*]

2. CRIMINAL LAW (§ 792*)—TRIAL—INSTRUCTIONS—APPLICABILITY TO EVIDENCE.

Where the evidence showed that two persons participated in the offense, a charge on the law of principals was applicable.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1818-1820; Dec. Dig. § 792.*]

3. CRIMINAL LAW (§ 824*)—TRIAL—CHARGES—SPECIAL REQUEST.

In a prosecution for burglary, where evidence of explanations made by defendant as to his possession of the alleged stolen property was not objected to when offered, and not made the subject of a motion to strike, a charge on the issue of whether defendant was under arrest at the time he made the explanation was unnecessary; no special charge having been requested.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1996-2004; Dec. Dig. § 824.*]

4. CRIMINAL LAW (§ 1109*)—APPEAL—BILLS OF EXCEPTION.

An appellant who accepts a bill of exception as qualified is bound by its qualification.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 2897, 2898, 2900, 2902, 3204; Dec. Dig. § 1109.*]

5. CRIMINAL LAW (§ 1090*)—APPEAL—BILL OF EXCEPTIONS—RESERVATION.

Where the record contains no bills of exception to the admission of testimony, the error in its admission cannot be reviewed.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 2653, 2789, 2803-2822, 2825-2827, 2927, 2928, 2948, 3204; Dec. Dig. § 1090.*]

6. CRIMINAL LAW (§§ 763, 764*)—TRIAL—INSTRUCTIONS—COMMENT ON EVIDENCE.

In a prosecution for burglary, where the state introduced evidence of defendant's explanation of the possession of the stolen property, a charge authorizing acquittal if the property was purchased as defendant stated, or if the jury had a reasonable doubt as to his so purchasing it, is not improper as a comment on the evidence.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1731-1748, 1752, 1768, 1770; Dec. Dig. §§ 763, 764.*]

7. CRIMINAL LAW (§ 1173*)—APPEAL—REVIEW—HARMLESS ERROR.

In a prosecution for burglary, where the state introduced evidence of defendant's explanation of his possession of the property alleged to have been stolen, and the falsity thereof, the failure to charge that defendant should be acquitted if the property was purchased as he stated, or if the jury had a reasonable doubt as to that fact, was harmless, where the entire evidence amply showed defendant's guilt.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 3164-3168; Dec. Dig. § 1173.*]

Appeal from District Court, Comanche County; J. H. Arnold, Judge.

Dave Coggins was convicted of burglary, and he appeals. Affirmed.

C. E. Lane, Asst. Atty. Gen., for the State.

HARPER, J. Appellant was prosecuted and convicted of burglary, and his punishment assessed at two years' confinement in the penitentiary.

[1] The evidence discloses that R. L. Graham's smokehouse was burglariously enter-

ed and a side of bacon stolen; at the same time and place a box of "honest snuff" was also taken. It rained the night of the burglary, and tracks were found around the smokehouse and buggy shed. These tracks were measured, and were trailed or followed some three or four miles to a path leading to the tent of appellant; the tracks corresponded with known tracks made by appellant. Along the trail, the wrapper from the snuff was found. In the tent of appellant was found a piece of bacon and a bottle of "honest snuff." Appellant, when approached, said he had purchased the meat from George Noel about two weeks prior to this time. Noel and his wife testified appellant had gotten no meat from them at the time named by him, but some six weeks or more prior to this time they had let appellant have a small piece of bacon. Graham had killed and cured the meat in his smokehouse, and he testified it was meat from a black Poland China hog. The meat found in appellant's tent was home cured, and had evidences that it was meat of a black hog. The meat was carried to Graham's, and the other side of bacon was cut just as the piece found in appellant's possession, and witnesses testify it corresponded exactly in looks, streaks of fat and lean, and identified it as positively as it is possible to identify this character of property. The appellant offered no explanation of his possession of a box of snuff of the make, character, and kind of that stolen. Appellant earnestly insists that the evidence is insufficient to sustain the conviction. The court gave a full and fair charge on circumstantial evidence, and we are not prepared to hold, in the face of the finding of the jury and the conclusion of the trial judge, that the verdict is unauthorized. Especially is this true when we find that the explanation of his possession of the meat found in his tent was proven to be untrue.

[2] There is no complaint of the charge on principals, but it is insisted that such charge was not called for. The evidence clearly discloses that two persons participated in the offense, and the court properly applied the law to the testimony.

[3, 4] There was no bill of exceptions reserved to the officer and others testifying to the explanation of defendant at the time he was accosted by the officer, but appellant presents a bill in which he states he objected to the "charge of the court because the charge failed and omitted to distinctly instruct the jury on the issue of whether or not appellant was under arrest at the time he made the statement. This bill does not disclose that the testimony was objected to on that or any other ground at the time it was offered, there is in the record no motion to strike it

out, and no special charge requested in regard thereto, and, under such circumstances, it was not necessary for the court to charge thereon. In addition to this the court, in approving the bill, certifies that appellant was not under arrest at the time he made the explanation. Appellant accepts this bill and files it, and, as thus qualified, it presents no error. Again appellant complains of the remarks of the court to the jury, after they had reported they could not arrive at a verdict. The court in approving the bill, states: "The language I used was substantially that used by the court in the Dow Case, 31 Tex. Cr. R. 278 [20 S. W. 583], and also substantially the same language used by me in Nesbitt v. State, 144 S. W. 944." In the Dow Case Judge Davidson collates the authorities and discusses the question here presented, and, under the rule announced in that decision, this bill presents no error.

[5] The grounds in the motion for new trial complaining of the introduction of testimony cannot be reviewed by us, as no bills of exception were reserved; at least none are presented in the record.

[6, 7] The only serious question in the case is presented in the sixth ground of the motion for new trial, and third bill of exceptions—the failure of the court to charge on defendant's explanation of possession of recently stolen property. In approving the bill, the court states: "The defendant tried the case on the theory that the meat found at his camp was not Graham's meat, and I felt that to charge the jury on explanation of recently stolen property would prejudice his rights and might be construed as an intimation that the court believed the meat found was Graham's meat." We might say that it would have been proper for the court to have instructed the jury that if they believed that the meat found in his camp was purchased from Noel, or had a reasonable doubt as to defendant having so purchased it, to acquit him, and this would have given the jury no intimation as to the court's belief in the matter. Mathews v. State, 32 Tex. Cr. R. 357, 23 S. W. 690. And in this case, if on the trial defendant had offered any proof that he had so purchased the meat, we would feel called upon to reverse the case. On the other hand, the defendant did not offer testimony on this issue, but the state introduced Noel and his wife and proved that the explanation was absolutely untrue; and such being the condition of the record, while it would have been proper for the court to have submitted the issue, yet it is not such error as necessitates a reversal.

The circumstances, taken all together, support the verdict, and the judgment is affirmed.

WAGONER v. STATE.

(Court of Criminal Appeals of Texas. Nov. 20, 1912.)

CRIMINAL LAW (§ 1037*)—APPEAL AND ERROR—PRESENTATION AND RESERVATION OF GROUNDS—REMARKS OF COUNSEL.

Where, in a prosecution for crime, the court's attention was not directed to remarks of state's counsel complained of as prejudicial at the time, and no instruction was requested thereon, the propriety of the making of such statements is not presented for review.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1691, 2645; Dec. Dig. § 1037.*]

Appeal from District Court, Comanche County; J. H. Arnold, Judge.

Dude Wagoner was convicted of crime, and appeals. Affirmed.

J. M. Rieger, of Comanche, for appellant.
C. E. Lane, Asst. Atty. Gen., for the State.

HARPER, J. This is a companion case to that of Coggins v. State, 151 S. W. 311, this day decided, and the facts and questions are so similar we do not deem it necessary to again discuss, but merely refer, to that case.

The only question presented by this record, not raised in the Coggins Case, is an objection to the remarks of state's counsel. It appears it was proven, without objection, that appellant had been convicted of swindling, and the district attorney, commenting on that fact, said, if he would "obtain property under false pretenses, he would also steal." The court states, in approving the bill, that he does not know whether the language was used or not; that, if used, his attention was not called to it at the time, and no charge was requested instructing the jury not to consider it. As the qualification renders it uncertain whether the language was used, and the court is certain that his attention was not called to it, if used, and no request was made to instruct the jury not to consider it, the matter does not present reversible error.

The judgment is affirmed.

DAVIS v. STATE.

(Court of Criminal Appeals of Texas. Nov. 20, 1912.)

1. GAMING (§ 98*)—SUFFICIENCY OF EVIDENCE.

Evidence held to sustain a finding that defendant permitted a house under his control to be used as a resort for gambling.

[Ed. Note.—For other cases, see Gaming, Cent. Dig. §§ 291-298; Dec. Dig. § 98.*]

2. GAMING (§ 76*)—"RESORT FOR GAMBLING."

Where a person opens a house under his control and permits persons to gather there and gamble without invitation, it becomes a "resort for gambling."

[Ed. Note.—For other cases, see Gaming, Cent. Dig. §§ 202, 208; Dec. Dig. § 76.*]

For other definitions, see Words and Phrases, vol. 7, p. 6174.]

3. GAMING (§ 76*)—PERMITTING GAMBLING ON PROPERTY—WHAT CONSTITUTES THE OFFENSE.

Where an unmarried man takes possession of a private house, by permission or otherwise, during the owner's absence, and permits gambling therein, he is guilty of unlawfully permitting property under his control to be used as a resort for gambling.

[Ed. Note.—For other cases, see Gaming, Cent. Dig. §§ 202, 208; Dec. Dig. § 76.*]

4. GAMING (§ 76*)—PERMITTING GAMBLING ON PROPERTY—WHAT CONSTITUTES PERMISSION.

The act of a person in engaging with others in gambling on premises under his control constituted permission to the others to gamble.

[Ed. Note.—For other cases, see Gaming, Cent. Dig. §§ 202, 208; Dec. Dig. § 76.*]

5. CRIMINAL LAW (§ 814*)—INSTRUCTIONS—EVIDENCE.

An instruction not called for by the evidence was properly refused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1821, 1833, 1839, 1860, 1865, 1883, 1890, 1924, 1979-1985, 1987; Dec. Dig. § 814.*]

6. GAMING (§ 94*)—EVIDENCE—ISSUES.

In a trial for permitting gambling on premises under defendant's control, evidence that one night shortly before the grand jury met he requested that gambling stop did not present the issue that the gambling took place without his consent, where it appeared that he engaged in the games on all prior occasions.

[Ed. Note.—For other cases, see Gaming, Cent. Dig. §§ 274-283; Dec. Dig. § 94.*]

7. CRIMINAL LAW (§ 717*)—TRIAL—CONDUCT OF COUNSEL—DISCRETION.

Whether the state's counsel shall be permitted to read cases and discuss law to the trial court is within the court's sound discretion.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1682-1687; Dec. Dig. § 717.*]

8. CRIMINAL LAW (§ 1169*)—HARMLESS ERROR—ADMISSION OF EVIDENCE—VERDICT.

In a trial for permitting gambling, error in permitting a witness to testify that he had never known defendant to work, and had frequently seen him in a pool hall, was harmless, where the jury assessed the minimum punishment.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3083, 3137-3143; Dec. Dig. § 1169.*]

9. GAMING (§§ 88, 89*)—INDICTMENT—SUFFICIENCY.

An indictment for violating Pen. Code 1911, art. 559, by permitting property under the defendant's control to be used as a resort for gambling, need not describe the premises, further than to say that it was a house under defendant's control, or allege that the house was a public place, or name the games played therein.

[Ed. Note.—For other cases, see Gaming, Cent. Dig. §§ 241-243, 244-248; Dec. Dig. §§ 88, 89.*]

10. INDICTMENT AND INFORMATION (§§ 86, 87*)—SUFFICIENCY.

An indictment alleging that defendant, on or about a certain day, in C. county, in the state, did then and there permit property under his control, to wit, one house in C., to be used as a resort for gambling sufficiently alleged the

date, and that the offense was committed in C. county.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 230-243, 244-255; Dec. Dig. §§ 86, 87.*]

Appeal from District Court, Comanche County; J. H. Arnold, Judge.

M. H. Davis was convicted of permitting property under his control to be used as a gambling resort, and he appeals. Affirmed.

Smith & Palmer, of Comanche, for appellant. C. E. Lane, Asst. Atty. Gen., for the State.

HARPER, J. Appellant was prosecuted under an indictment containing several counts, and convicted under the fifth count, in which he was charged with unlawfully and knowingly permitting property which was under his control, a house situate in Comanche, to be used as a place for people to resort to bet and wager upon certain games played with dice and cards.

[1] G. W. Fitch testified that his family consisted of himself and wife, and that defendant had been staying with him; that he and his wife took a trip to East Texas, and were absent some 13 or 14 days; that appellant continued to stay at his residence while he was absent. No one else stayed there, except appellant, while Mr. Fitch and his wife were absent. This would show that appellant was in control of the premises during that time, and the facts show that he was an unmarried man. During that time a number of witnesses testified that they went to this house and gambled there on several occasions, some saying they played poker, and others testified they threw dice. It is also shown that appellant played in part of the games and gambled with the others. Leslie Stewart testifies he played at this house, during the absence of Mr. Fitch, Thursday and Friday nights, and that six others were there and engaged in the games.

John Rhoads testifies he was there on occasions while Mr. Fitch was absent when gambling took place, twice in the daytime and three times at night, engaging in gambling, both with cards and dice; that he had gone to this place with appellant on one occasion, and on other occasions went with others. Frank Keeter testified he went to this house and gambled; that appellant was not there when he got there the first night, but came shortly afterwards; that on the second occasion appellant gambled with him and others; that on another occasion appellant and he gambled alone at the house—no one else being present. Joe Hulsey testified he had gambled at this house on two occasions, shooting craps on one occasion and playing cards on the other.

[2] This testimony, we think, sufficiently

shows that appellant permitted a house under his control to be used as a resort for gambling. He knew the gambling was taking place, engaged in the games a portion of the time, and it is shown that while Mr. Fitch and his wife were absent that on at least five occasions the witnesses gathered there and gambled with his knowledge. The boys say they just "went there" knowing that they could gamble there. When a person opens a house under his control and permits people to gather there and gamble without invitation (for he testifies he invited none of them), it becomes, in law, what is termed a common resort for gambling. The fact that it was the residence of Mr. Fitch does not alter the fact that as soon as Mr. Fitch left he permitted it to become a resort for the boys to gather and gamble, and the testimony would support the verdict.

[3] There was no error in the court refusing to quash the indictment, on the ground that it did not negative the fact that it was a private residence, or allege that it was a private residence commonly resorted to for gambling. For the time being, it was not a private residence occupied by a family, but appellant, an unmarried man, was staying there by permission at least. It would be immaterial whether he was in possession by permission, or had taken possession during Mr. Fitch's absence, believing that it would be agreeable with the owner. If one should in any manner, while the family was absent, take possession of a house and permit gambling to be engaged in by all those who came to the house while he was in control of the house, and when it was shown that on five occasions during this time he permitted gambling to be carried on in the house, it would be an offense against the law.

[4] The court did not err in refusing the special charge requested by defendant, as it is shown that on more than one occasion he engaged in gambling with the others, and this, in law, would be construed to be permission for the others to gamble.

[5] There was no evidence upon which to base the second charge requested by defendant; and it is never improper to refuse a charge not called for by the evidence. Neither was there any evidence suggesting that the persons who gambled "were guests at the defendant's house, engaged in gaming for pleasure"; consequently the court did not err in refusing the special charge presenting this issue.

[6] Special charges Nos. 4 and 5 were covered by the main charge of the court, in so far as they presented the law of the case. The fact that one night just before the grand jury met the appellant requested them to stop gambling on that occasion would not present the issue that the gambling took place without his consent, when it is shown

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

that he engaged in the games with the others on all prior occasions.

[7] The question of whether or not the state's counsel shall be permitted to read cases and discuss the law to the court is one within the sound discretion of the court. The qualification of the bill shows that no authorities were read to the jury, but all were read to the court prior to the preparation of his charge. As thus qualified, the bill presents no error.

[8] The defendant complains that a witness was permitted to testify that he had never known defendant to do any work, and had seen him in the pool hall a number of times. This testimony was inadmissible; but, inasmuch as the jury only gave appellant the minimum punishment fixed by law to this offense, it does not present such error as should cause a reversal of the case.

[9] The grounds of the motion in arrest of judgment should not have been sustained. Under article 559 of the Penal Code it was not necessary to describe the premises in which it was alleged the gaming took place, further than to say it was a house under his control. It was not necessary to allege that it was a house for retailing spirituous liquor, or other public place, under the article of the Code under which this prosecution was brought.

[10] The indictment alleges that "on or about the 13th day of October, 1911, in the county of Comanche and state of Texas, appellant did then and there unlawfully and knowingly permit property which was under his control, to wit, a house situate in Comanche, to be used as a place for people to resort to bet and wager upon certain games played with cards and dice." This sufficiently alleged the date, and that the offense was committed in Comanche county; and it was not necessary to name the games played with the dice and cards.

The judgment is affirmed.

DRAKE v. STATE.

(Court of Criminal Appeals of Texas. Nov. 6, 1912. Rehearing Denied Dec. 4, 1912.)

1. CRIMINAL LAW (§ 736*)—CONFESSION—ADMISSIBILITY.

Where a confession, signed by accused, stated that he made same to the county attorney freely and voluntarily, after having been warned that he did not have to make it, and that it could be used against him, it was not inadmissible, under the statute relating to the admissibility of confessions, though accused's testimony raised the issue that it was not freely and voluntarily made, and that he was not aware of its contents; such issue being for the jury.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1219, 1220, 1701, 1702, 1705, 1716; Dec. Dig. § 736.*]

2. CRIMINAL LAW (§ 489*)—EXPERT TESTIMONY—CROSS-EXAMINATION.

Where, in an incest case, a doctor testified, on cross-examination by accused, that the hymen would have been injured by penetration beyond a certain depth, it was not improper for the state to adduce, on redirect examination, that there were cases of women being impregnated without destroying the hymen.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1078; Dec. Dig. § 489.*]

3. CRIMINAL LAW (§ 338*)—EVIDENCE—MATERIALITY.

Testimony of accused's witness in an incest case, that she had stopped visiting at accused's home because she believed a third party and accused's wife were criminally intimate, was properly excluded, where neither the wife nor the third party were used as witnesses, especially where other witnesses were permitted to state all facts showing such criminal intimacy.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 752-757, 787, 788, 801, 855; Dec. Dig. § 338.*]

4. CRIMINAL LAW (§ 656*)—CONDUCT OF COUNSEL—ADMONITION BY COURT.

Where counsel for accused sought by certain remarks to get excluded evidence before the jury, it was proper for the court to state, in the jury's presence, that counsel's statement was improper, and he must not again make such statements.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1520-1523, 1527, 1535; Dec. Dig. § 656.*]

5. INCEST (§ 13*)—ADMISSION OF EVIDENCE.

In an incest case the court properly excluded testimony as to what police and detectives told the prosecutrix and her mother when the complaint was made.

[Ed. Note.—For other cases, see Incest, Cent. Dig. § 11; Dec. Dig. § 13.*]

6. CRIMINAL LAW (§ 675*)—CUMULATIVE CHARACTER—EVIDENCE.

Where some dozen witnesses testified to accused's reputation, and the state admitted that his reputation as a law-abiding citizen was good, it was not error to refuse to permit other witnesses to testify to the same fact.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 850, 1607; Dec. Dig. § 675.*]

7. CRIMINAL LAW (§ 824*)—INSTRUCTION—DEFINING TERMS.

Failure of the court to define the words "carnal knowledge" and "carnally know," as used in an instruction in an incest case, was not error, in the absence of a request therefor; such words having a plain, well-understood meaning.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1996-2004, Dec. Dig. § 824.*]

8. INCEST (§ 6*)—NATURE OF OFFENSE.

The depth of the penetration is not material to the crime of incest, where there is an emission.

[Ed. Note.—For other cases, see Incest, Cent. Dig. § 5; Dec. Dig. § 6.*]

9. CRIMINAL LAW (§ 945*)—NEW TRIAL—GROUNDS.

The fact that a doctor, after testifying in an incest trial to making an examination of the person and clothing of prosecutrix, in which he discovered a certain state of facts, subsequently testified at the hearing on a motion for new trial that he made another examination after accused's conviction and discovered a different state of facts, did not present ground

for a new trial, where there was no evidence that the conditions discovered at the later examination existed at the time of the former examination, especially where the facts discovered at the former examination were corroborated by other testimony and accused's confession, made shortly after the alleged occurrence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2324-2327, 2336; Dec. Dig. § 945.*]

10. CRIMINAL LAW (§ 1099*)—APPEAL AND ERROR—MOTION FOR NEW TRIAL—REVIEW OF GROUND.

Where the testimony relied upon as a ground for a new trial in an incest case was not filed until after adjournment of the term of court at which the accused was convicted, such ground could not be reviewed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2866-2880; Dec. Dig. § 1099.*]

Appeal from District Court, Tarrant County; R. H. Buck, Judge.

T. Drake was convicted of incest, and he appeals. Affirmed.

Poulter & Johnson and Mays & Mays, all of Ft. Worth, for appellant. C. E. Lane, Asst. Atty Gen., for the State.

HARPER, J. Appellant was prosecuted and convicted of the offense of having sexual intercourse with his daughter.

[1] The state introduced the following confession of defendant: "My name is T. Drake. I make the following statement to the county attorney, John W. Baskin, freely and voluntarily, and after having been warned by him, the said John W. Baskin, first, that I do not have to make any statement at all, and, second, if I do make any statement, such statement can be used in evidence against me in my trial for the offense concerning which the statement is made, and cannot be used for me. I am 42 years of age. I have been living in Ft. Worth for six years. I am a car repairer on the Rock Island Railroad. I have four children. My oldest daughter's name is Eva Drake, and she is 15 years of age. Last night, to wit, the 11th day of August, 1911, about 8 or 9 o'clock, I was sitting on my front steps, and Eva came out and sat down by me. My wife was at a lodge meeting. She (Eva) began picking at me and teasing me, and I began picking at her and teasing her. My passion then got the best of my judgment. I got up and went out back toward the barn. Eva followed me. When we got back there, I threw my arm around her and drew her up to me. I then reached down and unbuttoned her drawers and let them drop down. I then told Eva to lay down on the ground, which she did. I then got down on her with my penis out. I spit on my hand and rubbed it on her private parts. I attempted to insert my penis in her private parts, but could not make the entry. I kept up the motions, and finally succeeded in inserting my penis in her private parts a short distance, not more than

an inch, I am sure. I withdrew my penis to keep from making a discharge in her, and discharged between her legs. Just before I got through, she complained of it hurting her. That is the only time I ever had anything to do with her. My wife is delicate to such an extent that I am unable to gratify my passion with her, and I just let my passion get the best of me. [Signed] T. Drake."

Many objections were urged to the introduction of this confession, but none of them are tenable. This court has been frequently called upon to construe this statute, and the construction finally adopted is announced in *Henzen v. State*, 62 Tex. Cr. R. 336, 137 S. W. 1141, and this confession is in accordance with the rule there announced. While the defendant's testimony raised the issue that it was not freely and voluntarily made, and that he was not aware of the contents of the paper when he signed same, yet the court submitted that issue to the jury in his charge, and in a way that is not criticised by defendant in his motion for a new trial.

[2] In his next bill of exceptions it is shown that Dr. McElroy had testified that on the day following the alleged offense that he had examined the private parts of the prosecuting witness; that he found an inflamed condition, etc., and on her clothing a discharge that indicated intercourse with a man. On cross-examination defendant developed that her hymen was not destroyed nor punctured, and, in his opinion, that if she had been penetrated by the male organ of a man more than a given depth it would have injured the hymen. On direct examination the state developed that in the medical world it was known that there were cases where women had become impregnated without destroying the hymen. This latter testimony was objected to by defendant. As the doctor had testified, at the instance of defendant, that, in his opinion, the girl, if penetrated, had been penetrated only a given depth, and based his opinion on the fact that the hymen had not been destroyed nor injured, the testimony adduced on redirect examination was admissible as an aid to the jury in passing on the weight of the testimony of the opinion of the doctor that penetration could not have been beyond a given depth without the hymen being affected.

[3] Appellant desired to prove by a witness that she had stopped visiting at the home of defendant, because she believed that one B. M. Howard and the wife of defendant were criminally intimate. As neither the wife of defendant, nor B. M. Howard, were used as witnesses in the case, the court did not err in excluding the testimony. It further appears in the record that defendant had summoned Howard as a witness, and moved to continue the case on account of his absence; but when the attendance of Howard was secured the defendant declined to place him

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

upon the witness stand. The same ruling applies to the excluded testimony of the witness Wentzell.

[4] When the defendant's counsel made the remarks he did in the presence of the jury, what the court said to him was not improper. He had brought about the occasion for the remark that the statement made by counsel was an improper one, and he must not make such statements again. When the court has sustained an objection to evidence, counsel should not seek to get the testimony before the jury in this way; and when he does, if the court only informs the jury that it was improper for counsel to have made such statement, he is dealing with the matter as leniently as one should expect.

It appears from the qualification of the court that he permitted the witnesses to state all facts and circumstances which would show improper relations between the wife of defendant and Howard; and this was certainly as far as defendant was entitled to go, in the absence of either of them testifying.

[5] The court properly excluded the testimony as to what the city police and detectives told the prosecuting witness and her mother on the occasion when complaint was made as to the alleged crime of defendant.

[6] Some dozen witnesses had testified to the reputation of defendant, and the state admitted that the reputation of defendant as a law-abiding citizen was good. The record being in this condition, there was no error in the court declining to permit other witnesses to testify to the same fact.

[7, 8] In his motion and in his brief defendant earnestly insists that the facts do not show that defendant had a completed act of sexual intercourse with his daughter, and the court erred in not defining the words "carnal knowledge" and "carnally know." These words have a plain, well-understood meaning, and the jury could not have been misled by their use. If defendant desired them explained, he should not have waited to complain in his motion for a new trial, but should have requested that a definition be given at the time of trial. When the meaning of words are so well understood by all mankind as are these words, if a definition of them is desired, a request must be made at the time of trial. As to the facts not showing a completed act of intercourse, the confession of defendant herein copied answers that complaint. The testimony of the daughter is also ample upon which the jury would be authorized to so find. The depth of penetration, if there is penetration, is immaterial, where there was an emission, as shown by the testimony of the daughter and the confession of the father.

[9] The only other ground in the motion alleges newly discovered testimony. Dr. Kibbie had testified on the trial to examining the girl a day or so after the alleged offense,

and examining the discharge found on the dress, and stated, in his opinion, it was an emission from the male organ, and had stated: "So far as my knowledge goes, I do not believe this spot could have been any other mixture than the discharge of the male. I do not know of any other discharge that would give me those cells. There is some difference in the discharge from a man and the discharge from a woman. I do not believe this could have been a discharge from a woman, because, in the first place, the quantity attracted my attention, and the amount of stiffness there; and, secondly, the character of cells that are thrown out from the male, which differ from the female—the epithelium cells. It is almost impossible to make a practical explanation of it, because the cells in the body vary according to where they come from; but the little granules in the cells that were present in this discharge indicated to me that it was the seminal discharge of a male of some sort." After the conviction of defendant, on the hearing of the motion for a new trial, he again testified, and stated the date of the original examination was August 11th, the day after the alleged offense; that since the trial of the case, on December 2d, he again examined her, and found that at that time she was suffering from a venereal disease—clap—and that the character of discharge from this disease might have produced the spot he found on the dress on August 11th. There is no positive testimony offered that if the girl was suffering from this character of disease in December that she was also suffering from it in the month of August prior thereto; and it seems remarkable to us that if the physician could tell in December that she was afflicted with this disease, if she had the disease in August, in his examination of her—the character and kind he says he made in August—he would not have discovered and thus diagnosed the case in August. But, be that as it may, without proof that the girl was suffering from this disease at the time of the examination in August, it does not present ground for a new trial, especially in the light of the confession of defendant, made shortly after the alleged occurrence. Our decisions all hold that the newly discovered evidence must be such that it would probably produce a different verdict; and in passing on this question we must consider the testimony adduced on the trial. *Burns v. State*, 12 Tex. App. 269; *Hassel-meyer v. State*, 6 Tex. App. 21; *Wharton's Crim. Law*, § 3161; *Arch. Cr. Pr. & Pl.* (6th Ed.) 178, § 26. In the light of the testimony and defendant's confession, testimony that this discharge could have been produced from the discharge of a female suffering with this disease would not have changed the result, and the court did not err in overruling the motion.

[10] While we have discussed this ground

of the motion, yet this testimony on an issue found on a ground in the motion for a new trial, was not filed until after the adjournment of court, and cannot properly be considered by us. *Probest v. State*, 60 Tex. Cr. R. 608, 133 S. W. 263, and cases there cited.

The judgment is affirmed.

WALKER v. STATE.

(Court of Criminal Appeals of Texas. Oct. 23, 1912. Rehearing Denied Nov. 27, 1912.)

1. INDICTMENT AND INFORMATION (§ 86*)—VENUE—AVERMENT—"THEN AND THERE."

An information charging that in a certain town, voting precinct, and county of the state, while a public election was being held on a certain day, defendant then and there unlawfully and willfully gave to another intoxicating liquor, sufficiently charged, by the use of the words "then and there," that the offense was committed in the town specified.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 230-243; Dec. Dig. § 86.*]

For other definitions, see Words and Phrases, vol. 8, pp. 6946-6948.]

2. INTOXICATING LIQUORS (§ 221*)—STATUTORY OFFENSES—NEGATING APPLICATION OF PROVISIO.

An information charging the giving of intoxicating liquors to another while an election is being held need not state that the defendant is not a druggist, etc.; the proviso of the statute relating to such offense forming no part of its definition.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 240-248; Dec. Dig. § 221.*]

3. CRIMINAL LAW (§ 970*)—ARREST OF JUDGMENT—DEFECTS IN INFORMATION—DUPLICATION.

An information charging a gift of intoxicating liquor while an election was being held was not defective so as to furnish a ground for arrest of judgment because it also charged that the defendant informed the other person of the whereabouts of the intoxicating liquor; it being permissible by the use of the conjunction "and" to allege that a misdemeanor was committed in any of the ways defined by statute.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2445-2462; Dec. Dig. § 970.*]

4. INTOXICATING LIQUORS (§ 226*)—EVIDENCE—CREATION OF PRECINCT.

In a prosecution of a defendant charged with giving intoxicating liquor to another while an election was being held in a certain town, precinct, and county of the state, evidence of the orders of the commissioners' court creating such precinct as well as the fact that the town was in such precinct was admissible.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 282-286; Dec. Dig. § 226.*]

5. CRIMINAL LAW (§ 772*)—INSTRUCTIONS—VENUE OF OFFENSE.

Where, in the trial of one for giving intoxicating liquor to another in a certain town and precinct while an election was being held, an instruction that the jury should convict if they believed beyond a reasonable doubt that defendant committed the offense charged at the time stated could not have been misleading, be-

cause it did not require the jury to find that the acts took place in the town and precinct charged in the information.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1812-1814, 1816, 1817; Dec. Dig. § 772.*]

6. CRIMINAL LAW (§ 814*)—CRIMINAL PROSECUTION—INSTRUCTION.

Nor was such instruction erroneous for failure to state the purpose for which the election was being held, where the information stated that the purpose was to determine whether the sale of intoxicating liquors should be prohibited in the state, and the evidence did not put in issue the legality of the election.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1821, 1833, 1839, 1860, 1865, 1883, 1890, 1924, 1979-1985, 1987; Dec. Dig. § 814.*]

Appeal from Delta County Court; C. C. Dunagan, Judge.

Joe Walker was convicted of giving intoxicating liquor to another while a public election was being held, and he appeals. Affirmed.

Patteson & Patteson, of Cooper, for appellant. C. E. Lane, Asst. Atty. Gen., for the State.

HARPER, J. Appellant was prosecuted under an information alleging that in the town of Cooper, voting precinct No. 1, in the county of Delta, state of Texas, while a public election was being held on July 22d to determine whether the sale of intoxicating liquors should be prohibited in this state, he did then and there unlawfully and willfully give to Henry Nidever intoxicating liquor, etc. When tried, he was convicted, and his punishment assessed at a fine of \$200.

[1] The motion in arrest of judgment was not well taken. By the use of the words "then and there," it was charged that the offense was committed in the town of Cooper. *Moreno v. State*, 143 S. W. 156; *De Los Santos v. State*, 146 S. W. 919, and cases cited.

[2] Neither was it necessary for the information to state that appellant was not a druggist, etc. The proviso forms no part of the definition of the offense. *Dankworth v. State*, 61 Tex. Cr. R. 157, 136 S. W. 789; *Slack v. State*, 61 Tex. Cr. R. 372, 136 S. W. 1073.

[3] The other grounds in the motion—that the information charged both a gift of intoxicating liquor and charged that appellant "informed Nidever of the whereabouts of intoxicating liquor"—present no ground in arrest of judgment. By the use of the conjunction "and," it is permissible to allege that a misdemeanor was committed in any of the ways defined by the statute. *Hart v. State*, 2 Tex. App. 39; *Davis v. State*, 23 Tex. App. 637, 5 S. W. 149; *Gage v. State*, 9 Tex. App. 259; *Nicholas v. State*, 23 Tex. App. 317, 5 S. W. 239; *Lancaster v. State*, 43 Tex. 519.

[4] As qualified by the court, bill of ex-

ceptions No. 8 presents no error. The information having alleged that the election was held in Cooper, voting precinct No. 1, in the county of Delta, in the state of Texas, the orders of the commissioners' court creating precinct No. 1 were admissible in evidence as well as the fact that Cooper was in said voting precinct.

[5] The court charged the jury: "If you believe from the testimony in this case beyond a reasonable doubt that the defendant on the 22d day of July, 1911, and you further believe that said day was an election day as alleged in the information in this case, that the said defendant did then and there unlawfully during the said day on which said election was being held as stated in the information willfully give Henry Nidever intoxicating liquor, and the said defendant did then and there inform the said Henry Nidever of the whereabouts of said intoxicating liquor, then, in that event, if you so believe, you should find the defendant guilty as charged herein." The objection that the charge does not require the jury to find that the acts took place "in Cooper in voting precinct No. 1" is rather hypercritical. When we take the complaint and information in connection with the charge, and the reference therein to the information, it is readily seen that it is impossible for the jury to have been misled, or have thought they were authorized to convict the defendant of an offense committed at any place other than as alleged. The evidence suggests no other place, and shows beyond question that the offense, if committed, was committed in the town of Cooper; consequently, if subject to the criticism of appellant, we would not be authorized to reverse the case under article 723 of the Code of Criminal Procedure.

[6] It was not necessary to state the purpose for which the election was being held in the charge. The information sufficiently stated the purpose, and that it was a legal election cannot be questioned under the evidence.

The other criticisms of the charge and grounds in the motion present no error.

The judgment is affirmed.

CURRY v. STATE.

(Court of Criminal Appeals of Texas. Nov. 20, 1912.)

SEDUCTION (§ 46*) — EVIDENCE — CORROBORATION.

In a prosecution for seduction, the testimony of the prosecutrix need not be corroborated in each of the necessary elements of the offense; but the corroborative evidence is sufficient if it tends to connect accused with the commission of the offense.

[Ed. Note.—For other cases, see Seduction, Cent. Dig. §§ 83-86; Dec. Dig. § 46.*]

Appeal from District Court, Taylor County; Thos. L. Blanton, Judge.

Roy Curry was convicted of seduction, and he appeals. Reversed and remanded.

J. F. Cunningham, of Abilene, for appellant. O. E. Lane, Asst. Atty. Gen., for the State.

PRENDERGAST, J. The appellant was convicted for seducing Belle McFarland, an unmarried woman under the age of 25 years, charged to have been committed on or about January 15, 1910, and given the lowest penalty.

Soon after the crime was alleged to have been committed, an examining trial was held, at which appellant was present and heard and cross-examined the state's witnesses. Belle McFarland testified on that trial, and the substance of her testimony was taken down in writing, which she signed, all of which was identified and introduced on this trial. We know that the practice in taking down the testimony on such examining trials is to give the substance only, and not the details, of the witness' testimony. That seems to have been done in this case. After this testimony was taken down, and after the indictment was found in this case, the said girl died. Her evidence on this examining trial as thus taken down was proven up and introduced on the trial of this case. Her mother and sister also testified. No other member of the family did so. The record shows that the case was not fully developed. As an illustration, no direct proof was made that the girl was unmarried. This, if true, could have been so easily proven by the mother and sister, and doubtless many others, that it is strange the record does not disclose that it was. However, this can be proved by circumstantial as well as direct testimony, like any other fact. The appellant did not testify. He introduced several witnesses, who testified that Belle McFarland had stated to them that she had sworn falsely in previous trials in several particulars. They also testified that her general reputation for chastity was bad at a time long after the alleged seduction. None of them attempted to testify that that was her reputation at the time or about the time of her charged seduction. It was also disclosed by this testimony that none of these parties disclosed the fact, if so, that the girl had stated to them that she had sworn falsely, or said anything about this to any one until after the death of the girl. Of course, on the trial, she, being dead, had no opportunity to explain or deny any of this. It was disclosed, however, that these claimed statements by her were made after the appellant had been seen to be with her shortly before these witnesses claim she made such statements to them.

The only ground of complaint by appellant of this conviction is that the testimony is insufficient to sustain the verdict. This is

contended on several grounds. We doubt if appellant's contention is well taken, save and except on one ground only; that is, that the testimony of Belle McFarland was not corroborated, as required by law. We sustain appellant's contention on that point, and on that point alone will reverse and remand this cause.

It is unnecessary to discuss or detail the evidence. Probably it is not proper to do so. However, we do say that the law is that the testimony of the injured party in cases of this character does not have to be corroborated in each and all of the necessary elements of the offense, and that the corroborative evidence may be slight, and that the requirements of the statute are fulfilled if there be any corroborating evidence which, of itself, tends to connect the accused with the commission of the offense. Such corroboration only is necessary as is sufficient to satisfy a jury, beyond a reasonable doubt, of the truth of the charge, in connection with the testimony of the accomplice. *Nourse v. State*, 2 Tex. App. 316; *Jones v. State*, 4 Tex. App. 531; *Tooney v. State*, 5 Tex. App. 193; *Simms v. State*, 8 Tex. App. 243; *Clanton v. State*, 13 Tex. App. 157; *Moore v. State*, 47 Tex. Cr. R. 415, 83 S. W. 1117; *Nash v. State*, 61 Tex. Cr. R. 284, 134 S. W. 709; *Williams v. State*, 59 Tex. Cr. R. 347, 128 S. W. 1120; *Bost v. State*, 144 S. W. 589; *Murphy v. State*, 143 S. W. 618. It is needless to cite other cases. This must necessarily be the law and the proper construction of the statute in cases of this character; for acts of intercourse between persons are always as secret and private as can be, and under such circumstances as the parties believe will prevent their detection or even suspicion at the time. Also, engagements of young persons to marry are made in private and in secret between them; and very generally, if not entirely, the fact of engagement, for at least some length of time, is kept as privately and secretly between them as can well be. Therefore proof, in the nature of these things, generally cannot be made other than by the testimony of the accomplice, corroborated by such circumstances as to time and place, opportunity, and the course of dealing or treatment between the parties along about the time, such as the man being the accepted suitor, devoting his attention at the time to the girl, so recognized and understood by her family, his frequent attendance upon her, the fact, if so, of his exclusive attentions to her, and the attention of no other man to her during the time, and such like matters. Yet in this case the evidence was not developed sufficiently so that we can hold, as a matter of law, the evidence was sufficient to corroborate the prosecuting witness. These matters may be developed on another trial of the case sufficiently to authorize the jury to find and believe that the accomplice is corroborated, as required by law.

For the want of this, as stated above, the judgment is reversed and the cause remanded.

INTERNATIONAL ORDER OF TWELVE KNIGHTS & DAUGHTERS OF TABOR v. WILSON et al.

(Court of Civil Appeals of Texas. San Antonio. Nov. 13, 1912.)

1. APPEAL AND ERROR (§ 742*)—ASSIGNMENTS OF ERROR—STATEMENTS.

An assignment of error, not followed by a statement, will not be considered, though there is a reference to the record for a bill of exceptions.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3000; Dec. Dig. § 742.*]

2. INSURANCE (§ 818*)—FRATERNAL INSURANCE—ACTIONS—EVIDENCE—ADMISSIBILITY.

In an action against a negro fraternal organization on a benefit certificate, payable to the deceased member's wife and father, a letter written after the member's death, notifying the wife of her expulsion because of her disregard of the laws of the order and her application to the white courts concerning her husband's death, was inadmissible; the issue being whether the member at his death was a member in good standing.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 2003-2006; Dec. Dig. § 818.*]

3. INSURANCE (§ 815*)—FRATERNAL INSURANCE—ACTIONS—EVIDENCE.

Where the petition in an action on a certificate issued by a fraternal organization alleged that decedent was a member of a subordinate temple, it was error to introduce in evidence the financial card of another temple.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1996-1998; Dec. Dig. § 815.*]

4. INSURANCE (§ 747*)—FRATERNAL INSURANCE—GOOD STANDING OF MEMBER AT TIME OF DEATH.

Where a fraternal benefit certificate was made payable on condition of the member's good standing in his subordinate temple, and the evidence showed that decedent was not in good standing in the only temple to which he belonged, or could belong, at the time of his death, there could be no recovery on the certificate, merely because he sent money by some one not authorized to handle money to the grand body of the order.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1892; Dec. Dig. § 747.*]

Appeal from Dallas County Court; W. F. Whitehurst, Judge.

Action by A. G. Wilson and another against the International Order of Twelve Knights & Daughters of Tabor. From a judgment for plaintiffs, defendant appeals. Reversed and rendered.

J. L. Turner, of Dallas, for appellant. Hiram F. Lively and R. A. Ritchie, both of Dallas, for appellees.

FLY, C. J. A. G. Wilson, the surviving wife of G. W. Wilson, deceased, and G. W. Wilson, his father, instituted this suit against appellant, a negro fraternal organization, on a certificate for \$300, issued by appellant to

the deceased; \$200 being payable to the wife and \$100 to the father. It was alleged that at the time of his death G. W. Wilson "was a member of Green Bay Temple Number 19, of Dallas county, Texas, which said Green Bay Temple is a subdivision of the defendant order." The defenses were that deceased was never a member of Green Bay Temple, but had been a member of King Solomon Temple, and that "he was unfinancial with said temple, and was in no way entitled to any benefits therefrom." It was also alleged that the deceased had been suspended from King Solomon Temple on account of his "unfinancial" condition, which seems to mean that he had not paid all his dues and endowment and burial funds. Twenty-four pages of the typewritten transcript are devoted to setting out the cause of action and defenses.

The testimony tended to show that G. W. Wilson, deceased, was never in reality a member of Green Bay Temple because of his failure to obtain a transfer from King Solomon's Temple, of which he was a member, and to pay the amounts due that temple. It appears that he attempted to join Green Bay Temple to avoid the dues he owed in the other temple, from which he was suspended in May, 1910, for failure to pay his indebtedness. He died in July, 1910.

[1] The first assignment is not followed by a statement, and will not be considered. Reference to the record for a bill of exceptions will not take the place of a statement.

[2] The second assignment of error complains of the introduction in evidence of a letter from Mount Olive Tabernacle to "Daughter A. G. Wilson," written on September 10, 1910, long after the death of her husband, notifying her of her expulsion, "on account that you disregard the laws of Tabor, and have applied to the white courts concerning the death of your husband." The letter was improperly admitted in evidence. It had no bearing, whatever, on the issues in the case, and was calculated to arouse a prejudice against appellant. It was written by a subordinate of appellant, which had no connection with the case.

[3] The petition alleged that deceased was a member of Green Bay Temple; and it was error to introduce in evidence the "financial card" of Rice Temple, and the third assignment of error is sustained. For the same reason the letter from S. S. Reid to counsel for appellees, although its contents do not seem to be injurious to appellant.

The testimony as to conversations between officers of appellant and the attorney for appellees was immaterial, and should not have been admitted.

[4] The good standing of the deceased with the subordinate was what fixed his standing in the organization; and it was error to instruct the jury that if the Supreme Secretary of the order had accepted certain dues

its liability was fixed. It was provided in the certificate of the dead man that the payment of the \$300 was conditioned on his good standing in his temple. The proof showed that deceased was not in good standing in the only temple to which he belonged, or could belong. He was not a legal member of Green Bay Temple, and his standing therein was worth nothing to him. He could not obtain a standing in the grand body by sending up money by some one not authorized to handle or send in such money. Such money could not, and did not, give him standing in King Solomon's Temple, to which he belonged.

The overwhelming weight of the testimony was against the contention of appellees; and the evidence showed that the deceased was in arrears to his temple and was rightfully suspended, and was so suspended when he died. His wife and father are not, under the rules of the organization, which were fully accepted by deceased, entitled to the insurance.

The judgment is reversed, and judgment here rendered that appellees take nothing by their suit, and that appellant recover all costs in this behalf expended.

PETERSON et al. v. KERBEY et al.
(Court of Civil Appeals of Texas. Austin.
Oct. 30, 1912. Rehearing Denied
Nov. 27, 1912.)

MORTGAGES (§ 115*)—TRUST DEED—"ASSUMED."

Where defendants were deeded certain property on which plaintiff held a vendor's lien, evidenced by notes, and asked for an extension of time, for which they executed a trust deed, which contained the recital that the defendants "are justly indebted to the plaintiff, as evidenced by certain notes assumed" by the defendants, an indebtedness was created on the part of the defendants, although the ordinary office of a trust deed is to furnish security for a debt already created; the expression "notes assumed" meaning that payment was assumed (citing Words and Phrases, 588, 587).

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 229; Dec. Dig. § 115.*]

Appeal from District Court, Travis County; Chas. A. Wilcox, Judge.

Action by Joe C. Kerbey and others against Charles Peterson and another. Judgment for plaintiffs, and defendants appeal. Affirmed.

Love & Williams, of Uvalde, for appellants. W. B. Garrett and J. H. Hart, both of Austin, for appellees.

Findings of Fact.

JENKINS, J. Appellee Kerbey owned an addition to the town of Uvalde, consisting of a large number of lots, and on May 29, 1909, entered into a contract in writing with appellants, by the terms of which they became the sole agents for the sale of said property, upon the terms stated in the agree-

ment, their authority as such agents to continue until June 1, 1910. In said contract appellants bound themselves to sell, or to purchase themselves, by June 1, 1910, not less than 200 of the lots mentioned in said contract, at the price and upon the terms therein set forth. On May 21, 1910, appellants, having failed to sell the required number of lots, requested appellee Kerbey to deed said number of lots to four other parties. Appellee made such deed, receiving one-fifth of the purchase money, and the vendor's lien notes of said parties, payable in 6, 12, 18, and 24 months, respectively, after date. The grantees in said deeds were not financially responsible, and appellants desired the deeds to be made to them and their notes taken for the remainder of the purchase money, in order to avoid personal responsibility, and also that they might be entitled to their commission. The grantees in said deeds in fact paid nothing, the one-fifth purchase price being advanced by appellants, and said deeds were taken with the intention that the same should inure to the benefit of appellants. These facts were all known to appellee Kerbey at the time he executed said deeds. Within a short time thereafter the grantees in said deeds executed a deed to said lots to appellants, reciting the consideration of \$10, and other valuable considerations. In fact, nothing was paid to said parties by appellants. Said notes provided that upon the failure to pay those first maturing the holder of same might declare all of said notes due. As the time approached for the payment of the first of said notes, appellants requested appellee Kerbey to grant an extension of the same. There was considerable negotiations between Kerbey and appellants with reference to the granting of such extension; but the same was finally granted in consideration of appellants' executing a deed of trust on all of said lots, which deed of trust, among other things, contained the following recital: "Whereas, Peterson and Avant, the said parties of the first part, are justly indebted to Joe C. Kerbey of the county of Travis and state of Texas, party of the third part herein, as evidenced by 508 certain promissory notes executed as stated below, and assumed by the parties of the first part and payable to the order of the said party of the third part as follows: [Describing said notes]."

The case was tried before the court, without a jury, and the court filed findings of fact, from which we quote as follows: "(6) I find that at the maturity of notes No. 1 of each of said series of notes the defendants Peterson and Avant requested plaintiff Joe C. Kerbey to extend the date of maturity of all of said notes included in the deed of trust herein referred to, and which deed of trust is set out in full in the statement of facts, to which reference is made for the terms of same; that at said time said Peterson and Avant were the owners, through

said deeds of conveyance from Foote, Baxter, Hughlett, and Gainsberg, of most of the lots described in said deed of trust; that on December 3, 1910, said Peterson and Avant executed a deed of trust, in which they conveyed to John H. Cunningham, in trust for plaintiff Joe C. Kerbey, all of the lots involved in this suit to secure to said Kerbey the payment of the 508 promissory notes herein sued on, said deed of trust reciting an extension of the notes then due, and in which deed of trust said Peterson and Avant acknowledged that they were justly indebted unto said Kerbey in the sum represented by said 508 notes, and in which they assumed the payment of said notes."

The court rendered judgment for appellee against the makers of said notes, foreclosing the deed of trust lien, and also a personal judgment over against appellants Peterson and Avant. No complaint is made as to this judgment, except as to rendering personal judgment against Peterson and Avant.

Opinion.

The only issue in this case is as to the proper construction of that clause of the deed of trust executed by appellants, above set out. Upon the facts above found, the court filed its conclusions of law, from which we quote as follows: "(2) I conclude, as a matter of law, that by the execution of the deed of trust introduced in evidence the defendants Charles Peterson and A. M. Avant assumed and became liable to pay to plaintiff Joe C. Kerbey the said notes, and each and all of them, and that a personal judgment should be rendered in favor of plaintiff and against said defendants Charles Peterson and A. M. Avant, and each of them, for the amount of said notes, principal, interest, and attorney's fees; and such judgment is so given."

It is true, as contended by appellants, that the ordinary office of a deed of trust is not to create an indebtedness, but to furnish security for the payment of indebtedness theretofore created. But there is no reason why an indebtedness should not be created by such instrument; and we think the court did not err in holding that this deed of trust created such indebtedness on the part of appellants. Prior to the execution of this deed of trust, and pending negotiations for the same, appellants were asserting that they were not personally liable to Kerbey for the purchase money of said lots. They were asking an extension of the notes. What were they offering as an inducement for such extension? The deed of trust, without personal liability on their part, would have been no additional security to Kerbey; for he already held a vendor's lien on and the superior title to all of said lots. Said deed of trust recites that appellants are justly indebted to Joe C. Kerbey, as evidenced by 508 certain promissory notes, but those notes were signed by other parties,

and appellants had denied their personal responsibility for the payment of same; but here they admit responsibility by stating that they are justly indebted to Kerbey, as evidenced by these notes, "executed as stated below, and assumed by the parties of the first part." What is meant by the expression "assumed by the parties of the first part"? The ordinary meaning of this term is that payment is assumed. When and how? Evidently by the execution of this instrument, carrying into effect whatever verbal agreements might have preceded the execution of the same. We think the common sense and legal meaning of this instrument is that it declares that appellants are indebted in the amount of said notes; and that they thereby assume payment of the same. *Am. & Eng. Ency. Law*, vol. 20, pp. 989, 990; *Words and Phrases*, book 1, pp. 586, 587, and authorities there cited.

Finding no error in the record, the judgment of the trial court is affirmed.

McPHERSON v. C. W. HAHL & CO.

(Court of Civil Appeals of Texas, El Paso.
Nov. 7, 1912. Rehearing Denied
Nov. 27, 1912.)

CONTRACTS (§ 176*) — CONSTRUCTION — EVIDENCE—QUESTION FOR JURY.

In an action to recover defendant's portion of certain expenses for the advertising of certain farm lands because of defendant's alleged failure to procure for plaintiff an option extending a prior contract of sale, evidence held to require submission to the jury of the question whether a provision in the agreement to procure the extension, that it should be sufficient to protect plaintiff in the full exercise and enjoyment of the original contract and its terms, required defendant to obtain proper agreements and releases from the holders of superior liens against the land so that a merchantable title thereto could be conveyed.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 767-770, 917, 956, 979, 1041, 1697, 1825; Dec. Dig. § 176.*]

Error to District Court, Harris County; Wm. Masterson, Judge.

Action by John J. McPherson against C. W. Hahl & Co. Judgment for defendant, and plaintiff brings error. Reversed and remanded.

C. R. Wharton, of Houston, for plaintiff in error. L. B. Moody and L. A. Kottwitz, both of Houston, for defendant in error.

HIGGINS, J. This is an action for the recovery of \$2,000 deposited in escrow with the Houston National Bank, and is the second appeal; Judge Reese's opinion upon the previous appeal being reported in 133 S. W. at page 515, where a full and complete statement of the case is made, and we will therefore not restate the same further than as may be rendered necessary by an amendment to plaintiff's petition filed subsequent to the former appeal. As we construe Judge

Reese's opinion, he held that, under the state of pleadings and such of the evidence as could properly be considered a part of the statement of facts, the trial court erred in holding the agreement of date February 23, 1909, did not require the extension agreement called for therein to be binding upon any one other than Hahl & Co. and upon the owner of the land, W. J. Candlish. The court did not hold the clause of the contract, the meaning and scope of which was in issue, to be unambiguous, but emphasizes the fact that there were no allegations in the petition that the terms in the agreement, "in the full exercise and enjoyment of the contract and its terms," bore other than the ordinary signification, or that they were understood by the parties in any other sense, or that by mutual mistake the contract failed to express the meaning and intention of the parties, and they further state, "if there was anything in the circumstances under which this contract was executed to indicate that the parties understood this contract to bind Hahl & Co. to get such an instrument as would protect appellee against these liens, it is not alleged in the petition nor shown by the evidence, which shows only the existence and assertion, in a pending suit, of the vendor's lien and right to rescind and recover the land; all of the other liens having been discharged. It may be that the evidence which the court evidently made the basis of its findings, and which appellee in his brief relies upon to support them, would put a different view upon the matter; but we are precluded, we think, as stated in *limine*, from going into this evidence."

The amendment to the plaintiff's petition, upon which it was last tried, contains the following allegations: "That at the time this contract was executed, neither plaintiff nor his attorneys knew with any accuracy the state of the title to these lands; they had never seen an abstract of the title, and the only information they had with reference thereto was from rumor and from statements made by defendants; that the defendant C. W. Hahl represented that, on the day following the execution of the supplemental agreement heretofore copied in this pleading, he was going to consummate a transaction that would enable him to place the lands in plaintiff's hands for sale, free from any imperfection as to title, and that the title would be in good and satisfactory condition, and that the extension of the contract which he was to procure under this supplemental agreement would be sufficient to protect the plaintiff and his associates in the full exercise and enjoyment of the contract in all its terms. By this expression it was meant and understood that the defendants would procure an extension of the contract, binding upon the owners of the superior title to the land, whoever they might be, or would

exhibit releases of any liens or incumbrances that might be menacing sale or foreclosure of the land, and it was especially understood that the defendants were to procure the concurrence of certain clients of Messrs. Cocke & Cocke, attorneys of San Antonio, who held certain liens against the land, the names of these clients not being divulged to the plaintiff or his attorneys at the time of these negotiations, and since neither plaintiff nor his counsel was familiar with the details of the title or the nature and extent of the imperfection that existed in it, if any, or the nature and extent of the liens that might be against the land and subjecting it to sale, these things were not enumerated or set out at length in the contract, but, under the assertions of the defendants that all of the objections to the title would be obviated in such way that the sales could go forward without interruption, and that plaintiff and his associates could make sales and deliveries of the land free from objections on account of the title, it was written in the contract of the 23d of February, 1910, that this extension agreement to be procured would be sufficient to fully extend the original contract and protect the said McPherson and Prudential Land Company in the full exercise and enjoyment of the contract and its full terms, which meant, and was so understood by the parties thereto to mean, that defendants were then entering into various negotiations and arrangements, the full nature of which were not disclosed to plaintiff or his counsel, and the names of the parties with whom had were not disclosed to the plaintiff or his counsel, but that, under these arrangements then going forward and in process of early completion, the title to the lands would not only be left in good condition and be made acceptable to plaintiff and his counsel and any purchaser that plaintiff might have for the lands, but the title to the land would be in fact made good and merchantable."

As we construe the opinion of Judge Reese and, as heretofore stated, the Galveston court did not hold the clause "in the full exercise and the enjoyment of the original contract and its terms" was unambiguous, but upon the contrary we think they clearly intimate that, under proper allegations supported by proper proof, it was a question of fact whether or not this clause would have required Hahl & Co. to obtain from the holders of the vendor's lien and other superior liens agreements whereby plaintiff, McPherson, would have been fully protected, in the exercise of the original contract and its terms, and under the paragraph of the plaintiff's petition above quoted, we think it was permissible to show these facts; the language quoted being ambiguous.

Upon trial before a jury, the court gave a peremptory instruction in favor of Hahl &

Co., and the material question involved upon this appeal is whether or not an issue is raised by the testimony as to what was understood and meant by the parties by the clause above quoted, the meaning of which is in dispute. The nearest approach to any testimony showing that it was contemplated by the parties that this clause was intended to require Hahl & Co. to obtain proper agreements from the lienholders is that of the witness Thos. P. Fenlon of Kansas City, attorney for McPherson, and of Mr. Wharton, likewise Mr. McPherson's attorney, who drew the agreement sued upon, and the testimony of Mr. Cocke of San Antonio, an attorney for one of the lienholders.

Mr. Fenlon testified as follows: "Hahl represented to Mr. Wharton and myself, at the time this supplemental contract was drawn in Mr. Wharton's office, that he was perfecting an arrangement by which all liens would be lifted from this land before March 5, 1909, and stated that he was going to San Antonio on the night of the 23d of February, 1909, the date upon which this supplemental contract was signed, for the purpose of negotiating a deal which would leave the land entirely free and enable him to procure us the extension called for in this supplemental contract referred to. Mr. Hahl was told by both Mr. Wharton and myself that unless he had these liens extinguished, or procured an agreement from the holders of these liens, and especially from the holders of the superior title, that the extension of the contract would be useless to us; that we could not sell the land unless we could represent to our clients that the title was merchantable. Mr. Hahl assured us that there would be no trouble on this score, and was given a copy of this supplemental contract, which he was to show to Cocke & Cocke at San Antonio, Tex., attorneys for P. E. Bialack, and with whom Hahl said he was negotiating. Mr. Hahl undertook to procure the consent of these parties to this extension, with the understanding that, if it was not procured, the extension would be worthless, and that we would be unable to handle the land under the contract of September 10, 1908, or any extension thereof."

Wharton testified: "We told Hahl we would sue him for breach of contract on account of the money we had spent unless we got an extension on the contract that was made by our clients with him. I asked him about the title to the land, as I had no abstract; he said the abstracts were in San Antonio, but that title would be fixed up all right; that he was going to San Antonio that night, to see some lawyers there, and they were going to fix up the title to the land. We discussed some of the matters with reference to the land—that is, some judgment liens—and Mr. Hahl said those liens would all be released, or, if not released, would be

left in such shape that anybody else holding any liens against it would agree to this extension. He did not go into detail as to exactly what he was going to do; seemed to be in considerable of a hurry; said he had to get out of town that night. The contract was drawn up, and several copies were made; one of the copies was put in the bank with the \$2,000; one of the copies was taken by Mr. Hahl to San Antonio, where he agreed to show it to Cocke & Cocke, and get them or their clients to agree to the extension if the liens were not extinguished."

Cocke testified: "We had certain negotiations with Hahl & Co. in January and February, 1909, by which we purchased from Hahl & Co. about \$51,000 in vendor's lien notes held by Hahl & Co. against the northern portion of the Nutt pasture in Bee county. These were second vendor's lien notes, and were subject to another set, which had been theretofore executed by Hahl in favor of Nutt, the original owner of the land. The notes we purchased were secured by a deed of trust and vendor's lien on the land. I know there was some conversation about it, and I am sure that Hahl told us he would have to lose this \$2,000 in order to get rid of the controversy with McPherson. I do not know whether Hahl made a formal request for our concurrence in the contract, but, if he did not do so, it was because he had been told in advance that neither we nor our clients would concur in the extension agreement in the manner proposed and under the conditions proposed. Hahl told us he had agreed to get our concurrence in this extension, or, in lieu thereof, lose \$2,000 then in the Houston bank."

We think the testimony quoted sufficient to raise the issue of whether or not it was contemplated and understood by the parties that Hahl & Co. were required to obtain proper agreement or releases from the holders of the superior liens by the clause in the contract of February 23d that the extension contract to be secured by Hahl & Co. should be sufficient to protect McPherson in the full exercise and enjoyment of the original contract and its terms. The testimony which we have quoted is not entirely clear and satisfactory to our minds that the clause was so understood and interpreted by the parties, as neither Wharton nor Fenlon testify directly to that effect, but we think it sufficient to have raised an issue to be submitted to the jury, and therefore hold that the court erred in giving a peremptory instruction for the defendant. The fourth assignment is not considered. It is not supported by a proposition and is not a proposition within itself.

Reversed and remanded.

HARPER, C. J., did not participate in this case.

NATIONAL LUMBER & CREOSOTING CO. v. MARIS.

(Court of Civil Appeals of Texas. San Antonio.
Oct. 23, 1912. Rehearing Denied
Nov. 27, 1912.)

1. TRESPASS TO TRY TITLE (§ 32*)—NATURE OF PLAINTIFF'S TITLE—PLEADING.

While plaintiff in trespass to try title is not required to plead his title, yet if he does so he will be confined to proof of that title, and, if his allegations of title are not sufficient to show a good one, a general demurrer should be sustained.

[Ed. Note.—For other cases, see *Trespass to Try Title*, Cent. Dig. §§ 39-41; Dec. Dig. § 32.*]

2. PLEADING (§ 34*)—GENERAL DEMURRER.

On general demurrer, every reasonable intendment must be indulged in favor of the pleading assailed by it, and, if any cause of action or ground of defense is shown by the pleading, the demurrer should be overruled.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. §§ 66-75; Dec. Dig. § 34.*]

3. TRUSTS (§ 102*)—RESULTING TRUST—PURCHASE OF PROPERTY.

Where a corporation of which S. and M. were stockholders had a lease and option on certain land in controversy and, to prevent a forfeiture by reason of certain financial difficulties of the corporation, S. and M. purchased the land in their own names, they would be regarded as constructive trustees of the title for its benefit.

[Ed. Note.—For other cases, see *Trusts*, Cent. Dig. § 153; Dec. Dig. § 102.*]

Error from District Court, Cameron County; John O. Scott, Judge.

Trespass to try title by C. H. Maris, trustee in bankruptcy of the Brownsville Lumber & Manufacturing Company, against the National Lumber & Creosoting Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Allen & Rich, of Brownsville, for plaintiff in error. F. W. Seabury, of Brownsville, for defendant in error.

FLY, J. Defendant in error, as trustee in bankruptcy for the Brownsville Lumber & Manufacturing Company, instituted an action of trespass to try title to an undivided one-half interest in 10 lots in West Brownsville, Cameron county, Tex., and for partition, against the plaintiff in error herein. Defendant in error specially pleaded his title, in which it was alleged that plaintiff in error claimed the land through a deed from C. H. Mason, Jr., who held the same in trust for defendant in error. The cause was tried by jury and resulted in a verdict in favor of defendant in error, the plaintiff in the court below. No statement of facts has been filed in this court.

[1] In trespass to try title the plaintiff is not required to plead his title, but, if he does plead it, he is confined to proof of that title; and, if his allegations of title are not sufficient to show a good one, a general demurrer should be sustained. *Hughes v. Lane*, 6

Tex. 289; Pilcher v. Kirk, 55 Tex. 208; Snyder v. Nunn, 66 Tex. 255, 18 S. W. 340; McDonald v. Bank, 74 Tex. 539, 12 S. W. 235; Mayers v. Paxton, 78 Tex. 196, 14 S. W. 568. It has never been held otherwise in this state, and, appellee having specially pleaded his title, his case must stand or fall upon that plea, and he cannot, in order to resist a general demurrer, fall back upon his general action in trespass to try title. This is said in view of defendant in error's contention that the petition, containing the statutory allegations of trespass to try title, is not subject to general demurrer, even if the title specially pleaded is insufficient to maintain the action. The two cases cited are not actions of trespass to try title, and have no bearing on the proposition stated. The case of Staples v. Llano County, 9 Tex. Civ. App. 203, 28 S. W. 569, was an action for debt; the case of Oheeves v. Anders, 87 Tex. 294, 28 S. W. 274, 47 Am. St. Rep. 107, was a suit on an insurance policy. An exception to the rule is where title by limitation is pleaded in addition to the ordinary action of trespass to try title. Mayers v. Paxton, 78 Tex. 196, 14 S. W. 568.

[2] On general demurrer every reasonable intendment must be indulged in favor of the pleading assailed by it, and, if any cause of action or ground of defense is shown by the pleading, the general demurrer should be overruled.

In this case it was alleged that W. H. Mason, Jr., Albert Snyder, and O. K. Mason incorporated their business under the name of the Snyder-Mason Lumber & Manufacturing Company, and afterwards sold to the Brownsville Lumber & Manufacturing Company all of the business of the first-named corporation for \$16,000 and the assumption of its debts; that the last-named corporation was a reincorporation of the Snyder-Mason Lumber & Manufacturing Company, with the same stockholders, and occupied the same relation to the land in controversy as did the original lease and option owners, which was the ownership of a certain lease on said land and option to purchase the same from the Brownsville Land & Improvement Company; that the terms of the lease and option were that the said company leased the land to Snyder and Mason for five years on condition that within 30 days from October 1, 1908, it should begin the construction of a planing mill, not to cost less than \$5,000, on the land and should complete the same within five months and continue to operate it thereafter, and to put a lumber yard on the land, and that the lessees should have the right to buy the land for \$800 at any time after the planing mill and lumber yard had been installed; that afterwards the time for installing the two plants was extended to November 1, 1909; that Snyder and Mason transferred all their rights to the Snyder-Mason Lumber & Manufacturing Company on

August 10, 1909, and the same were acquired from that corporation by the Brownsville Lumber & Manufacturing Company; that Snyder and Mason did place the lumber yard on the land, and the two corporations maintained it, and the construction of the planing mill was begun on September 1, 1909, and was being carried on when on October 12, 1909, an attachment was levied on all the property of the corporation by a United States marshal, the same having been sued out by the appellant in this suit, and on December 4, 1909, bankruptcy proceedings were begun and were pending in the federal court.

It was further alleged: "Your petitioner further represents that upon the levy of the said writ of attachment, namely, on October 12, 1909, the said Albert Snyder and W. H. Mason, Jr., for the purpose of protecting the said Brownsville Lumber & Manufacturing Company from a forfeiture of its said lease and option by the Brownsville Land & Improvement Company, which forfeiture was then and there anticipated by reason of the aforesaid attachment, procured from the Brownsville Land & Improvement Company a conveyance of the said block 3, in West Brownsville, which conveyance they took in their own names, and they then and there paid said Brownsville Land & Improvement Company the sum of \$800 as required by the terms of the aforesaid lease and option; the said conveyance being made expressly, subject to said lease and option. And that by reason of the premises the said Snyder and Mason thereby obtained and held the title to said block of land in trust for the benefit of the said Brownsville Lumber & Manufacturing Company, subject only to the return to them of their expenditures in the premises. That thereafter the said Albert Snyder acknowledged said trust, and together with W. C. Feild, to whom he had transferred half his title to said land, conveyed to plaintiff herein, as trustee for the Brownsville Lumber & Manufacturing Company, then in bankruptcy, his right in and to said block, being one undivided half thereof, which undivided half was thereafter conveyed to plaintiff under an order of sale issued in said bankruptcy proceeding out of the said district court of the United States to the said National Lumber & Creosoting Company, the defendant in this cause. But that the said W. H. Mason, Jr., wholly failed to transfer to plaintiff the legal title in and to the remaining undivided half of said premises, but subsequently, on June 29, 1910, conveyed same to the defendant herein. And your petitioner represents that he is ready and willing to pay to the defendant herein as assignee of said W. H. Mason, Jr., the aforesaid moneys paid by him to said Brownsville Land & Improvement Company, to wit, the sum of \$400, with legal interest thereon, and all legitimate expenses connected with the

obtaining of said conveyance from said Brownsville Land & Improvement Company, and he now here offers so to do, and avers that he is entitled to have from defendant a conveyance of its right and interest in and to said undivided half of said block, held from and under the said W. H. Mason, Jr."

[3] If the bankrupt corporation owned the lease and option, and Snyder and Mason, stockholders in the concern, paid the \$800 specified in the contract for the express object of protecting the corporation in its lease and option, the deed made to them inured to the benefit of the corporation. They were members of the corporation managing its affairs, and, if they obtained the benefit of the option from the owner of the land for themselves, they could have obtained it for the corporation. It owned the lease and the option; it had been striving to perform the conditions of the option; and the sale was based upon a lease and option to which Snyder and Mason had no right nor title. When they bought the land they bought for the corporation, no matter in whose name the deed was executed. One of them recognized the trust that was reposed in him, and, when the money that he had paid out was refunded, he conveyed the land to the trustee. The other, however, repudiated the trust and sold to another person. The stockholders under the allegations were acting for the corporation, and they cannot defeat the claims of creditors by claiming property bought for the corporation by having it conveyed to them in their individual capacity.

The land could not have been bought by Snyder and Mason except through the assistance of a contract owned by the corporation, and, when it was bought by means of and under the shadow of that contract by men in control of the corporation, equity, in order to work out right and justice, even though the stockholders did not intend or desire to create a trust relation, will raise a constructive trust in favor of the corporation. The stockholders occupied a fiduciary relation to the corporation, and for them to be permitted to acquire rights that are and ought to be the rightful property of the corporation would be inequitable and unjust. Constructive trusts "arise when the legal title to property is obtained by a person in violation, express or implied, of some duty owed to the one who is equitably entitled, and when the property thus obtained is held in hostility to his beneficial rights." "Persons acting in a fiduciary relation to a corporation will not be permitted to acquire title to the trust property, but equity impresses a constructive trust upon the property purchased or obtained for the benefit of the party beneficially entitled." Pomeroy, Eq. §§ 1051, 1052. The trustee will not be permitted to trade and speculate in the necessities of the person to whom he occupies a fiduciary relation.

There is no merit in the third, fourth, and fifth assignments of error, and they are overruled. There being no statement of facts, the remaining assignments cannot be considered. The corporation having been declared a bankrupt, all of its property passed to the trustee in bankruptcy.

The judgment is affirmed.

GAMBLE v. MARTIN et al.

(Court of Civil Appeals of Texas. El Paso.
Oct. 24, 1912. Rehearing Denied
Nov. 27, 1912.)

1. VENDOR AND PURCHASER (§ 289*) — VENDOR'S LIEN—FORECLOSURE—RIGHTS OF PERSONS NOT PARTIES.

Where a subsequent purchaser or incumbrancer is not made a party to a suit to foreclose a vendor's lien, his right to redeem is not prejudiced by the judgment.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 820, 821; Dec. Dig. § 289.*]

2. VENDOR AND PURCHASER (§ 279*)—FORECLOSURE OF VENDOR'S LIEN—PARTIES—INSTRUMENTS NOT RECORDED.

Under the statute providing for registration of all instruments affecting title to real estate, a junior mortgagee who is not in possession, and whose mortgage is not of record at the time of the institution of the suit and entry of judgment of foreclosure of a vendor's lien, and of whose rights the prior lienholder is not otherwise advised, is not a necessary party, and such foreclosure of the first lien bars his rights.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 778-782; Dec. Dig. § 279.*]

3. VENDOR AND PURCHASER (§ 289*) — VENDOR'S LIEN—FORECLOSURE—JUNIOR INCUMBRANCER—BURDEN OF PROOF.

Where the lien of a junior incumbrancer was not of record at the time of foreclosure of a senior vendor's lien, and such junior incumbrancer was not made a party to the suit, the burden was on him to show possession or other facts sufficient to put the holder of the vendor's lien on notice of his rights at the time of the foreclosure proceeding, in order to retain his right to redeem.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 820, 821; Dec. Dig. § 289.*]

4. VENDOR AND PURCHASER (§ 231*) — BONA FIDE PURCHASERS — DISCONNECTED DEED—EFFECT.

A recorded deed disconnected from the title is not notice.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 513-539; Dec. Dig. § 231.*]

5. MORTGAGES (§ 426*)—FORECLOSURE—PARTIES.

The only proper parties to a suit to foreclose a mortgage are the mortgagor, the mortgagee, and those who have acquired rights or interests under them subsequent to the execution and delivery of the mortgage; a stranger claiming adversely to the title of the mortgagor not being a necessary or proper party, as he could not be affected by the foreclosure suit.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 1272-1287; Dec. Dig. § 426.*]

6. ESTOPPEL (§ 29*)—ESTOPPEL BY DEED—ACCEPTANCE OF QUITCLAIM.

In a suit by a junior lienholder to redeem from foreclosure of a vendor's lien, mere acceptance of a quitclaim deed by the purchaser on foreclosure of the lien was insufficient to create an estoppel.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 69-73; Dec. Dig. § 29.*]

7. APPEAL AND ERROR (§ 548*)—REVIEW OF EVIDENCE—NECESSITY OF BILL OF EXCEPTIONS.

An objection to the admission of testimony cannot be reviewed in the absence of a bill of exceptions reserved at the trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2433-2440; Dec. Dig. § 548.*]

8. EVIDENCE (§ 317*)—HEARSAY.

Evidence of a witness as to certain statements made to him by J. in explanation of J.'s failure to testify on a former trial was inadmissible as hearsay.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1174-1192; Dec. Dig. § 317.*]

9. EVIDENCE (§ 271*)—RECORDS—ABANDONED PLEADINGS.

Abandoned pleadings drawn by one not a party, containing self-serving declarations, were properly excluded.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1068-1079, 1081-1104; Dec. Dig. § 271.*]

10. TRIAL (§ 237*)—INSTRUCTIONS—BURDEN OF PROOF—"ESTABLISHED."

An instruction that, if plaintiff had established by a preponderance of the evidence that at a certain conference he had accepted defendant's proposal, then the jury should answer a certain question submitted in a special verdict in the affirmative was not objectionable on the ground that the word "established" imposed a greater burden on plaintiff than he was required to bear; the word being used in its common acceptance and therefore not misleading.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 542, 548-551; Dec. Dig. § 237.*]

For other definitions, see Words and Phrases, vol. 8, pp. 2469-2473.]

Appeal from District Court, Taylor County; Thomas L. Blanton, Judge.

Suit by E. C. Gamble against George B. Martin and others. Judgment for defendants, and plaintiff appeals. Affirmed.

See, also, 129 S. W. 336.

Edwin H. Yeiser and James H. Robertson, both of Austin, and S. P. Hardwicke, of Abilene, for appellant. H. G. McConnell, of Haskell, A. H. Kirby, of Abilene, and Montgomery & Britain, of Wichita Falls, for appellees.

HIGGINS, J. This suit was brought in the district court of Taylor county by Gamble against Geo. B. Martin and King county to recover four leagues of land situated in Lamb county, Tex., patented by the state to King county and being the King county school land. Recovery of said land was sought upon two counts: First, upon an alleged right to specific performance of an agreement to convey to Gamble; and, second, to enforce a right of redemption as a junior mortgagee, which appellant claimed

under the mortgage hereinafter referred to, executed by Ashby S. James to L. C. Grant, trustee, for the use and benefit of Gamble. Upon trial before a jury, the cause was submitted upon special issues, and upon such findings, and upon additional findings of fact by the court, judgment was rendered in favor of the appellees. This is the second appeal of this case; former opinion appearing in 129 Southwestern Reporter at page 387. On March 22, 1892, the land in controversy was conveyed by King county to Powell & Bradford in consideration of their note for \$22,139, payable on or before 20 years after date, with interest at the rate of 6 per cent. per annum, payment of which was secured by a vendor's lien. This deed was duly recorded on April 13, 1892. By deed dated April 13, 1892, recorded April 26, 1892, Powell & Bradford conveyed to John G. James, in consideration of \$2,000, cash and assumption by the vendee of the purchase-money note due King county. By deed dated July 20, 1893, duly recorded August 4, 1893, John G. James conveyed to the First National Bank of Childress, Tex., for a consideration of \$1 per acre and other valuable considerations. By deed dated August 1, 1893, recorded October 27, 1894, the First National Bank of Childress conveyed the land to Ashby S. James in consideration of \$4,000. By deed dated September 1, 1893, recorded September 20, 1893, Ashby S. James conveyed the land in trust to L. C. Grant for the use and benefit of Gamble, securing James' note to Gamble in the sum of \$3,000, due January 1, 1896, and in addition to the other terms and provisions usually incorporated in instruments of this character it was provided that a substitute trustee might be appointed in case Grant for any reason failed to act. In February, 1907, the land was sold under the deed of trust by a substitute trustee, and by deed dated February 5, 1907, recorded March 4, 1907, it was conveyed by the substitute trustee to appellant. This suit was filed April 29, 1907. On January 5, 1894, King county filed suit against Powell & Bradford, John G. James and First National Bank of Childress to recover judgment on the note executed by Powell & Bradford to King county in payment for said land and for foreclosure of the vendor's lien securing its payment. Neither Ashby S. James nor the appellant Gamble were parties to this suit. The First National Bank of Childress disclaimed any interest in the land and on October 23, 1894, judgment was entered in favor of King county for the sum of \$25,615.17, with foreclosure of vendor's lien, under which judgment the land was sold and conveyed on March 5, 1895, to King county, for the sum of \$9,000. By ordinary quitclaim deed dated January 9, 1898, recorded May 4, 1898, Ashby S. James, in consideration of the sum of \$10, released and quitclaimed unto King county and its assigns all of his right, title,

and interest in and to the land. On February 16, 1899, the commissioners' court of King county entered an order accepting the proposition of appellee to purchase the land for \$1 per acre, to be paid on or before 20 years from date, with interest at the rate of 3 per cent. per annum, payable in advance, and ordering the county judge upon the execution by Geo. D. Martin of his note covering the purchase money, to execute to him a bond for title, the note to be secured by lien upon the land. On October 2, 1900, King county, by J. M. Martin, its county judge executed a deed to the appellee covering the land in controversy, reciting authority of the commissioners' court, but referring to no order. A deed having been given for the land instead of the bond for title, as directed by the order of February 16, 1899, the commissioners' court of King county therefore, on August 13, 1906, entered an order ratifying the above-mentioned deed of October 2, 1900, executed by its county judge to Geo. D. Martin, and directed the county judge of the county to execute to appellee a deed ratifying the said deed of October 2, 1900, and in pursuance to this last-mentioned order R. E. Lassiter, county judge of King county, on August 13, 1906, executed a deed to Geo. D. Martin conveying the land in controversy.

It is unnecessary to detail the evidence upon which the appellant claims a right to specific performance of an agreement to convey the land to him as it was a controverted issue whether or not such an agreement was ever made, and this issue, having been submitted to the jury, was determined adversely to the appellant.

Coming now to a consideration of appellant's asserted right of redemption, it will be noted that neither he nor Ashby S. James, under whom he claimed, were parties to the foreclosure suit instituted on January 5, 1894, by King county against Powell & Bradford, John G. James, and the First National Bank of Childress. It will also be noted that, while the deed of trust to L. C. Grant, trustee, was of record when the foreclosure suit was instituted, yet the deed from the First National Bank of Childress to Ashby S. James was not of record and was not recorded until October 27, 1894, subsequent to the entry of the judgment of foreclosure. It is contended by appellant that, inasmuch as he had a valid lien upon the premises, his right to redeem the land was not affected by the foreclosure of the senior lien in favor of King county because he was not a party to the suit.

[1] The general rule is well settled that, in case of a foreclosure of a vendor's lien, a subsequent purchaser or incumbrancer, who is not made a party thereto, is not affected by the judgment rendered, and it does not prejudice the rights of such parties to redeem the land. In other words, in order to bar the equity of redemption, they must be parties to the suit and to the judgment.

Ufford v. Wells, 52 Tex. 612; Foster v. Power, 64 Tex. 247; Railway Co. v. Whitaker, 68 Tex. 634, 5 S. W. 448; Pierce v. Moreman, 84 Tex. 596, 20 S. W. 821; McDonald v. Miller, 90 Tex. 309, 39 S. W. 89; Spencer v. Jones, 92 Tex. 520, 50 S. W. 118, 71 Am. St. Rep. 870; Rogers v. Houston, 60 S. W. 445; Milmo Nat. Bank v. Rich, 16 Tex. Civ. App. 364, 40 S. W. 1032. This is but the application of the well-settled rule that the rights of parties interested in the subject-matter of litigation are not affected by the judgment rendered unless they are parties to the suit.

[2] Our statutes, however, provide for the registration of all instruments affecting title to real estate, so that parties dealing with the same may have notice and be apprised of the rights of all parties therein, and, in the absence of such record, possession of the land, or other facts sufficient to affect one with notice, innocent parties dealing with the land take same discharged of such secret and unknown claims, and it seems to be well settled that, in a suit to foreclose a lien upon land, a junior mortgagee who is not in possession, and whose deed is not of record at the time of the institution of the suit and entry of the judgment of foreclosure, and of whose rights the prior lienholder is not otherwise advised, is not a necessary party to such suit, and such foreclosure of the first lien bars the rights of the junior mortgagee in the land. Webb v. Maxan, 11 Tex. 678; Bradford v. Knowles, 86 Tex. 508, 25 S. W. 1117; Rogers v. Houston, 94 Tex. 403, 60 S. W. 870; Adoue v. Town of La Porte (Sup.) 124 S. W. 135; 27 Cyc. 1572; Wiltzie on Mortgage Foreclosure (1st Ed.) §§ 191, 192, 418, 419, and 420.

[3] Of course the rights of the junior lienholder would not be affected by the decree of foreclosure if the holder of the first lien had notice of his rights by possession or otherwise; but, in the absence of constructive notice afforded by the record, the burden of proof is upon the junior incumbrancer to show possession or other facts sufficient to put the holder of the first lien upon notice of his rights at the time of the foreclosure proceedings. Rogers v. Houston, supra. There is nothing in the record to show that King county had any notice of the rights of Ashby S. James, or of E. C. Gamble, unless the record of the deed of trust given by James to Grant, trustee, was constructive notice thereof. The deed from the First National Bank of Childress to Ashby S. James, appellant's mortgagor, not being of record at the time of the institution of the foreclosure suit by King county, appellant's mortgage, though recorded, was disconnected from the chain of title upon which King county was seeking to foreclose.

[4] Being entirely disconnected from the title, it was not notice to King county of any rights in the title to the land against which King county had its lien and desired to fore-

close. Many titles are clouded and obscured by transfers and incumbrances emanating from parties disconnected from and in no wise related to the title, and in a foreclosure suit we think it necessary only to proceed against those whose claims in the land appear to be connected with the title against which the foreclosure is sought.

[5] Mr. Wiltsie in his work on Mortgage Foreclosure, par. 420, says: "The only proper parties to a foreclosure are the mortgagor and the mortgagee and those who have acquired rights or interests under them subsequent to the execution and delivery of the mortgage, for they are the only persons who have any rights or obligations growing out of the mortgage, or who can be affected in any manner by the litigation. A stranger claiming adversely to the title of the mortgagor can in no way be affected by the foreclosure suit. It can make no difference to him whether the mortgage is valid or invalid, whether it is discharged or foreclosed, or whether the estate mortgaged, the only estate which can be affected by the decree, remains in the mortgagor, or is transferred to another. As such adverse claimant is a stranger to the mortgage and to the mortgaged estate, he can have no interest in the subject-matter of the action; there is no privity between him and the plaintiff; and the plaintiff has no right to make him a party defendant to a foreclosure, for the purpose of trying his adverse title." This statement of the rule, we think, bears out the conclusion reached by us. The Grant mortgage, under which appellant claims, having emanated from one who was an apparent stranger to the title of Powell & Bradford, the presumption would be that his claim was adverse to that of the Powell & Bradford title, and as such he would not be a proper party to the foreclosure proceedings, as questions of title cannot be passed upon in those proceedings.

It is contended by appellant that King county recognized the Ashby S. James title and thereby became estopped to show the invalidity thereof by reason of its acceptance of above-mentioned quitclaim deed from James taken after the foreclosure of its lien. It is not a question, however, of whether or not the James title was valid or invalid, and it may be conceded that same was valid; but this does not alter the fact that neither James nor Gamble were necessary parties defendant to the foreclosure suit, for the reasons indicated above.

[6] Furthermore, by the mere acceptance of a quitclaim deed, no element of estoppel is raised in a case of this kind. The case of Waco Bridge Co. v. City of Waco, 85 Tex. 327, 20 S. W. 137, and other cases cited by appellant, wherein grantees have been held estopped to deny certain facts by the accept-

ance under certain circumstances of deeds, we do not regard as applicable.

In the former opinion of this case there is a discussion of whether or not appellant's right of redemption was barred by limitation, and upon this appeal it is again contended that appellant's right was so barred. Under the view which we take, however, that the foreclosure proceeding barred the right of redemption, we find it unnecessary to pass upon the questions now presented regarding the plea of limitation.

[7] The ninth assignment of error is overruled. It complains of the admission of certain testimony, but our attention is called to no bill of exceptions questioning the admission of the testimony of which complaint is made.

[8] The court properly refused to permit the witness Yelser to testify to certain statements made to him by Ashby S. James in explanation of the failure of James to testify upon the former trial of this case; such statements were hearsay and inadmissible.

[9] Neither did the court err in refusing to permit appellant to offer in evidence the abandoned pleadings in the case which had been drawn by James; the declarations therein were self-serving and inadmissible. The various assignments relating to the sufficiency and validity of the deed dated October 2, 1900, from King county by its county judge, J. M. Martin, to Geo. B. Martin, are overruled. The validity of this instrument is immaterial in view of the execution of the subsequent deed by King county dated August 13, 1906. We do not think the charge of the court is subject to the objections urged in the seventeenth and eighteenth assignments, and they are therefore overruled.

[10] By the nineteenth assignment complaint is made of that portion of the charge which reads as follows: "In case the plaintiff has established, by a preponderance of the evidence, that he had at said conference in Ft. Worth accepted the said proposal of defendant, then you will answer said question 'yes,' otherwise you will answer the same 'no'"—the contention being that by the use of the word "established" a greater burden is imposed upon the appellant than the law requires. Literally and technically, this may be true, but in its common acceptation, and considering the charge as a whole, we do not think the jury could have been misled by the use of the word quoted.

The twentieth assignment is also overruled. This complains of the refusal of the court to submit a special charge requested by the appellant which was properly submitted in the court's general charge. It was therefore not error to refuse a special charge submitting the same issue.

Affirmed.

ST. LOUIS SOUTHWESTERN RY. CO. OF TEXAS v. LEE.

(Court of Civil Appeals of Texas, Texarkana. Nov. 6, 1912. On Motion for Rehearing, Nov. 14, 1912.)

1. RAILROADS (§ 103*)—FENCES—STATUTORY PROVISIONS—"FIELD."

The word "field," in Rev. Civ. St. 1911, arts. 6595-6598, requiring every railroad company whose road passes through a "field" to place and maintain cattle guards at the points of entry, etc., means land inclosed by a fence which will prevent the ingress of live stock, and a railroad company need not provide cattle guards unless its track passes through an undivided field inclosed by the owner, as distinguished from separate fields so inclosed.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 315-332, 762, 763, 767, 769, 772; Dec. Dig. § 103.*]

For other definitions, see Words and Phrases, vol. 3, pp. 2761-2762.]

On Motion for Rehearing.

2. RAILROADS (§ 103*)—FENCES—CATTLE GUARDS—DUTY TO CONSTRUCT AND MAINTAIN.

Where a railroad company maintaining a track through a plantation fenced its right of way, and constructed cattle guards at the points of entry, and the owner subsequently inclosed the land and joined his fences to the right of way fences without intending to subdivide his land into separate fields, the track passed through a field within Rev. Civ. St. 1911, arts. 6595-6598.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 315-332, 762, 763, 767, 769, 772; Dec. Dig. § 103.*]

3. DAMAGES (§ 62*)—INJURIES TO PROPERTY—MITIGATION.

Where a railroad company failed to maintain proper cattle guards at points of entry into a field, the owner damaged by trespassing hogs passing over the cattle guards was not required to minimize damages by fixing the cattle guards and the right of way fence built by the company.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 119-132; Dec. Dig. § 62.*]

Appeal from District Court, Bowie County; P. A. Turner, Judge.

Action by Luck Lee against the St. Louis Southwestern Railway Company of Texas. From a judgment for plaintiff, defendant appeals. Affirmed.

Appellee owns a plantation of about 500 acres in Bowie county, which the appellant's line of railroad enters on the east, running through in a southwesterly direction to the west side. The conclusion is reasonably warranted that appellee cleared and inclosed the land after the railway was built. Prior to the injury in suit, the railway company had erected a fence on its right of way, on both the east and the west side, entirely through the tract of land. Appellee's fences around his land joined to the right of way fences. In addition to the right of way fences, the appellant had constructed cattle guards or stops at the points where the railway enters the appellee's farm on the east and west. There is evidence that the right of way fences were insufficient to prevent hogs from en-

tering the appellee's cultivated land, which was situated on each side of the right of way fences, if the hogs once entered the inclosed railway track at the cattle guards or stops on the east and west sides of the farm where the railway enters the same. It was established, without conflict of evidence, that hogs entered appellee's inclosed farm by first getting over or through the cattle guards or stops on the east side, and then getting through the right of way fence into appellee's growing crops, and destroyed a large amount of same. The suit, among other things, was to recover the value of the crops thus destroyed. It was alleged as ground for suit that appellant had neglected and failed to place, and keep same in good repair, good and sufficient cattle guards or stops at the points where its line of railroad entered appellee's inclosure, as required by law. The court charged the jury: "The evidence shows that the railroad of defendant enters the inclosure or field of plaintiff in two places, one on the east and one on the west. It was the duty of defendant to put in cattle guards where its railroad enters the field of plaintiff that would prevent stock of every kind from entering said field. If you believe from the evidence that hogs crossed either of said cattle guards and thereby entered the field of plaintiff and injured or destroyed any of his corn or peas standing therein, and thereby damaged plaintiff, then you will find for plaintiff as to this item of damage."

Glass, Estes, King & Burford, of Texarkana, and E. B. Perkins and D. Upthegrove, both of Dallas, for appellant. Mahaffey & Thomas, of Texarkana, for appellee.

LEVY, J. (after stating the facts as above). The reasons relied on, among others, in the first, second, and third assignments for error in the charge of the court are (1) because the charge made it the absolute duty of the railway company to put in cattle guards sufficient to turn the hogs of appellee; and (2) made the railway company liable for the damage from depredation, regardless of its negligence. The charge assumed as a matter of law a violation on the part of appellant of an express statutory provision imposing upon a railway company the duty to place and keep in repair such good and sufficient cattle guards or stops at the points where the railway enters a field or inclosure of the owner as to protect such field or inclosure from depredations of stock of every description. Articles 4523-4527, Revised Civil Statutes 1895 (articles 6595-6598, Rev. Civ. St. 1911). As the charge was evidently applied to the facts proven, the objection here made, that it was error to impose absolute liability on appellant upon the finding that the hogs got over the cattle guards, necessarily extends to and involves a determination of the correctness of the charge as applied to the

facts proven. If the court was in error in assuming the facts established, a violation of an express statutory provision, then imposing absolute liability, or liability at all, for the damage, was error, as claimed. The railway company had erected a fence on its right of way on both the east and west sides, extending entirely through the appellee's land. Appellee's fences around his farm joined and connected to the right of way fences. The appellant had, in addition to the right of way fences, constructed cattle guards or stops at the points where the railway enters the appellee's farm on both the east and the west. The hogs got over or through the cattle guards or stops, and then got through the right of way fences into appellee's growing crop. These are the facts admitted by the record. The statute above referred to was intended as well to relieve the landowner from the necessity of making cross fences because of the right of way as to protect the crops and inclosed land as a whole of adjacent landowners or their tenants from the incursions of live stock from the outside.

[1] "A field" evidently means that the part of the land used as such must be evidenced by a fence or some form of inclosure on the part of the owner which will prevent the ingress of live stock, since it would be an idle thing to require the railroad company to protect such cultivated land by a cattle guard or barrier to stock when by reason of the lack of a fence or other form of inclosure running to that portion of the right of way occupied by the railway company such cattle guard or stop would afford no protection. The statute, as can be seen, imposes the duty upon the railway company to put in the cattle guards or stops only "where the railway passes through a field or inclosure." A railway company has the legal right to fence in its track or right of way. Considering the purpose and language of the statute, in connection with the legal right of the company to fence in its track or right of way, it is evidently implied that, before the neglect of the duty to provide the cattle guards or stops is established, it must be shown that the track of the railway passed through the single or undivided field or inclosure of the landowner, as distinguished from two separate fields or inclosures of the landowner's making and intention. As appellee's fences were joined to the right of way fences on each side of the right of way of appellant, with his intention to have separate fields and inclosures, his field and his inclosure were partitioned from the single field and inclosure, and became and were by intention and design separate and distinct as such field and inclosure, lying one on each side of appellant's right of way and fence. After such partition by the landowner, the railway then and thereafter passed through and within its own fenced, separate, and exclusive in-

closure, and not through either of the fields or inclosures of appellee on each side of the right of way. In answering a certified question in *Railway Co. v. Wetz*, 97 Tex. 581, 80 S. W. 988, the Supreme Court, in making distinction of the *Adams Case*, 63 Tex. 200, remarked: "The only difference between that case and this is that in the one there were and in the other there were not fences built along the margins of the right of way. Obviously that makes no difference in the application of the statute." This latter remark was not involved in the question there to be answered, and we do not think that the court meant it to decide the question in the instant case being considered. And in that case there was no question of the intention of the landowner to partition his land by fences into two fields or inclosures, one on each side of the right of way. It is the simple question here, and no other, of whether the statute is applicable to the peculiar facts proven. In the case of *Southwestern Telegraph & Telephone Co. v. Krause*, 92 S. W. 431, the court in the opinion cited the case *supra*, but the facts of the case and the question involved there are entirely different from the peculiar facts of the present case. In the facts of the instant case we think the statute is not applicable and that the court erred in the charge, as contended by appellant. Though the cattle guards have been also erected, the railway company has not done so under legal requirement here and is not absolutely obligated to maintain same to prevent stock depredations on appellee's land.

The judgment must be reversed and the cause remanded in so far as the particular recovery appealed from is concerned. The judgment for stock killed at Findly Station will be affirmed.

On Motion for Rehearing.

[2] In the first consideration of the case, we treated the evidence as showing that appellee had joined his fence with the right of way fence of the railway company, with the intention and purpose of using and having the railway fence to subdivide his tract of cultivated land into two separate and distinct inclosures, one on each side of the right of way. It was because of this fact appearing that appellee had intentionally subdivided and used his tract in two separate and distinct fields, one on each side of the railway, that we ruled that he had not so brought himself within the terms of the statute in question as to make it applicable, for it would not appear in such circumstances that the railway passed "through a field or inclosure" of his. Upon a reconsideration of the case, we find that we were in error in so treating the facts. We would not be warranted in the evidence in concluding that appellee in fencing only to the right of way intended, and had the purpose of, having the railway fence operate to subdivide his cultivated land into

two separate fields or inclosures, one on each side of the right of way fence. This difference in fact makes, we think, the first ruling erroneous, and the appellee's motion for rehearing is granted.

The assignments are further considered and ruled on. The objection to the charge of the court heretofore set out must be overruled to the effect that it was erroneous as imposing absolute liability for the damages shown in the evidence because of the failure of the company to put in a stock guard that was sufficient to turn the hogs in evidence. The charge was in substantially the language of the statute in such respect. See articles 6595-6598, R. S. of 1911. And statutes upon like subjects have been held constitutional as within the police powers of the state. See *Railway Co. v. Childress*, 64 Tex. 346; *Railway Co. v. Rowland*, 70 Tex. 298, 7 S. W. 718.

A further point made by the assignments is based upon the assumption that the evidence showed that it was impossible for the company to construct a stock guard that would be sufficient to turn the hogs in evidence. The proof does not, we think, warrant the assumption, and therefore such question is not properly before us. There is no proof that the hogs were not hogs of ordinary disposition and docility. The appellee testified, and there is no proof to the contrary, that "my hogs were not any worse than anybody else's before they went through that guard."

[3] Error is predicated upon the refusal of the court to give special charges to the effect that it was the duty of the appellee to minimize the damages to his growing crop by fixing the stock guards and the right of way fence so as to keep the hogs out of his field. The question here has been heretofore decided, and the assignments are overruled. *Railway Co. v. Young*, 60 Tex. 201; *Railway Co. v. Adams*, 63 Tex. 201; *Railway Co. v. Knoepfl*, 82 Tex. 270, 17 S. W. 1052; *Railway Co. v. Blackwell*, 40 S. W. 860; *Kendall v. Railway Co.*, 95 S. W. 757.

The judgment is in all things affirmed.

POWELL v. STEPHENS et al.

(Court of Civil Appeals of Texas. Austin.
Nov. 27, 1912.)

APPEAL AND ERROR (§ 756*)—BRIEFS—FORM AND REQUISITES.

Act April 8, 1909 (Laws 31st Leg. [1st Called Sess.] c. 6) provides that on appeal to the Court of Civil Appeals the attorneys for both parties may file written or printed briefs, if written, not to exceed 15 pages; and rule 37, as amended October 30, 1912 (see Amendment to Rules, 149 S. W. x), provides that briefs may consist of 15 pages of foolscap. A typewritten brief containing 22½ pages of double-spaced typewritten matter, on paper of the size of ordinary letter heads, gotten up in book form, and which, if single-spaced, would not have contain-

ed over 12 pages of letter size, does not violate the rules or the statute, and will not be stricken out on motion.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3091; Dec. Dig. § 756.*]

Appeal from District Court, Coleman County; John W. Goodwin, Judge.

Action between Mrs. M. E. Powell and W. H. Stephens and others. Judgment for Stephens and others, and Mrs. Powell appeals. Opinion on appellees' motion to strike brief of appellant. Motion overruled.

Walter O. Woodward and Woodward & Baker, all of Coleman, for the motion.

RICE, J. Appellees have filed their motion to strike out appellant's brief, on the ground that the same contains more than 8 pages of foolscap paper, and more than 15 pages of typewritten matter, and is not printed as required by the rules of the Supreme Court, adopted January 24, 1912, and the statute relative to the preparation and filing of briefs in this court, alleging that said brief of appellant is typewritten and contains 22 pages, and is therefore in conflict with law and the rules of said court.

As this motion involves a matter of considerable importance to the bar, it is deemed advisable to collate the statute and rules pertaining thereto, and to express our views thereon. By the act of April 8, 1909 (Laws 31st Leg. [1st Called Sess.] p. 270), it is provided that, "when any case or suit may be taken up from any inferior court to the Court of Civil Appeals, whether by appeal, writ of error or otherwise, it shall be lawful for the attorney for both the plaintiff and defendant to file in the papers of said suit or cause, written or printed briefs or argument; if written, not to exceed fifteen pages, and that said court shall be required to notice the same as if it were the personal appearance of said attorney, and shall not dismiss any suit or cause where such brief or argument of counsel is filed with the papers for want of other or further prosecution."

Prior to the enactment of this statute, the Supreme Court had formulated rule 37 for the preparation of briefs in this court, which reads as follows: "The brief of the parties framed in accordance with these rules must be signed by the party or his counsel; and if by counsel it shall appear for and on behalf of what party or parties, by name, it is signed; and the copies thereof filed in the appellate court shall be plainly written or printed, and if it covers more than eight pages of foolscap, they shall be printed." This rule, however, was amended by the Supreme Court on October 30, 1912, by providing that said brief may consist of 15 pages of foolscap, instead of 8, as theretofore, so as to conform with the statute just quoted on

this subject. See Amendment to Rules, 149 S. W. x.

The brief complained of contains 22½ pages of double-spaced typewritten matter, on paper of the size of ordinary letter heads, and is gotten up in book form. Many of the pages are so spaced that their contents, double-spaced, could have been placed on half a page of foolscap, for which reason the brief comes within the purview of the statute and rule. If this brief had been single-spaced, as many are, it would not have contained over 12 pages of letter-size paper. We therefore hold that the brief in question does not violate the rule or statute, and is not subject to the objection made.

We wish to commend the manner in which this brief is prepared, in that it is double-spaced, clearly written on heavy paper, which renders it much more legible than if single-spaced and written on thin paper. It sets out the assignments, propositions, and statements, each on a line to itself, in capital letters, and in a manner to readily catch the eye, all of which materially aid the court in its examination of the brief.

For the reasons above stated, we overrule appellees' motion to strike out said brief.

NATIONS et al. v. HARRIS.

(Court of Civil Appeals of Texas. El Paso. Oct. 31, 1912. Rehearing Denied Nov. 27, 1912.)

1. DAMAGES (§ 159*)—PLEADING—VARIANCE—EVIDENCE.

A prayer for "damages as the result of the operation of a slaughterhouse, etc., for a period of two years next immediately preceding the filing of plaintiff's petition" would not warrant a recovery of damages up to the time of the trial.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 429-438, 440-444, 447, 449-453; Dec. Dig. § 159.*]

2. TRIAL (§ 191*)—DAMAGES—INSTRUCTIONS—ASSUMING FACTS.

In an action to abate a slaughterhouse as a nuisance and for damages, a requested instruction that the jury should not consider the annoyance or harm caused by flies was properly refused as withdrawing from the jury the question whether the flies were due to the slaughterhouse and its condition.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 420-431, 435; Dec. Dig. § 191.*]

3. DAMAGES (§ 228*)—INSTRUCTIONS—CURE BY REMITTITUR.

In an action for damages and an injunction, any error in instructions as to damages are cured by a remittitur of the entire amount of damages.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 576-579; Dec. Dig. § 228.*]

4. NUISANCE (§ 36*)—JUDGMENT—CONFORMITY TO FINDINGS AND EVIDENCE.

Where the evidence raised the issue whether a slaughterhouse was a nuisance, and damages were allowed the plaintiff, though there was evidence that the premises had been made clean before the trial, it was proper to abate it, especially where the verdict in answer to a

special charge to determine whether it was an existing nuisance found that it was.

[Ed. Note.—For other cases, see *Nuisance*, Cent. Dig. § 95; Dec. Dig. § 38.*]

5. APPEAL AND ERROR (§ 221*)—OBJECTION BELOW—NECESSITY—SCOPE OF DECREE.

Assignments of error to the decree enjoining a nuisance cannot be sustained where the decree follows the prayer of the petition and the findings that the matter was a nuisance, and no steps were taken by defendant to limit the scope of the injunction in the lower court.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 1353-1356, 1359, 1361-1363, 1365-1367; Dec. Dig. § 221.*]

Appeal from District Court, El Paso County; J. R. Harper, Judge.

Action by Mrs. Annie Hays Harris against J. H. Nations and another. Judgment for plaintiff, and defendants appeal. Affirmed on condition.

W. B. Ware, Turney & Burges, and T. A. Falvey, all of El Paso, for appellants. Nealon, Neill & Thomason, of El Paso, for appellee.

HIGGINS, J. This was a suit by Annie Hays Harris against J. H. Nations and the J. H. Nations Meat & Supply Company for damages in the sum of \$2,000 and for an injunction restraining the defendants from using on the property described in plaintiff's petition, or on any property near plaintiff's home, any of the buildings, slaughterhouses, and things complained of, and from butchering cattle or keeping cattle on the premises near plaintiff's home, or for using said property for the purpose or purposes for which it is now used, or for any purpose or purposes similar thereto. It resulted in a judgment in the sum of \$250 in favor of the plaintiff against J. H. Nations, dismissing the J. H. Nations Meat & Supply Company, and for an injunction in favor of the plaintiff, in substantial accord with her petition.

[1] In the plaintiff's petition she prayed as follows with reference to damages: That she recover \$2,000 damages to her health and for the loss and impairment of the use and comfortable enjoyment of her property, which she has suffered as a result of the operation of said slaughterhouse, etc., for a period of two years next immediately preceding the filing of plaintiff's petition; that is, the 13th day of April, 1911. The first and second assignments of error and propositions thereunder complain that the trial court, in the face of this pleading, submitted the issue of damages up to the time of trial, and that this was error. Appellee explains in oral argument the condition of the record by saying that the portion of the prayer quoted was inserted to meet defendant's plea of two years' limitation, and that it was not intended thereby to refrain from asking for damages up to the time of trial. We are of the opinion, however, that, in the absence of anything in the record explaining or limiting the effect of the portion of the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

prayer quoted, the assignments mentioned must be sustained. We do not think, however, that the sustaining of these assignments requires a reversal of the case, as it can be cured by remittitur of the entire amount of the damages. This we shall require, as we do not think that this court can undertake to apportion the damages embraced in the finding for \$250 which occurred prior to the time of filing the petition and those which occurred afterwards.

[2] The third assignment of error complains that the trial court erred in refusing to give a special charge, in its nature peremptory, telling the jury that they could not consider, in arriving at said damages, the annoyance or harm caused by flies. We do not think the court erred in refusing to give this charge. Possibly a special charge requesting an issue as to whether these slaughterhouses, etc., caused flies might have been properly given under this testimony, but it could certainly not have been proper to peremptorily tell the jury that the flies present were not caused by the slaughterhouses and their condition.

[3] The fifth assignment of error recites that the court erred in charging the jury to find for plaintiff the damages she had sustained by flies being attracted by defendant's slaughterhouses. The court did not so tell the jury, but told the jury, if they believed that she had sustained damages by flies which were attracted by defendant's slaughterhouses, they might find for plaintiff. It would seem, however, that both the last two assignments are addressed to the damages rather than the injunction, and that requiring plaintiff to remit the damages would cure any question raised by these assignments.

[4] The fourth and sixth assignments of error complain because it was decreed that the said premises of the defendant were a nuisance at the time of trial, when the evidence showed that, for a period of 10 days before the trial, the premises had been cleaned up and rendered cleanly, etc.

The court on the trial charged that the operation of a slaughterhouse, etc., is lawful and not necessarily a nuisance, but may become a nuisance if conducted in such manner as to cause flies or disagreeable or unhealthy odors. The defense asked a special charge to the effect that the jury would find whether or not the slaughterhouse, etc., in the condition it is now conducted, is a nuisance, and that they would so state in their verdict, and by their verdict the jury answered that the slaughterhouse was a nuisance. The testimony being sufficient to raise an issue of whether or not the slaughterhouse was a nuisance, it would probably have been correct for the court to abate it by injunction. See *Burditt v. Swenson*, 17 Tex. 489, 67 Am. Dec. 665. But, in view of the special charge asked and the jury's an-

swer thereto, there can be no question that the court properly by the injunction abated the nuisance.

[5] The remaining assignments are addressed to the form of the permanent injunction rendered in the judgment; the point being made that the judgment, without a hearing on the question, enjoined defendant from using said land for any purpose similar to a slaughterhouse, without regard to whether or not the said use would be a nuisance.

If we should sustain these assignments, it would only necessitate the reformation of the judgment; but we are of the opinion that they should not be sustained. The injunction ordered ran substantially in the language of the petition praying therefor; no exception was taken to this prayer; nor did defendant below point out or suggest any purpose similar to a slaughterhouse for which the property might be used which would not be a nuisance. In other words, we believe that if the defendant below, appellant here, desired to limit and narrowly define the extent to which the injunction should go, if granted, steps to effect that purpose should have been taken during the trial in the court below, and that it is not improper for the injunction to run substantially as prayed for, after the facts had been submitted to a jury, who found the premises a nuisance.

If within 10 days from this date the appellee shall file a remittitur of \$250, the cause will be affirmed; otherwise it will be reversed and remanded.

BOOKER v. COULTER.

(Court of Civil Appeals of Texas. Austin.
Nov. 6, 1912.)

1. JUDGMENT (§ 138*)—SETTING ASIDE DEFAULT—DILIGENCE—PROCURING COUNSEL.

A nonresident defendant, who, though knowing for some time that he was without counsel in an action, did not attempt to engage counsel until a few days before the beginning of the term at which the case was to be tried, did not exercise sufficient diligence to warrant the setting aside of his default because he was unrepresented by counsel.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 249-251, 254; Dec. Dig. § 138.*]

2. JUDGMENT (§ 145*)—VACATION OF DEFAULTS.

A default judgment will not be vacated, on the ground that defendant was not represented by counsel, where it appears that, had he been represented by counsel, the result could not have been changed.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 271, 292-295; Dec. Dig. § 145.*]

3. JUDGMENT (§ 138*)—VACATION—DEFAULTS—OBTAINING TESTIMONY.

Where a nonresident defendant knew, at least a month before the trial of an action, that he could not be present, and that his defense could alone be made by his testimony, his failure to have his deposition taken was such

a lack of diligence that a default will not be set aside to allow him to present his defense.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 249-251, 254; Dec. Dig. § 138.*]

4. JUDGMENT (§ 158*)—VACATION—DEFAULTS—MERITORIOUS DEFENSE.

A motion to set aside a default must be denied, where the allegation of a meritorious defense is not supported by affidavit.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 311; Dec. Dig. § 158.*]

Appeal from District Court, Tom Green County; J. W. Timmins, Judge.

Action by J. D. Coulter against S. W. Booker. There was a judgment for plaintiff, and defendant appeals. Affirmed.

See, also, 150 S. W. 219.

I. J. Curtsinger, of San Angelo, for appellant. C. E. Dubois, of San Angelo, and Stone & Wade, of Ballinger, for appellee.

Findings of Fact.

JENKINS, J. Appellee recovered a judgment for \$1,000 against appellant, the amount paid by him for stock in the Booker-Jones Oil Company, which he alleged he was induced to purchase by the fraudulent representations of appellant. Appellant assigns error on the action of the court in overruling his motion for a new trial, first, because he was not represented on said trial by any attorney; and, second, because he was not present at said trial.

The facts show: That appellant had formerly resided at San Angelo, Tom Green county, Tex., but that at the time of the trial he was a resident of Eminence, Ky. That at the institution of this suit in 1910 he employed a firm of lawyers of San Angelo, Tex., to represent him in this case. Said lawyers moved away from San Angelo prior to the trial of this cause, which fact appellant learned from a letter from one of them on November 16, 1911. On December 6, 1911, he wrote I. J. Curtsinger, who represents appellant on this appeal, asking what he would charge him to represent him; and on December 12th had his bank at Eminence, Ky., wire the San Angelo National Bank to pay said Curtsinger the amount of the fee demanded, of which telegram, by reason of a mistake in transmitting same, Curtsinger was not notified until December 16th. Court convened on December 11th, and this case was tried on the 14th. At the time of said trial, and at least a month prior to said time, appellant's wife was seriously sick at their home in Eminence, Ky., so that he could not leave her.

Opinion.

[1] 1. No sufficient diligence was shown as to the employment of an attorney to represent him after appellant learned that his attorneys would not be present to represent him at the December term of court.

[2] 2. Had Mr. Curtsinger been employed

on December 12th, the date of appellant's telegram to the bank, it is not probable that his presence at the trial would have changed the result, as the testimony in appellee's behalf was ample to sustain the judgment, and Mr. Curtsinger would have had no testimony to offer in rebuttal; it not appearing that the facts of appellant's alleged defense were known to any one but himself.

[3] 3. Appellant was a citizen of another state, and knew, for at least a month before the trial, that he could not be present at said trial, and yet he took no steps to have his deposition taken. This shows a lack of diligence as to procuring his testimony on said trial. *Mayer v. Duke*, 72 Tex. 445, 10 S. W. 566.

[4] 4. It is not properly made to appear that appellant had a meritorious defense to appellee's suit. The motion states that appellant did not sell said stock to appellee, and did nothing to induce him to buy the same; but this is not supported by affidavit.

Finding no error in the record, the judgment of the trial court is affirmed.

Affirmed.

PITTS v. KANE.

(Court of Civil Appeals of Texas. El Paso, Nov. 13, 1912.)

APPEAL AND ERROR (§ 621*)—FILING OF TRANSCRIPT—TIME.

A transcript upon writ of error cannot be filed after the filing of a motion to affirm on certificate; the appeal having been perfected upon the filing of an appeal bond.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2724-2731; Dec. Dig. § 621.*]

Appeal from Presidio County Court; W. W. Bogel, Judge.

Action by J. D. Kane against J. A. Pitts, in which the defendant appealed from an adverse judgment. On motion to affirm on certificate. Motion granted, and judgment affirmed.

Hays & Miller, of Marfa, for appellant. P. H. Clarke, of Marfa, for appellee.

HARPER, C. J. This case was brought by J. D. Kane in the county court of Presidio county against J. A. Pitts, upon written contract for certain moneys, which the record shows to be within the jurisdiction of the trial court. And the record also shows that the trial court had jurisdiction of the parties to the suit.

Judgment was rendered by the trial court, without jury, for the plaintiff, after which the defendant, J. A. Pitts, appealed by giving notice in open court, and by filing, on May 28, 1912, an appeal bond in compliance, in form and substance, with article 2097, Revised Civil Statutes of 1911; but the transcript was presented too late to be filed under the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

rule prescribed by article 1608, Revised Civil Statutes of 1911—that is, the transcript prepared by the clerk of the trial court, and the certificate accompanying the motion to affirm, show that the judgment was rendered May 11, 1912; that on May 28, 1912, the appeal bond was filed in the lower court; and that on the 27th day of August, 1912, the transcript was delivered to the clerk of this court, and this court refused to file same because not having been presented within the time (90 days) prescribed by law (Revised Civil Statutes 1911, art. 1608; Rio Grande & E. P. Ry. Co. v. Mendoza, 66 S. W. 578; Welsh v. Weiss, 40 Tex. Civ. App. 257, 90 S. W. 160; Wandelohr v. Grayson County Nat. Bank, 90 S. W. 180); that thereafter, on the 9th day of October, 1912, the defendant in error filed a motion to affirm on certificate thereto attached, regardless of the merits (authorities above cited), which motion is sustained, and the judgment of the lower court is in all things affirmed as to appellant and the sureties on the appeal bond.

Subsequent to filing of motion to affirm on certificate, appellant presented to the court transcript upon writ of error, and asked that same be filed. This comes too late, because the appeal was perfected to this court upon filing of the appeal bond.

TEXAS & P. RY. CO. v. MYERS et ux.

(Court of Civil Appeals of Texas. Texarkana. Oct. 29, 1912. Rehearing Denied Nov. 7, 1912.)

1. LIMITATION OF ACTIONS (§ 127*)—COMMENCEMENT OF ACTION—AMENDMENT OF PLEADINGS.

A railway employé who had been riding on a hand car was struck and killed by a train while attempting to cross the track to a place of safety after ineffectually attempting to remove the hand car from the track. The original complaint alleged as a cause of action the negligence of his foreman in compelling the crew to stay with the hand car too long. After a cause of action for his death would have been barred by limitations, except for the commencement of the action, the petition was amended to allege negligence on the part of the engineer of the train. *Held*, that the amendment did not introduce a new cause of action against which limitations had run.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 543-547; Dec. Dig. § 127.*]

2. MASTER AND SERVANT (§ 286*)—ACTIONS FOR INJURIES—EVIDENCE—SUFFICIENCY.

In an action for the death of a railway employé who was struck by a train while attempting to cross the track to a position of safety after attempting to remove a hand car from the track, evidence *held* to present a question for the jury as to the negligence of the engineer of the train and to support its verdict.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1001, 1006, 1008, 1010-1015, 1017-1038, 1038-1042, 1044, 1046-1050; Dec. Dig. § 286.*]

Appeal from District Court, Harrison County; H. T. Lyttleton, Judge.

Action by W. L. Myers and wife against the Texas & Pacific Railway Company. Judgment for plaintiffs, and defendant appeals. Affirmed.

See, also, 125 S. W. 49; 134 S. W. 814.

On the afternoon of April 9, 1908, Charley Myers was struck and instantly killed by one of the appellant's freight locomotives. He was a member of a regular bridge gang in the service of the appellant that were working on the bridges north of Woodlawn. At 4:30 in the afternoon, which was the usual hour to stop work, the bridge gang loaded their tools on a hand car furnished by the company for the purpose of transporting the tools, and started south to the town of Woodlawn. The regular boarding car of the bridge crew was stationed at Woodlawn, about three miles distant from the bridge they were working upon. While the bridge crew were proceeding from their work to Woodlawn on the hand car, the bridge foreman, who was on the lookout, discovered a freight train approaching from the north. It was proven that the operatives of the freight train saw the bridge crew on the hand car about the same time that the bridge foreman saw the freight train. The hand car at the time of the discovery of the approaching train was at a point about the middle or towards the south end of a narrow cut, and this is the point at which the operatives of the train saw the hand car. The cut was about 300 yards long, of narrow width; and the banks on each side were perpendicular and about 10 feet high. From the point of location of the hand car towards the south the track was straight, but upgrade. The bridge foreman testified that, when he first saw the approaching train, it was about 250 yards, or about 3 or 4 telegraph poles, distant. A member of the bridge crew testified that the train was about a quarter of a mile distant from the hand car. The engineer of the freight train testified that the hand car and crew were inside and towards the south part of the cut when he first saw them, and his locomotive was about 700 yards distant from the hand car at the time. The fireman on the locomotive gives the same distance as the engineer. Upon discovering the approaching train, the foreman immediately ordered the hand car stopped, and ordered the men to their places to assist in removing the car from the track. In compliance with the command of the foreman, the bridge crew endeavored to remove the hand car from the track, and lifted it until one of the employés dropped his end of the car and ran away. The car was gotten off the track except for one wheel, which hung to the rail. The employés then scattered away from the hand car, and Myers ran north on the right-hand or east side of the track, being the

same side on which the hand car was being lifted, and being the outside of a curve. After running a few feet, Myers attempted to cross the track to the other side, where the other members of the crew were, so as to be out of the way of the hand car, which was sure to be struck by the approaching train. It was dangerous to be near the hand car in the collision, because it was loaded with tools such as axes and the like. Just as he had crossed the rails to the ties on the west side of the track he was struck by the pilot beam of the engine, and instantly killed. The operatives of the freight locomotive admit that Myers and his crew were all the time in a perilous situation and place from the approaching train because it was in a narrow and deep cut and the hand car was on the track. These operatives further say that they saw and knew the perilous situation to the crew from the time of their first seeing the crew. The engineer testified that during all the time to the injury there was only once or twice, and then for a few seconds only, when some one of the bridge crew was not on the track with the hand car. According to the testimony of the engineer, there were 25 cars in the train, and at the time he first saw the bridge crew the engine was running at a speed of not less than 25 miles an hour or more than 28 miles an hour; that the time card limit was 18 miles an hour, but that the officers of the company had authorized him to run the train as fast as he thought it was safe; that as soon as he saw the bridge crew he applied the emergency brakes, and caused the whistle to be sounded and the bell to be rung. He said it was not possible to stop the train in the distance to be run, but that he slackened the speed down to between 12 and 15 miles per hour, and that this was the rate of speed of the train at the time of the injury. The fireman testified substantially as did the engineer about what was done to stop the train, except that the fireman testified that he did not see the engineer try to put sand on the rails in front of the wheels. Both the fireman and the engineer say that, after the deceased was struck, the train was stopped within five or six car lengths distance, and that at the time it struck deceased it was running between 12 and 15 miles per hour. The foreman of the bridge gang testified that the rate of speed of the train when it was first discovered by him was about 20 miles, and that it was running at the same rate of speed when it struck deceased. At the time of his death deceased was 20 years and 2 months old, and unmarried, and was earning about \$60 per month. His father and mother claim damages for loss of services during his minority and of expected pecuniary benefits after attaining his majority. The alleged grounds for negligence are (1) in the bridge foreman in ordering the members of his crew to remove the hand car from the track and in keeping them too long at work in the ef-

fort to remove the car from the track; and (2) in the operation of the locomotive after the operatives saw the perilous situation of the bridge gang. The court submitted only the second ground of alleged negligence to the jury, and confined a recovery to plaintiffs on that ground.

We conclude that the operatives of the freight train were guilty of negligence as pleaded, proximately causing the death of deceased; and the verdict of the jury in this respect is sustained.

F. H. Prendergast, of Marshall, for appellant. S. P. Jones, of Marshall, for appellees.

LEVY, J. (after stating the facts as above) The several assignments mainly present the two points as argued by appellant in its brief: (1) That the cause of action upon which recovery was had was barred by limitation; and (2) that there was no act of negligence shown on the part of the engineer and fireman to support the judgment.

[1] The precise contention as to the first point made is that the claim growing out of the negligence of the engineer of the freight train was barred by limitation because it was not set up until the filing of the second amended petition in June, 1910, more than two years after the death of Myers. The first petition was filed about a month after the death of deceased. This petition set up the fact that the deceased was struck and killed by a freight locomotive, and the circumstances under which it occurred; and charged the negligence to be in the foreman of the bridge crew in compelling the crew to stay with the hand car till the last to get it out of the way of the approaching freight train. The amended petition in 1910 charged substantially the same facts, reasserting the negligence of the bridge foreman, and also asserting the negligence of the engineer of the freight train in failing to discover Myers in time, or, having discovered him, in failing to stop his engine before it struck Myers. We do not think that the amended petition, upon which the case was tried, introduced a new cause of action against which limitation had run. *Caswell v. Hopson*, 47 S. W. 54, and authorities there cited.

[2] There was sufficient evidence, we think, to raise the issue of negligence on the part of the operatives of the locomotive proximately causing the death of Myers requiring its submission to the jury, and sufficient to support their findings. *Myers v. Railway Co.*, 134 S. W. 814 (on former appeal). The assignments presenting these two questions, being Nos. 1, 2, 3, 4, 7, 12, 14, and 15, are therefore overruled.

Assignments Nos. 8, 9, 10, and 13 are without injury, and are overruled.

The eleventh and sixteenth assignments are to the point that the judgment is excessive. Besides other things, it was shown that the deceased was young, strong, and

healthy, and was earning money, and that his father was 51 years old. Under the language of the statute, broad authority is given the jury to measure the pecuniary injury in this character of cases. There is nothing in the record or the size of the verdict to suggest any passion or prejudice on the part of the jury. The assignments are overruled.

It is unnecessary, we think, to discuss appellees' cross-assignments. They are overruled.

The judgment is ordered affirmed.

INGRAM v. McCLURE et al.

(Court of Civil Appeals of Texas. Texarkana. Oct. 24, 1912.)

1. JUSTICES OF THE PEACE (§ 210*)—REVIEW BY CERTIORARI—JUDGMENT ON STATUTORY BOND.

Where defendant, against whom a default judgment was rendered in justice's court, brought the case to the county court by certiorari, giving the statutory bond, plaintiff, obtaining a judgment showing a trial on the merits in the county court, was entitled to judgment against the sureties on the bond filed in the county court, as required by Rev. Civ. St. 1911, art. 749.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. § 829; Dec. Dig. § 210.*]

2. STIPULATIONS (§ 6*)—REQUISITES OF WRITING—RULES OF COURT.

An agreement of counsel, to be enforceable, must be reduced to writing, signed, and filed, as required by district and county court rule 47 (142 S. W. xxi).

[Ed. Note.—For other cases, see Stipulations, Cent. Dig. §§ 5-13; Dec. Dig. § 6.*]

Appeal from Wise County Court; E. M. Allison, Judge.

Action by J. J. Ingram against R. C. McClure and another. From a judgment of the county court granting insufficient relief to plaintiff, on defendant bringing the case from justice's court to the county court by certiorari and giving the statutory bond, he appeals. Reformed and affirmed.

R. E. Carswell and Robert Carswell, both of Decatur, for appellant. C. V. Terrell, of Decatur, for appellees.

LEVY, J. [1, 2] The suit was filed in the justice's court on a promissory note, and a judgment by default was entered. The defendant R. C. McClure carried the case to the county court by certiorari, giving the statutory bond. The county court rendered judgment in favor of the plaintiff and against the defendants for the amount of the note, interest, and attorney's fees sued for, but refused to enter judgment against the sureties on the certiorari bond. The chief question presented on the appeal is on the action of the court in refusing to enter judgment against the sureties on the bond given. The plaintiff was entitled to have judgment rendered against the sureties on the certio-

rari bond. Article 749, R. S. of 1911; Yates v. Collins, 19 Tex. 138. The face of the judgment shows a trial on the merits, and not a judgment by agreement. For agreements of counsel to be enforced by the courts, the agreements must be made as provided by the rules of court. See rule 47 for district and county courts (142 S. W. xxi).

The judgment as entered by the trial court is here reformed so as to allow the plaintiff further to have judgment against C. B. Beard, J. A. Moore, and R. L. Hunt, sureties on the certiorari bond, for the amount of the judgment rendered against the defendants Fannie and R. C. McClure, and as so reformed the judgment is affirmed, costs of appeal to be taxed against appellees.

CLAYTON D. BROWN CO. v. O'CONNOR et al.

(Court of Civil Appeals of Texas. San Antonio. Nov. 13, 1912.)

1. LANDLORD AND TENANT (§ 76*)—RIGHT TO ASSIGN OR SUBLET.

Where a lease provided that the premises should be used for mercantile purposes and not otherwise, and that the lessee should not assign or underlet the premises or any part thereof, without the consent of the lessor in writing, the lessee had no right without the consent of the lessor to permit a third person to place signboards on the roof, especially as Rev. St. 1895, art. 3250, expressly provides that lessees shall not rent or lease the leased premises during the term to any other person without the consent of the landlord, his agent or attorney.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 225-230; Dec. Dig. § 76.*]

2. LANDLORD AND TENANT (§ 123*)—EXTENT OF PREMISES LEASED.

Where an owner of a one-story building containing several rooms leases them to different tenants, each lessee has merely an easement in the roof for the purpose of protection from the weather and has no control over it.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 435, 436; Dec. Dig. § 123.*]

3. LANDLORD AND TENANT (§ 76*)—RENT—PAYMENT—OPERATION AND EFFECT.

An owner of a one-story building containing several rooms, who leased them to different tenants, was not estopped by the acceptance of the rent from compelling a removal of signboards erected on the roof by a third person with the consent of the lessees; such consent not being a subletting, but an attempt to rent the property of another without authority.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 225-230; Dec. Dig. § 76.*]

Appeal from District Court, Dallas County; Kenneth Foree, Judge.

Action by the Clayton D. Brown Company against J. C. O'Connor and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Alex F. Weisberg and Spence, Knight, Baker & Harris, all of Dallas, for appellant. Cockrell, Gray, Thomas & McBride, of Dallas, for appellees.

FLY, C. J. This is a suit instituted by appellant to restrain appellees from injuring or destroying any signboards erected and maintained by appellant on the roof of a building owned by J. C. O'Connor. It appears from the pleading that J. C. O'Connor owns a certain one-story building in Dallas, Tex., which is divided into several stores, the stores being occupied by different lessees, and appellant, which is in the business of advertising through the medium of signboards, obtained from such lessees permission to place such signs on the roof of J. C. O'Connor's building. The owner, through his agents, objected to such use of his building, and appellant sought to enjoin the owner and his agents from interfering with the signs. A temporary writ of injunction was granted, but was dissolved upon motion of appellees, after a full hearing on the facts.

The facts show that J. C. O'Connor owned the house in question, which is divided into several storehouses occupied by tenants. In the lease to each tenant it was provided that the storehouse should be used "for mercantile purposes and not otherwise." The following provision was also embodied in each lease: "That the lessee shall not assign this agreement or underlet the premises, or any part thereof, or make any alterations in the building or premises, without the consent of the lessor in writing, or occupy or permit or suffer the same to be occupied for any business or purpose deemed extra hazardous on account of fire." The tenants, or a portion of them, it may be assumed from the facts, undertook to lease the roof to appellant to be used for signboards. The owner was not a party to such agreement with appellant, but protested against the roof being used by appellant. Appellant placed signboards on the roof, and the owner's agents were threatening to take them down. Appellees accepted rent from the lessees after the signboards had been placed on the roof, but constantly protested against their presence on the roof and told the tenants they must be taken down.

[1, 2] Under the terms of the contract, as well as under the law, the tenants had no authority to rent any portion of the building without the consent, in writing, of the owner. Article 3250, Rev. Stats. No such consent was obtained, and we might rest our decision on the contract, but we go further and hold that the tenants did not control the roof. The house, in this instance, included several rooms, each of which was leased to a different tenant, and such leasing certainly did not include the roof. It was a one-story building, and each lessee had merely an easement in the roof for the purpose of protection from the weather. *McNair v. Ames*, 29 R. I. 45, 68 Atl. 950, 16 Ann. Cas. 1208; *Payse v. Irvin*, 144 Ill. 482, 33 N. E. 756; *Krueger v. Ferrant*, 29

Minn. 385, 13 N. W. 158, 43 Am. Rep. 223; *Hanley v. Banks*, 6 Okl. 79, 51 Pac. 664; *Shipley v. Fifty Associates*, 101 Mass. 251, 3 Am. Rep. 346.

In the cited case of *McNair v. Ames*, in the Supreme Court of Rhode Island, the cases on the subject are reviewed and the following quotation is made and approved from the case of *Gude Co. v. Farley*, 28 Misc. Rep. 184, 58 N. Y. Supp. 1036: "The purpose of the roof of a building is primarily to shelter it and all of its occupants, and the tenant of the top floor has no better title to the roof or better right to use it for any other purpose than shelter than has the tenant of any other floor, and his right to use the roof over him is like his right to use the supporting walls of the foundation—one that is necessary and essential to the safety and quiet enjoyment of his apartments under the roof in the usual manner—and any extension of that right must be by agreement with or license from the owner. It is clear, therefore, that *McMenamery* had no right to sublease the roof of the building, as his subletting was by the terms of his own lease restricted to 'the second and third floors.'" In the Rhode Island case, that of a one-story building, it was said: "Doubtless it would have been competent for the parties to have contracted specifically that the complainant lessee should have control of the roof; but the lease is silent on that point, and we cannot say that the lessee of a part only of this business block is entitled to more than the lease describes—that is to say, the store and basement in the building as distinct from the land on which it stands, and as distinct, also, from the entire building."

The test that could be applied in this case would be, Who would be responsible for damages resulting from a failure to keep the roof in repair, the landlord or the tenants? The question is answered by the Supreme Court in *O'Connor v. Andrews*, 81 Tex. 28, 16 S. W. 628, and the liability for damages, under facts like those in this case, is placed upon the owner, for he alone controlled the roof. The duty of repairing the roof in this case devolved on the owner because he alone held control of it.

[3] If the owner had received the rent arising from the use of the roof by appellant, it would operate perhaps as a waiver of the right to complain of the renting of the roof, but that was not done, and receipt of the rent for the storerooms, while protesting against the unlawful use of the roof, was not a waiver. The owner received no compensation for the use of the roof. This was not a case of subletting but an attempt to rent the property of another without the semblance of authority.

There is no merit in this appeal, and the judgment is affirmed.

COFIELD et al. v. SUPREME CAMP OF AMERICAN WOODMEN.

(Court of Civil Appeals of Texas. Austin. Nov. 13, 1912.)

1. APPEAL AND ERROR (§ 547*)—RECORD—QUESTIONS PRESENTED FOR REVIEW.

In the absence of a statement of facts, findings by the trial court cannot be reviewed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2427, 2429-2432; Dec. Dig. § 547.*]

2. APPEAL AND ERROR (§ 564*)—STATEMENT OF FACTS—TIME OF FILING.

Under Acts 32d Leg. c. 119, § 7, fixing the time for filing statements of facts, a statement filed more than 30 days after adjournment of court without any order having been entered authorizing the same to be so filed cannot be considered on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2501-2506, 2555-2559; Dec. Dig. § 564.*]

Error to Travis County Court; R. E. White, Judge.

Action by James Cofield and another against the Supreme Camp of American Woodmen. There was a judgment for plaintiffs, and they bring error. Affirmed.

D. R. Pickins, of Austin, for plaintiffs in error.

RICE, J. This suit was instituted by plaintiffs in error Jas. Cofield and wife, Indiana Cofield, against defendant in error, to recover the full amount of a policy issued to Indiana Cofield for \$500, together with premiums thereon paid, amounting to \$52.85, as well as for interest, attorney's fees, and statutory damages, alleging that defendant in error had theretofore issued a policy of insurance upon the life of Indiana Cofield, basing their right of recovery chiefly upon the contention that said camp had illegally canceled said policy, and denied her the right of membership therein. Defendant in error answered by special exception, general denial, and by special answer, denying that it had ever canceled her policy or denied her membership, but, on the contrary, that she had failed and refused to pay certain assessments and dues, which authorized it, under the terms of said policy, to suspend her on account of nonpayment, averring, however, that it had offered to reinstate her, provided she would comply with the rules and regulations of said order by the payment of said dues, etc., which she declined to do. A jury was waived, and the case was tried before the court, who rendered judgment in behalf of plaintiff in error for the sum of \$1.80 and costs, from which judgment this appeal is prosecuted.

[1, 2] The court filed its conclusions of fact and law upon the request of plaintiff in error, from which it appears that plaintiff in error had failed to pay her assessment and dues for several months preceding the

filing of said suit, and that she had not been expelled nor denied membership by reason thereof; but, on the contrary, said defendant had offered to reinstate her if she would pay same in accordance with its by-laws and regulations, that said policy had never in fact been canceled, but that plaintiff in error had failed and refused to pay said dues and assessments, and declined to continue her membership therein, and concluded as matter of law therefrom that she was not entitled to recover on said policy, but rendered judgment in her favor for \$1.80, which she had improperly paid to an officer of the subordinate lodge not authorized to receive same.

These findings are assigned as error, and, without intending to intimate that they are incorrect, we cannot review them for the reason that there is no such statement of facts as can be considered by us, in that the same was filed more than 30 days after the adjournment of court without any order having been entered, authorizing the same to be so filed. See section 7, Acts of 32d Leg. p. 266, approved March 31, 1911. And in addition to this, even if said statement had been filed in due time, it could not be considered for the further reason that the same is not prepared in accordance with the law regulating the same.

Finding no error in the proceedings of the trial court, its judgment is affirmed.

Affirmed.

MILLER et al. v. LAYNE & BOWLER CO.

(Court of Civil Appeals of Texas. El Paso. Oct. 31, 1912. On Rehearing, Nov. 27, 1912.)

1. PLEADING (§ 174*)—ANSWER—SUPPLEMENTAL PETITION—RESPONSIVENESS.

An allegation of the supplemental petition in an action on a note given for work in drilling a well, denying that plaintiff had guaranteed that the water was of a certain quality, was responsive to the allegation in the answer that, after the development of a well, plaintiff represented that the water equalled 1,000 gallons per minute of a quality suitable for rice irrigation, and the note was executed in consideration of such representations.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 342; Dec. Dig. § 174.*]

2. APPEAL AND ERROR (§ 1040*)—HARMLESS ERROR—RULINGS ON PLEADINGS.

Any error in overruling an exception in an action on a note given for drilling water wells, to an allegation of the supplemental petition denying that plaintiff guaranteed that the water was any certain quality, on the ground that such allegation was not responsive to any issue, was harmless.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4089-4105; Dec. Dig. § 1040.*]

3. CONTRACTS (§ 198*)—CONSTRUCTION—DIGGING WELLS.

A contract for drilling water wells provided that the contractors agreed to furnish all material and labor to put down "a test well for water," and that, in case they find sufficient wa-

ter-bearing strata to justify them in doing so in their opinion, from which a supply not less than 800 gallons per minute could be obtained "suitable for irrigation" purposes as shown by test wells, they will develop it, and that the contractors do not guarantee a well of any certain quantity of water, and the contract is made upon the express understanding that, if the contractors fail to obtain water, they shall be under no obligation to the owners, but that, if they should not succeed in getting a well which would produce 800 gallons per minute, they should receive no pay, but, if the well would produce 800 gallons per minute, the owners shall pay the sum named. *Held*, that the contractors were not required to obtain water suitable for irrigation.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 861-883; Dec. Dig. § 198.*]

4. TRIAL (§ 251*)—INSTRUCTION—ISSUES.

Even though an issue be raised by the evidence, it should not be submitted as such to the jury unless raised by the pleadings.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 834-839; Dec. Dig. § 251.*]

5. FRAUD (§ 28*)—ACTS CONSTITUTING.

If a test well was drilled by a contractor according to his contract, the fact that after it was completed he made untrue representations as to the quality of the water would not constitute actionable fraud so as to be a defense to an action on a note given for the work.

[Ed. Note.—For other cases, see *Fraud*, Cent. Dig. §§ 8, 26; Dec. Dig. § 28.*]

6. COMPROMISE AND SETTLEMENT (§ 15*)—EFFECT.

Where persons for whom a water well was drilled were not satisfied with it when it was completed, and the note given for the work was not executed until the parties had considerable negotiations and some mutual concessions were made, the owners would be precluded from denying the validity of the note on the ground that it was obtained by false representations as to the quality of the water; it having been executed in compromise of existing differences.

[Ed. Note.—For other cases, see *Compromise and Settlement*, Cent. Dig. §§ 61-63; Dec. Dig. § 15.*]

Appeal from District Court, Harris County; Norman G. Kittrell, Judge.

Action by the Layne & Bowler Company against Anson Miller and others, in which defendants pleaded set-off. From a judgment for plaintiff, defendants appeal. Affirmed.

Harbert Davenport, of Brownsville, and J. H. Davenport, of Houston, for appellants. Andrews, Ball & Streetman, of Houston, for appellee.

HIGGINS, J. Appellee, a corporation, entered into a written contract with Anson Miller and Sylvester Shaffer, appellants, by the terms of which appellee, as contractor, agreed with appellants, as owners, to put down on certain land of the owners a test well for water. Those portions of the contract material to a consideration of the rights of the parties are as follows: "(a) Contractors agree to furnish all the material, machinery and labor except hereinafter stated necessary to put down on the land of the owners, hereinafter described, a test well for

water. (b) The contractors further agree that, in case they encounter sufficient water-bearing strata to justify them doing so, in the opinion of the contractors, from which a supply of water of not less than eight hundred (800) gallons of water per minute can be obtained suitable for irrigation purposes as shown by test well, they will develop same. (c) The contractors do not guarantee a well of any certain quantity of water, and this contract is made by the contractors only upon this express understanding: That if, for any reason whatever, the contractors should fail in their attempt to obtain water, the contractors shall be under no obligation to the owners whatsoever, and no liability shall rest upon them on account of the making of this contract. In this connection, however, it is understood and agreed that, if the contractors should not succeed in getting a well that will produce eight hundred (800) gallons of water per minute, they are to receive no pay under proposition No. 2 of this contract. They are, nevertheless, to have the right to remove such of their material as they desire. (d) If, however, the well put down is capable of producing eight hundred (800) gallons of water per minute, when pumped to its capacity, the owner shall pay to the contractors the sum of \$799.78, which will include a No. 6 Layne Ball-Bearing New Model Pump and one 24" steel pit properly set by the use of the Layne interlocking coupling device and 20' of screen to each 100' of hole drilled. In addition to this, the owners agree to pay to the contractors the sum of \$5.50 per foot on the total depth of the hole, and \$5 per foot for each additional foot of screen used in excess of 20' to each 100' of hole drilled. (e) The owners agree to pay to the contractors full settlement in cash the foregoing amounts as soon as well has tested eight hundred (800) gallons of water per minute."

By virtue of said contract appellee proceeded to bore a well upon the land described in the contract, and at a depth of 482 feet they encountered a water-bearing strata which they proceeded to develop; but being unable to obtain a flow of 800 gallons per minute, as provided by the contract, they proceeded deeper, and at a depth of about 900 feet they encountered another water-bearing stratum, which they developed, and produced a flow of 1,020 gallons of water per minute. Some controversy then arose between the parties as to whether or not the well complied with the contract, but appellants finally executed in payment therefor their joint and several promissory note in the sum of \$3,918.90 in favor of appellee, with interest and attorney's fees, and upon which this suit is based. Appellants answered, admitting the execution of the note described in the petition, and admitted that

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

plaintiff had a good cause of action, except as same was avoided by reason of the special defenses thereafter pleaded, and which will be hereafter adverted to. Upon trial the jury was given a peremptory instruction to find in favor of appellee upon the note sued upon. As to certain items pleaded in offset by defendants, the issues involved therein were submitted to the jury, and upon this cross-bill the jury found in their favor in the sum of \$300, which was deducted from the amount due upon the note sued upon, and judgment rendered accordingly, from which appellants prosecute this appeal, assigning numerous errors alleged to have been committed. We will not discuss the assignments in detail, for the reason that the issues involved upon this appeal are few, and the various assignments are but repetitions presenting in different forms these issues.

[1] In appellants' answer it was averred that, after the development of the 900-foot well, appellee stated and represented that the water produced therefrom equalled 1,000 gallons per minute, of a quality suitable for rice irrigation, and that, in consideration of these representations, defendants executed the note sued upon. Appellee in a supplemental petition denied that it had guaranteed that the water was of any certain quality, and to this allegation appellants excepted upon the ground that it was not responsive to any issue raised by their answer and was immaterial and irrelevant.

[2] If their contentions were correct, the overruling of the exception would have been harmless error. But we think it was responsive to the allegation in their answer that the note was executed in consideration of representations and assurances that the water produced from the well was suitable for rice irrigation. Passing to a consideration of the correctness of the court's action in peremptorily instructing the jury to find in favor of the appellee upon the note sued upon, we think the court committed no error in this respect.

[3] In the first place, a careful consideration of the contract will disclose that it imposed no obligation upon the Layne & Bowler Company to produce a well whose water would be suitable for rice irrigation; they obligated themselves, by the clause which we have designated as "a," merely to put down "a test well for water." Clause "b" is the only one which even hints at any obligation to produce water of any given quality, and this obligation has reference to the developing of the well and the water after it has been bored, rather than to its original boring. In other words, this clause imposes upon them an obligation to develop the water after they reached the water-bearing stratum, in the event only the contractor was of the opinion that it was suitable for irrigation purposes and would produce not less than

800 gallons per minute. The only thing which the contractor guaranteed under the contract was that the well should produce 800 gallons of water per minute; all of which is more fully shown by the remaining clauses "c," "d," and "e"—especially clause "e," which provides that the owners would pay as soon as the well has tested 800 gallons of water per minute, the condition of payment being dependent upon amount, and not quality. We think the construction which we place upon this contract clearly correct; but, if we should be in error in this respect, defendants' answer is insufficient to raise the issue of want of failure of consideration upon which the defense is predicated.

[4] A careful examination of the defendants' answer discloses that it is nowhere alleged that, under the terms of the contract entered into between the parties, the appellee was under any obligation to bore a well which would produce water suitable for irrigation purposes; and, in the absence of any such allegation, it would have been error for the court to have submitted such an issue, even if it were raised by the evidence. *Loving v. Dixon*, 56 Tex. 75; *Railway Co. v. Sillegman*, 23 S. W. 298; *Traction Co. v. Jamison*, 38 Tex. Civ. App. 55, 85 S. W. 305. It is true it is alleged in the answer that, after the well had been developed, the appellee represented to and assured appellants that the water was suitable for rice irrigation, and that the note was executed in consideration solely of these representations; but this is not sufficient to relieve appellants from the necessity of directly averring that the contract required them to produce water suitable for rice irrigation, and it does not raise the issue of a failure of consideration. If their contract did not require them to furnish a well producing water adapted to such purposes, the fact that they may have made such representations and assurances after completion would not then impose such an obligation upon them. As to the issue of fraud suggested by the alleged falsity of the statements made in regard to the quality of the water, appellants' answer does not seem to have been based upon fraud alleged to have been perpetrated in procuring the note, defendants treating the same as raising the issue of a want of consideration rather than fraud; and we do not think the answer sufficient to raise any issue of fraud in the execution and delivery of the note.

[5] But if the answer could be properly so treated as sufficient, under the view which we take of the rights of the parties as determined by the written contract entered into between them, no such issue of fraud could be raised by the mere fact that, after it had completed its contract in accordance with the terms thereof, appellee may have made representations in regard to the quality of the water which were not in fact true,

as its right to compensation had been fixed by compliance with the terms of its contract.

[8] Furthermore it is apparent, from the testimony of the defendants themselves, that they were not satisfied with the well when it was developed, and the note was not executed until considerable negotiations had taken place between the parties and some concessions made by appellee in regard to offsets and counterclaims asserted by the appellants. Under such circumstances, appellants would be precluded from denying the validity of the note, because it was executed in settlement and compromise of the differences then existing between the parties.

With reference to certain issues of partnership and issues in regard to the original contract and the alleged supplemental contract, these are of no merit. In reply thereto, it is sufficient to say that this suit and plaintiff's cause of action herein is based upon the joint and several promissory note of appellants, and these questions could not arise under those circumstances.

Affirmed.

On Rehearing.

Appellants' motion for rehearing herein is overruled. In our original opinion we stated what we conceived to be all of the material facts in the case, but appellants have filed motion for additional conclusions of fact, and, in deference to this motion, we file the following additional conclusions:

The well-drilling contract referred to in the opinion, in its entirety, reads as follows:

"The State of Texas, County of Harris—This memorandum of agreement made and entered into this 15th day of April, 1910, by and between the Layne & Bowler Company, a corporation, hereinafter called the contractors, and Sylvester Shaffer and Anson Miller of Anahuac, Chambers county, Texas, hereinafter called the owners. Witnesseth:

"Proposition No. 1.

"1. Contractors agree to furnish all the material, machinery and labor except hereinafter stated necessary to put down on the land of the owners, hereinafter described, a test well for water.

"2. The well shall be put down at a point to be designated by the owners on the following described land, to wit, being James Price 160 survey.

"3. The owners agree to furnish a 25 H. P. J. I. Case traction engine, lumber and nails for derrick.

"4. The contractors and owners each agree to keep a correct account of all moneys spent on this work, including all freight, drayage and transportation to Anahuac and return; and the owners agree to pay to the contractors in cash upon completion of this test, the actual cost of work plus 25%.

"Proposition No. 2.

"1. The contractors further agree that, in case they encounter sufficient water-bearing strata to justify them doing so, in the opinion of the contractors, from which a supply of water of not less than eight hundred (800) gallons of water per minute can be obtained suitable for irrigation purposes as shown by test well, they will develop same.

"2. The contractors agree to furnish all material, machinery and labor to drill the well; setting same with 11% casing and finishing the same with Layne patent screen, or Layne Shutter screen, at the option of the contractors.

"3. The owners agree to do all hauling in connection with said well and to furnish the derrick; said derrick to remain the property of the owner.

"4. The contractors do not guarantee a well of any certain quantity of water, and this contract is made by the contractors only upon this express understanding: That if, for any reason whatever, the contractors should fail in their attempt to obtain water, the contractors shall be under no obligation to the owners whatsoever, and no liability shall rest upon them on account of the making of this contract. In this connection, however, it is understood and agreed that if the contractors should not succeed in getting a well that will produce eight hundred (800) gallons of water per minute, they are to receive no pay under proposition No. 2 of this contract. They are, nevertheless, to have the right to remove such of their material as they desire.

"5. If, however, the well put down is capable of producing eight hundred (800) gallons of water per minute, when pumped to its capacity, the owner shall pay to the contractors the sum of \$799.78, which will include a No. 6 Layne Ball-Bearing New Model Pump and one 24" steel pit properly set by the use of the Layne interlocking coupling device and 20' of screen to each 100' of hole drilled. In addition to this, the owners agree to pay to the contractors the sum of \$5.50 per foot on the total depth of the hole, and \$5.00 per foot for each additional foot of screen used in excess of 20' to each 100' of hole drilled.

"Terms.

"6. The owners agree to pay to the contractors full settlement in cash the foregoing amounts as soon as well has tested eight hundred (800) gallons of water per minute.

"In testimony whereof witness our hands and seal this the 15th day of April A. D. 1910.

"[Seal.] [Signed] Layne & Bowler Co.,

"By Jno. Ilfrey, Sec. & Treas.

"Anson Miller, Sylvester Shaffer, Owners."

We decline to make any further finding of fact, believing that all material facts are

stated in the original opinion. We make the additional conclusion as to the contents of the above-mentioned contract in deference only to the insistence of appellants that we have not correctly interpreted the contract.

KEASLER LUMBER CO. et al. v. CLARK.
(Court of Civil Appeals of Texas. Texarkana.
Nov. 14, 1912.)

1. APPEAL AND ERROR (§ 78*)—ORDER APPEALABLE.

An order to preserve the property under the control of the court in replevin is interlocutory, and not appealable.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 426, 464-483; Dec. Dig. § 78.*]

2. APPEAL AND ERROR (§ 71*)—APPEALABLE ORDERS—COMPPELLING ACCEPTANCE OF REPLEVIN BOND—PROCEEDINGS.

Where defendant in replevin showed that the property in controversy was levied on by a constable who refused to accept a sufficient replevy bond, and prayed that the constable be compelled to accept the bond and deliver the property to defendant, the proceeding resulting in granting the relief demanded could not be treated as one granting a temporary mandatory injunction, within Rev. St. 1911, arts. 4644-4646, allowing appeals from orders granting or dissolving temporary injunctions, but the proceeding must be treated as one for mandamus independent of the replevin action.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 386-401; Dec. Dig. § 71.*]

3. REPLEVIN (§ 48*)—CUSTODY OF PROPERTY—ORDERS.

Where the officer in replevin has accepted the bond tendered by plaintiff, and has delivered the property in controversy to him, the court on the petition of defendant may not require the officer to accept defendant's bond and deliver to him the property.

[Ed. Note.—For other cases, see Replevin, Cent. Dig. § 179; Dec. Dig. § 48.*]

4. COURTS (§ 122*)—AMOUNT IN CONTROVERSY—PLEADING.

Where the petition for mandamus in the district court to compel an officer to accept a replevy bond and deliver property in controversy to the principal obligor therein did not show the value of the property, the court did not acquire jurisdiction, since to give the court jurisdiction the value of the property must have been less than \$200 or more than \$500.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 427; Dec. Dig. § 122.*]

Appeal from District Court, Harrison County; H. T. Lyttleton, Judge.

Action by the Keasler Lumber Company against Chesley Clark, who filed a petition to compel T. J. Johnson, a constable, to accept a replevin bond, and deliver the property to defendant. From a judgment granting relief on the petition, plaintiff and the constable appeal. Reversed and dismissed.

Beard & Davidson, Jno. W. Scott, and R. A. Hall, all of Marshall, for appellants. Jones, Bibb & Scott, of Marshall, for appellee.

WILLSON, C. J. The Keasler Lumber Company sued Chesley Clark for the title

and possession of a wagon, several mules, some harness, etc., and on April 12, 1912, procured the issuance of a writ of sequestration, which on the same day was levied on the property by T. J. Johnson, a constable. June 2, 1912, Clark, as found by the court below, presented a good and sufficient replevy bond to the constable, who declined to accept and approve it. June 5, 1912, the lumber company presented a replevy bond to the constable, and he accepted and approved it. June 7, 1912, Clark petitioned the court as follows: "Now comes the defendant Chesley Clark and shows that heretofore, to wit, on or about the 4th day of April, 1912, the personal property described in the plaintiff's original petition in this cause and in the plaintiff's amended petition was levied upon by T. J. Johnson, constable, and the defendant was dispossessed of same, and that on, to wit, on the ——— day of May, 1912, the said defendant presented to the said T. J. Johnson, officer aforesaid, a good and sufficient replevy bond conditioned as required by law, with more than two good sureties, to wit, W. H. Killingsworth, Ike Killingsworth, and Lee Killingsworth, and said defendant requested said officer aforesaid to accept the said bond and approve the same, and demanded that the said property levied upon by said officer in said suit be turned over to the said defendant; that the said T. J. Johnson refused to accept and approve the said bond for no other reason than that he claimed that the same came too late. Wherefore the defendant prays that notice be issued at once, and that the said T. J. Johnson be cited to appear before this honorable court, and that he be required to approve the said bond and turn over to the defendant the said property, dating the approval of the said bond as of the date that the same was actually tendered and presented to him." The petition was verified by Clark's affidavit. June 8, 1912, the constable filed a sworn answer denying that Clark had ever presented a replevy bond to him, and averring that on June 5, 1912, the lumber company had presented such a bond to him, and that on the day it was presented he approved it and delivered the property to said lumber company. June 8, 1912, the court, after hearing testimony offered by the parties, decreed as follows: "It is adjudged, decided, and decreed that the said replevy bond bearing date of June 1, 1912, with Chesley Clark as principal and W. H. Killingsworth, Ike Killingsworth and Lee Killingsworth as sureties is hereby approved as of date June 2, 1912, and the said T. J. Johnson aforesaid is required to turn over to the said Chesley Clark the possession of the said property at once." The constable and the lumber company, which also had filed an answer contesting the right of Clark to the relief he asked, prosecute the appeal to this court.

[1] If the order should be treated, as appellee contends it should be, as an ordinary one for the purpose of preserving property under the control of the court during the pendency of the lumber company's suit against Clark, the appeal should be dismissed for want of jurisdiction in this court to hear and determine it; for such a judgment would be interlocutory. *Lumber Co. v. Williams*, 71 Tex. 444, 9 S. W. 436; *Linn v. Arambould*, 55 Tex. 611. Except in cases specially provided for by statute, this court has power to review final judgments only. *Fidelity Funding Co. v. Hirshfield*, 41 Tex. Civ. App. 517, 91 S. W. 246; *Baumberger v. Allen*, 101 Tex. 352, 107 S. W. 526.

[2, 3] If the order should be treated as the lumber company and constable treat it—not as an ordinary one, but as one granting a temporary mandatory injunction—then by virtue of the statute (articles 4644 to 4646, Revised Statutes of 1911) an appeal could be prosecuted, notwithstanding the judgment was an interlocutory one, and it would be the duty of this court to dispose of it on its merits. In that event, it conclusively appearing from testimony in the record that the constable had accepted and approved the replevy bond tendered to him by the lumber company, and that by virtue of the bond it held possession of the property, we would vacate the order of the court below and dissolve the injunction, on the ground that it required the officer to do something he lawfully could not do; for we think it should not be assumed that the lumber company would return the property to him. Unless it did he could obtain possession thereof only by force. As he did not have a right forcibly to resume possession of the property, he could not without violating the law comply with the order of the court. The officer should not have been placed in a position where if he complied with the order he must violate the law and subject himself to a suit by the lumber company for damages, and where, if he did not comply with it, he would subject himself to punishment by the court for contempt.

However, we have concluded that the case should not be viewed as one granting a temporary injunction in the suit of the lumber company against Clark, and therefore appealable under the statute referred to, but that it should be viewed as a suit by Clark against the constable for a mandamus, independent of the lumber company's suit. The effect of the order, if complied with, would not be temporary, in the sense that it would give to Clark the possession of the property subject to a right in the court, should it be made to appear during the pendency of the suit that he should do so, to revoke it and thereby restore the possession of the property to the officer, but it would be permanent, in the sense that it would give

to Clark the possession of the property during the pendency of the suit, without a right in the court during that time to deprive him of it; for certainly, having directed the property to be delivered to Clark on his bond, conditioned as the law directed, and a delivery thereof having been accordingly made, the court could not by merely revoking his order restore the possession of the property to the constable.

[4] Treating the proceedings as an independent suit by Clark for a mandamus, we think the judgment should be reversed and the cause dismissed, because it does not appear from the petition for the writ that the court below had power to hear and determine it. To give that court jurisdiction, the value of the property must have been less than \$200 or more than \$500 (*Lazarus v. Swafford*, 15 Tex. Civ. App. 367, 39 S. W. 389; *Bigby v. Brantley*, 38 Tex. Civ. App. 44, 85 S. W. 311; *Calhoun v. Wren*, 26 Tex. Civ. App. 618, 64 S. W. 786); and whether it was either did not appear from the allegations in the petition (*Lillard v. Freestone County*, 23 Tex. Civ. App. 363, 57 S. W. 339; *Needham v. Austin Electric Ry. Co.*, 127 S. W. 904; *Royal Fraternal Union v. Bedford*, 105 S. W. 523).

F. T. RAMSEY & SON v. COOK et al.
(Court of Civil Appeals of Texas. Austin. May 29, 1912. On Motion for Rehearing. June 29, 1912. On Appellant's Motion for Rehearing, Oct. 16, 1912.)

1. VENUE (§ 32*)—PRIVILEGE—WAIVER.

Defendants, by a motion to quash under Rev. St. 1895, art. 1243, entered their appearance at the next term, and, as article 1241 declares that an appearance shall have the same force and effect as if citation had been duly issued and served, the motion did not bar them from filing a plea of privilege to be sued in another county, for that plea need not be filed until citation has been served.

[Ed. Note.—For other cases, see Venue, Cent. Dig. §§ 47-50; Dec. Dig. § 32.*]

2. PRINCIPAL AND AGENT (§ 84*)—CONTRACTS—CONSTRUCTION.

Where defendants employed plaintiff to sell nursery stock for them under a written contract providing that defendants would allow plaintiff 50 per cent. of the price quoted, but that he should bear all expenses in selling, delivering, and collecting, and should owe and pay defendants for all stock shipped to him whether delivered or not, defendants should not be charged with any amount for sales uncollected, whether the same be represented by notes or otherwise.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 221; Dec. Dig. § 84.*]

On Motion for Rehearing.

3. VENUE (§ 32*)—PRIVILEGE—WAIVER.

The filing of a cross-action and a trial on the merits waived the privilege of defendants to be sued in another county, being equivalent to the institution of a new suit by defendants invoking a jurisdiction of the court.

[Ed. Note.—For other cases, see Venue, Cent. Dig. §§ 47-50; Dec. Dig. § 32.*]

Appeal from Coleman County Court; T. J. White, Judge.

Action by G. T. Cook and another against F. T. Ramsey & Son, begun in justice court. There was a judgment for plaintiffs, and on defendants' appeal to the county court judgment was again rendered for plaintiffs, and defendants appeal. Reformed and rendered.

Weathered & McDaniel, of Coleman, for appellants. T. H. Strong and Woodward & Baker, all of Coleman, for appellees.

Findings of Fact.

JENKINS, J. This suit originated in a justice's court in Coleman county upon an account alleged to have been due T. W. Galloway for selling fruit trees for appellants, and transferred to appellee Cook, and payment thereof guaranteed by Galloway. Ramsey & Son are nurserymen, whose residences are in Travis county, Tex. They employed Galloway under a written contract to sell nursery stock for them. Said contract provided, among other things, that "they (Ramsey & Son) will allow party of the second part (Galloway) 50% of the price quoted in their catalogue for selling and delivering nursery stock; but said party of the second part is to bear all expenses in selling, delivering and collecting. * * * Party of the second part owes and will pay said Ramsey & Son for all stock shipped to him, whether it is delivered or not." Galloway made out an account against Ramsey & Son, showing a balance due him of \$119.13. In this account he charged Ramsey & Son with certain notes taken in payment of stock sold, which notes have not been paid, but were in the hands of appellee Cook's attorney at the time of the trial hereof, having been delivered to him by said Galloway. In the justice's court appellants moved to quash the citation against them, which motion was sustained, and the case was continued. At the next term of said court appellants filed a plea of privilege to be sued in Travis county, alleging that the pretended transfer and guaranty of the account sued upon was fictitious, and made with the fraudulent purpose of attempting to confer jurisdiction in Coleman county. Appellee Cook moved to strike out said plea of privilege for the reason that appellants, by filing a motion to quash the citation served on them, had waived the right to file said plea of privilege. Said motion was sustained, and judgment was rendered for the amount sued for. Similar action was had on said plea in the county court, and a like judgment was rendered therein.

Opinion.

[1] The action of the court in striking out appellants' plea of privilege was error. Such plea was filed in due order of pleading. *Railway Co. v. Lynch*, 73 S. W. 87, and authorities there cited. Appellants were not required to file their plea of privilege until

the next term of the justice's court after quashing said citation, for the reason that they were not in court until that time. By making said motion they entered their appearance at the next term of said court. Article 1243, R. S. What was the effect of such entry of appearance? Article 1241 declares that an appearance "shall have the same force and effect as if citation had been duly issued and served upon him, as provided by law." Had citation to the next term of said justice's court been duly issued and served upon appellants, it could not be doubted that they would have had the right to file their plea of privilege, which they did file at said term of said court.

Appellee Cook cites us to the case of *York v. State*, 73 Tex. 351, 11 S. W. 869, in support of the ruling of the trial court in this case. In that case the written contract of lease upon which the suit was brought provided that such suit should be brought in Travis county, Tex. It was brought in that county. York did not claim the privilege of being sued elsewhere, but his contention was that the process of the state of Texas could not run beyond its borders, and consequently the attempted service upon him in Missouri did not give the court jurisdiction to try the case which the state had brought against him. He made a motion to quash the service upon him. The Supreme Court held that this motion operated to enter his appearance, and had the same force as a citation legally served. Having thus brought himself into court, the court had power to render judgment in the case.

[2] 2. As we cannot know whether or not the evidence upon another trial will sustain appellants' plea of privilege, we deem it proper to indicate our construction of the contract between appellants and Galloway.

As we construe said contract, 50 per cent. of the value of all of the nursery stock shipped to Galloway was chargeable to him, and Ramsey & Son cannot be charged with any amount of said sales uncollected, whether the same be represented by notes or otherwise. Said notes should not be charged to Ramsey & Son, but to Galloway.

For the error of the court in striking out appellants' plea of privilege, and refusing to allow them to introduce evidence thereon, the judgment herein is reversed, and this case is remanded.

Reversed and remanded.

On Motion for Rehearing.

[3] Upon a former day of the present term, we reversed and remanded this case for the error of the trial court in striking out appellants' plea of privilege. The briefs of the parties did not call our attention to the fact that appellants filed a cross-action against appellee Galloway, asking judgment against him for \$49.40, by reason of matters growing out of the contract sued on. Ap-

pellees have called our attention to this fact on motion for rehearing.

The filing of said cross-action and a trial thereon on its merits was equivalent to the institution and trial of a new suit brought by appellants against appellee Galloway, and by such action appellants invoked the jurisdiction of the trial court. *Thorndale Mercantile Co. v. Evans & Lee*, 146 S. W. 1053; *Kolp v. Shrader*, 131 S. W. 860.

The motion for rehearing is granted, and the judgment of the trial court is affirmed. Affirmed.

On Appellants' Motion for Rehearing.

As stated in the original opinion in this case, this court is called upon to construe the written contract sued on. In our judgment on appellees' motion for rehearing we overlooked this fact and affirmed the judgment of the trial court for the full amount. The uncollected sales, amounting to \$86.95, as shown by the notes, and which in the judgment of the trial court were charged against Ramsey & Son, should be charged against Cook. This will reduce the judgment against Ramsey & Son by that amount.

Appellants' motion for a rehearing is granted, and the judgment of the trial court is here reformed so that the appellees recover of the appellants for the sum of \$32.18, with interest at the rate of six per cent. per annum from January 1, 1911.

Reformed and rendered.

ALLEN v. ABERNETHY et al.

(Court of Civil Appeals of Texas. San Antonio. Nov. 13, 1912.)

1. COUNTIES (§ 167*)—WARRANTS—NEGOTIABILITY.

Warrants issued by the commissioners' court to pay a contractor constructing a courthouse are mere orders on the treasurer to pay the amounts named, and are nonnegotiable, and the contract for the work may not make them negotiable so as to entitle a purchaser thereof to the rights of an innocent purchaser.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 249; Dec. Dig. § 167.*]

2. COUNTIES (§§ 113, 164*)—CONSTRUCTION OF COURTHOUSE—POWERS OF COMMISSIONERS' COURT.

Under the statute empowering the commissioners' courts to provide and keep in repair courthouses, jails, and public buildings, the commissioners' court of a county may contract for the construction of a courthouse and issue interest-bearing nonnegotiable warrants to pay therefor.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 174-180, 241-245; Dec. Dig. §§ 113, 164.*]

3. COUNTIES (§ 165*) — CONSTRUCTION OF COURTHOUSE—WARRANTS—VALIDITY.

Warrants issued by the commissioners' court to pay a contractor constructing a courthouse are not void because they are made payable at the county seat or outside the state,

even if payment at the latter point may be enforced.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 246-248; Dec. Dig. § 165.*]

4. COUNTIES (§ 192*) — CONSTRUCTION OF COURTHOUSE—TAX LEVY.

A taxpayer may not complain of a tax levied by the commissioners' court of a county for the construction of a courthouse, where the levy is for so much of 15 cents on \$100 as may be necessary.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 300-302; Dec. Dig. § 192.*]

5. COUNTIES (§ 113*)—COMMISSIONERS' COURT—DELEGATION OF AUTHORITY—STATUTES.

Under Rev. Civ. St. 1911, art. 1373, authorizing the commissioners' court to appoint agents to contract for the county, the commissioners' court may appoint the county judge or any other agent to make a contract for it for the construction of a courthouse.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 174-180; Dec. Dig. § 113.*]

Appeal from District Court, Atascosa County; E. A. Stevens, Judge.

Action by George Allen against W. M. Abernethy and others. From a judgment granting partial relief, plaintiff appeals. Affirmed.

Frank H. Burmeister, of Christine, and J. F. Carl, of San Antonio, for appellant. C. C. Clamp, of San Antonio, for appellees.

FLY, C. J. Appellant obtained a temporary injunction from the judge of the Seventy-Third judicial district of Texas restraining W. M. Abernethy, county judge, and the county commissioners, treasurer, and assessor of Atascosa county from proceeding under and recognizing a certain contract made and entered into by the commissioners' court on June 10, 1912, with the Gordon-Jones Construction Company, to build a courthouse at Jourdanston to cost \$65,000, to be paid for with county warrants secured by a lien on a 15-cent tax levy on each \$100 of the valuation of the entire property of the county, as well as a lien on the contemplated courthouse; the warrants to bear 6 per cent. interest from June 10, 1912, and payable, principal and interest, on March 1, 1913, and on each successive year up to and including the year 1928. The papers were returned to the district court of Atascosa county, and a trial had on a motion to dissolve the injunction, in which it was decreed that the temporary writ of injunction "was properly granted," and in addition it was recited: "But, it appearing that W. M. Abernethy, acting in behalf of Atascosa county, and the Gordon-Jones Construction Company have subsequently entered into an agreement in writing, dated July 19, 1912, by the terms of which the objectionable features of the original contract between said Atascosa county and said Gordon-Jones Construction Company, with reference to the obligations to be issued by said county and to be delivered to

said company, it is ordered that said temporary injunction be and is hereby modified so as not to restrain the defendants, nor any of them, from proceeding with the erection of a courthouse building in accordance with the terms of said original contract after the commissioners' court of said Atascosa county shall have fully ratified the said agreement in writing entered into by said W. M. Abernethy and said Gordon-Jones Construction Company amending said original contract."

It was admitted that the orders, contract, and other matters were as alleged in the petition; that the warrants described in the petition had been issued and signed by the county judge and county clerk and were in the hands of the county judge. Appellees introduced in evidence a supplemental contract made by the county judge with the construction company, in which the following language in the original contract was eliminated: "And the delivery of said warrants shall be a waiver by the county officials of all defense of whatever nature, which said county or any officer or other person may interpose to the payment of any of said warrants, or the county's right to levy said special tax of fifteen cents (15¢) on the one hundred dollars, or so much thereof as may be necessary, and make sufficient appropriations out of the same for the payment of the same, for the payment of said warrants, and of the amounts, both principal and interest, on the contract price represented by them from year to year." The following stipulation was also eliminated: "That they shall pass by delivery merely, and to the extent of cutting out equities and defenses in the hands of innocent purchasers for value, said warrants and interest warrants are, and shall be, negotiable instruments." It was also agreed in terms that the warrants should not be negotiable instruments, but merely be assignable. The warrants had written across their face "interest warrants" and "principal warrants." The warrants were orders on the county treasurer to pay the construction company, on a certain date, a certain sum "out of the special county courthouse building fund; being the amount allowed by the county commissioners' court of said county, at their June term, A. D. 1912, for labor and material furnished in the erection of a county courthouse."

[1,2] The warrants were not negotiable paper, but were simply evidence of the debt that the county owed. They are merely orders on the treasurer to pay the amounts named, on compliance with law. *San Patricio County v. McClane*, 44 Tex. 397. In the same case, in 58 Tex. 243, it was held that the statutory power "to provide courthouses, jails, and all necessary public buildings" gave authority to the county to contract to pay interest on its indebtedness incurred in the erection of a courthouse. The

same proposition was reiterated in *Davis v. Burney*, 58 Tex. 364.

Under our present statute, the power is given commissioners' courts "to provide and keep in repair courthouses, jails, and all necessary public buildings"; being the same power lodged in the county court under the statute which the Supreme Court in the *McClane Case*, 58 Tex. 243, held authorized the issuance of interest-bearing warrants. They would not be negotiable paper, and could not prevent the county from setting up any defense it might have against the construction company, and any attempt upon the part of the commissioners' court to make them negotiable was futile and void. The commissioners' court had the authority to build the courthouse, and had the right to make the order it did, and had the authority to issue interest-bearing warrants to pay the indebtedness incurred in building the courthouse. A very similar state of facts prevailed in the case of *Stratton v. Commissioners' Court*, 137 S. W. 1170, and this court held that the contract for building the courthouse was valid and legal. A writ of error was refused in that case. To the same effect are *Cowan v. Dupree*, 139 S. W. 887, and *Commissioners' Court v. Nichols*, 142 S. W. 37. In the last-named case it was held that, if the instruments showing the indebtedness had been intended for bonds, they were illegal as such and could not pass into the hands of an innocent purchaser. If that be true, the injunction should have been dissolved by the district court. There could have been no error, of which appellant could reasonably complain, in the action taken by the district court. He obtained everything that he was entitled to, if not more. The warrants issued by the commissioners' court are not bonds in any sense, and the contract made with the construction company could not make them bonds. The warrants were not negotiable instruments, and the contract sought to be made by the county judge could not transform them into paper that would entitle a purchaser of them to the benefits of an innocent purchaser. The warrants do not provide for attorneys' fees.

[3] We do not think that the warrants would be void because of the provision making them payable in Jourdan or New York, even if payment at the latter point could be enforced.

[4] The tax levied by the commissioners' court was not positively for 15 cents on the \$100, but was for "so much thereof as may be necessary." We do not think that appellant had any cause for complaint.

[5] The commissioners' court had the authority to appoint the county judge or any other agent to make the contract for it. That right is given by statute. Rev. St. art. 797; last revision, art. 1373.

The judgment is affirmed.

MASON v. MISSOURI, K. & T. RY. CO. OF TEXAS.

(Court of Civil Appeals of Texas. Dallas. Nov. 9, 1912.)

1. CARRIERS (§ 345*)—CARRIAGE OF PASSENGERS—INJURY TO PASSENGER—EVIDENCE—PRIOR OR HABITUAL DRUNKENNESS.

Though, in an action for injuries to a passenger on a railroad train, alleged to have been caused by the sudden starting of the train when he was preparing to leave it, the question of the plaintiff's sobriety at the time of the alleged injury was in issue, testimony of prior or habitual drunkenness was improperly admitted, as such testimony could in no manner prove or disprove that drunkenness did or did not contribute to the injury on the day in question.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1400; Dec. Dig. § 345.*]

2. WITNESSES (§ 414*)—EVIDENCE—ADMISSIBILITY—CORROBORATION.

Where, in an action for injuries to a passenger, the testimony of the plaintiff as to how the accident was caused was impeached by evidence of statements made by him after the injury, tending to show that he himself was the cause of the accident, evidence of other statements after the injury, offered in behalf of the plaintiff, should have been admitted in corroboration of the impeached testimony.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1287, 1288; Dec. Dig. § 414.*]

3. WITNESSES (§ 287*)—REBUTTAL TESTIMONY—EXPLAINING INCONSISTENCIES.

Where the testimony of plaintiff had been impeached by the witnesses for the defendant, a refusal to permit him, on rebuttal, to testify to any fact tending to explain any conflicts in the testimony was improper.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 980, 1000-1002; Dec. Dig. § 287.*]

Appeal from District Court, Hunt County; T. D. Montrose, Judge.

Action by G. W. Mason against the Missouri, Kansas & Texas Railway Company of Texas. From a judgment for defendant, plaintiff appeals. Reversed and remanded.

Evans & Carpenter, of Greenville, for appellant. Alex. S. Coke, of Dallas, and Dinsmore, McMahan & Dinsmore, of Greenville, for appellee.

RASBURY, J. Appellant instituted this suit against appellee to recover damages for personal injuries alleged to have been inflicted upon him while a passenger upon appellant's train at Celeste, in Hunt county, Tex. The claim is made that when the train stopped at Celeste appellant arose, with baggage in hand, preparatory to leaving the cars; that as appellant arose the train made an unnecessary and unusual jerk; or that just as it stopped, and as appellant arose, the appellee's employes negligently stopped its train with a sudden and unusually quick stop, or started same after stopping and made a second stop jerking appellant forward and throwing him down with great force and violence, rendering him temporarily uncon-

scious, and inflicting upon him serious and permanent injuries.

Appellee answered by exceptions, general denial, and that appellant was guilty of contributory negligence in arising from his seat and attempting to stand or walk before the train stopped, and in that at said time he was voluntarily intoxicated to the extent that his power to control his muscles, balance himself, and stand or walk was destroyed.

Trial was had before a jury and a verdict returned for appellee, upon which judgment was accordingly entered, and from which this appeal is taken.

[1] Appellant, by his first, eighth, ninth, tenth, and eleventh assignments of error, complains of the admission of testimony, over his objection, tending to prove habitual drunkenness and the use of intoxicants by appellant on other occasions. On cross-examination of Dr. Pierson, witness for appellant, who had testified he had known appellant for a number of years, appellee asked: "You have seen him when he was in a state of intoxication before this? Well, I have seen him under the influence of whisky. Never saw him drunk. Have seen him under the influence of whisky, not often—not more than three or four times in 12 years." While Steve L. Green, witness for appellee, was testifying, appellee asked: "Had you seen Mr. Mason before when he was drinking?" to which witness responded, "Yes, sir." Lowery Glascoe, witness for appellee, who had known appellant a number of years, was asked by appellee: "Had you ever seen plaintiff intoxicated before this time?" He responded, "I had seen plaintiff intoxicated three or four times in Celeste since I had known him." Jim Landers, witness for appellee, on direct examination, after testifying that he was living with appellant when the alleged injury occurred, and had been three or four months, was asked by appellee: "During the time you lived there, did you ever see Mr. Mason [plaintiff] intoxicated?" He answered: "Yes; I believe twice." George Gooch, witness for appellee, after testifying he had known appellant 7 or 8 years, was asked by appellee, "Had you ever seen the plaintiff intoxicated before the time you saw him the day he was hurt?" and answered, "I had seen him intoxicated two or three times before." Appellant objected to this testimony as immaterial, irrelevant, and calculated to prejudice him before the jury. The trial court, in each instance, overruled the objection, and appellant saved his exceptions, and has presented same here by proper bill and assignment. Appellee, in reference to the admission of the testimony, asserts that proof of former habitual drunkenness was admissible in rebuttal to impeach plaintiff's statement that he did not get drunk, was harmless, and was admissible in any event to corroborate the statements of the witnesses that

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

he was, in fact, intoxicated on the day of the accident. Under the pleading appellant's condition of sobriety at the time of the alleged injury was unquestionably a legitimate inquiry, since it may or may not have contributed to his injury. But we think it equally clear that prior or habitual drunkenness could in no manner prove or disprove that drunkenness did or did not contribute to his injury on the day alleged. *Browne v. Bachman*, 81 Tex. Civ. App. 490, 72 S. W. 622; *Railway Co. v. Davis*, 92 Tex. 372, 48 S. W. 570; *Railway Co. v. Evanish*, 61 Tex. 6; *Railway Co. v. Rowland*, 82 Tex. 166, 18 S. W. 96.

The cases we have cited state the correct and settled rule, and render a discussion of the matter unnecessary, and make it clear that the testimony complained of was not only inadmissible, but presumably harmful. To permit the introduction of the testimony for the purpose of impeaching appellant's statement that he had never been drunk would be to try the case on collateral issues—the identical thing which the cases cited hold may not be done. The fact that appellant had been drunk or intoxicated on former occasions could have no legitimate bearing upon the question of his negligence on the day of the alleged injury.

[2] Appellant's fifth assignment of error complains of the exclusion of certain testimony offered by him in rebuttal. It appears from the record that appellee proved by the witness Neub Stephens, who, in the absence of a physician, washed and bathed appellant's wounds, that appellant stated, while the witness was so engaged, that "he had a bottle too much of beer, he guessed, and said he got up a little too quick to get off the train, and when the train stopped he fell." It further appears from the record that defendant proved by its witness Lowery Glascoe, who was constable of the Celeste precinct, that when appellant got out of his son's buggy "the plaintiff [appellant] was talking about getting hurt when they drove up. He [appellant] said it was not their [meaning appellee's] fault. 'It was my own fault.'" After these witnesses had testified, Dock Mason, son of appellant, was placed upon the witness stand by appellant in rebuttal. This witness testified that he met his father (appellant) at the train and walked with him from the depot to where his horse and buggy were hitched; that he then drove to a gin or lumber yard with one Joe Andrews and delivered him a bottle of whisky; that afterwards he rejoined his father at the drug store, where his wounds were being dressed. At this point in the examination the witness was asked: "Did you on that occasion, either at the train or on the way up town, have any conversation with your father as to how he came to fall, or hear him relate how he came to fall?" Counsel for appellee objected to this question, and

the objection was sustained and the witness not permitted to answer. The bill of exception shows that the witness would have testified "that on said occasion plaintiff [appellant] did relate to him, and in his presence and hearing, how he came to fall and hurt himself in the train, and in that connection stated that he arose as the train stopped, turned and reached for his grip, and that just as, or just after, the train stopped it started suddenly forward with a jerk and immediately stopped with a jerk, and the jolt threw him down, and he struck his face against some part of a chair or seat." We think the court erred in excluding the testimony. It is well settled that, the plaintiff's testimony having been impeached by proof of contradictory statements made by him in relation to his injuries, he is entitled to corroborate his own testimony by statements made to others corroborative of what he has testified to. To permit the witnesses to contradict him by proof of what he told them and refuse to permit other witnesses to corroborate him by the same process, it seems to us, would be palpably unjust. We do not mean to say that the trial court might not exercise its discretion about the scope and extent of such testimony; but that question is not raised by the record in this case. The admission by him that it was his fault that he suffered the claimed injury was important and conceivably vital to his cause of action, and for that reason we cannot conclude the error was unimportant or harmless. *Railway Co. v. Hawk*, 30 Tex. Civ. App. 142, 69 S. W. 1040; *Railway Co. v. Sizemore*, 53 Tex. Civ. App. 491, 116 S. W. 403.

[3] We are also of opinion that the court erred in refusing to permit appellant to testify in rebuttal to any fact tending to explain any apparent or real conflicts in his testimony concerning the contents of his "grip" or valise. His testimony on direct examination as to how much beer and whisky the grip contained had been impeached by the witnesses for the appellee, and he should have been given the opportunity to make such explanation as he could. *Dooley v. Bolders*, 128 S. W. 690.

We do not think the charge of the court, submitting the question of appellant's intoxication as the proximate cause of the alleged injury, is subject to the criticisms directed against it. We think the testimony was sufficient to warrant the court in submitting to the jury whether or not the accident was the result of the fact that appellant was in such state of intoxication as to destroy his power to control his muscles and balance himself and stand or walk steadily.

Holding the views expressed, we conclude that the several errors of the court in the trial of the case were harmful to appellant, and it becomes our duty to reverse and remand the case, which is accordingly directed.

Reversed and remanded.

KRUEGEL v. COCKRELL & GRAY et al.

(Court of Civil Appeals of Texas. Dallas.
Nov. 2, 1912. Rehearing Denied
Nov. 23, 1912.)

1. LIBEL AND SLANDER (§ 38*)—PRIVILEGED COMMUNICATIONS—ABSOLUTE PRIVILEGE—ATTORNEY.

Questions asked by an attorney of a party while testifying as a witness are absolutely privileged, and cannot be made the basis of an action for slander, though otherwise actionable.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 117-123; Dec. Dig. § 38.*]

2. COURTS (§ 42*)—CREATION—CONSTITUTIONALITY OF STATUTE.

Acts 30th Leg. c. 5, creating and constituting Dallas county the Fourteenth, Forty-Fourth, and Sixty-Eighth judicial districts, are not unconstitutional, on the ground that more than one district court with concurrent jurisdiction for Dallas county cannot exist.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 103-170, 181-183; Dec. Dig. § 42.*]

Appeal from District Court, Dallas County; J. C. Roberts, Judge.

Action by Herman Kruegel against Cockrell & Gray and others. From a judgment dismissing the petition, plaintiff appeals. Affirmed.

Herman Kruegel, of Dallas, for appellant. Cockrell, Gray, Thomas & McBride, of Dallas, for appellees.

RAINEY, C. J. This is an action for slander and libel brought by Herman Kruegel, plaintiff, against J. E. Cockrell and Edward Gray, and Curtis Hancock, as attorneys at law, and E. B. Muse, as district judge, to recover damages for malicious utterances of Curtis Hancock made by said Hancock during the trial of a cause in the Forty-Fourth judicial district court in Dallas county, before E. B. Muse, judge presiding. Collusion and conspiracy between all the defendants was alleged. Defendants pleaded absolute privilege in making such utterance, the same being in the process of a judicial trial, and interposed a general demurrer to plaintiff's petition, which demurrer was sustained by the court, and, the plaintiff refusing to amend, the cause was dismissed. From this action of the court Kruegel appeals.

The libelous matter alleged is: That while he was on the stand as a witness in his own behalf he was asked by Curtis Hancock, attorney, and required by the court to answer, questions as follows: "(1) 'Is it not a fact you (meaning plaintiff) are an anarchist?' (meaning to say that plaintiff is an anarchist). To which plaintiff answered, 'No.' (2) 'What is your politics?' (still meaning plaintiff is an anarchist). Plaintiff answered: 'I am a Republican.' (3) 'Is it not a fact that you

(meaning plaintiff) have no respect for law, nor for the courts of the country, nor for their judgments (meaning thereby that plaintiff is an anarchist, an outlaw, and undesirable citizen of low degree)?' To which plaintiff answered, 'No; it is not the fact' (4) 'Is it not a fact you would rather go to jail than to obey the law and the judgments of the courts of the country (still meaning plaintiff is an anarchist, an undesirable citizen of low degree with no respect for law nor fear for the jail)?' To which plaintiff answered, 'No; it is not the fact' (5) 'Is it not a fact you have brought many damage suits in the district courts of Dallas county against nearly all the officers of Dallas county past and present?' To which plaintiff answered, 'Yes; for the willful wrongs done him in an official capacity.' (6) 'Is it not a fact, if you recovered judgment on all your suits, you would be richer than Rockefeller (meaning to ridicule plaintiff)?' To which plaintiff answered he did not know how much all the damages sued for amounted to, and did not know how rich Rockefeller was. (7) 'Is it not a fact, you also intend to sue Judge Muse, the judge of this court?' To which plaintiff in substance answered, 'Perhaps so, or he ought to be sued.' That said questions were predesigned, malicious, immaterial, irrelevant, and impertinent to the matters in controversy, and made to injure the reputation of plaintiff and to so impress the jury. That Cockrell & Gray were parties defendant to the cause then on trial.

[1] Without determining whether or not under any conditions the language charged would be actionable we are of the opinion that, under the circumstances charged in plaintiff's petition, it was absolutely privileged, and the defendants are not liable in damages therefor. *Runge v. Franklin*, 72 Tex. 585, 10 S. W. 721, 3 L. R. A. 417, 13 Am. St. Rep. 833. In the case cited it is held that charges made in a judicial proceeding, whether true or false, are privileged, as it constitutes no basis for an action in damages. We rest our holding in affirming this case upon the principle announced in the case cited.

[2] The plaintiff attacks the constitutionality of the court in trying this case on the ground that there cannot exist more than one district court with concurrent jurisdiction for Dallas county. We do not concur in this contention. Act Leg. 1909, p. 4, creating the Fourteenth, Forty-Fourth and Sixty-Eighth District Courts, violates no provision of the Constitution, and is valid. *Lytle v. Hall*, 75 Tex. 128, 12 S. W. 610; *Wheeler v. Wheeler*, 76 Tex. 489, 13 S. W. 305; *Kruegel v. Daniels*, 50 Tex. Civ. App. 215, 109 S. W. 1108.

The judgment is affirmed.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

WILSON v. WARD.

(Court of Appeals of Kentucky. Dec. 13, 1912.)

APPEAL AND ERROR (§ 1022*)—REVIEW—FINDINGS OF FACT.

Findings on conflicting evidence by a special commissioner, concurred in by the lower court, will not be disturbed; it being impossible to say from the record that there is a clear preponderance against them.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4015-4018; Dec. Dig. § 1022.*]

Appeal from Circuit Court, Bell County. Action by H. L. Ward against E. M. Wilson. Judgment for plaintiff. Defendant appeals. Affirmed.

N. J. Weller, of Pineville, for appellant. Jas. H. Jeffries and N. R. Patterson, both of Pineville, for appellee.

TURNER, J. This is an action instituted by the appellee against appellant for a balance claimed to be due on an account current between them, growing principally out of a partnership or joint venture in logging. The defendant answered, and by way of counterclaim and set-off asserted certain claims against the plaintiff. By agreement between the parties the action was transferred to the equity docket, and A. G. Patterson, a prominent lawyer of the Bell county bar, was selected as special commissioner, and the cause was referred to him for an adjustment of the accounts between the parties. The transactions in dispute cover a period of some five or six years, and there are numerous contested items on each side. The special commissioner, after taking the evidence, prepared with great care and skill an unusually intelligent and comprehensive report. He even went so far as to give in his report a statement of the evidence on each contested item. To this report each party excepted, and the lower court overruled all the exceptions, and approved the report in full.

It would be unprofitable for us to enter into a discussion of the various items and the evidence relied upon to sustain or reject them. It is sufficient to say that there is a sharp conflict of evidence as to a number of the items; but these matters have been carefully considered and passed upon, both by the special commissioner and the lower court, and we are unable to say from the record that there is such a preponderance as to any one of the items as to justify us in differing from them on the facts. Those gentlemen were on the ground, and not only familiar with the evidence in the record, but with the persons who gave it; and, as there is nothing presented to us here for review, except a question of fact, the judgment is affirmed.

FIDELITY & DEPOSIT CO. OF MARYLAND v. SOUSLEY et al.

(Court of Appeals of Kentucky. Dec. 5, 1912.)

1. SUBROGATION (§ 31*)—RIGHTS OF SURETY AS AGAINST PRINCIPAL—SATISFACTION OF JUDGMENT.

Where a creditor obtains judgment against the principal in F. county, and by a suit thereon in J. county recovers the amount of the first judgment from the surety, it is only necessary that the surety, as a condition precedent to the action against the principal after satisfaction of the J. county judgment, should take from the creditor an assignment of the F. county judgment, and its taking of an assignment of the J. county judgment is immaterial.

[Ed. Note.—For other cases, see Subrogation, Cent. Dig. §§ 70-91; Dec. Dig. § 31.*]

2. SUBROGATION (§ 31*)—RIGHTS OF SURETY AS AGAINST PRINCIPAL.

A surety who pays a judgment against his principal, without taking an assignment of the judgment against the principal, can only recover from the principal upon the implied promise that the law raises in his behalf.

[Ed. Note.—For other cases, see Subrogation, Cent. Dig. §§ 70-91; Dec. Dig. § 31.*]

3. LIMITATION OF ACTIONS (§ 28*)—REIMBURSEMENT OF SURETY.

A surety who pays a debt against his principal without taking an assignment of the creditor's judgment, and who seeks relief against the principal upon the promise raised by law in his behalf, must proceed within five years from the time of paying such judgment.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 134, 135; Dec. Dig. § 28.*]

4. LIMITATION OF ACTIONS (§ 28*)—SUBROGATION (§ 31*)—REIMBURSEMENT OF SURETY—STATUTORY PROVISIONS.

Under Ky. St. § 4686, which entitles a surety, who pays the whole or part of a judgment, to an assignment in whole or part from the judgment creditor or his attorney, and provides that, when satisfied, such judgment shall give him the right to control the judgment for his own benefit, so far as to obtain satisfaction from the principal for the amount paid, does not require that the assignment of the judgment shall be in writing or be made a matter of record, or that it shall be entered in the record book in which a judgment is entered; and an assignment within five years gives the surety all the rights against the principal that he could acquire by an assignment of record, and extends the time in which he may proceed against his principal for reimbursement, so that his right to recover against his principal is not limited to an action on an implied promise, barred within five years, but extends for the same time that the right of the judgment creditor extends.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 134, 135; Dec. Dig. § 28; Subrogation, Cent. Dig. §§ 70-91; Dec. Dig. § 31.*]

5. SUBROGATION (§ 31*)—RIGHTS OF SURETY AS AGAINST PRINCIPAL—NOTICE TO PRINCIPAL.

After a surety's right of action against his principal is barred, he should not be permitted, by an order of court, to restore it to life without notice to the principal; but, when his action is not barred, it is not necessary that he should give notice to his principal of his intention to obtain an assignment of the creditor's judgment, since, if the principal has a defense, such as that the party obtaining a statutory assignment of the judgment was not

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes 151 S.W.—23

in fact a surety, that his right to the assignment was barred by limitation, or that his claim against the principal had been satisfied, the fact that the surety obtained an assignment without notice would not prevent the principal from making such defenses.

[Ed. Note.—For other cases, see Subrogation, Cent. Dig. §§ 70-91; Dec. Dig. § 31.*]

6. PRINCIPAL AND SURETY (§ 182*)—RIGHTS OF SURETY AS AGAINST PRINCIPALS INDIVIDUALLY.

Where a surety for two persons as assignees satisfies a judgment against them, growing out of their failure to faithfully discharge their duties as assignees, he may, after satisfying such judgment, proceed against them individually.

[Ed. Note.—For other cases, see Principal and Surety, Dec. Dig. § 182.*]

7. SUBROGATION (§ 31*)—RIGHTS OF SURETY AS TO PRINCIPAL — EXTINGUISHMENT OF PRINCIPAL'S LIABILITY.

Where a creditor, obtaining judgment against a principal in F. county, recovered thereon against the surety in J. county, the surety's payment of the J. county judgment and taking the creditor's assignment of the F. county judgment did not extinguish the liability of the principal under the F. county judgment.

[Ed. Note.—For other cases, see Subrogation, Cent. Dig. §§ 70-91; Dec. Dig. § 31.*]

8. SUBROGATION (§ 31*)—RIGHTS OF SURETY AS TO PRINCIPAL—PRESUMPTION.

The legal presumption is and should be that the surety's payment of a judgment against the principal does not extinguish it, so as to deprive the surety of the right to an assignment of the judgment for his benefit against the principal.

[Ed. Note.—For other cases, see Subrogation, Cent. Dig. §§ 70-91; Dec. Dig. § 31.*]

Appeal from Circuit Court, Fleming County.

Action by the Fidelity & Deposit Company of Maryland against R. H. Sousley and another. Judgment for defendants, and plaintiff appeals. Reversed, with directions.

R. J. Babbitt and J. H. Power, both of Flemingsburg, for appellant. B. S. Grannis and John P. McCartney, both of Flemingsburg, for appellees.

CARROLL, J. In 1896 R. H. Sousley and R. K. Hart qualified as assignees of David Wilson, under a general deed of assignment, with the appellant company as surety. In May, 1902, the Louisville National Banking Company obtained a judgment in the Fleming circuit court against Hart & Sousley, as assignee of Wilson, for \$1,850, with interest from the date of the judgment until paid. Upon this judgment an execution, issued in July, 1902, and in September, 1902, was returned "no property found." After this the Louisville National Banking Company and Henry L. Stone, who it appears had some interest in the judgment, brought suit in the Jefferson circuit court against the appellant company to recover from it, as surety of Hart & Sousley, the amount of the Fleming county judgment against them, and in March, 1903, they obtained judgment against the appellant com-

pany for the same amount that judgment had been rendered against Hart & Sousley. In January, 1904, the appellant company satisfied this judgment, and also the judgment in the Fleming circuit court, in favor of the Louisville National Banking Company, by paying the amount of the judgments, with interest and costs. Upon its payment of the Fleming county judgment, the Louisville Banking Company in 1904 assigned in writing to the appellant company the Fleming county judgment. The assignment, after setting out some preliminary facts, recites that "whereas, by virtue of the bond executed by said Hart & Sousley, as principals, and the Fidelity & Deposit Company of Maryland, as surety, to secure the faithful performance of their duties by said Hart & Sousley, as assignees of David Wilson, said Fidelity & Deposit Company became liable to said banking company for the amounts recovered by said judgment, and whereas said Fidelity & Deposit Company has paid the whole of said judgment, and said banking company has been fully satisfied with respect to all its rights under such judgment, now, therefore, said Louisville National Banking Company, in consideration of said payment of said judgment as aforesaid, hereby assigns to said Fidelity & Deposit Company of Maryland said judgment and all said bank's rights in, to, and under said judgment, without recourse against said bank in any event." Afterwards, and in December, 1911, the Louisville National Banking Company and Henry L. Stone each made written assignments of the Jefferson county judgment to the appellant company, and Stone also assigned to it his interest in the Fleming county judgment. In December, 1911, this suit was brought by the appellant against Hart & Sousley to recover from them the amount it had been compelled to pay as their surety in satisfaction of the judgment rendered against them as assignees in the Fleming circuit court.

To this suit an answer was filed by Hart & Sousley, consisting of several paragraphs, but the substance of the defense was: (1) That the judgment relied on by appellant as the basis of its action were extinguished and satisfied in January, 1904, and, as the assignments of these judgments to it were of no effect, its right to a recovery rested entirely on the implied promise of Hart & Sousley, its principals, to repay to it the amount it had paid for them as surety, and was barred by the five-year statute of limitation; (2) that the assignments of the judgments were void because no notice was given to Hart & Sousley that the judgment plaintiff would be requested to make the assignments, or that they had made the assignments; (3) that, as the Fleming county judgment was rendered against Hart & Sousley as assignees, the appellant acquired no right against them as individuals by vir-

tue of the assignment of that judgment; (4) that the assignment of the Fleming county judgment by the Louisville Banking Company was only operative as to one-half of the judgment, as Henry L. Stone was the owner of the remaining one-half; (5) that, as the Jefferson county judgment was based on the Fleming county judgment, the latter judgment was merged in the former, and the assignment of it passed nothing to appellant; (6) that the assignment of the Jefferson county judgment, which was made in 1911, more than five years after the judgment had been satisfied by the appellant, was of no effect, because the right of the appellant, if it had any, to recover on the judgment against Hart & Sousley was then barred by the five-year statute of limitation. In disposing of the case we will consider only in a general way these defenses, as it does not appear to be necessary that each of them should be taken up separately.

[1] The record shows that the Fleming county judgment was rendered in behalf of the Louisville Banking Company against Hart & Sousley as assignees. It was therefore only necessary that the appellant, when it satisfied this judgment, should procure from the banking company an assignment of it. If, however, Stone, by reason of some private arrangement between himself and the banking company, had an interest in the judgment, the assignment of the judgment by the banking company only passed to the assignee the interest that the banking company owned; and, as the surety only obtained within five years from the date of the Fleming county judgment an assignment from the banking company, and not from Stone, it is only substituted to the rights of the banking company in the Fleming county judgment. This Fleming county judgment was not satisfied by appellant until some two years after its rendition, when it satisfied the judgment rendered against it in the Jefferson circuit court; but this circumstance is of no material importance. The appellant did not suffer any loss by reason of its suretyship until it satisfied the judgment against its principals, and it was not entitled to an assignment of the judgment until it had satisfied it. It was not necessary that it should have obtained in 1904, or indeed at any time, an assignment of the Jefferson county judgment. There was no reason why it should take an assignment of a judgment against itself, and so the assignment of the Jefferson county judgment to it by the banking company and Stone do not add anything to the strength of appellant's case or take anything from it.

The rights of the parties are to be judged by the effect of the judgment in the Fleming circuit court, and the assignment of this judgment to appellant. If appellant is entitled to recover, its right to do so must rest on the effectiveness of the assignment of the Fleming county judgment, because if this as-

signment did not enlarge its rights as a surety, and they must rest on the implied promise of the principals to repay the amount it was compelled as surety to pay for them, its claim is barred by the five-year statute of limitation.

[2, 3] A surety, who pays a judgment for his principal without taking an assignment of the judgment against the principal that he paid, can only recover from his principal upon the implied promise that the law raises in his behalf, and he must proceed to obtain relief upon this implied promise within five years from the date of the payment. *Bowman v. Wright*, 7 Bush, 375; *Robinson v. Jennings*, 7 Bush, 630; *Duke v. Pigman*, 110 Ky. 756, 62 S. W. 867, 23 Ky. Law Rep. 209.

[4] But the rights of a surety, who satisfies a judgment, have been enlarged by the statute, and, when a surety takes a statutory assignment of a judgment against his principal within five years from its rendition, he steps into the shoes of the judgment plaintiff, and has all the rights against his principal that the judgment plaintiff would have. *Joyce v. Joyce*, 1 Bush, 474. Among other rights that the surety acquires by obtaining within the five years a statutory assignment is the one extending the time in which he may proceed against his principal for reimbursement. His right to recover against his principal is not limited to an action on the implied promise and barred within five years if no action be taken, but extends for the same period of time that the right of the judgment plaintiff would extend. Therefore, if the assignment of the Fleming county judgment was made in the manner provided in the statute, the five-year statute of limitation relied on by appellee constitutes no defense. This statute, which is section 4686 of the Kentucky Statutes, reads as follows: "If the surety pays the whole or part of a judgment he shall have a right to an assignment thereof from the plaintiff or the plaintiff's attorney, in whole or in part; and when the plaintiff has been fully satisfied, such assignment shall give him the right to sue out or use any existing execution, or otherwise control the judgment for his own benefit against other defendants, so far as to obtain satisfaction from the principal for the whole amount so paid by the surety with interest, or from any cosurety his proper part of such payment according to the principles of the last section. Such assignment shall also transfer to the sureties so paying the benefit of any lien existing under or by virtue of such judgment; and the right to the assignment shall exist, though the money was made or secured by sale of the property of the surety under execution." Under this statute the appellant, when it satisfied the judgment, had a right to an assignment thereof, and this assignment it obtained. The statute does not require that the assignment of a judgment shall be in writing or be

made a matter of record, or that the assignment shall be entered on the record book in which the judgment is entered. An assignment within five years will give to the surety all the rights against his principal that he could acquire by an assignment of record. *Patton v. Smith*, 130 Ky. 819, 114 S. W. 315, 23 L. R. A. (N. S.) 1124; *Brown & Bro. v. Lapp*, 89 S. W. 304, 28 Ky. Law Rep. 409; *Freeman on Judgments*, vol. 2, § 422.

[5] It is, however, earnestly insisted by counsel for appellee that the assignment of a judgment, to be effective, must be made after notice to the principal debtor, and that, unless the principal debtor is given notice of the fact that an assignment will be requested or that an assignment has been made, so that he may, if he desires, contest the right of the surety to the assignment, he will not be affected by it. In support of this proposition, our attention is called to *Veach v. Wickersham*, 11 Bush, 261. In that case it appears from the opinion that in April, 1855, McDowell and Young recovered judgments against Veach, Cornish, and Wickersham; the latter two being the sureties of Veach, and as such sureties they were compelled to and did satisfy the judgment in 1855. In 1869, 14 years after the satisfaction of the judgment by the sureties, Wickersham, without notice to Veach, procured an order from the court in which the judgment was rendered, indorsing one-half of the judgment for his benefit, and empowering him to sue out execution thereon. Execution having been issued in favor of Wickersham, Veach contested his right to collect the execution, and his contention was sustained by the court. It will be observed that in that case the surety did not seek to secure an assignment of the judgment until after the expiration of five years from its rendition, or until after his right of action upon the implied promise of Veach had been barred by limitation. At the time Wickersham obtained the assignment, he had no enforceable demand against Veach, and the court, under this state of facts, said that it was necessary to the validity of the order of the court making the assignment that Veach should have had notice of the application for the order and opportunity to defend and show cause against it. That case does not hold that, within five years after the rendition of the judgment, the surety may not obtain, without notice to his principal, an assignment of the judgment from the judgment plaintiff. Of course when the surety's right of action is barred by limitation, and he undertakes to revive his cause of action by obtaining, through an order of court, an assignment of the judgment, he must give notice to his principal, so that the principal, if he desires, may defeat his right to the assignment upon the ground that his claim is barred by limitation.

It can readily be seen that, after the surety's right of action is barred, he should not be permitted, through an order of court, to

restore it to life without notice to the principal; but, when his right of action is not barred, it is not necessary that he should give notice to his principal of his intention to obtain an assignment of the judgment. A surety who satisfied a judgment is entitled, as a matter of right, to an assignment of it within the five years, and this right the principal debtor cannot obstruct or defeat if the judgment was in fact paid by the surety.

The case of *Plummer v. Talbott*, 50 S. W. 1097, 21 Ky. Law Rep. 30, is also relied on by appellee. In that case it appears that in 1894 Plummer, who was a member of a partnership, bought out the other members and executed his note for the purchase price of the partnership stock. Failing to meet these notes, Plummer in 1895 returned what he had bought to his partners, and a contract was then entered into by which his partners agreed to pay off the firm debts and save Plummer harmless therefrom. After this contract was made, a creditor of the old firm obtained judgment against Plummer in the quarterly court; the other partners defeating in that court a recovery against them. From the judgment refusing him relief against the other members of the firm, the creditor appealed to the circuit court, and in that court obtained a judgment against the other members of the firm. The result of this was that the creditor had a judgment in the quarterly court against Plummer and a judgment for the same debt in the circuit court against the other members of the firm. After this the other members of the firm obtained from the creditor, without notice to Plummer, an assignment of the quarterly court judgment against Plummer, and sought to collect it. Plummer, after setting up the facts before stated, sought to enjoin the collection of the execution, but the lower court dismissed his petition. In reversing the case this court said that under the facts stated in the petition of Plummer seeking to enjoin the collection of the execution, he did not owe any part of the debt, and therefore the other members of the firm were not entitled to an assignment of the quarterly court judgment without notice to him. The court further said: "If the debt is the debt of Plummer alone, he is not hurt by the assignment; but if it is a firm debt, and he owes only a part of it, or if it is a debt against which he is to be saved harmless under the contract, then the injunction is to be perpetuated." The difference between that case and this is apparent. In that case, according to the averments of Plummer's petition, he did not owe the judgment, and the other members of the firm had no right to an assignment, or to collect it from him. In this case it is not denied, and we take it could not be, that Hart & Sounsley, as assignees, should have paid the Fleming county judgment against them; but, failing to pay it, the appellant, as their surety, was compelled to satisfy it, and the only defenses they make to the right of

the surety to recover against them the part of that judgment owned by the banking company are purely technical. They have no meritorious defense as Plummer had or as Veach had.

If Hart & Souseley had a defense, the fact that the appellant obtained an assignment without notice to them would not prevent them from making the defense in this action. For example, if a person who obtains an assignment of a judgment under the statute was not in fact a surety, or if his right to the assignment was barred by limitation, or if his claim against his principal had been satisfied, or for any other reason should not be paid, the principal can make his defenses when it is sought to collect the judgment debt under the assignment, unless the assignment was made by an order of court after due notice to the principal and opportunity to resist in court the assignment.

[6] There is no merit in the contention that, as the Fleming county judgment was against Hart & Souseley as assignees, the appellant, who as surety satisfied that judgment, cannot proceed against them as individuals. The judgment against them in the Fleming circuit court was caused by their failure to faithfully discharge their duties as assignees, as may be seen by an examination of *Stone v. Hart*, 66 S. W. 191, 23 Ky. Law Rep. 1777, and *Wilson v. Louisville Nat. Banking Co.*, 76 S. W. 1065, 25 Ky. Law Rep. 1065.

When a fiduciary, by his wrongdoing or faithless performance of his trust, causes his surety to suffer a loss, the surety may proceed against him individually to recover what he has been compelled to pay. If this were not so, a faithless fiduciary could put the burden of his wrongdoing upon his surety and escape liability for loss occasioned by his breach of duty.

[7] Nor did the payment of the Jefferson county judgment by the surety have the effect of extinguishing the liability of Hart & Souseley under the Fleming county judgment. When the surety paid off the Jefferson county judgment against it and took an assignment of the Fleming county judgment, this act plainly showed that it was not intended, in satisfying this judgment, to extinguish its right to reimbursement against the principal. *Roberts v. Bruce*, 91 Ky. 379, 15 S. W. 872, 12 Ky. Law Rep. 932.

[8] Aside from this, the legal presumption is, and should be, that the payment of a judgment by a surety does not extinguish it so as to deprive the surety of the right to an assignment of the judgment for his benefit against the principal. The judgment creditor had a right to bring this suit against the surety alone in Jefferson county, and, when the surety satisfied the judgment against it, it was entitled to be substituted to all the rights the judgment plaintiff had against Hart & Souseley, and among these was the

right to have an assignment of the Fleming county judgment, and by virtue of this assignment it acquired all rights against Hart & Souseley that the Louisville Banking Company had, but was not substituted by the assignment to any interest that Stone may have had in the Fleming county judgment, because it did not obtain, within five years from the rendition of this judgment, an assignment by Stone of his interest in it.

Wherefore the judgment is reversed, with directions to enter a judgment in favor of appellant for the sum the record, in this case and the cases out of which this litigation grows, shows the Louisville Banking Company was entitled to in the Fleming county judgment, with interest thereon from the date of that judgment, and a proportionate part of the cost of that judgment.

SHIRLEY v. RENICK.

(Court of Appeals of Kentucky. Dec. 4, 1912.)

1. APPEAL AND ERROR (§ 1046*)—RIGHT TO OPEN AND CLOSE—REVERSIBLE ERROR.

Under Civ. Code Prac. § 317, subsec. 6, providing that the party having the burden of proof shall have the conclusion of the argument, the denial of that right to the party having the burden is reversible error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4128-4134; Dec. Dig. § 1046.*]

2. PLEADING (§§ 2, 133*)—CODE PLEADING—"COLOR"—"SON ASSAULT DEMESNE."

A plea of "son assault demesne," which is in the nature of a confession of the assault charged, and an avoidance thereof, by showing that the plaintiff first assaulted the defendant, and that the injuries grew out of his assault, must, even under the Code, give "color," which, as a term of pleading, signifies an apparent or prima facie right in the plaintiff; the Code, while having abolished forms, not having changed the substance of various pleas.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 3, 4, 280; Dec. Dig. §§ 2, 133.*]

For other definitions, see Words and Phrases, vol. 2, p. 1262; vol. 7, p. 6552.]

3. PLEADING (§ 133*)—ANSWER—CONFESSION AND AVOIDANCE—COLOR.

In an action for damages for willful and malicious assault, the first paragraph of the answer traversed the allegations of malice, and the second paragraph alleged that defendant attempted to assist the constable in making an arrest, whereupon plaintiff attempted to restrain defendant, who to protect himself struck plaintiff. Held that, while not expressly admitting the assault on plaintiff, defendant's answer, taken as a whole, was a good plea in confession and avoidance, impliedly confessing the assault.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 280; Dec. Dig. § 133.*]

4. TRIAL (§ 25*)—RIGHT TO OPEN AND CLOSE.

Under Civ. Code Prac. § 526, providing that the burden of proof in the whole action lies on the party who would be defeated if no evidence were given, a defendant in an action for malicious assault who pleaded in confession and avoidance that he struck plaintiff in repelling plaintiff's assault, though traversing

the allegations of malicious and willful injury, has the burden of proof, the gist of the plea being one of son assault demesne in confession and avoidance; and hence, under the direct provisions of section 317, subsec. 6, is entitled to the conclusion in argument.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 44-75; Dec. Dig. § 25.*]

Appeal from Circuit Court, Warren County. Action by James Garland Shirley against Tom Renick. From a judgment for defendant, plaintiff appeals. Affirmed.

Rodes & Wallace, of Bowling Green, for appellant. T. W. & R. C. P. Thomas, of Bowling Green, for appellee.

MILLER, J. Shirley sued Renick for \$5,100 damages for a willful and malicious assault, committed on the ——— day of August, 1911. The first paragraph of the answer is a traverse, but in such a way as to deny only that the assault upon plaintiff was willful or malicious. In effect, it admits the assault. The second paragraph alleged affirmatively that, while attending a tent meeting in Warren county some time in August 1911, the plaintiff and his brother, Porter Shirley, became drunk and disorderly; that Smith, a constable, while attempting to arrest Porter Shirley, who resisted arrest, called defendant to his assistance to effect the arrest, whereupon the plaintiff assaulted, took hold of, and attempted to restrain, the defendant from making said arrest; and, in order to make said arrest and protect himself, the defendant struck plaintiff with his fist. In a third paragraph defendant alleges that he was justified in striking the plaintiff under the circumstances above set forth; and that he used no more force than was necessary to repel the assault and force used by the plaintiff.

The case was twice tried. Upon the first trial plaintiff obtained a verdict for \$100, but this judgment was set aside; and upon a second trial the verdict was for the defendant. Plaintiff appeals.

No bill of exceptions containing the evidence or the instructions is presented. The appellant seeks a reversal upon the single ground that the trial court refused him the burden of proof and the closing argument to the jury.

[1] Under subsection 6 of section 317 of the Civil Code of Practice, the party having the burden of proof shall have the conclusion in the argument; and section 526 further provides that "the burden of proof in the whole action lies on the party who would be defeated if no evidence were given on either side." If, therefore, the burden of proof was upon the appellant, he was entitled to the closing argument; and a denial of that right by the circuit judge was a reversible error. *Royal Ins. Co. v. Schwing*, 87 Ky. 410, 9 S. W. 242, 10 Ky. Law Rep. 380; *Lucas v. Hunt*,

91 Ky. 279, 15 S. W. 781, 12 Ky. Law Rep. 871; *Crabtree v. Atchison*, 93 Ky. 338, 20 S. W. 260, 14 Ky. Law Rep. 313; *Ashland & Catlettsburg Street Railway Co. v. Hoffman*, 82 S. W. 566, 26 Ky. Law Rep. 778. The trial court evidently took the view that the defendant had pleaded son assault demesne; and the burden of proof was therefore upon the defendant, and not upon the plaintiff.

[2] It is contended, however, that the answer nowhere alleges that the assault by plaintiff upon defendant is the same assault committed by the defendant upon the plaintiff, which is the subject of this action, and that the answer therefore does not plead son assault demesne. A plea of son assault demesne is in the nature of a confession of the assault charged, and an avoidance thereof, by showing that the plaintiff first assaulted the defendant, and that the injuries complained of grew out of the assault by the plaintiff upon the defendant. In speaking of pleas in confession and avoidance, Perry's *Common-Law Pleading*, at page 273, says: "With respect to the quality of these pleadings, it is a rule that every pleading by way of confession and avoidance must give color. This is a rule which it is very essential to understand, in order to have a correct apprehension of the nature of these pleadings; yet it appears to have been not hitherto adequately explained or developed in the books of the science. Color is a term of the ancient rhetoricians, and was adopted at an early period into the language of pleading. As a term of pleading, it signifies an apparent or prima facie right; and the meaning of the rule, that every pleading in confession and avoidance must give color, is that it must admit an apparent right in the opposite party, and rely, therefore, on some new matter by which that apparent right is defeated."

The reason for the rule exists as well under our system of code pleading as it did under the common-law system of pleading. And, although forms have been abolished by the Code of Practice, the substance of the common-law rules of legal procedure remains, except where they conflict with the spirit of our statutory regulations upon the subject of pleading and pactice. *R. & L. T. Co. v. Rogers*, 7 Bush, 535.

Strictly speaking, therefore, a plea of son assault demesne, being by way of confession and avoidance, should admit the assault complained of, and rely upon the first assault by the plaintiff, to defeat plaintiff's case. But must such an admission be expressly made, or is it sufficient if it be distinctly implied from the matters set forth in the pleadings?

In *Stephen on Pleading*, star page 200, the rule as to the nature and properties of pleas in confession and avoidance is laid down as follows: "It was formerly the practice in

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

many cases to frame such pleas with a *formal* confession or admission in terms, using the introductory phrase of 'True it is that,' etc., and then proceeding to plead in answer to the matter thus explicitly admitted. But this method is not required by the rules of pleading, and, with a view to brevity, is now generally abandoned. It is essential that the confession, though not express, should be distinctly implied in or inferable from the matter of the pleading. If a pleading, therefore, purporting to be by way of confession and avoidance, or, in other words, not pleaded by way of traverse, does not import a confession of the traversed allegations, it is defective and insufficient." See, also, star page 163 for the form of the plea of son assault demesne.

[3] It will be seen, therefore, that, while the second paragraph of the answer might well have been more specific in confessing the assault, and in alleging that the assault and the counterassault were one and the same, it nevertheless substantially shows that state of fact, and sufficiently complies with Stephen's rule. The seeming confusion between counsel arises from the fact that the first paragraph of the answer traverses the allegations of the petition, while the second paragraph is in confession and avoidance; and appellant, relying on the issue made by the first paragraph, claims the burden of proof, while appellee claims it under the second paragraph. Taking the two paragraphs together, or disregarding the first paragraph because of its insufficiency as a traverse, the answer is equivalent to a plea of son assault demesne.

[4] Where there is a plea of son assault demesne, the burden of proof is upon the defendant. *Walls v. Robb*, 15 Ky. Law Rep. 159; *Phillips v. Mann*, 44 S. W. 379, 19 Ky. Law Rep. 1705; *Johnson v. Strong*, 58 S. W. 430, 22 Ky. Law Rep. 577; *Torain v. Terrell*, 122 Ky. 745, 93 S. W. 10, 29 Ky. Law Rep. 306. But where the defendant merely traverses the allegations of the petition, or, in addition thereto, pleads distinct and separate matters by way of justification or excuse, but which do not amount to an assault, the burden is on the plaintiff to make out his case. *Wilken v. Exterkamp*, 102 Ky. 143, 42 S. W. 1140, 19 Ky. Law Rep. 1132; *Finnell v. Bohannon*, 44 S. W. 94, 19 Ky. Law Rep. 1587; *Ryan v. Quinn*, 71 S. W. 872, 24 Ky. Law Rep. 1517; *Hess v. Hymson*, 93 S. W. 9, 29 Ky. Law Rep. 327; *Doerhoefer v. Shewmaker*, 123 Ky. 646, 97 S. W. 7, 29 Ky. Law Rep. 1193.

As the answer, taken as a whole, presents a plea of son assault demesne, the case comes within the first class of cases, *supra*, and the burden was upon the defendant, the appellee in this case. In so holding the trial court ruled correctly.

Judgment affirmed.

RODES et al. v. YATES et al.

(Court of Appeals of Kentucky. Dec. 11, 1912.)

APPEAL AND ERROR (§ 78*)—FINALITY OF DETERMINATION—SUSTAINING DEMURRER.

An order sustaining a demurrer to an amended petition, but making no further disposition of the action, is not appealable.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 426, 464-483; Dec. Dig. § 78.*]

Appeal from Circuit Court, Madison County.

Action by James Rodes, trustee, and others, against Charles Yates, trustee, and others. From an order sustaining a demurrer to the amended petition, plaintiffs appeal. Appeal dismissed.

O. P. Jackson and John C. Chenault, both of Richmond, for appellants. D. M. Chenault, of Richmond, for appellees.

CLAY, C. This appeal is prosecuted from an order sustaining a demurrer to the amended petition, but making no disposition of the action. An order which sustains a demurrer to an amended petition, but goes no further, is not a final order, and no appeal lies therefrom. *Harrison v. Stroud*, 150 Ky. 797, 150 S. W. 993.

The appeal is dismissed.

HOPPER v. HOPPER et al†

(Court of Appeals of Kentucky. Dec. 10, 1912.)

1. LIENS (§ 7*)—EQUITABLE LIEN—MAINTENANCE OF GRANTOR.

Where a mother deeds property to her son, in consideration of a home and maintenance, but she is unable to get along with the latter's wife, to whom the son conveyed it, and leaves, being old and unable to work, she is entitled to a lien on the property for her maintenance.

[Ed. Note.—For other cases, see *Liens*, Cent. Dig. §§ 26-28; Dec. Dig. § 7.*]

2. HUSBAND AND WIFE (§ 49½*)—CONVEYANCES—GIFTS—EQUITIES.

A wife, taking property from her husband as a gift, with knowledge that his mother had conveyed the property to him in consideration for maintenance, which she did not get, being unable to live with the wife, cannot object to the declaring of a lien in favor of the mother.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. §§ 249-255; Dec. Dig. § 49½.*]

Appeal from Circuit Court, Kenton County, Common Law and Equity Division.

Action by Mary F. Hopper against Charles W. Hopper and another. Judgment for defendants and plaintiff appeals. Reversed.

Myers & Howard, of Covington, for appellant. D. C. Lee and S. D. Rouse, both of Covington, for appellees.

NUNN, J. Appellant, Mary F. Hopper, is a widow about 68 years of age. Her husband died in Cincinnati, Ohio, several years ago, leaving her and several infant children,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes
† Rehearing denied January 22, 1913.

with a small estate. She bought a lot in the town of Bellevue, Ky., and with the help of her son, Charles Hopper, appellee, and her three daughters, when they arrived at a sufficient age, erected a house upon the lot. She borrowed some money from a building loan association in Bellevue to help erect the house, but by her own efforts and with the aid of her children she repaid the loan, and she was then the owner of the property, which was worth about \$2,500, free of any lien. The mother and children then concluded that they would like to have a home in the country, so they bought a house and about four acres of ground from a man by the name of Graf, which was located at Crescent Springs, Kenton county, at the price of \$3,900. To secure the money with which to make the first payment of \$1,000 on this property, Mrs. Hopper executed a mortgage on her home to the building loan association, and executed a second mortgage for the same amount on the same property to meet the second payment. At about this time Charles Hopper married Georgia Noe Hopper, his coappellee. When the last purchase-money note on the Crescent Springs property fell due, appellee approached his mother and proposed to her that, if she would convey it to him, he would mortgage it to a building loan association in Covington, Ky., and raise the money to pay the note; that he would arrange to pay off the debt to the Covington association, and also the debts held against the Bellevue property, if she would allow the rents from the Bellevue property to go to him to aid in settling the matter. It was also expressly understood that Mrs. Hopper should have a home with her son on the Crescent Springs property so long as she lived, and that he was to furnish her with the necessaries of life. The mother and son were the only two witnesses who testified in the case, and they do not differ in any material degree. The mother conveyed the Crescent Springs property to her son, and moved there, intending to make her home, but soon became dissatisfied. The wife of appellee and his mother could not, for some reason not explained in the record, live together. Mrs. Hopper said she had rather live in the gutter the rest of her days than to live with her daughter-in-law. Appellee's wife complained to him about appellant's conduct, and appellant complained to him of his wife's conduct. The turmoil became so great that the mother left and went to her property in Bellevue. After this the son ceased making any payments on the Bellevue property and the association demanded its debts. Appellant having no means to pay the association, she sold the property, as she claims she was compelled to do, at a sacrifice. She received \$250 in cash, and the purchaser assumed the mortgage debts.

[1] Appellant instituted this action to have the deed she made to her son conveying the Crescent Springs property set aside. Soon after she conveyed the property to her son, he deeded it to his wife as a gift. Upon a trial of the case, the lower court dismissed appellant's petition, stating that he was unable to find any proof of fraud on the part of appellee. We agree with the lower court in this respect. Every fact appearing in the record shows the son to be an excellent, industrious, and honorable young man. The record likewise shows that appellant was an intelligent and good woman, and the unfortunate circumstance, the falling out of the mother and daughter-in-law is to be regretted, but nevertheless it is a fact. The separation exists, and, according to the testimony, they cannot live together in peace. The court was right in not setting the deed aside for fraud; but appellant should have at least been adjudged a lien on the Crescent Springs property for her maintenance. She paid \$2,000 of the purchase price of that property by placing mortgages on her Bellevue home. She is now old and without a home. For a time she worked, first one place then another, but finally received an injury which rendered her unable to make a living for herself. Under these circumstances, equity and justice demand that appellant should have back at least a portion of the money she paid on the Crescent Springs property, to enable her to live in some comfort the balance of her days. This ought to, and doubtless will, meet with the approval of her son. He carried out his part of the contract with his mother, until his wife and mother were unable to longer live together and the mother left his home. In our opinion, a lien should be declared on the Crescent Springs property for \$1,500 in favor of appellant. It is to be subject, however, to the mortgage lien of the Covington Building Loan Association for money paid on the purchase price of the property.

[2] The wife of Charles Hopper took the conveyance for the property without paying any money consideration, therefore, as she knew of the equities of her mother-in-law in the property, declaring a lien upon the property to secure those equities will not disturb any pre-existing equities of the wife. Appellant is entitled to this relief under her general prayer for all equitable and proper relief. On the return of the case the lower court will adjudge the payments of this lien debt on the terms most agreeable to the mother and son, and if they fail to agree the court will then fix yearly payments least hurtful to appellee, but keeping in mind the maintenance of appellant.

For these reasons, the judgment is reversed, and case remanded for further proceedings consistent with this opinion.

DAVIS v. DAVIS.

(Court of Appeals of Kentucky. Dec. 10, 1912.)

HUSBAND AND WIFE (§ 288*) — SEPARATE MAINTENANCE — REFUSAL TO LIVE WITH HUSBAND.

A wife, who refused to live in a comfortable home provided at a place where her husband's business required him to be, was not entitled to alimony.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 1077; Dec. Dig. § 288.*]

Appeal from Circuit Court, Whitley County.

Action by Wheeler Davis against Oscar Davis. Judgment for defendant, and plaintiff appeals. Affirmed.

Sharp, Gatliff & Smith, of Williamsburg, for appellant. Stephens & Steeley, of Williamsburg, for appellee.

CARROLL, J. This suit was brought by appellant, the wife of appellee, to require him to pay her alimony in the sum of \$500, upon the ground that he refused to permit her to live in his home and compelled her to take shelter with her parents. The appellee filed an answer and counterclaim, in which he averred that his wife left his home without any fault on his part, and he sought a divorce from her on statutory grounds. Pending the suit a child was born to appellant, and the lower court, upon the pleadings and evidence, granted the appellee a divorce upon his counterclaim, and ordered him to pay to appellant, for the support of the child, the sum of \$300 and also attorney's fee, but refused to allow appellant anything for alimony. On this appeal she asks that the judgment declining to allow her alimony be reversed, with directions to the lower court to enter a judgment giving her alimony.

The weight of the evidence supports the contention of appellee that his wife abandoned him and his home without sufficient cause. He had provided her with as comfortable a home as his circumstances would permit, at a place where his business required him to be; but his wife was not satisfied with the place in which they lived, and desired that appellant should locate in the town in which her parents lived. He could not do this without losing the employment in which he was engaged, and upon his refusal to gratify her wishes in this respect she left his home and went to live with her parents. Under the circumstances she was not entitled to alimony.

The judgment is affirmed.

HOME PROTECTIVE ASS'N v. WILLIAMS.

(Court of Appeals of Kentucky. Dec. 10, 1912.)

INSURANCE (§ 525*)—LIFE POLICY—DISABILITY CLAUSE—CONSTRUCTION—"CONFINED TO BED."

Under a life policy which provided that the insured should not be liable to a member for

disability while convalescing from any disease, but that it should accept liability only for the actual time the member is necessarily and continuously "confined to bed," the insured could collect benefits if his sickness was such as would reasonably confine a person continuously to bed or substantially so confine him, though he may have been up at times to get fresh air or for other purposes.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1310; Dec. Dig. § 525.*]

Extension of opinion. Reversed.

For former opinion, see 150 Ky. 134, 150 S. W. 11.

HOBSON, C. J. When this appeal was originally before us by a clerical error, the policy sued on had not been correctly copied into the transcript. See Home Protective Ass'n v. Williams, 150 Ky. 134, 150 S. W. 11. Since the opinion was delivered under an agreed stipulation of counsel, the original policy has been filed. One of its provisions, following that part of the policy which provides for the payments to be made by the company, is as follows: "From the amount of such payment shall, however, be deducted any disability benefits that may have been paid to said member. In case the above named member shall become wholly disabled by sickness or accident which shall produce visible marks upon the body, and which shall begin after thirty days continuous membership, the association will, upon satisfactory proof thereof, pay to said member, as a benefit for loss of time, \$5.00 per week during the time the member is necessarily confined to his or her bed, beginning with the date of mailing notice to the home office, and for a period not to exceed ten weeks in any one year." Section 7 of the conditions indorsed on the policy, among other things, provided: "Neither shall the order be in any manner liable to the member for disability while convalescing from any disease; the order accepting liability only for the actual time the member is necessarily and continuously confined to bed and totally unable to follow his or her vocation. No allowance will be made for fractional parts of a week."

The court gave the jury this instruction: "The court instructs the jury that, if they believe from the evidence that prior to January 5, 1911, Willie Williams was totally unable to follow his vocation or do any labor, and by reason of such disability the defendant company was indebted to him in a sum sufficient to have carried the policy in suit and paid the premiums thereon up to the time of said Willie Williams' death, then and in that event the jury will find for the plaintiff; otherwise they will find for the defendant. The recovery in this case, if you find for plaintiff, not to exceed \$300, the amount sued for." It will be observed that the instruction of the court entirely ignored the words "confined to bed" contained in the policy, and the pro-

priety of this ruling is the question now to be determined on the appeal.

There are numerous cases in which the words "confined to the house" have come up for adjudication under similar policies. In *Metropolitan Plate Glass & Casualty Ins. Co. v. Hawes*, 150 Ky. 52, 149 S. W. 1110, we held that, under such a clause, it was not required that the insured should be confined all the time in the house, and that a recovery might be had where he was able at times to sit on the veranda and get fresh air under the advice of his physician. There are numerous other decisions to the same effect. See *Breil v. Claus Groth Plattdutch-en Vereen*, 84 Neb. 155, 120 N. W. 905, 23 L. R. A. (N. S.) 359, 18 Ann. Cas. 1110, and note thereto, in which a number of decisions on the subject are collected, the sum of the decisions being that such clauses must be given a reasonable construction, and that a recovery may be had where there is a substantial confinement to the house, although the assured occasionally goes out of the house to get air or sunshine or to see his physician, or for some other necessary purpose. We have been able to find but two cases construing the words "confined to bed," but we do not see any reason why the same principle should not be applied in construing these words. In *Bradshaw v. Am. Benevolent Ass'n*, 112 Mo. App. 435, 87 S. W. 46, the court said: "We would not, of course, hold that this clause meant that a patient must spend every minute in bed for his right to indemnity to accrue; but the manifest purpose of the policy was not to indemnify for loss of time due to sickness unless the patient was bedridden in a substantial sense. We suppose the purpose was to insure against such illness only as would keep the patient in bed and thereby diminish the danger of claims founded on feigned or exaggerated illness. Now to hold that a person who could take a trip to Texas, another to St. Louis, and who was able to be up and around when he chose, was confined to his bed would be to ignore one clause of the policy."

The question came before the same court again in *Hays v. Am. Benevolent Ass'n*, 127 Mo. App. 195, 104 S. W. 1141. In that case the jury had been instructed that the plaintiff might recover if he was bedridden, in a substantial sense, all of the time during the period of his sickness. Approving this instruction as the proper interpretation of the words "confined to bed," the court said: "The words employed must be viewed in the light of common sense, and there must be some reasonable construction placed upon the words 'entirely and continuously' when used in connection with requiring a sick person to keep his bed, otherwise one who is in fact so enfeebled by sickness as to be unable to bear the fatigue of being dressed by

an attendant would forfeit his insurance by sitting propped up in a chair for a few moments or an hour, as a change from a reclining position upon the bed. Now, in the case at bar, the plaintiff's proof tended to show he was confined to his bed each and every day during the several months of his sickness. There were times when his dropsical affection rendered him unable to lie in bed, or elsewhere for that matter. He was compelled to sit up in order to breathe."

In the case at bar the insured had consumption. He was taken sick in June, 1910. One witness who testified as to his condition prior to the time of his death in July, 1911, said: "I don't think he was worse much the day he died than he was six months prior to that; he was just walking about virtually dead." There was other evidence that his condition was not so bad until a month or two before he died.

In lieu of instruction 1, the court should have instructed the jury as follows: (1) If the jury believe from the evidence that on and after January 5, 1911, Willie Williams was necessarily and continuously confined to bed and totally unable to follow his vocation, they should find for the plaintiff in the sum of \$300. (2) The insured was necessarily and continuously confined to bed if his sickness was such as would reasonably confine a person continuously to bed or substantially so confine him, though he may have been up at times to get fresh air or for other purposes.

Judgment reversed, and cause remanded for a new trial.

WHITE v. CITY OF CALHOUN.†

(Court of Appeals of Kentucky. Dec. 10, 1912.)

MUNICIPAL CORPORATIONS (§ 654*)—WAYS—PERMISSIVE USE—BURDEN OF PROOF.

Where a strip of land in front of a house was used as a walkway for 15 years after an apparent dedication, its owner, who asserts that the use was merely permissive, in an action for damages from the building of a concrete sidewalk under a city ordinance providing for such building and making the cost of the improvement a lien on the property, has the burden of showing that such use was only permissive.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1428; Dec. Dig. § 654.*]

Appeal from Circuit Court, McLean County.

Action by Ann M. White against the City of Calhoun. From a judgment for defendant, plaintiff appeals. Affirmed.

L. P. Tanner, of Owensboro, for appellant. G. H. Cary, of Calhoun, for appellee.

NUNN, J. This action was instituted by appellant to recover \$1,000, which she alleged was occasioned by appellee in construct-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes
† Rehearing denied January 23, 1913.

ing a concrete pavement along her front property line, which abuts on Main (or Ferry) street in Calhoun. Calhoun is a municipal corporation of the fifth class. On August 6, 1909, its council enacted an ordinance requiring the construction of a brick or concrete sidewalk, of certain specifications, in front of the property of appellant and other citizens. One of the specifications was that, if the property owner failed or refused to construct such pavement, the city council would, after due notice, let the construction thereof to the lowest bidder, and the cost of the improvement would become a lien upon the property. Appellant failed to construct the sidewalk, so the city proceeded to have the work done in accordance with the ordinance. Appellant objected to the city placing the walk in front of her property. It was located between her fence and the gutter, in a space which was from 8 to 10 feet wide, and extended the full length of her property. The pavement was 4 feet wide, and a space was left between it and the fence and the gutter. There was no destruction of the property in any manner, except where it was absolutely necessary to locate the walkway as stated. Before 1893 the public traveled along the place where the walk is now located, on slabs which extended the full length of the property; but it appears from the testimony, without contradiction, that in 1893 appellant's husband, who then owned the property, together with several other citizens of the town, made up a fund, purchased material, and constructed a plank sidewalk where the slabs were, and where the concrete pavement now is, and it remained there and was used as a walkway until the concrete walk was constructed.

Appellant brought this action in April, 1911, to recover the value of the land covered by the concrete walk. It appears to us that she waited too long, as her husband appears to have dedicated this strip of land for a walkway prior to 1893, and the public has continuously used it as such from that time to the present, with the knowledge and consent of the owners. But appellant claims that this use was merely permissive, and that the statute did not run. There was no testimony to the effect that the use was merely permissive, and the burden, after a lapse of 15 years, was upon her to show that fact. *Butt v. Napier*, 14 Bush, 46; *Talbott v. Thorn*, 91 Ky. 417, 16 S. W. 88, 13 Ky. Law Rep. 401; *Newcome v. Crews*, 98 Ky. 339, 32 S. W. 947, 17 Ky. Law Rep. 899; *Potts v. Clark*, 62 S. W. 884, 23 Ky. Law Rep. 332; *Bowen v. Cooper*, 66 S. W. 601, 23 Ky. Law Rep. 2065; *Clay v. Kennedy*, 72 S. W. 815, 24 Ky. Law Rep. 2034; *Magruder v. Potter*, 77 S. W. 919, 25 Ky. Law Rep. 1336.

For these reasons, the judgment of the lower court is affirmed.

CHESAPEAKE & O. RY. CO. v. DE ATLEY. (Court of Appeals of Kentucky. Dec. 10, 1912.)

1. PARENT AND CHILD (§ 7*)—RIGHT OF ACTION FOR INJURIES TO CHILD.

A parent who has not emancipated a child may recover for loss of services and medical care and attention on account of injuries received in the employment of a person employing the child with notice of the minority, but not where he had emancipated such child, or where the child was employed without notice of the minority.

[Ed. Note.—For other cases, see Parent and Child, Cent. Dig. §§ 86-99; Dec. Dig. § 7.*]

2. PARENT AND CHILD (§ 7*)—ACTION FOR INJURIES—WEIGHT AND SUFFICIENCY.

In a father's action for injuries to his son while in defendant's employ, evidence held to show that the father consented that his son might work for himself, and surrendered his right to his control and services.

[Ed. Note.—For other cases, see Parent and Child, Cent. Dig. §§ 86-99; Dec. Dig. § 7.*]

3. PARENT AND CHILD (§ 7*)—RIGHT OF ACTION FOR INJURIES TO CHILD.

A father, who voluntarily permits a grown son to work for himself in a neighboring county for more than a year without making any effort to control his conduct or employment, although he knows that he is employed, and can easily ascertain the character of his employment, and who permits the son to receive and spend his own wages, cannot recover from the employer for injuries sustained by the son in such employment, since he has impliedly, if not expressly, emancipated the son.

[Ed. Note.—For other cases, see Parent and Child, Cent. Dig. §§ 86-99; Dec. Dig. § 7.*]

4. PARENT AND CHILD (§ 7*)—RIGHT OF ACTION FOR WAGES OR PERSONAL SERVICES.

A stranger exercising reasonable care to ascertain the age of a person applying for employment whose appearance indicates that he is over 21 years of age is not liable to such person's father for personal injuries sustained by the son, although the son is, in fact, under 21 years of age when employed.

[Ed. Note.—For other cases, see Parent and Child, Cent. Dig. §§ 86-99; Dec. Dig. § 7.*]

5. PARENT AND CHILD (§ 7*)—RIGHT OF ACTION FOR INJURIES—EMPLOYER'S KNOWLEDGE OF MINORITY.

Where a minor, when employed by a railroad company, misstates his age in his application by advice of the company's clerk, and, when subsequently employed in an entirely different department of the road, again misstates his age, in reliance on the advice previously given, the company is not charged with knowledge that he is a minor, so as to render it liable to his father for personal injuries.

[Ed. Note.—For other cases, see Parent and Child, Cent. Dig. §§ 86-99; Dec. Dig. § 7.*]

Appeal from Circuit Court, Mason County. Action by W. L. De Atley against the Chesapeake & Ohio Railway Company. Judgment for plaintiff, and defendant appeals. Reversed, with directions.

Worthington, Cochran & Browning, of Maysville, for appellant. Allan D. Cole, of Maysville, and Holmes & Ross, of Carlisle, for appellee.

CARROLL, J. John De Atley, a minor, was injured while working for the appellant,

and this action was brought by the appellee, his father, to recover from the appellant damages for the loss of the services of his son during the time he was unable to work on account of the injuries, and reimbursement for amounts he had paid out in furnishing medical service and attention to him during the time he was suffering from the injuries. He averred that his son was employed by appellant without his knowledge or consent, and received injuries while engaged for it in the performance of dangerous work. For answer the appellant, after traversing the averments of the petition, affirmatively pleaded that, when it employed John De Atley, it believed he was of age, and had no knowledge or information that he was under 21 years of age, and could not have obtained such information by the exercise of ordinary care. It further pleaded that the appellee knew that his son was working for it as an employé in its train service, and that he permitted him to continue in the service without objection. It further averred that appellee had emancipated his son and voluntarily relinquished all right to control his employment or to have the benefit of his services, and, this being so, had no cause of action upon the grounds stated. Upon a trial before a jury a verdict was returned in favor of appellee for \$500, and a reversal of the judgment on this verdict is asked upon the single ground that the trial court should have directed a verdict in its favor.

[1] If appellee had not emancipated his son, and he was employed by appellant without the consent of appellee and with notice of his minority and received injuries while in this employment, then appellee was entitled to recover, not only for the loss of the service of his son while unable to work on account of injuries received, but also the money necessarily expended by him in giving to his son medical care and attention. *McGarr v. National & Providence Worsted Mills*, 24 R. I. 447, 53 Atl. 320, 60 L. R. A. 122, 96 Am. St. Rep. 749; *Dennis v. Clark*, 2 Cush. (Mass.) 347, 48 Am. Dec. 671; *Meers v. McDowell*, 110 Ky. 926, 62 S. W. 1013, 23 Ky. Law Rep. 461, 53 L. R. A. 789, 96 Am. St. Rep. 475; *Illinois Central Ry. Co. v. Henon*, 68 S. W. 456, 24 Ky. Law Rep. 298; *L. & N. R. R. v. Willis*, 83 Ky. 57, 4 Am. St. Rep. 124. But if appellee had emancipated his son, or if appellant employed him without notice of his minority, he was not entitled to compensation for loss of his services, or to be reimbursed for amounts expended by him in care and attention to his son during the time he was suffering from the injuries received. When the father loses by manumission the right to control the services of his son, who is old enough to work for himself and make his own living, he also loses the right to recover from the person in whose service his son was engaged the amount expended by him in care and attention to his

son, made necessary by injuries received while so employed, as the right to recover for this expense depends on the right to recover for loss of service. In such a state of case the right of action to recover for lost time and medical expenses is in the son, not the father. *Rounds Bros. v. McDaniel*, 133 Ky. 669, 118 S. W. 956, 134 Am. St. Rep. 482, 19 Ann. Cas. 826.

[2] This being the law applicable to the case on this point as we understand it, we will now look into the evidence for the purpose of determining whether or not the appellee had emancipated his son before he accepted employment with appellant. The evidence shows that the son, John De Atley, was born in September, 1891, and lived with the appellee, his father, until December, 1909, when he left home and went to a relative of his father's in Bourbon county, Ky., to assist him in stripping tobacco. He remained in Bourbon county for about 10 days, and went from there to Covington, Ky., at which place another relative of his father's lived.

While he was in Bourbon county his father testifies that he went to see him twice, but did not succeed in finding him, and that he supposed he went away from home because he wanted to work for himself. He further testifies that, after he went to Covington, his mother received a letter or two from him, which she answered, but that he did not know his address in Covington, although he heard he was living there and was working at a wholesale whisky house, and that he took no steps to find out where he was, as he expected he would get homesick and come back. He also said he did not write to his brother-in-law who lived in Covington, although he suspected that his son was making his home with him, or that he knew where his son was, and that he did not send his son any money, nor did his son send him any. He was asked these questions: "Q. From the time your son left your home in Bourbon county, in the fall of 1909, until he was injured in January, 1911, you acquiesced in his remaining away from home and at work, and permitted him to do this without requiring any portion of his wages to be sent to you? A. I never gave him any authority to work for anybody. Q. But you permitted him to work away from home for other people without requiring his wages to be sent to you? A. No, sir; he never worked away from home. Q. Did you think he was living without expense? A. I allowed the boy was trying to earn his wages. Q. You knew he had to have money to live on away from home, didn't you? A. I suppose a man could not live without doing something. Q. You knew that six or eight months prior to the time of his injury you had heard he was at work? A. I heard it rumored about the house. Q. And that he was working in a whisky house in Covington? A. I heard it.

Q. You never went to Covington to ascertain his whereabouts? A. I never went for the reason I had bought a little place, and didn't have the money to spend running around hunting the boy. Q. Did you know the name of the whisky house? A. No, sir. Q. Did you ever try to find out? A. No, sir. Q. Did you write to your son in Covington, or to your brother-in-law in Covington, to ascertain where he was, or for whom he was working? A. No, sir; I did not. Q. Did you undertake to ascertain just exactly where he was and just exactly what he was doing, in order that you might write him to get a portion of his wages to assist you? A. I did not. Q. Guy Bell told you he was in Covington and was not coming home Christmas? A. He did not think he was. He was thinking of going on the railroad. Q. When you heard that he was going on the railroad, why didn't you go and see him? A. I just said it looked like times were pretty hard, and as I was in debt and didn't have the money to spend. Q. But you had notice, that your son intended to go to work on the railroad? A. I heard he was thinking of going on the railroad, and I said to Guy: 'You tell him it is against my will to go to work on any railroad, and to come home.'

John De Atley, the son, says that, when he left home, he went to his uncle's in Bourbon county, and remained there about two weeks, and went from there to his uncle's in Covington, and after being there three or four weeks got employment as a laborer with the appellant company, and worked for it about three months, and then got employment in a whisky house in Covington, and worked there about six months, when he again went back to work for the railroad company as a brakeman, and continued in this employment until he was injured in January, 1911. He further testifies that, when he first obtained employment from the appellant company, he was sent to a clerk to make out a written application, and, when he told the clerk that he was born in 1891, the clerk told him that his minority would prevent him from getting employment, and suggested to him that he say in his application that he was born in 1889, and this he did. He also testified that when he was employed the second time as a brakeman, by another and different department, he filled out his own application, giving the date of his birth as 1889, doing this because he had been told by the clerk to give this date if he ever afterwards applied for employment. He says that, when he was employed the second time, he was not asked his age and did not tell it, although he himself made out the written application in which his age was given as over 21. When the son left home, he was between 18 and 19 years of age, and, when he was employed the second time by the appellant company, in December, 1910, he was between 19 and 20 years

of age, and the evidence shows that his appearance indicated that he was over 21 years of age.

We think the evidence shows very plainly that the father consented that his son might work for himself, and that he surrendered his right to the control and services of his son. The boy was old enough and large enough to make his own living, and although he worked for more than a year within a hundred miles of his father, who all this time knew where he was, he made no effort to reclaim his services, nor did he do anything indicating that he desired to exert any further paternal control over him.

[3] This course of conduct on the part of the father amounted to an implied, if not an express, emancipation of his son. A father who voluntarily permits his grown son to work for himself in a neighboring county, and who knows where his son is employed, or at least knows that he is employed, can easily ascertain the character of his employment, and who permits him to remain away from home more than a year without making any effort to control his conduct or his employment, and the son receives and spends his own wages, in short, acts in all respects as if he had reached his majority, the father cannot, when the son receives some injury, assert claim of parental authority, and recover from the employer of the son compensation. *L. & N. R. R. Co. v. Davis*, 105 S. W. 455, 32 Ky. Law Rep. 306; *Mauck v. Southern Ry. Co.*, 148 Ky. 122, 146 S. W. 28; *Rounds Bros. v. McDaniel*, 133 Ky. 669, 118 S. W. 956, 134 Am. St. Rep. 482, 19 Ann. Cas. 326.

[4] There is another reason why the appellee should not recover in this case. When the son was employed in December, 1910, as a brakeman, in which employment he received the injuries that are the basis of the recovery sought in this action, his appearance indicated that he was 21 years of age, and a written application, made out by himself, gave his age as over 21. Under this state of facts, the appellant is not liable to the father upon the ground that it employed his minor son. In actions like this the father is not entitled to recover unless the employer of his son knows, or in the exercise of reasonable prudence and care could know, that the son was an infant. A stranger who exercises reasonable care to ascertain the age of a person making application for employment, and whose appearance indicates that he is over 21 years of age, cannot be made liable in an action by the father, either for the services of his son or for care and attention given to him while suffering from injuries received in the course of the employment, although the son may in fact have been under 21 years of age when he was employed. *Gulf, Colorado & Santa Fé R. Co. v. Redeker*, 67 Tex. 190, 2 S. W. 527, 60 Am. Rep. 20; *Illinois Central R. R. Co. v. Henon*,

68 S. W. 456, 24 Ky. Law Rep. 298; Hendrickson v. Louisville & Nashville R. R. Co., 137 Ky. 562, 126 S. W. 117, 30 L. R. A. (N. S.) 311.

[5] The attempt, however, is made to overcome this principle by the testimony of the son that, when he was first employed, the clerk who took his application advised him to give 1889 as the date of his birth, also telling him that if he was afterwards employed and required to state his age to give 1889 as the date of his birth, although the clerk knew that he was born in 1891. Assuming that in giving the date of his birth incorrectly in the written statement made by him when he was first employed by the appellant company in January, 1910, he was induced to do so by the advice of the clerk, this did not excuse him from the consequences of giving an incorrect date when he was employed the second time, nor did the advice of the clerk charge the company with notice that when he was employed the second time he was in fact a minor. His employment the second time was in an entirely different department of the road from the one in which he worked under his first employment, and there is no suggestion in the record that any person connected with the railroad company at the time of the second employment had any knowledge or information of the misstatement made in his first application, or of the advice given to him by the clerk who took it.

The motion for a peremptory instruction should have been sustained. The judgment is reversed, with directions for a new trial in conformity with this opinion.

ÆTNA LIFE INS. CO. et al. v. RUSTIN.

(Court of Appeals of Kentucky. Dec. 10, 1912.)

1. TRIAL (§ 25*)—RIGHT TO OPEN AND CLOSE.

In an action on an insurance policy, where defendants denied the allegations of the petition, and also pleaded that insured either killed himself or procured another to kill him, a motion for leave to make the concluding argument was properly overruled, since under the pleadings, if no evidence had been given on either side, plaintiff would have been defeated.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 44-75; Dec. Dig. § 25.*]

2. INSURANCE (§ 665*)—ACTIONS ON POLICIES—SUFFICIENCY OF EVIDENCE—CAUSE OF DEATH.

In an action on an accident insurance policy in which defendants pleaded that insured either killed himself or procured another to kill him, evidence that he was found on his porch shot in the abdomen, and said that a man had shot him, made a prima facie case for plaintiff.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1555, 1707-1728; Dec. Dig. § 665.*]

3. TRIAL (§ 62*)—RECEPTION OF EVIDENCE—REBUTTAL.

The trial court has a discretion in permitting the introduction of evidence in rebuttal.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 148-150; Dec. Dig. § 62.*]

4. INSURANCE (§ 669*)—ACTIONS ON POLICIES—INSTRUCTIONS.

In an action on policies insuring a person against death resulting directly and independently of all other causes from bodily injuries effected solely through external, violent, and accidental means, where there was evidence that he was found shot, and said a man had shot him, and evidence tending to show that he either shot himself or procured some one to shoot him, instructions that if the wound causing his death was inflicted accidentally, either by himself or another, or intentionally by another without his consent or procurement, the law was in his favor, but if he committed suicide, sane or insane, or if the wound was inflicted intentionally by another with his consent or procurement the law was for defendants, and the jury should so find—properly submitted the case as made by the evidence.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1556, 1771-1784; Dec. Dig. § 669.*]

5. INSURANCE (§ 665*)—ACTIONS ON POLICIES—SUFFICIENCY OF EVIDENCE—CAUSE OF DEATH.

A policy of insurance provided for payment of a specified sum upon the death of insured through external, violent, and accidental means, and in the clause containing the promise to pay contained no qualification or exception or reference to a subsequent part of the policy providing that in case of death from injuries intentionally inflicted upon insured by another person, except assault committed for the purpose of burglary or robbery, only one-tenth of the principal sum should be paid. The evidence in an action thereon tended to show that insured was shot on the porch of his residence by some unknown man, but showed nothing else tending to show an assault for robbery or burglary. *Held*, that the rule that if on one state of facts plaintiff may recover, and on another not, and the evidence tends no more strongly to prove the first state of facts than the second, no recovery can be had, did not apply because the burden was on defendant to allege and prove the facts limiting its liability.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1555, 1707-1728; Dec. Dig. § 665.*]

6. INSURANCE (§ 629*)—ACTION ON POLICY—NECESSITY OF NEGATING EXCEPTIONS.

Where a policy contains a general clause containing a promise to pay without any reference to a subsequent separate and distinct clause containing limitations on the liability under the policy, a party relying on the general clause may plead it without noticing the exception.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1575, 1576, 1579, 1580, 1584-1586, 1592, 1598; Dec. Dig. § 629.*]

7. APPEAL AND ERROR (§ 1003*)—REVIEW—SUFFICIENCY OF EVIDENCE TO SUPPORT VERDICT.

A verdict will be disturbed on appeal as unsupported by the evidence only when it is palpably against the evidence, and not in every case where the appellate court would on the evidence reach a different conclusion.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3938-3943; Dec. Dig. § 1003.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Appeal from Circuit Court, Jefferson County, Common Pleas Branch, First Division. Action by Grace H. Rustin against the Ætina Life Insurance Company and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Marion W. Ripy and Bennett H. Young, both of Louisville, for appellant Casualty Co. Fred Forcht, Jr., of Louisville, and Edwin A. Jones, of New York City, for appellant Fidelity & Casualty Co. Trabue, Doolan & Cox, of Louisville, and William BroSmith and R. C. Dickenson, both of Hartford, Conn., for appellant Travelers' Ins. Co. Kohn, Bingham, Sloss & Spindle, of Louisville, for appellant Ætina Life Ins. Co. T. J. Mahoney, of Omaha, Neb., and Wm. Marshall Bullitt and Bruce & Bullitt, all of Louisville, for appellee.

HOBSON, C. J. These suits were brought by Grace H. Rustin against appellants to recover on certain policies issued by them on the life of her husband, Dr. Frederick Rustin of Omaha, Neb. The policies insured against death "resulting directly and independently of all other causes from bodily injuries effected solely through external, violent and accidental means." The defendants denied the allegations of the petition, and pleaded, in substance, that Dr. Rustin either killed himself or procured another to kill him. There was a trial before a jury which resulted in a judgment in favor of the plaintiff. The defendants appeal.

[1] 1. It is urged that the appellants had the burden and were entitled to the concluding argument, but they did not assert this at the opening of the trial, and nothing was said about it until the evidence had all been introduced, and the court had given the jury his instructions. The defendants then asked to be allowed to make the concluding argument. The motion was properly overruled. Under the pleadings, if no evidence had been given on either side, the plaintiff would have been defeated. Civil Code, § 526.

[2] 2. The court did not err in refusing to instruct the jury peremptorily to find for the defendants at the conclusion of the plaintiff's evidence. If the evidence for the plaintiff was true, a prima facie case was made out for her. *Hutchcraft v. Travelers' Ins. Co.*, 87 Ky. 300, 8 S. W. 570, 10 Ky. Law Rep. 260, 12 Am. St. Rep. 484; *Campbell v. Fidelity & Casualty Co.*, 109 Ky. 661, 60 S. W. 492, 22 Ky. Law Rep. 1295. Her proof showed that her husband was found on the porch of his residence shot in the abdomen, and that he said when found that a man had shot him. It is not presumed on these facts that he procured a man to shoot him, or that he had done anything wrong which brought on the shooting.

[3] 3. There was no substantial error in the introduction of evidence in rebuttal. The

trial court has a discretion in this matter and we do not see that it was abused.

[4] 4. The court by its instructions clearly submitted to the jury the issue. By the first instruction he told the jury as follows: "If the jury believe from the evidence that the wound which caused the death of Frederick Rustin was inflicted accidentally, either by himself or by another, or that it was inflicted intentionally by another without the consent or procurement of Frederick Rustin, then the law is for the plaintiff." The second instruction is in these words: "But if the jury believe from the evidence that Frederick Rustin committed suicide, sane or insane, or that the wound which caused his death was inflicted intentionally by another with the consent or procurement of Frederick Rustin, then the law is for each of the four defendants named in the foregoing instruction and the jury should so find."

These instructions aptly submitted to the jury the case as made by the evidence as to the first three appellants. The policy issued by the Travelers' Insurance Company is as follows:

"The Travelers' Insurance Company of Hartford, Connecticut, in consideration of the warranties hereinafter set forth, and of twenty-five dollars, does hereby insure Frederick Rustin of Omaha, county of Douglas, state of Nebraska, under classification preferred (being a physician by occupation) for the term of twelve months from September 13th, 1904, against bodily injuries effected through external, violent and accidental means, as specified in the schedule below. The principal sum of this policy in the first year is \$5,000.00, with 5% increase annually for ten years amounts to \$7,500.00. Each consecutive full year's renewal of this policy shall add 5 per cent. to the principal sum of the first year until such additions shall amount to 50 per cent., and thenceforth so long as this policy is maintained in force the insurance shall be for the original sums plus the accumulations theretofore granted.

"Schedule of Indemnities. [Here follows schedule.]

"In event of death the principal sum insured shall be paid to Grace H. Rustin [the beneficiary] if surviving, otherwise to the executors, administrators, or assigns of the insured.

"Weekly Indemnity. [Here follows provisions as to weekly indemnity.]"

The policy then contains under the head of double payments and special payments provisions on these subjects. These are followed by other clauses on the second page of the policy limiting the liability of the company in certain contingencies. One of these clauses is as follows: "In the event of death, loss of limb or sight, or disability caused by gas, vapor or poison, or by injuries intentionally inflicted upon the insured by any

other person, sane or insane (except assaults committed for purpose of burglary or robbery), the company shall pay but one-tenth of the amount otherwise payable for bodily injuries covered hereby, anything to the contrary in this policy notwithstanding."

As to the Travelers' Insurance Company the court instructed the jury as follows:

"(a) If the jury believe from the evidence that the wound which caused the death of Frederick Rustin was inflicted accidentally, either by himself or by another, or that it was inflicted intentionally by another, without the consent or procurement of Frederick Rustin, in an assault committed by such other person, if any, for the purpose of burglary or robbery, then the law is for the plaintiff as against the Travelers' Insurance Company, and the jury should award the plaintiff the sum of \$5,870, with interest at the rate of 6 per cent. per annum from January 10, 1909.

"(b) If the jury believe from the evidence that the wound which caused his death was inflicted intentionally by another, without the consent or procurement of Frederick Rustin, and not in an assault committed by such other person, if any, for the purpose of burglary or robbery, then the law is for the plaintiff as against the defendant, the Travelers' Insurance Company, and the jury should award the plaintiff the sum of \$587, with interest thereon at the rate of 6 per cent. per annum from January 10, 1909.

"(c) But if the jury believe from the evidence that Frederick Rustin committed suicide, sane or insane, or that the wound which caused his death was inflicted intentionally by another with the consent or procurement of Frederick Rustin, then the law is for the defendant, the Travelers' Insurance Company, and the jury should so find.

"(d) 'Burglary,' as used in these instructions, means the breaking and entering of a dwelling house of another in the nighttime with the intent to commit a felony therein. 'Robbery' means the taking with intent to steal of personal property, in possession of another, from his person, or in his presence, by violence or by putting him in fear."

[5] The jury found for the plaintiff the full amount of the insurance, and the company insists it can be held liable in any event under the evidence for only 10 per cent. of the amount of the policy.

The evidence as to how Dr. Rustin came to his death is by no means satisfactory. Between 2 and 3 o'clock in the morning a pistol shot was heard. His wife, who was upstairs, went down to the front door, and there found her husband shot in the abdomen. No one heard any altercation in the street or on the front porch where he was found. No pistol was found on him or about him. Where he had been for two or three hours before this is not shown by the evidence, and no one knows how he came to his residence. The sound of the pistol indicated

that it was fired on the porch or near the front of the house. No one was seen or heard running therefrom. His pocketbook and watch were upon his person, and no other fact was established in the evidence tending to show an assault for robbery or burglary. He did not explain how he came to be shot except to say that a man shot him. If he was shot by another accidentally, the full amount of the policy may be recovered, but, if he was shot by another intentionally, the full amount of the policy cannot be recovered, unless the shooting was done in an assault committed for the purpose of burglary or robbery.

We have held in a number of cases that if on one state of case the plaintiff may recover, and on another he cannot recover, and the evidence for the plaintiff tends no more strongly to prove the first state of case than the second, no recovery can be had. It is insisted for the Travelers' Insurance Company that this rule should be applied here, as the evidence fails to show how the shooting occurred. But the argument misapplies the rule. The rule has been applied only in those cases where the plaintiff had to show a certain state of facts in order to recover, and the evidence offered by the plaintiff to show these facts tended no more strongly to establish them than it did to establish another state of facts under which the defendant would not be liable. The plaintiff here made out a prima facie case when she showed that her husband had been shot, for the presumption against suicide was strengthened by the proof that no pistol was found about him or about the premises, and the nature of his wound was such that he must have been shot practically where he was when found. In addition to this, he said when found that a man had shot him. As the plaintiff had thus made out her case, it then devolved on the defendant to show that the clause limiting its liability applied. It will be observed that in the general clause of the policy containing the defendant's promise to pay there is no qualification or exception and no reference to the subsequent part of the policy containing the limitations upon its liability.

[6] In Stephens on Pleading, side page 443, the learned author, after showing that an exception contained in the general clause must be negatived, adds: "Hence, if a statute or a private instrument contain in it, first, a general clause, and afterwards a separate and distinct clause, which has the effect of taking out of the general clause something which would otherwise be included in it, a party relying on the general clause in pleading may set out that clause only, without noticing the separate and distinct clause which operates as an exception." Under this rule, it was unnecessary for the plaintiff to allege facts showing that the limiting clause did not apply, and, it not being necessary for her to allege these facts, it

was not necessary that she should in the first place prove them. The burden was on the defendant both to allege and prove them, and it was a question for the jury on all the evidence in what manner the deceased came to his death. The case therefore for the Travelers' Insurance Company is practically the same as for the other defendants.

[7] 6. The ground chiefly relied on for reversal as to all the appellants is that the verdict is palpably against the evidence. We have gone over the record with great care, and have made an abstract of the testimony which we have placed with it. Our conclusion is on this branch of the case that we ought not to disturb the finding of the jury. It would serve no good end to extend this opinion by setting out the evidence in detail. There is much in the proof offered by defendants to sustain their view. But, after all, the case turned largely on the credibility of the witnesses, and, in view of all the facts and circumstances, we cannot say that the verdict of the jury is palpably against the evidence.

The constitutional guaranty of trial by jury would be of little value if new trials were granted by the court in all cases where on all the evidence it seemed as probable to the court that a state of case existed under which the defendant was not liable, as that a state of case existed under which the defendant was liable. As the law has established this means of trial, the verdict of the jury must stand, unless we can say that it is palpably against the evidence. It is not sufficient that we would have reached a different conclusion. There is much evidence on behalf of the defendants tending to show that Dr. Rustin either shot himself or procured another to shoot him, and not a few circumstances tending to support this conclusion. But a great part of this evidence comes from a woman of confessedly bad character, and from a man confessedly mentally unbalanced. While their testimony is in some respects confirmed by other evidence, we all know how the effect of a fact may be changed by a slight coloring of its setting. The jury had a right in their discretion to give little weight to the testimony of these witnesses, and, if we leave out of view their testimony, the keystone of the arch of appellants' defense is taken away.

Judgment affirmed.

OWEN et al. v. BURKS.

(Court of Appeals of Kentucky. Dec. 11, 1912.)

1. WILLS (§ 602*)—ESTATES GRANTED—DEFERRED FEE.

A will devising property in trust for the sons of the testatrix during life, with a further provision that if either of them should die before the final distribution of the estate, directed to be made by the trustee, without

leaving bodily heirs, the portion devised to the decedent should vest in the survivor; and that if both should die, without bodily heirs, before distribution, the property should go to designated persons. *Held* that, after the final distribution of the estate, the reversionary interest granted was defeated, and must be considered to have remained in the testatrix, and to have passed by inheritance to her children, so that a survivor would hold a fee defeasible by his having children at the time of his death.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1351-1359; Dec. Dig. § 602.*]

2. TRUSTS (§ 193½*)—CREATION BY WILL—SALE AND REINVESTMENT OF PROPERTY.

Where property devised in trust for the children of testatrix produced very little income, the court properly permitted its sale and the reinvestment of the sum secured in other property, title thereto to be taken in a trustee, as required by the will, where the reinvestment would be advantageous.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 246, 248; Dec. Dig. § 193½.*]

Appeal from Circuit Court, Hart County.

Action by Lee O. Burks against Jordon Owen and others. From a judgment for plaintiff, defendants appeal. Affirmed.

Watkins & Carden, of Munfordville, for appellants. McCandless & Larimore, of Munfordville, for appellee.

TURNER, J. [1] Mrs. Cleopatra Chapline died in Hart county in 1895, having first made her will; and the construction of that will is the only thing involved in this appeal. The third, fifth, and sixth clauses thereof are as follows, to wit:

"3. I give and bequeath to my brother Jordon Owen the sum of one thousand dollars, in trust for the use and benefit of my son Lee O. Burks to be held by said trustee and by him invested in real estate as soon as same can be properly done and advantageously done, and said land to be by him held as aforesaid in trust for the use and benefit of said Lee O. Burks, during his life and at his death to descend to his children should he leave any surviving him.

"5. It is my will and desire that after my death my executor shall sell all my personal estate and also the tract of land upon which I now live known as the home place, and that he shall sell same either publicly or privately as he may deem best and in order to enable him to carry out this provision, he is hereby vested with full power and authority to sell and convey said land by deed or deeds of conveyance with covenant of general warranty in as full and ample a manner as I myself might or could do if present and acting in the premises, and it is my desire that the proceeds of the sales of said property and remainder of my estate from all sources whatsoever shall be divided between my two sons Lee O. Burks and C. H. Burks in such manner as to give to my said son C. H. Burks (\$900.00) nine hundred dollars more thereof than to my son Lee O. Burks for the reason that my said son C. H. Burks has

been denied the educational advantages enjoyed by his brother Lee O. and has also given much of his time and attention to caring for me in the long illness through which I have passed, and it is my will and desire that the portion of my said estate herein devised to my said son Lee O. Burks shall be invested by the trustee aforesaid in real estate to be held by him in trust for my said son during his life and to descend to his children should any be left by him at his death, but the trustee Jordon Owen is not to be charged nor become liable to pay any interest on either of the funds herein set apart for the use of the said Lee O. Burks or the said C. H. Burks during the existence of said trusts.

"6. It is further my will and desire that in the event that either of my said sons Lee O. or C. H. Burks shall die before the final distribution of my estate hereunder without leaving bodily heirs, then the portion of such decedent herein devised shall vest in the survivor, and if both of my said sons shall so die without leaving bodily heirs then I desire that one half of the property herein devised to them shall descend to my brother Jordon Owen and the other half thereof to be equally divided between my nieces Lizzie and Pearl Smith, Lizzie Owen daughter of my brother David R. Owen and my nephew Charles Smith."

She appointed her brother Jordon Owen executor, and he, as such, in March, 1898, made a final settlement of his accounts. Thereafter, in 1900 or 1901, her son C. H. Burks died, never having been married, and leaving no child. This suit was instituted by the appellee, Lee O. Burks, alleging that the appellants Jordon Owen and others, under the sixth clause of the will aforesaid, were claiming an interest in a tract of land which had been conveyed in trust to Jordon Owen, as his trustee, under his mother's will, and asserting in himself a fee-simple title therein, and praying the court to quiet his title as against their claims and to adjudge him the owner thereof in fee simple, and praying in the alternative that if the court was of opinion that his title to said property might be defeated, in the event he had a child surviving him, that the property be sold and reinvested in property in Louisville, where he lived, and setting up certain reasons why the reinvestment should be made.

To this petition the appellants Jordon Owen and others filed their answers, setting up their claim to a reversionary interest in the property under the above provisions of the will, in the event that Lee O. Burks should die without a child surviving him. On a demurrer to these pleadings the lower court held that the appellee had a defeasible fee in the property, subject to be defeated only by his death with a child or children surviving him; and that the appellants had no interest whatever, under the will of the

testatrix, in the property. The contingency in which the appellants were to take the property, to wit, the death of both Lee O. and C. H. Burks before the final distribution of the estate, without leaving bodily heirs, did not occur, and cannot now occur, for the estate has been finally settled; and, the testatrix having made no further provision for the reversionary interest, except in that contingency, that reversion was left in her, and as to it she died intestate, and at her death C. H. and Lee O. Burks inherited the same. Therefore Lee O. Burks, having taken a life estate under the will and inherited the reversion from his mother in the property sought to be sold, took a defeasible fee therein, subject to be defeated only by having a child or children living at the time of his death. *Alexander v. De Kermel*, 81 Ky. 351; *Pryor v. Castleman*, 7 S. W. 892, 9 Ky. Law Rep. 967; *Coots v. Yewell*, 95 Ky. 368, 25 S. W. 597, 26 S. W. 179, 16 Ky. Law Rep. 2.

[2]/It appears that the appellee received very little income from the farm in Hart county, and that its proceeds could probably be advantageously reinvested in the city of Louisville, where he lived; and the lower court properly ordered the sale of the farm and a reinvestment of the proceeds, the title to be taken to some trustee and held under the provisions of Mrs. Chapline's will.

Judgment affirmed.

HOWARD v. CORNETT et al

(Court of Appeals of Kentucky. Dec. 10, 1912.)

DEEDS (§ 114*)—PROPERTY CONVEYED—CONFLICTING DESCRIPTIONS.

The language of the whole deed, as well as the surrounding facts and circumstances, being required to be considered in ascertaining the intention, a deed, though boundaries given by it of the tract excluded 20 acres of the farm, within which was a graveyard, having concluded said "boundary being known as the N. farm, except one-fourth acre, it being a graveyard with the right of way to go to and from same," and the grantee having for years afterwards had undisputed possession, will be held to include the 20 acres; the exception of the quarter acre being otherwise senseless.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 316-322, 326-329; Dec. Dig. § 114.*]

Appeal from Circuit Court, Harlan County.

Two actions, consolidated, one by A. B. Cornett and another, the other by W. S. Blanton, both against N. H. Howard. From judgments for plaintiffs, defendant appeals. Reversed, with directions to dismiss.

W. F. Hall, of Harlan, for appellant. J. G. & J. S. Forester and Chas. G. Mutzenberg, all of Harlan, for appellees.

NUNN, J. Thirty or forty years ago Robert Napier owned about 400 acres of land on what is known as "Bob's Creek" in Harlan county, Ky. It laid in one irregular body and was covered by several patents;

three in his name, two in the name of William Farmer, one in the name of James Farmer, and one in the name of Jonathan Kelly. This 400-acre survey also conflicted with a 1,000-acre patent in the name of Lewis Farmer and another 1,000-acre patent issued to John Ledford and Robert Napier. These two 1,000-acre patents also conflicted with each other, and this court settled the rights of the owners of these two patents in the case of Hall v. Blanton, 77 S. W. 1110, 25 Ky. Law Rep. 1400. Robert Napier inclosed and cultivated a considerable portion of his 400-acre patent, and it was about 20 acres of this inclosed and cultivated land that the lower court gave Blanton in the judgment appealed from. This inclosed land was near the dwelling house of Napier and contained an orchard and graveyard. Appellee W. S. Blanton married a daughter of Robert Napier, and, after the death of Napier, he purchased all the interests of the other children in the land referred to, resided upon and cultivated the land for many years, and sold it April 30, 1901, to W. S. Hensley for \$4,000, moved away, and gave Hensley possession of the whole farm. The deed to Hensley attempted to give the boundary of the land; but it appears from the plat of the survey on file in the record and the evidence that the calls in the deed did not fit the actual boundary of the land in several particulars. Evidently, Blanton had lived upon the farm for such a long time he thought he could and attempted to give the exact location of the whole outside boundary of the farm from memory and failed in several particulars. The deed, after attempting to give the outside boundaries as stated, concluded with these words: "Same boundary being known as the R. Napier farm, except one-fourth acre, it being a graveyard with the right of way to go to and from same." It is certain that Blanton sold, attempted to and did convey the R. Napier farm, and the 20 acres of improved land recovered by Blanton in the judgment below was a part of the R. Napier farm. Hensley sold and conveyed this farm to Charles Hall, who sold it to N. H. Howard, appellant herein. In both of the deeds last mentioned, the 20 acres was included. The error made in the deed from Blanton to Hensley was not made in these deeds. Since 1901, the date of the deed from Blanton to Hensley, the R. Napier farm, including the land in contest, has been in the possession of and cultivated by the purchasers; and Blanton has exercised no control whatever over it, except several years after he sold it and, after appellant Howard had purchased it, he gave Howard notice not to trespass upon this disputed piece. It is evident to our minds that some time after Blanton conveyed the land he discovered that the calls in the deed made by him to Hensley did not include the land in dispute, and from that time he began, orally, to make some claim to it, and in 1905

he executed a mortgage upon it to A. B. Cornett and J. F. Skidmore to secure the payment of \$600. He says he received from Cornett and Skidmore as much as \$20 in cash; that they paid some fines for him and, to use his language, "a part of the consideration for this mortgage debt was that they were to take the property and keep thieves and rogues from stealing it."

This action was instituted by Cornett and Skidmore to enforce their mortgage lien, and Howard answered claiming the land. There is consolidated with this action, one brought by Blanton against N. H. Howard and one Asher in which he sued them for damages for trespass upon the land and cutting timber and for opening roads through the land in dispute. The actions were tried together, and the lower court enjoined appellant and Asher from trespassing upon the land and adjudged Blanton to be the owner of the small piece of land referred to and enforced appellees' lien. Much testimony is introduced showing that the land in dispute, or nearly all of it, was included in the patent boundary of Lewis Farmer for 1,000 acres and also in his patent for 400 acres, and there was also much evidence introduced showing the contrary. However, from the view we take of the case, after a careful examination of the record, it is unnecessary to pass upon this question. We are of the opinion that Blanton intended to sell and that Hensley thought he bought the whole of the R. Napier farm. It is not reasonable to suppose that Hensley thought, when he accepted the deed from Blanton, that he was not to get the orchard and this 15 or 20 acres of cleared land near his house which had been used and cultivated by Napier in his lifetime and by Blanton up to the time he made the deed to Hensley. There is also a statement in the deed which is inconsistent with the idea that Blanton retained the property in controversy; that is, the words above copied whereby Blanton reserved the graveyard and a right of way to and from it. Blanton could not and did not attempt to explain why he made this reservation if he did not sell the land immediately surrounding the graveyard, which is the land in dispute. The provision is absolutely senseless if he reserved that part of the R. Napier farm which he now claims he did reserve, for it included the graveyard. We are not unaware of the rule that a particular description in a deed usually governs the general description. But there is another rule which prevails in this case, which is as follows: To ascertain the intention of a vendor, the language of the whole deed must be considered as well as the surrounding facts and circumstances. So when, in accordance with this rule, we take the plat of the survey of the Napier farm which is on file and compare it with the calls in the deed which attempted to give the outside boundary of the land and discover the discrepancies in the deed, and consider that fact together

with the fact that Blanton stated in his deed that he was selling Hensley what was known as the "R. Napier farm," and with the fact that if he did not sell the land in dispute the reservation of the graveyard and right of way to and from it was meaningless, we are convinced that Blanton sold the whole farm to Hensley, and that by oversight the land in dispute was not included in the specific calls in the deed which attempted to give the outside boundary.

For these reasons, each of the judgments in the consolidated action against Howard is reversed and remanded, with directions to the lower court to dismiss the petition in each case.

ASBURY v. TAUBE et al.

(Court of Appeals of Kentucky. Dec. 10, 1912.)

1. BILLS AND NOTES (§ 348*)—TRANSFER—HOLDER BEFORE MATURITY.

Where a check, regular on its face and payable on demand, is transferred within two days after it is drawn, the transferee acquires title before it is overdue.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 870-877½; Dec. Dig. § 348.*]

2. BILLS AND NOTES (§ 497*)—ACTION—BURDEN OF PROOF—HOLDER IN DUE COURSE.

Under the express provisions of Ky. St. § 3720b, subsec. 56, defining notice, subsection 55, declaring that fraud in obtaining a negotiable instrument constitutes defective title, and subsection 59, providing that a holder is presumed to hold in due course, the transferee of a check, obtained from the maker by fraud, has the burden of showing that he acquired title as a holder in due course.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1675-1687; Dec. Dig. § 497.*]

3. BILLS AND NOTES (§ 525*)—ACTION—SUFFICIENCY OF EVIDENCE—HOLDER IN DUE COURSE.

Evidence, in an action by the purchaser of a check for cash, held to show that plaintiff was a bona fide holder in due course.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1832-1839; Dec. Dig. § 525.*]

Appeal from Circuit Court, Boone County.

Action by George Taube against J. S. Asbury and others. Judgment for plaintiff against defendant Asbury, and he appeals. Affirmed.

D. E. Castleman, of Covington, for appellant. S. W. Tolin, of Burlington, and John S. Gaunt, of Louisville, for appellee.

CLAY, C. Plaintiff, George Taube, brought this action against J. S. Asbury, the Farmers' Bank of Petersburg, Ky., and S. Straus to recover on a check for \$200 drawn by Asbury on the Farmers' Bank and made payable to S. Straus. Straus was not before the court. The Farmers' Bank paid the amount of the check into court, where it is now held pend-

ing the final determination of this suit. The defendant Asbury pleaded that the check was obtained from him by fraud, and that plaintiff, Taube, not only had knowledge thereof, but that he and defendant S. Straus were partners in the transaction, and that they had entered into a conspiracy to cheat and defraud defendant. The case as to defendant Asbury went to trial. At the conclusion of all the evidence, the court directed a verdict in favor of the plaintiff. To review the propriety of this ruling, the defendant appeals.

The check was executed and delivered under the following circumstances: Asbury, who lives in Boone county, Ky., went to Cincinnati on February 11, 1911, to purchase two horses. There he met his codefendant, S. Straus, and purchased the horses from him. Thereupon he gave to S. Straus the check in question to pay for the horses, and Straus agreed to deliver the horses on the following Monday on the Kentucky side of Anderson Ferry at Constance, in Boone county, Ky. Asbury went to Constance on Monday and waited for the horses. The horses were not delivered then, or at any time thereafter. While Asbury was waiting for the horses, Straus went to Petersburg, in Boone county, Ky., and presented the check to the Farmers' Bank for payment. Payment was refused because of Straus' failure to be identified. Straus then asked the cashier of the bank to certify the check. This was done. Returning to Cincinnati, Straus assigned and delivered the check to plaintiff, Taube. After Straus failed to deliver the horses on Monday, Asbury went to his place of business to find out what was the matter. Straus made some kind of explanation to the effect that one of the horses had become sick and could not be delivered. Asbury then demanded a return of the check. Straus refused, and replied that it had been put in the bank. Asbury returned home and directed the bank not to honor the check. When the check was presented by one of the bank's correspondents, payment was refused. The check was then duly protested, and this suit followed.

[1] The check in question being regular on its face and payable on demand, and being negotiated within two days after it was drawn, plaintiff acquired title before it was overdue. The only question to be determined is: Did plaintiff take the check in good faith and for value, and without notice of any infirmity in the instrument or defect in the title of his codefendant, Straus.

[2] To constitute notice of an infirmity in the instrument or defect in the title of the person negotiating the same, the person to whom it is negotiated must have had actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith.

Kentucky Statutes, § 3720b, subsec. 56. The title of a person who negotiates an instrument is defective when he obtains the instrument, or any signature thereto, by fraud. Kentucky Statutes, § 3720b, subsec. 55. When it is shown that the title of any person who has negotiated the instrument was defective, the burden is on the holder to prove that he, or some person under whom he claims, acquired title as a holder in due course. This rule, however, does not apply in favor of a party who become bound on the instrument prior to the acquisition of such defective title. Kentucky Statutes, § 3720b, subsec. 59. The evidence in this case leaves no doubt that the check was obtained from Asbury by fraud. That being shown, it was incumbent upon plaintiff to show that he acquired title as a holder in due course.

[3] Plaintiff, who was a horse dealer in Cincinnati, and conducts a sale stable at the stockyards, and other sale stables, testifies that on Monday night, following the transaction which Straus had with defendant, Straus came to him and asked him to cash a check. Straus informed plaintiff that a man had given him the check in payment for a horse. Plaintiff looked at the check and saw that it was certified, and said: "I guess it is good. I will give you the cash for it." He then paid to Straus the amount of the check. At the time he did this, plaintiff knew nothing about the transaction between Straus and defendant, and did not have the slightest information that there was anything wrong with the check. He had nothing to do with the transaction which took place between Straus and defendant. He and Straus had never been associated together in business. The only business he had ever had with Straus was to sell him horses occasionally. On cross-examination, plaintiff admitted that he had a bookkeeper by the name of Hopkins, who would sometimes fix up accounts for him. Did not remember whether Hopkins had ever fixed up his account with Straus or not. He never employed Straus to sell horses for him. He only sold to Straus. When he did, they would agree on the price before they went to Straus' stable.

Defendants proved by Joseph Snelder that the latter worked for plaintiff, who was operating a stable at the Union Stockyards at Cincinnati, Ohio. Snelder had known plaintiff for about five years, and on several occasions had, at plaintiff's direction, taken horses to Straus' stable; plaintiff telling him that the horses had been sold. Sol Straus, a brother of defendant Straus, testified that he knew plaintiff. Plaintiff has a stable at the stockyards and a stable at other places. Sidney Straus worked for plaintiff at the stable on Second street. Sidney Straus is the same person as the defendant S. Straus. The way witness knew that Sidney Straus was working for plaintiff was that while

witness was at the barn Sidney Straus would come out there and pick out three or four horses and take them away and sell them. Sidney Straus worked for Taube for about eight months. W. M. Hopkins testified that three or four years ago he kept books for plaintiff. Since that time he had done odd jobs for plaintiff, fixing up accounts for him. Plaintiff would advance money for traders to buy stock with. When the stock was sold, the traders would return the money to plaintiff. Plaintiff, after deducting his commissions and expenses, would divide profits with the traders, and sometimes the traders would get all the profits. While witness was working for Mr. Taube, Mr. Taube advanced money to Sidney Straus to buy stuff for him. Witness never did any book-keeping for Straus; but when he worked it was for Mr. Taube. Mr. Taube would call off to him the amount of stuff he had sold, what it cost, what he advanced on it, and the expense, from which items he would ascertain the profits that had been made. The profit was divided, or "torn in two." Witness further stated that in adjusting the accounts between Taube and Straus he charged up to Straus' business the rent of the stable occupied by Straus.

Giving full effect to the evidence of the defendant, it fails to show that a partnership existed between plaintiff and Straus. It simply tends to prove that plaintiff and Straus had occasional transactions with reference to the sale of horses, and that these transactions were settled as they arose. It is not shown that plaintiff had the slightest connection with the transaction in question. There is a failure to show either that plaintiff, at the time he cashed the check, had knowledge of the fraud of Straus, or had knowledge of such facts that his action in taking the instrument amounted to bad faith. Plaintiff having shown that he paid cash for the check, and he had no notice of any infirmity in the instrument or defect in the title of Straus, and defendant having failed to prove any facts or circumstances tending to show the contrary, we conclude that the trial court properly directed a verdict in favor of plaintiff.

Judgment affirmed.

CAHILL v. MANGOLD et ux.

(Court of Appeals of Kentucky. Dec. 11, 1912.)

1. EASEMENTS (§ 36*)—EVIDENCE—BURDEN OF PROOF.

Where the owner of land, across which another claimed a right of way, had asserted his ownership, and indicated that the use was by permission only, by changing its location and erecting fences and gates across it, the burden was on the person claiming the right of way to show that prior use thereof was

under a claim of right, and not merely by permission.

[Ed. Note.—For other cases, see Easements, Cent. Dig. §§ 77, 78, 88-93; Dec. Dig. § 36.*]

2. EASEMENTS (§ 36*)—INTERRUPTION OR CONTROL—EVIDENCE.

Where the use of a right of way is interrupted or controlled by the owner of the land as a matter of right, this constitutes evidence that the use was permissive only.

[Ed. Note.—For other cases, see Easements, Cent. Dig. §§ 77, 78, 88-93; Dec. Dig. § 36.*]

3. EASEMENTS (§ 36*)—EVIDENCE—BURDEN OF PROOF.

Where a way across another's land is used without interruption or interference for many years, it will be presumed that it existed as a matter of right; and the burden is on the landowner to show that such use was permissive.

[Ed. Note.—For other cases, see Easements, Cent. Dig. §§ 77, 78, 88-93; Dec. Dig. § 36.*]

4. EASEMENTS (§ 36*)—EVIDENCE—BURDEN OF PROOF.

The presumption that the uninterrupted use of a way for many years was one of right, and not by permission, may be rebutted by proof of acts showing that the landowner never intended to recognize that the use was other than permissive.

[Ed. Note.—For other cases, see Easements, Cent. Dig. §§ 77, 78, 88-93; Dec. Dig. § 36.*]

5. EASEMENTS (§ 37*)—PRESCRIPTION—QUESTIONS OF LAW OR FACT.

Whether the use of a way across another's land was under a claim of right or by permission, is a question of fact.

[Ed. Note.—For other cases, see Easements, Cent. Dig. § 94; Dec. Dig. § 37.*]

6. EASEMENTS (§ 36*)—EVIDENCE—WEIGHT AND SUFFICIENCY.

In an action to enjoin interference with a way across defendant's land, evidence held to support a finding that the previous use of such way by plaintiff was by the owner's permission, and not under a claim of right.

[Ed. Note.—For other cases, see Easements, Cent. Dig. §§ 77, 78, 88-93; Dec. Dig. § 36.*]

Appeal from Circuit Court, Pendleton County.

Action by Mrs. M. J. Cahill against Charles Mangold and wife. Judgment for defendants, and plaintiff appeals. Affirmed.

E. E. Barton, of Mazathau Simaloa, Mexico, and William A. Byrne, of Covington, for appellant. John H. Barker, of Falmouth, for appellees.

MILLER, J. The farm of Ora Mangold, in Pendleton county, lies between the farm of the appellant, Mariah Cahill, on the west and the Portland and Gardnersville turnpike road on the east. Appellant claims that she has had a passway from her farm over and across the Mangold farm to the turnpike since 1854; and, appellee having closed the passway about March 1, 1911, appellant brought this suit to enjoin the appellee and her husband, Charles Mangold, from interfering with the appellant's use thereof. Both tracts of land originally belonged to Arnold. Arnold sold the Mangold tract to Francis Mann, and put him in possession,

in about 1852, but did not make him a deed thereto until 1859. In 1854 Arnold sold the Cahill tract to Doyle and Kelly, and in the same year they sold the property to John Cahill, the husband of appellant. Mrs. Mangold inherited her farm from her grandfather, Francis Mann, and had lived thereon for about 12 years before this suit was brought. John Cahill and his wife have lived upon their property until John's death in 1900; and since 1900 his widow, the appellant, has occupied the homestead. At the time, however, that the Cahills moved upon their tract in 1854 Francis Mann was living upon the intervening tract now owned by his granddaughter, Mrs. Mangold.

Many pages of testimony have been taken, for the purpose of showing the character and the extent of the use of the passway by appellant and her husband. The substance of it is as follows: Three separate and distinct passways ran over the Mann land as early as 1854; the land being then almost entirely uninclosed, and in timber. These several roads were subsequently inclosed by the owner of the land over which they ran. These three ways ran, part of the way, over the Cahill land, and, after merging into one road on his land, it ran on westwardly to the McMillan place, and beyond. At that time there was a gristmill located upon the McMillan farm. About 27 years ago John Cahill built a fence across the road on his land, and stopped all travel over his farm westwardly. This act upon the part of Cahill resulted in closing all of the roads referred to, except so much of the one in controversy as ran from Cahill's house eastwardly and over appellee's land to the turnpike, near Mann's residence. About 24 years ago Mann built a fence across what remained of this passway between Cahill's house and Mann's residence, without objection from Cahill, and thereafter Cahill went through Mann's land by laying the fence down and opening the gates Mann had previously placed across the way. In allowing Mann to build this fence, Cahill was conceding to Mann the same right to close this road through his own land that Cahill had exercised in closing the road through his land. In separating his fields, and in fencing his barn lot. Mann placed gates across the way for his own convenience, at his own expense, and kept them in repair. After Mrs. Mangold and her husband moved there 12 years ago, he built a fence where Mann had built one years before, placed new gates, changed some of them, and inclosed part of this road into his calf lot, all without objection from the appellant. All these gates were placed upon the land either by Mann or by Mangold, at their own expense, and kept in repair by them. The passway had been thus controlled by Mann and Mangold since 1854, without interruption or objection from any

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

source, and, so far as this record shows, appellant never asserted any right to use this passway prior to about the time she brought this suit; on the contrary, according to the evidence of at least two witnesses, she admitted she had no such right.

Furthermore, it appears from the testimony of Michael Hyland that John Cahill, shortly before his death, became anxious about the use of the highway and sought the aid of Hyland, whom he requested to assist him in buying the right of way from Mann; and, some one having assured Cahill there would be no trouble about it, he replied that he did not fear any trouble from Mr. Mann, but there might be trouble with those who came after him.

Furthermore, Hyland had a similar passway across the Mann land for many years, which he admits was by permission only; and, according to the evidence, it was of the same general character as the passway used by Cahill.

Under this state of fact, the circuit court dismissed the petition, and Mrs. Cahill appeals.

[1] In order for appellant to establish her right, she must show that the use of the road by her and her husband was under a claim of right to so use it, and not merely by the permission of the owners of the land.

In *Lyles v. Graves*, 147 Ky. 809, 145 S. W. 763, we reaffirmed this well-established rule in the following language: "By a uniform line of decisions this court is committed to the doctrine that, where the use of the passway has extended over a long period of years, very slight evidence will be sufficient to show that it was enjoyed under a claim of right; and when a proprietor undertakes to close a passway the burden is on him to show that the use was merely permissive, and to explain away the presumption that its uninterrupted enjoyment for more than 15 years was not exercised under a claim of right. The mere fact that the owner of the servient estate never gave, and the persons using the passway never asked, permission is not, in itself, sufficient to overcome the presumption in their favor arising from the long-continued use of the way. *Smith v. Pennington* [122 Ky. 355, 91 S. W. 830], 28 Ky. Law Rep. 1282 [8 L. R. A. (N. S.) 149]; *Anderson v. Southworth* [76 S. W. 391], 25 Ky. Law Rep. 776; *Rogers v. Flick*, 144 Ky. 844 [139 S. W. 1008]."

But, in determining when a permissive use may be changed into a use under a claim of right, we used the following language, in *Fightmaster v. Taylor*, 147 Ky. 469, 144 S. W. 381: "The law is well settled that the permissive use of a passway for any number of years does not deprive the owner of the land of the right to close it at any time; and when the use is originally acquired by permission the character of the passway is established, and such use continues to be

permissive until something is done bringing notice home to the owner of the land that the character of the use has been changed. *Hall v. McLeod*, 2 Metc. 98, 74 Am. Dec. 400; *Conyers v. Scott*, 94 Ky. 123 [21 S. W. 530, 14 Ky. Law Rep. 784]. It is only where a claimant has had an uninterrupted use of a passway for a great number of years that a grant will be presumed. *Bowman v. Wickliffe*, 15 B. Mon. 84; *Beall v. Clore*, 6 Bush, 676."

[2] If the use is interrupted or controlled by the landowner as a matter of right, such interruption and control is evidence that the use was permissive only.

Appellant relies, however, principally upon *Lyles v. Graves*, supra. But the facts of that case clearly distinguish it from the case at bar, since *Lyles* not only knew that the passway was in existence, but he actually bought it. Moreover, in *Lyles v. Graves*, the passway traversed several tracts of land, and was used by the traveling public generally in going from one road to another road. In the case at bar, however, the Cahills discontinued the road through their own farm, and thereby not only denied its use to appellees and others in going to other farms or roads to the west of them, but insisted upon claiming an outlet from their own farm across appellee's farm to the turnpike on the east of both of them.

[3-5] In *Smith v. Pennington*, 122 Ky. 355, 91 S. W. 830, 28 Ky. Law Rep. 1282, 8 L. R. A. (N. S.) 149, as in other cases relied upon by appellant, the enjoyment of the passway had been without interruption or interference for many years; and in the absence of sufficient proof that it was permissive the court indulged the presumption that it existed as a matter of right. In that class of cases a presumption arises that the use is one of right; and the burden is upon the landowner to show that the use was permissive only. *O'Daniel v. O'Daniel*, 88 Ky. 185, 10 S. W. 638, 10 Ky. Law Rep. 760; *Talbott v. Thorn*, 91 Ky. 417, 16 S. W. 88, 13 Ky. Law Rep. 401; *Goldberg v. Cleveland*, 33 Ky. Law Rep. 953, 111 S. W. 682. This presumption may, however, be defeated by proof of acts which show that the landowner never intended to recognize that the use was other than permissive. Thus, in *Schwer v. Martin*, 97 S. W. 12, 29 Ky. Law Rep. 1221, 7 L. R. A. (N. S.) 615, it was pointed out that where the use of the passway was merely permissive on the part of the owner of the land, and there was no conduct by the owner indicating that the use thereof was other than a neighborly act, the privilege was one that might, at any time, be revoked by the owner of the land, regardless of the extent of the time during which it had been so used. *Conyers v. Scott*, 94 Ky. 123, 21 S. W. 530, 14 Ky. Law Rep. 784, *Warth v. Baldwin*, 84 S. W. 1148, 27 Ky. Law Rep. 339, and *Berea College v. Burnett*, 111 S. W. 332, fully recognize the rule. So the decision

turns, in each case, upon the character of the use. It is a question of fact in each case. *Downing v. Benedict*, 147 Ky. 8, 143 S. W. 756; *Driskill v. Morehead*, 147 Ky. 107, 143 S. W. 758.

In *Downing v. Benedict*, supra, a passway over uninclosed woodland had been used for about 20 years, when the owner fenced it, and thereafter some people used the way with the owner's permission, and others without his permission. Subsequently the owner built a rock fence across the passway, in which he placed a gate; persons continuing to pass through the gate with or without his permission. Still later the owner's grantee took the gates down and erected wire fences. Under that state of fact it was held that the fences and gates, which had been continued for 40 years, were sufficient notice to those using the passway that the owner had not dedicated it to a public use.

[6] So in the case at bar. Originally the passway was some 75 or 80 feet distant from where it is now located, and it has been changed, from time to time, and at the will of Mann and Mangold, the owners. At no time have they ever surrendered their control over the location of the passway, or its use; on the contrary, they have asserted their ownership, and indicated that appellant's use was by permission only, by changing its location and erecting fences and gates across it, at their pleasure. Mangold protected only when appellant continued to travel outside the lines of the passway, and thus injuring his meadow; and this he had the right to do.

This case, in its controlling facts, is very much like the case of *Fightmaster v. Taylor*, above referred to, where, in concluding, we said: "The evidence showed beyond question that the passway in dispute was never claimed by those who used it as a matter of right, but at all times with the consent or permission of the owner of the land over which it ran."

The issue being one of fact, and the chancellor having reached the conclusion that the use by appellant and her husband was by permission only, we will not disturb his finding. It is fully sustained by the proof.

Judgment affirmed.

LOUISVILLE & N. R. CO. v. GOODWIN.†
(Court of Appeals of Kentucky. Dec. 11, 1912.)

1. MASTER AND SERVANT (§ 286*)—ACTIONS FOR INJURIES—SUFFICIENCY OF EVIDENCE.

In an action for injuries caused by a chain on an air hoist breaking and striking the employé operating it, evidence to support plaintiff's contention that the chain would not have struck him if valve chains had been properly adjusted *held* to present a question for the jury.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 1001, 1006, 1010-1050; Dec. Dig. § 286.*]

2. TRIAL (§ 143*)—QUESTIONS FOR JURY—CONFLICTING EVIDENCE.

The fact that defendant's evidence strongly contradicts that of plaintiff does not justify a peremptory instruction for defendant; it being the province of the jury to weigh and pass upon all the evidence.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 342, 345; Dec. Dig. § 143.*]

3. APPEAL AND ERROR (§ 1003*)—REVIEW—QUESTIONS OF FACT.

A verdict will not be disturbed on appeal, unless flagrantly against the evidence.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3938-3943; Dec. Dig. § 1003.*]

4. MASTER AND SERVANT (§ 234*)—LIABILITY FOR INJURIES—CONTRIBUTORY NEGLIGENCE.

An employé is not guilty of contributory negligence in continuing work, although he knows of defects in the machine operated by him, unless the danger is so obvious and imminent that he must or should have known thereof.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 684-686, 706-709; Dec. Dig. § 234.*]

5. EVIDENCE (§ 539*)—OPINION EVIDENCE—QUALIFICATIONS OF EXPERT WITNESSES.

The foreman of a machine shop whose knowledge and skill as a machinist was derived from an experience of 30 or 40 years of work in that line, and the proprietor of a machine shop with an experience in handling and operating such machinery of more than 50 years, were qualified to testify that, if the valve chains on an air hoist had been properly adjusted, an employé would not have been injured by the breaking of the hoisting chain.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 2349-2352; Dec. Dig. § 539.*]

6. DAMAGES (§ 132*)—EXCESSIVENESS—PERSONAL INJURIES.

An employé was struck in the face by a broken chain, mashing in his face and upper jaw, and splitting his lip. Several teeth were knocked out, and the upper jaw was broken. An operation was necessary on his upper lip. His breast was also injured. He had a depressed fracture of the skull at the back of his head, and had a profound nervous shock. He was confined to the house for several months, and required medical treatment for eight months or a year. Although able to do some light work, he was permanently disabled from performing such work as he was accustomed to perform before the injury or to earn the same wages. *Held*, that a recovery of \$5,000 was not so excessive as to show passion or prejudice.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 372-385, 396; Dec. Dig. § 132.*]

Appeal from Circuit Court, Jefferson County, Common Pleas Branch, Third Division.

Action by J. N. Goodwin against the Louisville & Nashville Railroad Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Helm & Helm, Benjamin D. Warfield, and Chas. H. Moorman, all of Louisville, for appellant. A. T. Burgevin, of Louisville, for appellee.

SETTLE, J. This is the second appeal of this case. The opinion on the first appeal appears in 140 Ky. 837, 131 S. W. 1012, and, as it contains an elaborate statement of the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes
† Rehearing denied January 28, 1913.

facts with respect to the manner in which appellee received the injuries for which he recovered damages in the court below, only a partial review of them will now be necessary. It appears that appellee was operating an air hoist in appellant's machine shop, and while so engaged an iron chain, connecting the end of a piston rod with an axle and two car wheels, broke, striking him in the face and head, thereby producing the injuries complained of. The movements of the piston rod were controlled by the valve of an air cylinder, operated by a cross-piece six inches in length, to each end of which a short chain was attached. By pulling one of these short chains the valve on the air pipe would open and the air pressure enter into the cylinder, raising the piston rod. By pulling the other short chain the air pressure escaped from the cylinder, thereby lowering the piston rod. When the piston rod was thus lowered, the chain which was attached to the piston rod, and by the breaking of which appellee was injured, was connected with the car axle and wheels which were to be moved. By the application of the air pressure to the cylinder in the manner above described, the piston rod was being raised and with it the axle and wheels, when the chain broke and struck appellee.

It is appellee's contention that his injuries were caused by the improper location of the cap of the cylinder and crossbeam to which the short chains for raising and lowering the piston rod were attached; that is, that they were placed on the opposite side of the cylinder from where he had to stand in controlling the hoisting machine, which compelled him to reach around the cylinder to manipulate the valve chains, and thereby place his body so close to the chain which attached the piston rod to the axle and car wheels that the breaking of the chain necessarily injured him; whereas, the proper place for the cylinder cap and valve chains was on the side of the cylinder where he had to stand in operating the hoisting machine, and, if it had been so properly placed, he, in manipulating the valve chains, could have stood farther off and at such a safe distance from the chain which attached the piston rod to the axle and car wheels that the breaking of the chain would not have injured him. In considering this contention, we, in the former opinion, said: "The trial court submitted the case to the jury upon the single question of the defect in the position of the lower cap of the cylinder which placed the crossbeam further away from the operator than it should be. The promise to repair, and the failure to do so, although made a ground of negligence, was ignored in the instructions, and we think properly so, as the evidence did not sufficiently show that any promise to repair was made, or that appellee in continuing to work relied on any promise to repair. *American Tobacco Co. v. Adams*, 137 Ky. 414

[125 S. W. 1067]. But the case must be reversed because it does not appear from the evidence that the location of the valve chains on the cylinder cap was the proximate cause of the injury to appellee. * * * In other words, there should have been some evidence conducing to show that the position appellee was compelled to occupy in operating the machine on account of the location of the valve chains placed him in such a position that the chain, if it broke, would strike him. * * * On another trial, if the evidence on this point is the same as on the last trial, the court should direct a verdict for the defendant; but, if there is evidence conducing to show that appellee would not have been struck by the chain if the valve chains had been properly adjusted, then the court should let the case go to the jury under the instructions given on the last trial."

[1] It will be observed that the opinion narrowed the case to the single issue stated, distinctly approved the instructions given on the first trial, and directed that the case be again submitted to the jury under the same instructions, if the evidence on the second trial should conduce to prove that appellee would not have been struck by the chain, if the valve chains had been properly adjusted. Properly accepting the former opinion as the law of the case, the circuit court on the last trial submitted it to the jury under the instructions given on the first trial. A verdict was returned in favor of appellee for \$5,000 damages, and the present appeal is prosecuted from the judgment entered upon that verdict. We are now called upon to determine whether there was evidence to support it. It is insisted for appellant that the evidence on the last trial did not substantially differ from that introduced in appellee's behalf on the first trial, and that a peremptory instruction directing a verdict for it should, therefore, have been given. Our reading of the record has not enabled us to reach this conclusion. On the contrary, the additional evidence required to authorize the submission of the case to the jury was supplied by the testimony of appellee and his two expert witnesses, Cook and Fletcher. That of appellee, with great elaborateness of detail, explained his duties as operator of the hoisting machine, the safe and customary manner of operating same, and the manner of receiving his injuries; furthermore, that the placing of the cap of the cylinder, crossbeam, and short chains for raising and lowering the piston rod on the opposite side of the cylinder from where he had to stand in performing his duties rendered same unsafe for use and dangerous to him, as he was thereby compelled to manipulate the valve chains in raising and lowering the piston rod, by extending his arms and hands around the cylinder for the purpose of reaching them, which forced his body so dangerously close to the piston rod and chain attaching

it to the axle and car wheels that there was no way for him to escape injury from the breaking of the chain; that, if the cap of the cylinder and valve chains had been placed on the side of the cylinder where appellee, in the performance of his duties, was compelled to stand, he could have manipulated the valve chains without reaching around the cylinder and by standing at such a distance from the piston rod and its chain, as that no injury would have resulted to him by the breaking of the chain. It appears from the appellee's testimony that he complained to appellant's foreman of the improper location of the cylinder cap and valve chains, and requested that they be changed to the side of the cylinder next to which he was required to stand in performing his duties, but that the requested change was not made. It does not appear that any material part of the testimony referred to was given by appellee on the first trial of the case, or that any questions were asked him calculated to elicit it. The experts, Cook and Fletcher, were not introduced as witnesses on the first trial, and their testimony appears to fully corroborate that of appellee. It may, therefore, well be said that the testimony of the three furnished the additional evidence, which the opinion, on the first appeal, said would be necessary to authorize a submission of the case to the jury.

[2] It is true the evidence furnished by the several witnesses introduced for the appellant strongly contradicted that of appellee and his two witnesses referred to, but this did not authorize a peremptory instruction as asked by the appellant. The evidence being conflicting, it was the province of the jury to weigh and pass upon it all; and, as their verdict indicates, they gave greater credence to the evidence furnished by the appellee and his two witnesses than to that furnished by the appellant's witnesses.

[3] This they had the right to do, and, as in our opinion the case is not one in which we would be justified in holding that the verdict is flagrantly against the evidence, we are without authority to disturb it.

[4] If, as argued by counsel for appellant, there was evidence conducing to show contributory negligence on the part of appellee, we can only say that that question was fairly submitted to the jury by the instruction as to contributory negligence; and although there was evidence conducing to prove that appellee, notwithstanding his complaint to appellant's foreman of the improper location of the cylinder cap and valve chains, continued to work at the hoisting machine, in our opinion it failed to show that the danger of his continuing the performance of his duties thereat was so obvious and imminent as that he must or ought to have known it. It cannot, therefore, be said that contributory negligence was conclusively established.

[5] It is contended by appellant's counsel

that the testimony of both Cook and Fletcher was incompetent, and should have been excluded from consideration at the hands of the jury. We assume from the briefs that this contention rests upon the theory that the testimony of these witnesses did not show them to be experts; but we do not find in the bill of evidence that the introduction of the witnesses was objected to on this ground. There were objections to one or two hypothetical questions asked each of them, which were, in our opinion, properly ruled on, but none to such as were asked them respecting their skill and experience as machinists. It was shown that Cook is foreman of the Atlas Machine Company and that his knowledge and skill as a machinist was derived from an experience of 30 or 40 years of work in that line. It was also shown that Fletcher is himself the proprietor of a machine shop, and that his work and experience in handling and operating such machinery covered a period of more than 50 years. So it is fairly apparent from the evidence that both Cook and Fletcher were familiar with such hoisting machines as the one by which appellee was injured, and, though they had never seen that particular machine, that they understood its various parts, how it should be operated, and illustrated their knowledge thereof by reference to a model of the machine which was used on the trial. In view of these facts, we think each of them possessed the qualifications of an expert, for which reason their testimony was properly allowed to go to the jury.

[6] It is also insisted for appellant that the verdict is excessive. In view of the character of appellee's injuries, we cannot sustain this contention. He was first attended after they were received by appellant's surgeon, Dr. Griffith, who did not testify as a witness, because he died before the first trial. It appears, however, that Dr. J. W. Galvin, appellee's regular physician, began to attend him the week following the infliction of his injuries and continued such attendance until he was able to leave his bed and home.

Upon being called as a witness, and asked as to appellee's injuries, Dr. Galvin said: "His face, upper jaw, was mashed in and lip split. * * * He was laid up and a part of the time out of his head; six, eight or ten teeth, a number of teeth were missing from one side, and the upper jawbone was broken in there. He had an injury to his breast, his sternum, breastbone, and, I believe, an injury to his head. I don't recall about that. It has been two or three years ago. I treated him from January, about the 24th, up until probably middle of May. He was laid up, confined to the house at the time. Afterwards I treated him occasionally for about eight months or a year. * * * I operated upon his face afterwards on his upper lip. It was all adhering, stuck

to the bone, stuck to the process bone and tissues. He could not use his mouth so he could not take any fluid or food. I freed it all up so he could, so he could hold material in his mouth." In reply to the question as to when he had last seen and examined appellee the witness replied: "This week." Upon being further asked whether appellee's injuries were or not of a permanent character, the witness answered: "Yes; he is disabled, to a great extent for life. I don't see how he can ever recover; get better now."

Dr. D. S. Reynolds testified that he had examined appellee more than once since his injuries were received; the last time in April, 1909. In reply to the question: "What did you find to be his condition at that time?" Dr. Reynolds said: "He has a depressed fracture of the skull at the back of his head. He has a cut over the left nostril there, over the left, carrying away a portion of the jaw bone containing seven of the teeth on the upper side; cut through lower lip. He has profound nervous shock." In reply to an inquiry as to the extent, if any, of appellee's disability as to the performance of manual labor, the witness said: "It would be difficult for me to say. I should say a man, however, whose breathing is so rapid as his, with elevated temperature, feeble, irregular pulse would not be able to do much manual labor."

Other witnesses, relatives and neighbors of appellee, also testified as to the character of his injuries, the length of time he was confined to his bed and home, and the extent to which his injuries impaired his ability to earn money.

It appears from the evidence that appellee, after many months of complete disability, sufficiently improved in health to be able to do some light work, such as setting type, and that he is now at times engaged at that work in the Courier Journal office; but it is further apparent from the evidence that he will not again be able to perform such manual labor as he was accustomed to perform before he was injured, or to earn the same wages he then received. It is evident that the physical and mental suffering resulting to appellee from his injuries must have been very great; and, when to such suffering is added the value of the time lost by him, the expense incurred in endeavoring to effect a cure and the loss sustained in the permanent impairment of his power to earn money, caused by the injuries, the damages awarded, though liberal in amount, cannot fairly be pronounced excessive. At any rate, we are unwilling to say that the verdict bears any of the earmarks of passion or prejudice on the part of the jury.

Other objections besides those we have mentioned, are made by appellant to the judgment appealed from, but, as they were determined on the first appeal and disposed

of by the opinion then rendered, it will not be proper to consider them again.

Judgment affirmed.

CITY OF LOUISVILLE v. KRAMER'S ADM'X.

(Court of Appeals of Kentucky. Dec. 10, 1912.)

1. TRIAL (§ 252*)—INSTRUCTIONS—EVIDENCE TO SUSTAIN.

In an action for damages from the maintenance of an inadequate sewer, an instruction on contributory negligence was properly refused where the only evidence tending to show it was to the effect that there was a drain in the plaintiff's basement about two feet below the bottom thereof, and that the sewer was about two feet above the bottom of the basement, without any showing that the drain was connected with the sewer, as the submission of the issue would require a guess that the water which caused the damage flowed from the drain-pipe into the basement.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 506, 596-612; Dec. Dig. § 252.*]

2. LIMITATION OF ACTIONS (§ 55*)—ACCRUAL OF CAUSE—INSUFFICIENT SEWERS.

Though at the time a sewer was built it was adequate to carry off accumulated water, where it was rendered insufficient by reason of a construction of a feeder sewer and of new streets and their consequent drainage into the latter sewer, a right of action accrued upon the causing of damage from the overburdened sewer, and the failure to construct sufficient catch-basins to carry off the surface water.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 299-306; Dec. Dig. § 55.*]

3. LIFE ESTATES (§ 22*)—INJURIES TO PROPERTY—RIGHTS OF LIFE TENANT.

A life tenant may recover damages for the diminution in the value of her life use, caused by the depreciation of the rental value of the property and the time and money spent in repairing damage done by floods caused by the failure of the city to maintain a proper sewer.

[Ed. Note.—For other cases, see Life Estates, Cent. Dig. § 15; Dec. Dig. § 22.*]

4. APPEAL AND ERROR (§ 1033*)—REVIEW—PERSONS ENTITLED TO ALLEGE ERROR—PREJUDICE TO OPPOSITE PARTY.

Where, in an action for damages from an inadequate sewer, the evidence showed that the value and the use of the property had depreciated while the plaintiff occupied it, and that the rent had decreased while she rented, as well as the cost of repairs which were necessitated by floods, an instruction authorizing on a finding for the plaintiff the assessment of such damages as will fairly and reasonably compensate for any damage done to the use between certain dates was erroneous, but prejudicial only to the plaintiff, and cannot be complained of by the defendant as error warranting a reversal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4052-4062; Dec. Dig. § 1033.*]

Appeal from Circuit Court, Jefferson County, Common Pleas Branch, First Division.

Action by Gertrude Kramer's administratrix against the City of Louisville. From a

judgment for plaintiff, defendant appeals. Affirmed.

Huston Quila and Clayton B. Blakey, both of Louisville, for appellant. Jacob Solinger and O'Neal & O'Neal, all of Louisville, for appellee.

NUNN, J. One Frederick Kramer owned a lot with a 135-foot front and 125 feet deep on a corner of Clay and Ormsby streets, in the city of Louisville, upon which was a house worth about \$2,500. The lower floor of the house was a storeroom. Prior to 1903 Frederick Kramer died leaving a will in which he devised this property to his widow, Gertrude Kramer, for life with remainder to his children. In 1898 the city constructed a 36-inch sewer along Ormsby street which, prior to February, 1903, caused the water to overflow this property when there was an exceedingly hard rain. In February, 1903, the city constructed or reconstructed Clay street with vitrified brick and placed therein a 27-inch sewer, but, according to the proof, placed only two or three catch-basins therein, and several other streets in that vicinity were constructed and drained into Clay street. It appears from the testimony that after these streets were constructed and the sewer, which was provided with an insufficient number of catch-basins, was placed in Clay street, when an ordinary rain fell, the water would accumulate on the corner where appellee's property was situated so fast that the sewers would not carry it off, and it would become two or three feet deep, and at times it would get deep enough to flow into the lower floor of the house, and the basement of the building was rendered useless for the purposes for which it was constructed.

Appellee instituted this action February 12, 1908, to recover \$1,500 in damages which she alleged were occasioned to her use of the property by reason of the overflows from the date of the construction of Clay street to the time of filing the suit. She did not ask for any damages occasioned by the construction of the sewer in Ormsby street, which the proof shows was sufficient to carry off the water which drained to it during ordinary rain falls. Appellant, by its answer, denied the allegations of the petition, entered a plea of contributory negligence on the part of Mrs. Kramer, and a plea of the statute of limitations.

[1] Appellant asks a reversal of the case because the lower court failed to give an instruction upon its plea of contributory negligence, and calls attention to the fact that one witness stated that a drainpipe was discovered in the basement of appellee's house which was about two feet from the bottom of the basement, and that the sewer in Ormsby street was also about two feet above the bottom of the basement. There is no proof by any witness that this drainpipe was connected with the sewer in the street;

nor does the witness who testified to the above facts, or any other witness, state or even intimate that the water flowed through this drainpipe into the basement. No witness was asked about this matter. In order for the court to give an instruction on contributory negligence, it would have had to guess that the water flowed through the drainpipe into the basement, and this, of course, it was not authorized to do.

[2] The plea of limitation was not sustained for the reason that the injuries complained of occurred within five years before the institution of the action. The sewer in Ormsby street might have been adequate to carry off the water that accumulated at appellee's property at the time it was constructed, but it was insufficient to carry off the increased volume of water caused to collect at that place by reason of the construction of Clay street and the construction of other streets and their drainage into Clay street. Therefore, it was negligence in the city to overburden the sewer in Ormsby street and to fail to provide the sewer in Clay street with sufficient catch-basins to receive the surface water which accumulated therein, and which, according to the testimony, caused the overflow of appellee's property. *City of Louisville v. Leezer*, 143 Ky. 244, 136 S. W. 223. The testimony shows that the foundation of the building was constructed of brick; that there was a shed erected in front of the building; that the surface water which came down Clay street washed the sand and mortar from between the brick which caused the foundation to give way; that it flowed around the posts supporting the shed and caused them to decay; that appellee expended \$97 in cash to repair the building; that she used the building a small portion of the time and rented it the balance of the time; and that, on account of the overflows, she had to rent the building for less than she did previous thereto.

[3] The contention of appellant that appellee is not entitled to recover because she was only a life tenant is without merit. She had a right to recover the diminution in the value of her life use. Her criterion of recovery was the depreciation of the rental value of the property while she rented it and the diminution in the value of its use while she used it, together with the value of her time and the money spent in repairing the damage done by the floods. *Hutchison v. City of Maysville*, 100 S. W. 331, 30 Ky. Law Rep. 1173; *City of Louisville v. Leezer*, 143 Ky. 244, 136 S. W. 223; *Ewing v. City of Louisville*, 140 Ky. 726, 131 S. W. 1016, 31 L. R. A. (N. S.) 612. This action was based upon the theory that the city by its negligent construction of the streets and sewers caused the injury to appellee's property, and the above authorities are peculiarly applicable to this case.

[4] Appellant complains especially of in-

struction No. 4, which is as follows: "If the jury find for the plaintiff, they should award her such damages as the jury may believe from the evidence will fairly and reasonably compensate the estate of Gertrude Kramer for any damage done to her use of the property mentioned in the evidence between February 12, 1903, and February 12, 1908, the award not to exceed the sum of \$1,500, the amount claimed in the petition. If the jury find for the defendant, they will simply say so by their verdict and no more." This instruction was erroneous, but all the errors were prejudicial to appellee, and not to appellant. The instruction should have allowed her to recover the reasonable depreciation of the value of the use of the property while she occupied it, and to recover the rental decrease, if any, while she rented it, and to recover the cost of the repairs which had to be made upon the property by reason of the overflows. These matters were all in evidence, and the verdict shows that the jury considered them. The evidence supports the verdict, and we are not authorized to reverse a case when, upon the whole record, it appears that the substantial rights of the appellant have not been prejudiced.

For these reasons, the judgment of the lower court is affirmed.

BRYANT v. STRUNK.

(Court of Appeals of Kentucky. Dec. 4, 1912.)

1. BOUNDARIES (§ 40*)—LOCATION—QUESTION FOR COURT.

The proper location of land patented by the state is for the court, where there is no dispute as to the facts.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. §§ 196-204; Dec. Dig. § 40.*]

2. BOUNDARIES (§ 3*)—CALLS—DISTANCES—MONUMENTS.

The rule that calls of a patent for course and distance give way to monuments on the ground is for the purpose of establishing the actual location of the lines and corners of the original survey; and it has little application where the lines were not run out in the original survey, but were simply laid down by the surveyor by protraction, and, when the lines were not in fact run, the court in determining the lines has little to guide it, except the calls and the plot accompanying the original survey, and the plot is evidence in determining the general shape of the tract intended to be patented.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. §§ 3-41; Dec. Dig. § 3.*]

3. BOUNDARIES (§ 3*)—CALLS—DISTANCES—MONUMENTS.

The lines of a patent will not be extended to reach a designated monument on the ground where it is evident from all the facts that the surveyor made a mistake as to the location of the monument; he supposing it to be in one place while in fact it is in another.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. §§ 3-41; Dec. Dig. § 3.*]

4. ADVERSE POSSESSION (§ 73*)—COLOR OF TITLE—PATENTS.

A junior patentee who enters on his grant claiming to the extent of its boundaries is in

possession of the land included in the patent, for a patent, though void because including land previously granted, is color of title, and defines the extent of the possession.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 435-442; Dec. Dig. § 73.*]

5. ADVERSE POSSESSION (§ 116*)—EVIDENCE—INSTRUCTIONS.

Where there is evidence of adverse possession by a junior patentee in a patent including land previously granted sufficient to take the case to the jury as to any part of the land, the court must by its instructions define the extent of possession under the facts, so that only a question of fact will be submitted to the jury.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. § 66; Dec. Dig. § 116.*]

Appeal from Circuit Court, Whitley County.

Action by Roberta S. Bryant against Murray Strunk. From a judgment for defendant, plaintiff appeals. Reversed and remanded for new trial.

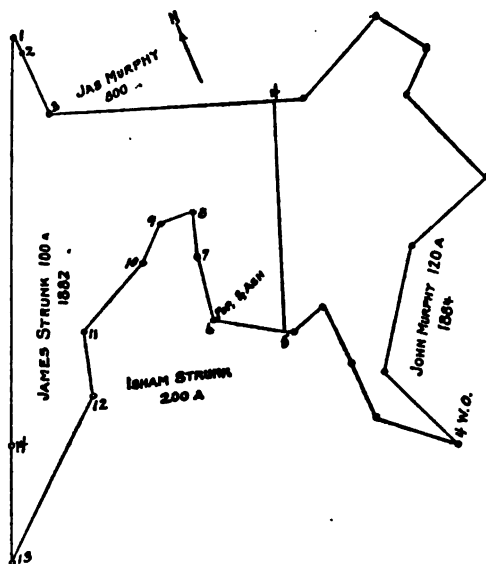
E. L. Stephens and Geo. P. Johnson, both of Williamsburg, for appellant. J. N. Sharp and I. N. Steely, both of Williamsburg, for appellee.

HOBSON, C. J. Roberta S. Bryant claims a large body of land in Whitley county under a patent for 9,600 acres issued October 18, 1855, to Jacob Hudson and Cyrenius Wait. The patent includes a large boundary of land from which prior patents and surveys are excepted. She brought this suit against Murray Strunk and others to recover a portion of the land embraced in her patent which was claimed by them. On a trial between her and Strunk, Strunk was adjudged the owner of the land claimed by him. She appeals.

Strunk's claim to the land is based upon a patent issued July 12, 1883, upon a survey made June 12, 1882. Although his patent is junior to hers, he insists that he is the owner of the land covered by his patent by reason of the fact that he and those under whom he claims had been in the adverse possession of the land for more than 15 years before the bringing of the action. He does not show a marked or well-defined boundary to which he claimed, but he insists that, having entered under his patent, he was in possession of all the land which the patent includes. So it becomes necessary to locate his patent in order to determine the extent of his possession. As claimed by him, and as located by the judgment of the circuit court, his patent, though calling for only 100 acres, in fact includes, according to one surveyor, 486 acres, and according to another 550 acres. The calls of his patent are as follows: "Beginning at a white oak corner of a survey in the name of Alexander Murphy; running thence with said survey S. 8° E. 16 poles to a spotted oak; thence S. 2° E. 44 poles to a gum; thence South 70° E. 144 poles to a stake in said line and in a line of John Murphy's survey; thence with

John Murphy's survey S. 20° W. 106 poles to a stake in a line of Isham Strunk's survey; thence with the same N. 10° W. 90 poles to a stake said Strunk's corner; thence with his line S. 31° W. 180 poles to a poplar and hickory; thence S. 76° W. 120 poles to a stake in a line of Enos King's survey; thence with same N. 23° W. 70 poles to a white oak James Strunk's corner; thence with his line to the beginning." It will be observed that the patent contains only 9 calls, but, as located by the surveyor, it has about 40 calls, and includes, not only the body of land indicated on the plot below given, but as much more lying west of it.

[1] The circuit court submitted to the jury the question of the location of the patent; but, as there is no dispute as to the facts, the proper location of the patent under the evidence is a question of law for the court. The following plot gives roughly the situation:



The beginning corner at a white oak, corner of a survey in the name of Alexander Murphy, is undisputed and is at 1 on the plot. The next line running from this corner S. 8° E., 16 poles, to a spotted oak, is also undisputed; this corner being at 2 on the plot. The next call S. 2° E., 44 poles, to a gum, is also undisputed, the gum being at 3 on the plot. The next call S. 70° E., 144 poles, to a stake in said line, takes us to the figure 4 on the plot. But it will be observed that this point is in a line of James Murphy's survey, and not in a line of John Murphy's survey, which is some distance south and east of this point. The next call of the patent is: "Thence with John Murphy's survey S. 20° W. 106 poles to a stake in a line of Isham Strunk's survey." If we run this line from 4 by the call of the patent, we strike a line of Isham Strunk's survey, but the distance called for in the patent gives out before we reach the line. The surveyors,

instead of running from 4 to Isham Strunk's line followed the lines of other patents until they reached John Murphy's line, and then ran with his line to Isham Strunk's corner, and then followed his lines around. The proof shows that the surveyor who made the survey of the patent in fact ran only the lines from 1 to 2 and from 2 to 3, and we think it must be concluded that he thought he would reach John Murphy's land if he ran out from 3 144 poles; for it is evident that he did not intend to go to James Murphy's corner, because he calls for a stake in said line. The shape of the land as indicated in the plot accompanying the patent shows that he did not intend to include any land east of the line 4-5; and our conclusion is that the line should be run from figure 4 by the patent call to the figure 5, and that the patent does not include any land lying east of this line. The next call of the patent is: "thence with the same N. 10° W. 90 poles to a stake Strunk's corner." As shown by Strunk's patent, the line of that patent which is struck at 5 runs from a hickory and sugar tree, N. 62° W., 52 poles, to an ash and a poplar; thence N. 10° W., 40 poles, to an ash and a white oak. The ash and poplar are at 6 on the plot; the ash and white oak at 7. It will be observed that the call of the patent in contest is N. 10° W., corresponding with the call of the Isham Strunk survey, which is also N. 10° W., but that the distance is given as 90 poles, while there are two calls in the Isham Strunk patent, one for 52 poles and the other for 40 poles; the two making 92 poles. We conclude that the surveyor undertook to unite these two calls, and thus reached the distance as 90 poles, and that what he intended to do was to run with the Strunk line. This takes us to 7. The next call of the patent in contest is "thence with his line S. 31° W. 180 poles to a poplar and hickory." The calls of the Isham Strunk patent, however, run from 7 to 8 to 9 to 10 to 11 to 12; and the sum of the distances called for in these lines is 181 poles. The next call of the patent in contest is "S. 76° W. 120 poles to a stake in a line of Enos King's survey." This is a call of the Isham Strunk survey, and takes us to the point 13. It is evident that the surveyor intended to run with Isham Strunk's survey from the time he reached it until he reached the point 13; and our conclusion is that he undertook to unite the calls by adding the distances together. It follows that the survey in question must be run with Isham Strunk's line from the point 5 to the point 13. But, when we reach 13, we do not reach King's land, and, to reach his land, a large number of calls must be put into the patent making it to include on the west as much more land as it will include if closed from 13 on the patent calls. As the surveyor did not run these lines, we are satisfied that, when he called for a stake in a line of Enos King's survey, he simply made a mistake as to the

location of the line of that survey, and that the patent must be closed by running the two closing lines from 13 to the beginning according to the patent calls as near as this may be done without interfering with the older survey. This would take us from 13 to 14 on the plot, and from 14 to the beginning. As thus run, the patent will contain over 100 acres of land lying in a boundary conforming to the general shape of the tract as indicated on the plot made by the surveyor.

[2] It is true the rule is that the calls of a patent for course and distance must give way to known or established objects found on the ground. But, after all, the rules that have been laid down on this subject are for the purpose of establishing the actual location of the lines and corners of the original survey, and they have little application where the lines were not run out in the original survey, but were simply laid down by the surveyor by protraction as was evidently the case in the patent before us. When the lines were not in fact run, we have little to guide us except the calls of the patent and the plot of the land accompanying the original survey. The plot accompanying the original survey is potent evidence in the determination of the general shape of the tract of land intended to be patented. To follow the lines of the other surveys in the case before us on the east to John Murphy's survey and on the west to King's survey, and then on around with still other surveys would be to make this tract include five times as much land as the grantee paid for and give the tract an entirely different shape from that which was evidently contemplated in the grant.

[3] While lines of a patent will be extended in order to reach a designated object, this will not be done where it is evident from all the facts that the surveyor simply made a mistake as to the location of the object; he supposing it to be at one place, when, in fact, it was at another. To run out this survey so as to reach on the east the lands of John Murphy and on the west the Enos King survey, we have not only to extend a line of the survey beyond any reasonable contemplation of mistake, but we have to put in a number of other lines on both sides of the survey. No rules of construction will justify such a departure from the calls of the patent and the plot accompanying the survey, where the lines were not in fact located on the ground, and the calls of the patent must control.

[4] Although the appellee's patent was inferior to appellant's and was void as the land had been previously granted, still, if he entered on his grant claiming to the extent of its boundary, he was in possession of all the land included in his patent; for his patent, though void, gave him color of title, and defined the extent of his possession. The circuit court should by his instructions under the evidence have located the Strunk patent as above indicated.

cult court should by his instructions under the evidence have located the Strunk patent as above indicated.

[5] If, on another trial, there is evidence of adverse possession by the defendant sufficient to take the case to the jury as to any part of the land, the court will by his instructions define the extent of possession under the facts shown by the evidence, so that only a question of fact will be submitted to the jury, and not both the law and the facts. *Le Moyne v. Hays*, 145 Ky. 415, 140 S. W. 552; *Burt & Brabb Lumber Co. v. Sackett*, 147 Ky. 232, 144 S. W. 84.

There is considerable evidence in the record in regard to the Copeland tract, or the Copeland survey as it is sometimes called, but no such survey is produced, and there is no proof of any marked boundary to which Copeland or those claiming under him held, as we understand the testimony.

Judgment reversed, and cause remanded for a new trial, and further proceedings consistent herewith.

J. M. ROBINSON, NORTON & CO. v.
LEGRANDE.

(Court of Appeals of Kentucky. Dec. 12, 1912.)

1. MASTER AND SERVANT (§ 217*)—INJURY TO SERVANT—ASSUMPTION OF RISK.

An employé of mature years who knew that a sufficiently lighted stairway used by her in going to and from the place of her work on the premises was steep, and not provided with any banisters, and that cleats were nailed on the side of each of the four top steps, and who made no complaint to her employer, and who was not assured or advised that the steps were safe, and who could by the exercise of reasonable care use the part of the steps unobstructed by cleats, assumed the risk of injury by falling down the steps, and could not recover for injuries so sustained.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 574-600; Dec. Dig. § 217.*]

2. MASTER AND SERVANT (§ 217*)—INJURY TO SERVANT—ASSUMPTION OF RISK.

An employé assumes the risks ordinarily incident to the business in which he is engaged, and, though the business may be hazardous and the surroundings not free from danger, yet, where he with knowledge of the conditions continues in the employment without objection, and injury results, the injury is the result of an assumed risk.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 574-600; Dec. Dig. § 217.*]

Appeal from Circuit Court, Jefferson County, Common Pleas Branch, First Division.

Action by Josie Legrande against J. M. Robinson, Norton & Co. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

Burwell K. Marshall, of Louisville, for appellant. O'Doherty & Yonts and Robt. J. Hagan, all of Louisville, for appellee.

LASSING, J. Josie Legrande had been for about two years prior to September 9, 1910, in the employ of J. M. Robinson, Norton & Co. She operated for said company a power machine, situated on the third floor of their factory building in Louisville. The steps leading up to this floor were steep. They were three feet wide. A solid wall was on either side, and there was no handrail. There was a cleat, or small wooden block, nailed on the side of each of the four steps next to the third floor, on the left-hand side going up. No one of these cleats extended out, according to the testimony of all the witnesses, more than three inches, and some of them put it from one and a half to two inches. The stairway was lighted by windows at the bottom on the second floor and at the top landing, so that one going up and down could readily see the way. On September 9th, at noon, while Josie Legrande was going down the steps, she fell, and sustained severe injuries. Allying that her fall was occasioned by the negligence of her employers in failing to furnish her a reasonably safe way or place to go to and return from her work, she filed suit to recover damages, and in her petition set up three particulars in which her employers were negligent, to wit: The stairway was steep, not supplied with banisters, and obstructed by the cleats or blocks of wood nailed on each of the four top steps at the left-hand side going up. She testified that she had been in the employ of the defendant company for 22 months, and that her employment had taken her up and down this flight of stairs at least twice a day during the time that she worked there; that she knew that the steps were steep and not provided with handrails; and that these small blocks or cleats were nailed or fastened in some way to the four top steps next to the wall on the left-hand side going up. Upon this showing the defendant insisted that it was entitled to a peremptory instruction. The trial judge declined to entertain this motion, submitted the case to the jury on the question of negligence, and plaintiff recovered a verdict for \$500. To reverse the judgment predicated thereon the company prosecutes this appeal.

It is practically conceded that there was no error during the conduct of the trial in admitting or rejecting evidence. No complaint is made of the amount awarded by the jury, and the sole ground upon which reversal is sought is that the court erred in not peremptorily instructing the jury to find for the defendant.

[1] Rarely is a case presented where there is so little conflict in the testimony. Appellee, a woman of mature years, had been in the employ of the appellant company for more than 22 months. She, as well as her employers, knew that the stairway was steep; that it was not provided with any banisters on either side; and that these blocks or

cleats were nailed upon the side of each of the four top steps. She testified that the stairway was sufficiently lighted. It is most earnestly insisted that this state of facts, as developed by her testimony alone, brings the case squarely within the principle announced by this court in *B. F. Avery & Sons v. Lung*, 106 S. W. 865, 32 Ky. Law Rep. 702, where the court said: "The doctrine which requires the master to provide and maintain a reasonably safe place in which his servant is to labor does not admit of that construction which excuses the servant from using his eyes, and the plainest precaution for his own safety. * * * When they can see and actually see the conditions, and without complaint or assurance undertake to do their work in these conditions, in the absence of statutory responsibility, they assume such risks as are incident to the conditions." We are of opinion that the point is well taken. There is no claim that appellee was not perfectly familiar with the surroundings. She knew of the existence of every defect, if they may be termed such, which, in her petition, she charges contributed to her injury. She made no complaint to her employer, nor was she, by any one connected with the defendant company, assured or advised that the steps were safe. So that in their daily use it must be presumed that she assumed the risks incident thereto. A very similar question was before this court in *American Tobacco Co. v. Adams*, 137 Ky. 414, 125 S. W. 1067. A recovery in that case was sought upon the ground that the employer had not furnished the employé a safe place in which to work. A jury returned a verdict for \$1,500, and the company appealed. Appellee slipped and fell to the floor. He alleged that the floor had been permitted to become defective by reason of grooves, worn in it by the wheels of a truck that was used in the handling of the tobacco; that the roof was defective and leaky and permitted the water during the rainy periods, to accumulate in these ruts or grooves in the floor; and that this rendered the floor at that point dangerous and unsafe to employes in the discharge of their duties. Appellee had, for sometime, been familiar with conditions and had, in fact, sought to have the defects remedied. The place, at which he was working was sufficiently lighted for him to see the grooves and the accumulation of water therein. In holding that he could not recover, the court there said: "Every person of ordinary intelligence knows that a wet floor is slippery, and that one is more likely to fall than if the place is dry. A person under circumstances like these who is required to walk over a slippery floor in an employment like this which is free from any danger or hazard cannot recover merely because he slips and falls. The place was not intrinsically dangerous. The employment was not at all hazardous. The implements used were of the simplest character. The

servant under facts like these will not be heard to say that he did not see or know the conditions that existed immediately under his eyes."

In the later case of *Foreman v. L. & N. R. Co.*, 142 Ky. 63, 133 S. W. 964, the principle announced in *B. F. Avery & Sons v. Lung*, supra, was reaffirmed; the excerpt above copied being quoted with approval. In *Interstate Coal Co. v. Deaton*, 148 Ky. 160, 146 S. W. 396, a boy was injured while driving a loaded wagon into a doorway. The evidence showed that he was familiar with the surroundings and had driven in and out of the door in question eight or ten times a day for eleven days. The testimony further showed that on the occasion when he was injured he stopped just before he entered the door, and, although he testified that he did not, at the time, observe the cross-beam overhead, with which he came in contact and which caused his injury, the opinion says: "While he claims that he did not know of the danger, there are some things that one must know. He must know those things which are right before his eyes, and which he himself admits having seen. The cross-beam was right in front of him. He intended to drive under. He admits that he saw it, and bowed his head to escape being struck. He says that he was caught on the shoulder after he got his head under, and this was due to the fact that the front wheels rose upon the sill. From his own statement he was seated about the middle of the wagon. Therefore, the front wheels struck the sill before he bowed his head. Although inexperienced in driving a wagon, he had sufficient judgment and discretion to know that if, in approaching an object right before his eyes, he did not keep out of its way, he would be struck. His earliest instinct taught him this, and it must have been confirmed many a time before he reached the age of 17 years. It is never necessary to warn a servant of a danger which he knows and appreciates. * * * He was injured solely because he failed to lower his head sufficiently to escape striking the cross-beam, although he had plenty of room for that purpose. The accident, therefore, was due to his own lack of ordinary care, and for this appellant is not responsible."

[2] From the foregoing and numerous authorities, to the same effect, which might be cited, it is apparent that the rule in this state is well settled, that an employé assumes the risks and hazards ordinarily incident to the business in which he is engaged, and that, although this business may be of a hazardous nature and his surroundings not free from danger, if he, with full knowledge of the existence of such conditions and dangers, without objection, continues in the employment, and injury results, it has uniformly been held that such injury is the result of an assumed risk, rather than

of any actionable negligence on the part of his employer. This rule is applicable, with most peculiar force to the facts in the case at bar. The only negligence with which appellant is charged is that its employes were provided with a stairway that was unusually steep; that there were no handrails on the side; and that small cleats or blocks were nailed upon one side of the four top steps. Just how long these cleats had been there the evidence does not show. The stairway had been in this identical condition during the whole time that appellee had been employed there. She knew just how steep it was, she knew that there were no handrails, and she knew of the existence of these cleats. It was well lighted. She could see the cleats. Indeed, had she looked, she could not have failed to see them. The steps were three feet wide. The cleats covered not more than three inches on the right-hand side of each of the four top steps going down. There was left for her use about 33 inches, more than five-sixths of these steps, free and unobstructed by any cleat. Had she exercised the slightest care, she could have avoided stepping on them. Indeed, it is apparent that she must have walked practically against the right-hand wall of the building, as she went down the steps, or else she could not have stepped upon the cleat.

Practically this same question was before this court in *Mann v. Moore*, 68 S. W. 402, 24 Ky. Law Rep. 253. In that case Mann was engaged by Moore as a warehouseman. His duties took him frequently to the second floor of the bonded warehouse. Upon one occasion, while on the second floor, he went hurriedly to the first floor to answer a telephone call. In coming down the steps he fell, and was severely injured. Alleging that his injury was due to the negligence of his employer in failing to furnish him a reasonably safe place in which to work, he sued. The defendant denied liability and pleaded contributory negligence. Upon the trial there was a verdict for the defendant. Upon appeal here a reversal was sought chiefly upon the ground that the trial court did not properly instruct the jury. In considering the case the court found that the instruction complained of was practically a peremptory to find for the defendant, and in passing upon the question of the correctness of the instruction given said: "So the question is presented, Was there error in instructing the jury peremptorily to find for defendants at the close of the case? We are of opinion there was not. Indeed, the testimony of appellant himself shows that he knew, or by any kind of care or observation could have known, of the condition of this stair. He used it almost daily for about six months; in fact since it was built, and oftener than any other person. If the steps were so steep as to be dangerous, appellant must have discovered this fact in six months' constant use.

If the steps are so dangerous as to make appellee liable for injury, the appellant was guilty of the same degree of negligence in not making the discovery in six months' use. But it is said that the urgent call at the telephone required appellant to hasten, and for the time to forget the dangerous steps. We do not think that an ordinary call at the telephone is such an emergency as will excuse a lack of care for one's own safety. A telephone is no more than an ordinary call by one person to another to come for the purpose of conversation. There was no emergency shown in the call, and, if there had been, appellant had no notice of such emergency. He only heard the telephone bell ring. * * * The peremptory instruction should have been given at the close of appellant's evidence."

There is a striking similarity between that case and the case at bar. The only difference is in degree. The plaintiff there knew that the steps were unsafe, just as did appellee here. The court found that the plaintiff was familiar with the steps. He had used them constantly for six months. Appellee is shown to have been familiar with the steps in this case, having used them almost daily for 22 months. There was nothing in the present case to require appellee to go down the steps hastily. She could have taken her own time, and, if she went with such haste as to prevent her making a safe passage down the stairway, appellant was certainly not responsible therefor. Upon appellee's own testimony it is apparent that she was not entitled to recover, and the trial judge erred in not sustaining the motion for a peremptory instruction at the close of her testimony.

Judgment reversed and cause remanded for further proceedings consistent herewith.

LANDERS et al. v. LANDERS et al.
MOTLEY et al. v. SAME.

(Court of Appeals of Kentucky. Dec. 13, 1912.)

1. JUDGMENT (§ 953*)—EVIDENCE AS TO JUDGMENT—WEIGHT AND SUFFICIENCY.

In an action involving the title to land, evidence held to show that, in a prior action to which the person under whom defendant claimed was a party, the construction of a will devising the land was involved, and it was adjudged that such person had a defeasible fee, although the papers in the action had been destroyed by fire.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1813-1815; Dec. Dig. § 953.*]

2. COURTS (§ 35*)—JURISDICTION—PRESUMPTIONS.

Where a commissioner's deed to a person having an undivided interest in land under a will conveying to him a part of such land during his natural life with remainder to the heirs of another, if the first taker died without children, recited that it was made pursuant to a judgment of the Circuit Court in an action pending therein, it would be presumed, where the papers in such action had been destroyed

by fire, that the construction of such will was involved in that action, since, the circuit court being a court of general jurisdiction, every presumption in favor of its jurisdiction will be indulged.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 88-45; Dec. Dig. § 35.*]

3. JUDGMENT (§ 686*)—CONCLUSIVENESS—PERSONS CONCLUDED.

A judgment in an action to which plaintiff's husband was a party, construing a will under which he claimed, which judgment had never been set aside or reversed, was conclusive against plaintiff as devisee of her husband.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1209; Dec. Dig. § 686.*]

4. DOWER (§ 18*)—ESTATES SUBJECT TO DOWER—DETERMINABLE FEE.

A widow is entitled to dower in land in which her husband owns a defeasible fee.

[Ed. Note.—For other cases, see Dower, Cent. Dig. § 44; Dec. Dig. § 18.*]

5. WILLS (§ 782*)—ELECTION—PROVISION FOR SURVIVING WIFE.

A widow is not entitled to dower or a distributable share of her husband's estate where she fails to renounce the provisions of his will in her favor within 12 months from its probate.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 2018-2033; Dec. Dig. § 782.*]

6. WILLS (§ 782*)—ELECTION—PROVISIONS FOR SURVIVING WIFE.

A widow is not required to elect between her right of dower and a devise from her husband where the husband could not dispose of the property devised by will, and hence, where he had only a defeasible fee, a claim of ownership by her under the devise did not prevent her from afterwards claiming dower.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 2018-2033; Dec. Dig. § 782.*]

7. WASTE (§ 5*)—PERSONS WHO MAY COMMIT WASTE—OWNER OF DEFEASIBLE FEE.

The owner of a defeasible fee is not chargeable with waste, although equity will sometimes restrain him from committing equitable waste.

[Ed. Note.—For other cases, see Waste, Cent. Dig. § 4; Dec. Dig. § 5.*]

8. ESTATES (§ 6*)—BASE OR QUALIFIED FEE—RIGHTS OF OWNER.

The proprietor of a qualified or base fee has the same rights and privileges till the contingency upon which it is limited occurs as if he were tenant in fee simple.

[Ed. Note.—For other cases, see Estates, Cent. Dig. § 6; Dec. Dig. § 6.*]

9. WASTE (§ 4*)—"EQUITABLE WASTE."

"Equitable waste" is such acts as at law would not be esteemed to be waste under the circumstances of the case, but which is so esteemed by a court of equity because of their manifest injury to the inheritance, although not inconsistent with the legal rights of the party committing them. It is a wanton and unconscientious abuse of the rights of the party in possession, ruinous to the interests of other parties; such acts as a prudent man would not do with his own property.

[Ed. Note.—For other cases, see Waste, Cent. Dig. § 6; Dec. Dig. § 4.*]

For other definitions, see Words and Phrases, vol. 3, pp. 2443, 2444.]

Appeal from Circuit Court, Allen County.

Actions by J. E. Landers and others against Nealie Landers, individually and as execu-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

trix of Bryant Landers, and by Elizabeth Motley and others against L. D. Landers and others, in which Nealie Landers intervened as defendant. From a judgment dismissing the petition in the first action, plaintiffs appeal. From the judgment in the second action, plaintiffs appeal, and the intervenor cross-appeals. Affirmed.

Bradburn & Basham, of Bowling Green, and J. H. Gilliam, of Scottsville, for appellants. G. D. Millikin and Sims & Rodes, all of Bowling Green, for appellees.

CLAY, C. These two actions have been consolidated, and will be considered in one opinion.

Isaac Landers died testate in the year 1854, leaving a widow, four daughters, and six sons, to wit, Bryant Landers, John Landers, Samuel Landers, Solomon Landers, Doc Landers, and Jacob Landers. After devising all of his property to his wife for life, he directed certain sums of money to be paid to his daughters, and, upon the death of his wife, that his land, consisting of about 900 acres, be divided equally between his sons. The widow, Patsey Landers, died in the year 1887. In the year 1873 John Landers, a son and devisee of Isaac Landers, died testate, unmarried and without issue. By his will he made certain provisions for his brothers and sisters, and directed that his brother Jacob Landers should have no part of his estate.

His will, in so far as it affects Bryant Landers, is as follows:

"To Bryant Landers, my brother, I give and bequeath, which is willed to me in my father's will which is one-sixth ($\frac{1}{6}$) part of all the lands belonging to my father at his death.

"I also give to him one-fifth part of one-sixth part of my father's land which was willed to my brother Solomon Landers now going to the heirs of said Solomon Landers which I bought of John W. Landers one of the heirs of the said Solomon Landers.

"I also give unto the said Bryant Landers my interest in my brother Samuel Landers' estate, is now dead, his interest in his father's land which is one-ninth ($\frac{1}{9}$) part of said land. If said Bryant Landers dies without heirs then my will is that it be equally divided between all my brothers and sisters of their heirs or descendants, except my brother Jacob Landers, or his heirs or descendants."

In 1910 Bryant Landers died testate and without issue, leaving a widow, Nealie Landers, who was appointed and qualified as his executrix.

In the first action plaintiffs, J. E. Landers and others, who were Bryant Landers' brothers and sisters and their descendants, sued Nealie Landers, individually and as executrix of Bryant Landers, deceased, to recover the sum of \$4,792, the reasonable value of timber

which it is alleged Bryant Landers cut and removed from the tract of land consisting of 170 acres, which represented the one-sixth interest of John Landers in the estate of his father, Isaac Landers, and which he devised to Bryant Landers. The petition charges that Bryant Landers took only a defeasible fee in the land in question under and by virtue of John Landers' will, and that, having died without issue, the tract in controversy passed to plaintiffs under John Landers' will; that in the division of Isaac Landers' land upon the death of his widow, Patsey Landers, the tract of 170 acres was allotted to Bryant Landers; that he held and occupied it up until his death, and that during his occupancy he unlawfully and without right cut and removed the timber in question. After filing a general demurrer to the petition, which was overruled, Nealie Landers individually and as executrix filed an answer pleading that Bryant Landers was the absolute owner of the land in controversy, and that, even if he was not, the claim of plaintiffs was barred by the statute of limitations. She further answered that, even though Bryant Landers had only a defeasible fee in the land in question, still he had the right to cut and remove the timber from the land without impeachment for waste.

The second action mentioned in the caption is a suit by Elizabeth Motley and others against L. D. Landers and others to sell a tract of 177 acres of land on the ground that the plaintiffs and defendants were the joint owners thereof, and the land could not be divided without materially impairing its value. It was charged in the petition that Bryant Landers took only a defeasible fee in the land in question, and that, he having died without issue, plaintiffs and defendants became vested with the absolute title thereto. In this proceeding Nealie Landers filed a petition and answer, asking to be made a party, and alleging that Bryant Landers was the absolute owner of the property under and by virtue of the will of John Landers, and that she was the absolute owner of the property under and by virtue of the will of Bryant Landers. The allegations of the petition and answer were denied by reply, and plaintiffs affirmatively pleaded that Bryant Landers had merely a defeasible fee in the property, which was defeated by his dying without issue. Subsequently Nealie Landers filed an amended answer in which she, without abandoning her claim of absolute ownership, pleaded alternatively that, in the event the court should declare that Bryant Landers had only a defeasible fee in the tract in controversy, she individually was entitled to dower in the property, or the cash value thereof out of the proceeds. Plaintiffs pleaded that having elected to take under her husband's will, and having claimed the property absolutely under and by virtue of his

will, she was estopped from claiming dower therein, more than one year having elapsed between the time of probate of her husband's will and her acceptance of its provisions and the filing of her amended answer. To her request for a construction of the will of John Landers, and to her claim of absolute ownership, plaintiffs interposed a plea of *res judicata*. They alleged that in the year 18—, a suit was instituted by Bryant Landers and others against J. W. Landers and others in the Allen circuit court to obtain a construction of the will of Isaac Landers, and also the will of John Landers; that judgment was entered construing both of said wills, and that by the judgment in question it was adjudged that Bryant Landers took only a defeasible fee in the tract in controversy; that, pursuant to said judgment, commissioners were appointed to divide and allot the lands of Isaac Landers and John Landers; that division and partition was made by the commissioners, and the tract in controversy, being lot No. 3 in said division, was allotted to Bryant Landers for and during his natural life, with remainder to the heirs of John Landers, except Jacob Landers, in the event said Bryant Landers died without children; that pursuant to this allotment and division, and the orders of the court, a deed was made by the master commissioner, conveying the tract in question to Bryant Landers upon the terms and conditions above set out, which the said Bryant Landers accepted and put to record, and under which he had ever since held and occupied the land. It was further pleaded that this judgment had never been set aside or reversed, and was in full force and effect, and was conclusive on the parties and all those holding under them. Nealle Landers denied the allegations of the reply with reference to the plea of *res judicata*. In the action for waste, plaintiffs' petition was dismissed, and they appeal.

In the second suit, the plea of *res judicata*, as to the construction of John Landers' will, was sustained. The court, however, held that Nealle Landers had dower in the 177 acres of land. From that part of the judgment holding that Nealle Landers was entitled to dower plaintiffs appeal, and from that part of the judgment sustaining the plea of *res judicata* Nealle Landers prosecutes a cross-appeal.

[1] As the determination of the other questions involved depends upon the character of estate Bryant Landers took under the will of his brother, John Landers, we shall first proceed to a consideration of that question. The plea of *res judicata*, if good, dispenses with the necessity for considering the will of John Landers. It appears from the evidence that a few years ago the courthouse of Allen county was destroyed by fire, and that the records of the circuit clerk's office, including the papers in the suit of Bryant Landers and Others v. I. W. Landers and Others,

in which it is claimed the will of John Landers was construed, were burned. A certified copy of the deed, however, which was made to Bryant Landers in that suit is in the record. The deed, however, which was made to Bryant Landers in that suit is in the record; the deed book in which it was recorded being only partially burned. The deed contains the following provisions: "Whereas, in the action of Bryant Landers, Dock Landers, Jacob Landers, Thomas W. Dodson, A. J. Dodson and Luther Dodson, Plaintiffs, against I. W. Landers, Isaac Landers, Sidney Landers, Patsy Moore (late Landers and her husband, Hozy Moore), Nahala Hunt (late Landers and husband R. N. Hunt), Laney Motley (formerly Landers), Elizabeth Motley (late Landers and her husband, E. C. Motley), Martha Kuykendol (late Dodson and husband Hardin Kuykendol), Isaac Dodson [balance of defendants' names written on the margin and was burned off], then pending in the Allen circuit court, an order was entered at the May term, 1887, directing F. G. Harlan, the master commissioner of said court, to execute a deed of conveyance to said Bryant Landers during his natural life with remainder to the heirs of John Landers, excluding Jacob Landers, in the event Bryant Landers died without heirs of his body, now, therefore: This indenture, made and entered into this 6th day of May, 1887, between the above named plaintiffs and defendants, by F. G. Harlan, commissioner of the said court, of the first part, and Bryant Landers of the second part, witnesseth, that for and in consideration of the premises, the parties of the first part, by F. G. Harlan, as commissioner aforesaid, by this writing do convey to said party of the second part during his natural life with remainder to the heirs of John Landers, Decd. excluding Jacob Landers in the event of said Bryant's death without children of his body, the following described property, to wit: [Here follows description of property and other provisions not necessary to be set out.]"

The deed shows that it was examined and approved in open court on the 7th day of May, 1887, by D. R. Carr, judge. The certificate of the circuit clerk on the deed shows that it was acknowledged by F. G. Harlan, commissioner, and was examined by the court, approved, confirmed, and so indorsed by the judge, and ordered to be transmitted, duly certified, to the clerk of the Allen circuit court for record, which was accordingly done. The certificate of the circuit clerk is dated May 10, 1887. Following the certificate of the circuit clerk is the certificate of the clerk of the county court to the effect that the deed in question was produced to him in his office on May 10, 1887, certified for record, and that the same, together with the certificate, had been recorded in his office. In addition to this evidence, Judge B. W. Bradburn testified that he had been a practicing attorney for 30 years or more.

He began the practice of law in Scottsville, Ky., in 1878. In 1886 or 1887 Bryant Landers and his brother, Doc Landers, and other brothers and sisters and their children, instituted a suit in the Allen circuit court for the construction of the will of their father, Isaac Landers, and their brother John Landers, and for a division of the land devised by the said Isaac Landers under his will. This suit was brought by Judge I. H. Goodnight of Franklin, Ky., and John M. Wilkins of Bowling Green, Ky., for Bryant Landers and the other plaintiffs. The judge who presided over the Allen circuit court at that time was Preston H. Leslie. When he testified, Goodnight, Wilkins, and Leslie were all dead. Bradburn was appointed guardian ad litem or attorney for nonresident defendants; possibly both. He examined the petition, and remembered distinctly that the suit was brought for a construction of the will of Isaac Landers and of John Landers. Judge P. H. Leslie was then the presiding judge, and rendered a judgment in which he determined that by the will of Isaac Landers his sons took one-sixth each in the land of their father, subject to the life estate of their mother. The court further adjudged that John Landers took a one-sixth interest in said lands, and that, under the will of John Landers, Bryant Landers took a defeasible fee, and that his interest in the John Landers estate in case Bryant Landers died without issue passed to his brothers and sisters and the descendants of those who died, except Jacob Landers and his descendants. In accordance with said judgment, commissioners were appointed to divide the lands of Isaac Landers into six shares or parcels. John Landers having died prior to the time of the division, the court directed the master commissioner to convey the one-sixth allotted to the estate of John Landers to Bryant Landers during his life, provided he died without bodily heirs, and then to his brothers and sisters and their descendants, except Jacob Landers and his descendants. In conformity to the judgment of the court the land was so deeded by the master commissioner. This judgment was never set aside or appealed from. After the judgment was so prepared, it was either read over to him in his presence or read by him. He remembered that the judgment was entered, and that the commissioners who divided the land filed their report. The report was confirmed, and the master commissioner directed to make deeds of conveyance according to said judgment. The deeds were so made and approved by the judge of said court. The deeds were certified to the clerk's office for record. The clerk recorded the same, and the deed filed with plaintiffs' reply is a correct copy of the original deed made by the master commissioner under the direction of the court. On cross-examination Judge Bradburn stated he was attorney of record for the plaintiffs in this case. Upon referring to the deed, he stated he was mis-

taken in stating that Leslie was the presiding judge, because it appeared from the deed that D. R. Carr was the presiding judge. He could not remember who the sheriff was at the time, or who the commissioner was. He could name but two of the three commissioners who divided the land. Did not remember what kind of pleadings he filed as attorney for nonresident or guardian ad litem, but supposed they were the usual kind of pleadings which would be filed by a young attorney in such a case. He also stated his practice had been large in the years subsequent to the suit in question, and nothing had occurred in the meantime to recall the suit, or to impress it on his mind.

W. H. Justice, the clerk of the Allen county court, testified that the copy of the deed above referred to was a correct copy of the original deed of record in his office; that the greater part of the records in the Allen county court were destroyed by the fire in 1892, but this particular deed was intact, with the exception of one or two words on the margin of the page of the deed book which had been charred, but this condition was not sufficient to render the deed unintelligible.

Judge D. R. Carr, who is quite old, testified that he was the presiding judge of the Allen circuit court at the time it is claimed that the action for the construction of John Landers' will was pending. He had no recollection of said suit.

[2] It will be observed that the deed in question is not only regular in all respects, but, after setting out the parties to the action, recites that an order was entered at the May term, 1887, directing F. G. Harlan, the master commissioner of the court, to execute a deed of conveyance to Bryant Landers during his natural life, with remainder to the heirs of John Landers, excluding Jacob Landers, in the event Bryant Landers died without heirs of his body. Thus the deed itself shows that it was made pursuant to the foregoing order. The Allen circuit court being a court of general jurisdiction, every presumption in favor of its jurisdiction will be indulged. There being the aforesaid order, directing not only what land should be conveyed to Bryant Landers, but how the land should be conveyed, it will be presumed that the court had before it the question of the construction of John Landers' will, and that the order was predicated on the will as construed by the court, rather than that the order was entered without the question of construction being before the court. While it is true that Judge Bradburn was mistaken in believing that P. H. Leslie was presiding over the court at the time of the pendency of the action, instead of D. R. Carr, and there are other matters about which his memory is at fault, he testified unequivocally to the fact that the construction of John Landers' will was involved in that action. Considering the deed itself in connection with the testimony

of Judge Bradburn, and the further fact that Bryant Landers himself accepted the deed and put it to record and held the land under it for a number of years, we conclude that, in the absence of evidence to the contrary, the evidence is sufficient to show that in the action in question the construction of John Landers' will was involved, and that a judgment was entered adjudging that Bryant Landers take under the will of John Landers only a defeasible fee.

[3] Bryant Landers being a party to that action, and there being a judgment construing the will of John Landers, and that judgment never having been set aside or reversed, it is *res judicata*, and conclusive upon Nealie Landers, the devisee of Bryant Landers.

[4] The next question to be determined is: Is Nealie Landers, the widow of Bryant Landers, entitled to dower in the land in question? It is the well-settled rule in Kentucky that, where the husband owns a defeasible fee in land, the widow on his death is entitled to dower. *Rice v. Rice*, 133 Ky. 406, 118 S. W. 270. Counsel for plaintiffs recognize this rule, but insist that as Nealie Landers claimed the absolute ownership of the tract in controversy under and by virtue of her husband's will, and continued to do so for a period of two years, her election to take under the will precludes her from asserting dower in the tract in controversy.

[5] It is true that under our statutes and decisions the widow of a testator is not entitled to her dower and distributable share of her husband's estate where she has failed to renounce the provisions of his will within 12 months from the time of its probate. Kentucky Statutes, § 1404; *Bayes, etc., v. Howes, etc.*, 113 Ky. 465, 68 S. W. 449, 24 Ky. Law Rep. 281; *Morgan et al. v. Christian et al.*, 142 Ky. 14, 133 S. W. 982. The reason for the statute and the rule is that the positions of devisee and doweress are absolutely inconsistent. Subject to the exceptions in the statute, she must take either what the husband devises, or what the law gives her. Having elected to take under the will, she cannot thereafter assert a claim for dower.

[6] Manifestly the statute and the decisions based thereon apply only to property which may be the subject of a devise. Bryant Landers having only a defeasible fee in the property in question, his authority ended at his death. No heir of his could inherit any interest therein, and no creditor of his could subject the property. Nor could he dispose of it by will. As a defeasible fee is not a proper subject for disposition by will, it cannot be said that the widow in asserting dower therein is claiming in opposition to the will. We therefore conclude that her election to take under her husband's will did not preclude her from asserting dower in the tract in controversy.

[7] The next question to be determined is

whether or not plaintiffs may recover damages from the estate of Bryant Landers for the timber cut and removed by him from the 170 acres of land devised to him by John Landers, and in which he owned only a defeasible fee. Our statute on the subject does not cover a defeasible fee so recourse must be had to the common law. In 2 Blackstone, p. 282, we find the following: "Let us next see who are liable to be punished for committing waste. And by the feudal law, feuds being originally granted for life only, we find that the rule was general for all vassals or feudatories. 'Si vassalus feudum dissipaverit, aut insigni detrimento deterius fecerit, privabitur.' But in our ancient common law the rule was by no means large; for not only he that was seised of an estate of inheritance might do as he pleased with it, but also waste was not punishable in any tenant save only in three persons, guardian in chivalry, tenant in dower, and tenant by the curtesy, and not in tenant for life or years; and the reason of the diversity was that the estate of the three former was created by the act of the law itself, which therefore gave remedy against them, but tenant for life or for years came in by the demise and lease of the owner of the fee, and therefore he might have provided against the committing of waste by his lessee, and, if he did not, it was his own default. But in favor of the owners of the inheritance the statutes of Marlbridge (St. 52 Hen. III, c. 23). and of Gloucester (St. 6 Edw. I, c. 5) provided that the writ of waste shall not only lie against tenants by the law of England (or curtesy) and those in dower, but against any farmer or other that holds in any manner for life or years. So that for above five hundred years past all tenants merely for life, or for any less estate, have been punishable or liable to be impeached for waste, both voluntary and permissive, unless their lease be made, as sometimes they are, without impeachment of waste, *absque impetitione vasti*; that is, with a provision or protection that no man shall impetere, or sue him for waste, committed. But tenant in tail after possibility of issue extinct is not impeachable for waste; because his estate was at its creation an estate of inheritance, and so not within the statutes. Neither does an action of waste lie for the debtor against tenant by statute, recognizance, or elegit, because against them the debtor may set off the damages in account; but it seems reasonable that it should lie for the reversioner, expectant on the determination of the debtor's own estate, or of those estates derived from the debtor."

[8] The proprietor of a qualified or base fee has the same rights and privileges over his estate till the contingency upon which it is limited occurs as if he were tenant in fee simple. *Walsingham's Case*, Plowd. 557—*Chitty*. In *Weed v. Woods*, 71 N. H. 581, 53 Atl. 1024, it was held that, where a deed reserves to a grantor a certain portion of the

premises so long as a religious association may want it, the estate retained is a qualified or determinable fee; and during its continuance the grantor and his successors in title, while they retain possession, have all the rights of tenants in fee simple. Mr. Washburn in his treatise on Real Property (4th Ed.) vol. 1, p. 89, § 86, in speaking of the incidents of a determinable fee, says: "So long as the estate in fee remains the owner in possession has all the rights in respect to it which he would have if tenant in fee simple, unless it be so limited that there is properly a reversionary right in another—something more than a possibility of reverter belonging to a third person—when, perhaps, chancery might interpose to prevent waste of the premises." In *Gannon v. Peterson*, 193 Ill. 372, 55 L. R. A. 701, 62 N. E. 210, it was held that the opening of mines and the mining of coal by the owner of a determinable fee in property of which the coal constituted the chief value was not such waste as could be enjoined by the owners of the expectancy, who claimed under an executory devise—at least where it is not made to appear that the contingency which would determine the fee was reasonably certain to happen. In discussing the question the court said: "The authorities are uniform as to the definition, duration, and extent of a base or determinable fee. They are agreed that it is a fee-simple estate, not absolute, but qualified. Upon the death of the donee, his widow has dower, although the contingency may have happened that defeats the estate, and that within the general acceptance and meaning of the term the person seised of such an estate is not chargeable with waste."

[8] The only exception to this rule is that equity will sometimes restrain equitable waste. Equitable waste is defined by Mr. Justice Story to consist of "such acts as at law would not be esteemed to be waste under the circumstances of the case, but which, in the view of a court of equity, are so esteemed from their manifest injury to the inheritance, although they are not inconsistent with the legal rights of the party committing them." 2 Story, Eq. Jur. § 915. The same author further says: "In all such cases the party is deemed guilty of a wanton and unconscientious abuse of his rights, ruinous to the interests of other parties." Lord Chancellor Campbell, in *Turner v. Wright*, 6 Jur. N. S. 809, 29 L. J. Ch. N. S. 598, defines equitable waste to be "that which a prudent man would not do with his own property." Even if an action for damages would lie for equitable waste, a question not decided, there is nothing in the record before us to show that Bryant Landers was guilty of such waste. It does not appear that he was guilty of a wanton and unconscientious abuse of his rights, or that he did that which a prudent man would not do with his own property. We

therefore conclude that the action for waste was properly dismissed.

The judgment in the case of *J. E. Landers, etc., v. Nealle Landers, etc.*, is affirmed. The judgment in the case of *Elizabeth Motley, etc., v. L. D. Landers, etc.*, is affirmed, both on the original and cross appeals.

HIGGINS v. SHIELDS et al.

(Court of Appeals of Kentucky. Dec. 18, 1912.)

1. RECEIVERS (§ 105*)—DUTY AS TO RENTING—NEGLIGENCE—LIABILITY.

A receiver in renting and collecting rents must exercise such care as may reasonably be expected of an ordinarily prudent person under the circumstances, and, failing by negligence to collect rents he should have collected, is liable therefor.

[Ed. Note.—For other cases, see *Receivers*, Cent. Dig. §§ 192-194; Dec. Dig. § 105.*]

2. APPEAL AND ERROR (§ 1009*)—REVIEW—QUESTIONS OF FACT.

In reviewing questions of fact, considerable weight is given to the judgment of the chancellor.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3970-3978; Dec. Dig. § 1009.*]

3. RECEIVERS (§ 101*)—INTEREST ON FUNDS.

A receiver having used the fund or commingled it with his own funds is chargeable with interest.

[Ed. Note.—For other cases, see *Receivers*, Cent. Dig. § 189; Dec. Dig. § 101.*]

4. RECEIVERS (§ 196*)—COMPENSATION—NEGLIGENCE AND MISCONDUCT.

A receiver negligent or guilty of misconduct, may, if the circumstances warrant it, be denied any compensation for services.

[Ed. Note.—For other cases, see *Receivers*, Cent. Dig. §§ 387, 389-391; Dec. Dig. § 196.*]

Appeal from Circuit Court, Campbell County.

Proceeding by John Shields, Jr., and others, against Matthias Higgins. From an adverse judgment, Higgins appeals. Affirmed.

Samuel C. Bailey, of Newport, for appellant. Samuel E. Anderson and Barbour & Bassman, all of Newport, for appellees.

HOBSON, C. J. Matthias Higgins as receiver of the Campbell circuit court by an order of that court was placed in charge of certain real estate in Newport belonging to the Shields' estate in January, 1904. He failed to make any report as receiver, and in February, 1911, this proceeding was instituted against him by certain of the parties in interest who charged in their petition that he had collected and had in his hands rents amounting to something over \$2,500. Upon their motion, he was ordered to settle his accounts, and, pursuant to this order, he filed a report of his accounts as receiver showing that he had collected rents to the amount of \$983.90, and that there was a balance in his hands of \$24.58. Numerous exceptions were filed to this report by the parties in

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

interest, and the court referred the case to a special commissioner to take proof and report. He reported that there was a balance in the hands of the receiver of \$701.98. The receiver excepted to the report, but his exceptions were overruled by the court. The report was confirmed and judgment entered against him for the amount. He appeals.

[1, 2] The appeal brings up practically simple questions of fact. It involves the renting for seven years of a number of pieces of property in Newport. It was the duty of the receiver in discharging his trust to exercise such care in renting the property and collecting the rents as might reasonably be expected of an ordinarily prudent person under the circumstances. If he failed by negligence to collect rents he should have collected, he is liable therefor. It was his duty to keep an account of what he collected and what he paid out, and it was also his duty under section 402, Ky. St., to file a report at each regular term of the court showing what he had collected and the amount remaining in his hands. For seven years he made no report. When he came before the special commissioner, he produced a book in which he testified that he had kept the account, and there was evidence tending to show that the account in this book was not kept contemporaneously with the transactions. The book is not before us on the appeal, and there is no copy of it in the transcript. We give considerable weight to the judgment of the chancellor on questions of fact, and, under all the circumstances shown, we do not think we should disturb his judgment. It is complained by the receiver that three small credits were not given him for which he produced receipts. On the other hand, he was not charged with some rents which the plaintiffs insisted that he should be charged with. He had received from his predecessor \$360, and this sum he had placed to his own personal credit in bank and appears to have used it. While the proof is not clear as to the rent money, the proof would indicate that he also used this money in his own personal matters, and did not keep it separate. He was charged no interest on the fund. He claims that he was not allowed commissions, but, in view of the way he transacted the business and the fact that he was charged no interest on the fund, we do not see that he has any cause of complaint.

[3, 4] Interest will be allowed against a receiver where he has used the fund himself or commingled it with his own funds (23 Am. & Eng. Encyc. of Law, 1100; *Hinckley v. Railroad Co.*, 100 U. S. 153, 25 L. Ed. 591), and, where he has been guilty of negligence or misconduct, the court, if the circumstances warrant it, may deny him any compensation for his services (22 Am. & Eng. Encyc. of Law, 1105, and cases cited).

Judgment affirmed.

LOVELY et al. v. KENTUCKY UNION CO.
(Court of Appeals of Kentucky. Dec. 12, 1912.)

TRESPASS (§ 67*)—UNAUTHORIZED CUTTING OF TIMBER—OWNERSHIP OF LAND—EVIDENCE.

In an action to recover damages for timber alleged to have been cut and removed from land owned by the plaintiffs, the evidence held sufficient to go to the jury on the issue of the plaintiffs' title to such lands.

[Ed. Note.—For other cases, see *Trespass*, Cent. Dig. § 150; Dec. Dig. § 67.*]

Appeal from Circuit Court, Breathitt County.

Action by Delilah Lovely and others against the Kentucky Union Company. From a judgment for defendant, plaintiffs appeal. Reversed, with directions to award new trial.

Byrd & Howard and T. T. Cope, all of Jackson, for appellants. W. B. Dixon, of Louisville, and O. H. Pollard, of Jackson, for appellee.

CARROLL, J. This suit was brought by the appellants as plaintiffs against the appellee as defendant to recover damages for timber alleged to have been cut and removed by appellee from land owned by appellants. The petition described a boundary of land from which the timber was cut, and the title to this land was put in issue by the appellee; it claiming to be the owner of it. The case went to trial before a jury, and upon the conclusion of the evidence for the plaintiffs the court directed a verdict for the defendant, and this appeal is prosecuted to obtain a reversal of the judgment entered on the verdict.

There are no maps, plats, or surveys in the record, and this makes it exceedingly difficult to arrive at a satisfactory conclusion as to the merits of the controversy. The appellants did not exhibit with their evidence any deeds or patents but relied upon a possessory title, and it is the contention of appellee that they failed to show such possession as would entitle them to recover. As we have concluded to order a new trial in the case, it is neither necessary nor proper that we should comment on the character or quantity of the evidence except to say that, in our opinion, there was sufficient to take the case to the jury.

It appears from the evidence for appellants that Thomas Hagins, Delilah Lovely's father, died about 1852, and there is evidence to the effect that he owned or claimed to own a large body of land on Quick Sand creek in Breathitt county. After his death his land was divided among his children, one of whom was the appellant, Delilah Lovely, who, at the time of her father's death, was a mere child. There is some testimony in her behalf conducing to show that soon after her father's death she married, and that she and her husband settled on the land al-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

lotted to her in the division of her father's estate, and that the land so allotted included all or a part of the land in controversy, and that after she married she lived on this land for 25 or 30 years, and afterwards rented it to tenants who occupied it.

John Hagins, a brother of appellant, testifies that his father had been in possession of the land in controversy for many years and up to the time of his death, and that after his death, and when the land was partitioned between the heirs, he assisted in marking the boundary of the land allotted to appellants, and that this land embraced the land from which the timber sued for in this action was cut and removed. He also testified to other facts tending to show a right of recovery in appellants, and we think the evidence of this witness was sufficient to at least make out such a case for appellants as, in the absence of countervailing evidence, entitled them to go to the jury.

It is said, however, by counsel for appellees, that the evidence of this witness, which was in the form of a deposition, was not read on the trial. The record shows that objection was made to the reading of the deposition of Hagins, and that the objection was overruled, with an admonition by the court to the jury to disregard some statements made by the witness, and the deposition appears in the transcript of the evidence, which was approved and certified according to law.

We take the liberty of suggesting, if there is another trial of the case, that before it is had the land in controversy be surveyed, and that such other surveys be made and accessible title papers be filed as will enable the court hearing the case to form a more satisfactory opinion as to the rights of the parties than can be obtained from the record in its present condition.

The judgment is reversed, with directions to award the plaintiffs a new trial.

CORBIN BANKING CO. v. BRYANT.

(Court of Appeals of Kentucky. Dec. 12, 1912.)

1. BANKS AND BANKING (§ 154*)—DEPOSITS—ACTION TO RECOVER—EVIDENCE—SUFFICIENCY.

In an action to recover a deposit in a bank, evidence held sufficient to support the finding that the deposit was made.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 502-512, 514-533; Dec. Dig. § 154.*]

2. LIMITATION OF ACTIONS (§ 66*)—ACCRUAL OF ACTIONS—DEMAND.

No cause of action for the recovery of a bank deposit arises until demand and refusal, and consequently the statute of limitations does not begin to run against a depositor until refusal of payment on demand; this being so though the bank failed to credit the depositor with a deposit in his passbook—that failure

not impairing the right of the depositor to payment.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 353-375; Dec. Dig. § 66.*]

Appeal from Circuit Court, Whitley County.

Action by Lon Rogers, as assignee of the Corbin Banking Company, against J. F. Bryant, who counterclaimed. From a judgment for defendant on his counterclaim, plaintiff appeals. Affirmed.

Stephens & Steely, of Williamsburg, for appellant. Tye & Siler, of Williamsburg, for appellee.

LASSING, J. The Corbin Banking Company commenced business in the city of Corbin in the year 1902, and continued its corporate existence until some time in January, 1910, when, in winding up its affairs, it transferred its banking building and good will to the Whitley National Bank, and its assets, in the way of notes, accounts, etc., to one Lon Rogers, who undertook the collection of these notes and accounts, and assumed the payment of the bank's outstanding obligations. Among the claims which passed to Rogers was one against Dr. J. F. Bryant for rent of offices in the banking building for nine months at \$5 per month. Upon presentation, the doctor declined to pay same, upon the ground that the bank was indebted to him. This action on the part of the doctor resulted in the filing of a suit in the Whitley quarterly court by Rogers against him for \$45. Shortly thereafter Bryant instituted suit in the circuit court against Rogers, in which he sought to recover \$414.34, claiming that this amount was due him on account of a deposit of \$389.34 which he had made with the bank, and for which he had been given no credit, and \$25, alleged to have been charged to his account without right. The trial in the quarterly court resulted in a verdict in favor of Rogers. This was appealed to the circuit court, and the two cases were consolidated and tried together. The jury found in favor of the doctor on his claim for \$389.34, and in favor of Rogers on his claim for \$45, and the court entered judgment in accordance with this finding. Rogers appeals, and seeks a reversal upon three grounds: First, that the court erred in instructing the jury; second, that the verdict is not sustained by the evidence, and is flagrantly against the weight of the evidence; and, third, that the plea of limitation interposed by Rogers to the claim of the doctor for \$389.34 should have been sustained.

[1] This claim for \$389.34 arose in the following manner: Appellee alleges that he made a deposit in the bank for this amount and received from the cashier of the bank a duplicate deposit slip; and he produced this slip, the genuineness of which was not

contested by appellant. The passbook of appellee shows that he never received credit on his account for this amount. Appellant explains the issuance of this duplicate deposit ticket and the failure of the bank to give appellee credit on his account for this amount in this way: The cashier of the bank testifies that on the day upon which this duplicate deposit ticket was issued appellee came to the bank and borrowed \$400, executed a note therefor, and that this \$389.34 represented the net proceeds of said note, after deducting therefrom the discount at 8 per cent. for four months; that the deposit slip was entered on the file at the time the transaction was had, but that during the day, and before the books were made up, appellee returned to the bank and notified the cashier that he did not need the \$400, as the business transaction in which he contemplated using it had fallen through, and requested that the note be returned to him. He states that this was done, and that the deposit slip, which had been placed on file, was torn up and destroyed by him, and on that account no entry whatever was made of the matter, either on the books of the bank, or upon appellee's passbook. Appellee showed that the cashier of the bank had never, on any other occasion, conducted a business transaction for the bank in the way in which, he says, he did this with appellee. Appellee's book had been balanced several times while he was doing business with the bank; and he made no claim, when it was so balanced, that the showing made by the bank was not correct. It is argued from this that, as no complaint was made until after he was sued for the rent, it is apparent that this claim is the result of an afterthought. And it is insisted that this position is strengthened by the further fact that about the time the bank was going out of business, and, in fact, just before it ceased to do business, appellee paid an overdraft to the bank for something like \$200, thus practically admitting that at that time he had no thought that the bank was indebted to him.

There would be much force in this line of argument, if the evidence supported the contention upon which it is based. We find that upon this point appellee testified as follows: "About January 3, 1910, I think it was—the bank was then going out of business—Mr. Bishop came and says, 'You have overdrawn your account over \$200,' and I says, 'No, I don't think I have,' and he says: 'You are; and Mr. Rogers is going to take charge of the bank, and I have been nice to you, and we have always gotten along, and I want you to fix it.' And he insisted that I give him a check. I said, 'You have not made up my passbook properly,' and he still insisted that I give him a check; and he says: 'We will make up your passbook, and if it is not right we will pay you.' And under that condi-

tion I gave him a check for \$200 on some funds my wife had in the bank."

Although the cashier testified, this statement of appellee, to the effect that at that time he was claiming there was an error in his account, was not contradicted. With the record in this state, it was the province of the jury to determine the rights of the parties. The instructions given by the court presented the issue in a way in which it could not have been misunderstood by the jury. It was not a difficult question; and the verdict, as returned by the jury, clearly shows that they understood the questions at issue. There was really no denial, on the part of the doctor, that he had occupied offices in the banking building for nine months, or that he was to pay \$5 per month therefor; and the jury accordingly awarded to appellant this amount. There was abundant evidence to support this finding; and no just complaint can be made of the jury because it accepted the evidence of appellee upon this point as true, rather than that of appellant and his witnesses.

Other minor errors are complained of, in brief, by counsel for appellant; but upon the whole case we are satisfied that he was given a fair opportunity to present his case to the jury; and, no reversible error being presented in the record, the judgment must be affirmed, unless the plea of the statute of limitation is well taken.

[2] The duplicate deposit slip, issued to appellee by the cashier of the bank, showed that appellee had deposited in bank, on that date, the sum of \$389.34. It is insisted for appellant that, as more than five years had elapsed from the date of the deposit before demand was made by appellee for this money, his right to recover is barred. This position is not sound. No cause of action arises for the recovery of a demand bank deposit until after it has been demanded and its payment has been refused. *Clark v. Farmers' National Bank*, 124 Ky. 563, 90 S. W. 674, 30 Ky. Law Rep. 738. The statute of limitation does not, therefore, begin to run against a depositor in favor of a bank until he makes demand for the money and payment is refused. *Koelzer v. First National Bank*, 125 Wis. 595, 104 N. W. 838, 2 L. R. A. (N. S.) 571, 110 Am. St. Rep. 870, 4 Ann. Cas. 1144; *Howell v. Adams*, 68 N. Y. 314. Appellee never, at any time until the suit was instituted, made demand for this money; and he states the reason why he failed to do so was that, by an oversight, he did not notice that he had not been given credit for this money on his bank book. In response to this explanation, it is insisted for appellant that appellee is not entitled to recover, because he should have discovered that, by fraud or mistake, the bank had failed to give him credit for this money before the lapse of more than five years from the date upon which he was entitled to have credit for same. This contention of appellant need not be considered, for the reason that

there is no effort to recover on the ground of fraud or mistake. It was not necessary, so far as appellee was concerned, that the record of the deposit of this money should have been entered upon his passbook. Evidently he did not have his passbook with him at the time the deposit was made, and the duplicate deposit slip served to take the place of the entry in his passbook. The failure of the bank to enter this deposit upon its books or the passbook is no defense for its refusal to pay upon demand, if, in fact, the deposit was made by appellee in said bank; and of this question the jury was the judge. The plea of the statute of limitation presenting no defense to the cause of action, the trial court properly sustained a demurrer thereto.

Upon a consideration of the whole case, we find no ground for disturbing the judgment of the lower court; and it is therefore affirmed.

RIEGER et al. v. SCHULTE & EICHER et al.

(Court of Appeals of Kentucky. Dec. 10, 1912.)

1. MECHANICS' LIENS (§ 164*)—LIEN OF SUB-CONTRACTORS AND MATERIALMEN.

Subcontractors and materialmen have a lien on a building to the extent of the amount for which the contractor was entitled to a lien.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. §§ 285-296; Dec. Dig. § 164.*]

2. MECHANICS' LIENS (§ 115*)—LIEN OF SUB-CONTRACTORS AND MATERIALMEN—PAYMENT TO CONTRACTOR.

Subcontractors and materialmen are entitled to a lien for the work done and material furnished in the erection of a building, although the owner thereof has paid the full contract price; the only limitation upon such right being that the sum total of their claims shall not exceed the contract price.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. §§ 150-159; Dec. Dig. § 115.*]

3. JURY (§ 13*)—RIGHT TO TRIAL BY JURY—LEGAL OR EQUITABLE ACTION — CONSTITUTIONAL PROVISIONS.

Const. § 7, which declares that the right of trial by jury shall remain inviolate, does not guarantee the right to a jury trial of issues of fact arising in every equity case, but in those cases in which, at common law, a litigant was entitled to a jury trial; and in cases of purely equitable cognizance a trial by jury is not a matter of right, but is within the discretion of the chancellor.

[Ed. Note.—For other cases, see *Jury*, Cent. Dig. §§ 35-83; Dec. Dig. § 13.*]

4. JURY (§ 14*)—RIGHT TO TRIAL BY JURY—LEGAL OR EQUITABLE ACTIONS—ENFORCEMENT OF MECHANICS' LIENS.

Civ. Code Prac. § 12, provides that in an equitable action, properly commenced as such, either party may on motion have the case transferred for the trial of any issue concerning which he is entitled to a jury trial. Ky. St. §§ 2471, 2472, 2473, provide that a proceeding to enforce a mechanics' lien shall be an equitable one conducted as other proceedings in equity in similar cases, except as otherwise provided, and that, after 10 days from the filing of the petition, the clerk shall refer the case to a

commissioner and deliver to him the pleadings and papers in the suit; that the commissioner shall hear all persons claiming liens against the property, with a right to the owner to contest any claim presented, and audit the claims and report the amount to each claimant with the evidence on which each claim is allowed. *Held*, that the purpose of the statute was to provide a speedy method of determining the validity of asserted liens against the property, and that questions as to whether alleged defects were properly chargeable to any of the lien claimants, and, if so, the extent to which their liens should be abated, were not intended to be tried by jury.

[Ed. Note.—For other cases, see *Jury*, Cent. Dig. §§ 40-60, 66-83; Dec. Dig. § 14.*]

5. APPEAL AND ERROR (§ 1170*)—REVIEW—ERROR AFFECTING A SUBSTANTIAL RIGHT.

In view of Civ. Code Prac. § 756, providing that no judgment shall be reversed for error at the trial not affecting the substantial rights of the appellant, the Court of Appeals, though doubtful as to whether the chancellor erred in not transferring issues for trial by jury, will not direct a reversal if it finds the findings and judgment of the chancellor to be correct.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4032, 4036, 4075, 4098, 4101, 4454, 4540-4545; Dec. Dig. § 1170.*]

6. MECHANICS' LIENS (§ 111*)—LIEN OF SUB-CONTRACTOR — EFFECT OF CLAIM AGAINST CONTRACTOR FOR BREACH.

Subcontractors and materialmen who perform work on a building as required by the specifications, and furnish material to the contractor of the quality called for by the contract, are entitled to liens without regard to the character of work done by the contractor himself or other subcontractors or materialmen; the only limitation upon their right being that the total of all the liens shall not exceed the contract price.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. §§ 144-146; Dec. Dig. § 111.*]

Appeal from Circuit Court, Kenton County, Common Law and Equity Division.

Action by Schulte & Eicher and others against Elizabeth Rieger and others to enforce mechanics' liens. Judgment for plaintiffs, and defendants appeal. Affirmed.

F. J. Hanlon, of Covington, for appellants. Frederick W. Schmitz and M. M. Durrett, both of Covington, and Fred B. Bassman and George Veith, both of Newport, for appellees.

LASSING, J. Elizabeth and Amelia Rieger entered into a contract with Adam Lahner by which he undertook to erect a building for them in Latonia, Ky., according to certain plans and specifications, for \$4,730. He sublet a large part of the work, and bought the material used in the building from various firms and individuals. Lyman Walker, an architect, prepared the plans and specifications and superintended the building. The owners advanced to the contractor money from time to time, as the work progressed, until the building was completed, at which time they had paid to him \$3,031.38. It appears that certain of the subcontractors and materialmen were not

paid. They filed mechanics' and materialmen's liens against the property, and later instituted suits in which they sought to have the property sold and the proceeds applied to the discharge of the debts due them. Shortly thereafter, while these suits were pending, the Rieger sisters filed suit against the contractor in which they sought to recover damages alleged to have been sustained by them by reason of his failure to erect the building according to the plans and specifications under which he contracted to do the work. They set up the particulars in which the building failed to conform to the requirements of the plans and specifications, and sought to set off this claim of unliquidated damages for \$1,643.50 against the liens which the subcontractors and materialmen were asserting against their property, and asked that the suit filed by them be consolidated with those filed by the subcontractors and materialmen, and the issues of fact be transferred to the common-law docket for trial by a jury. These motions were overruled. The answer of appellants to the claims asserted by the subcontractors and materialmen was, in all material respects, the same as the claim set up in their petition for damages against the contractor. Proof of claims was heard before the master, and in due time he reported his findings. In this report he sustained the claim of each of the subcontractors and materialmen. On exceptions to this report, the Rieger sisters again asked that the question of fact raised in the pleadings be submitted to a jury for its determination. This motion was overruled. Upon consideration of the case, on exceptions to the master's report, the court, with some slight changes, found that the report was correct, and subject to these minor errors, which were eliminated, the report was confirmed, and judgment entered, giving to each of the claimants a lien upon the property for the amounts so adjudged to him, and directed it sold in satisfaction thereof. The owners appeal, and seek a reversal upon two grounds. It is insisted for them, first, that they were entitled to a trial by jury of the issue made between them and the subcontractors and materialmen, and that the failure of the court to grant them a jury trial was a violation of that right guaranteed to them by section 7 of the Constitution, and expressly authorized by section 12 of the Code of Practice; and, second, that the finding of the chancellor on the disputed question of fact is not supported by the evidence, and his judgment should be reversed for this reason.

The record shows that there were nine subcontractors and materialmen who asserted claims for liens, amounting in the aggregate to about \$2,070. The owners claim that the contract price of \$4,730 should be abated by the sum of \$1,643. This amount was based upon the following items: Damage suffered because the foundation was built some

12 to 16 inches higher than it should have been, \$1,000; cost of four additional steps necessitated by the higher foundation, \$10; two copings or gratings left out, \$20; extra dirt left out, \$14.70; cementing cellar erroneously left out of contract, \$98.30; defective millwork, stair work, flooring, glass, plumbing, roofing, and electric work damaged, \$500. It will thus be seen that if appellants' contention be sustained in toto, the contractor, if he had been paid nothing, would be entitled to a lien upon the building for \$3,087; this being the contract price, less the amount which appellants claim is due them because of the damage in the construction of the building.

[1] The subcontractors and materialmen have a lien upon the building to the extent of the amount for which the contractor was entitled to a lien. Counsel for appellants seems to recognize this principle as correct, but insists that, inasmuch as the contractor was, during the progress of the work, paid something more than \$3,000. his lien or right to a lien has been canceled; and hence the subcontractors and materialmen are not entitled to liens, although they had not been paid. This is not the law.

[2] The subcontractors and materialmen are entitled to a lien for the work done and material furnished in the erection of a building, although the owner thereof has been paid the full contract price. The only limitation upon the right of the subcontractor and materialman is that the sum total of their claims may not exceed the contract price. If the owner settles with the contractor, and leaves the claim of the subcontractor or materialman unsatisfied, under the plain provision of the statute, he is bound to pay them although the effect of this may be to require him to pay twice for the building. It is no defense to the claim of the subcontractor or materialman, who has complied with the requirements of the statutes and whose work and material are of the standard as to quality and kind called for in the contract, that the owner had paid the contractor. Hence there are really but two questions raised by the pleadings in this case. First, were the defects in the building, set up and relied upon by appellants, such as were properly chargeable to any of the subcontractors and materialmen who were asserting these liens; and, second, if so, to what extent should their liens be abated? These are the questions which counsel for appellants insists should have been submitted to the jury. The lien of a subcontractor or a materialman is a creature of the statute. In the absence of a statute, they have no lien unless there existed some contractual relation between them and the owner of the building.

[3, 4] An examination of the statute creating the lien discloses the fact that provision is made, not only for establishing and perfecting the lien, but also for the method to be pursued in enforcing it. It is an equitable

proceeding, and it is apparent that the Legislature did not intend that the method of procedure, in cases arising under this act, should be the same as those prevailing in ordinary equitable actions. If so, there was no necessity for providing, in detail in the act, for the preparation of the case for trial; but it would have been sufficient to say, after providing for the creation of the lien, that, in the enforcement thereof, the procedure should be the same as in other equitable actions. The very fact that the Legislature provided for a different course is the best evidence that it was not contemplated that the mode of procedure governing ordinary equitable actions should control. If appellants were entitled to have the questions of fact raised by the pleadings determined by a jury, they were likewise entitled to have the witnesses, by whom the claims were either established or refuted, appear in person before the jury; a course which, it is apparent, the Legislature did not contemplate should be pursued, else the act would not have provided that the proof shall be taken before the commissioner. Section 2471, after providing that the action shall be in equity and conducted as other proceedings in equity in similar cases, has the following proviso: "Except as otherwise provided herein." Now this exception clearly has reference to the mode of procedure, for, further along in the act, we find that it provides: "After the expiration of 10 days from the filing of the petition, the clerk shall draw up an order referring the case to the master commissioner of the court and file the same with the petition, and deliver to the commissioner the pleadings and papers of the suit, and make a memorandum thereof in his minute book." This authority on the part of the clerk to refer the case, after the expiration of 10 days, to the master commissioner is not in accord with the practice in ordinary equitable actions. Section 2472 provides that the commissioner, upon receiving his commission, shall at once ascertain the names of the persons who have filed liens with the clerk of the county court against the property sought to be subjected, and shall fix a time and place for hearing proof, showing claims against the property. All persons holding liens against the property, of whatever kind or character, are thereupon required by the commissioner to present same, with the evidence supporting them. The act provides that the owner of the property, or any other person whose interest may be affected by the suit, may contest any claim presented; that is, the master commissioner is expressly authorized to hear proof in support of or against the validity of any claim presented. Section 2473 clothes the commissioner with ample power to bring before him witnesses whose testimony may be desired. The act further provides that, after having heard proof on all claims, it shall be the duty of the commissioner to audit the accounts and make a report, show-

ing the amount due each claimant, the nature and character of the respective claims, and the evidence upon which each claim was allowed. The evident aim of the Legislature, in the enactment of this statute, was to provide a speedy method of determining the validity of claims asserted as liens against the property; and it is apparent that, in directing the evidence to be taken before the commissioner, the questions of fact arising out of disputes over the claims thus presented were not intended to be tried by a jury.

Appellants' counsel, being of opinion that he was entitled to a jury trial, did not at first appear before the master at his sittings, and introduced no evidence contesting the validity of the claims presented, nor was any exception filed to the report of the commissioner. The chancellor, upon perceiving the error into which counsel for appellants had fallen and with the evident purpose of doing full justice between the parties, set aside the confirmation of the report on claims and again referred the case to the master, giving each side a limited time in which to present their evidence. This order was entered over the objection of the claimants. In obedience to this order, the commissioner heard such evidence as was offered, and again reported his finding. There is no complaint that any evidence which appellant had bearing upon the question was not presented to the commissioner, or that they were not given ample opportunity to present their defense to these claims when the evidence was being taken by the commissioner. Their sole complaint is that they were entitled to have the value of this evidence weighed and determined by a jury, rather than by the chancellor. There is no merit in this contention. The Constitution does not guarantee to a litigant the right to a trial by jury of issues of fact arising in every equity case, but in those cases to which, at common law, he was entitled to a jury trial. This being an equitable action and properly commenced as such, the right of appellants to have the issues of fact raised in the pleadings transferred to the common-law docket for trial is controlled by section 12 of the Code of Practice, which provides: "In an equitable action, properly commenced as such, either party may, by motion, have the case transferred to the ordinary docket for the trial of any issue concerning which he is entitled to a jury trial. * * *" This raises the question, Are the issues which appellants sought to have tried by a jury such as, under the facts of this case, they were entitled to have submitted to a jury?

In *Carder v. Weisenburgh*, 95 Ky. 135, 23 S. W. 964, 15 Ky. Law Rep. 497, the distinction between that class of cases in which, under the constitutional guaranty, a litigant is entitled to have a jury trial, and that class in which he is not, is clearly drawn. It is there said: "If the equitable right

depends upon the decision of legal issues, concerning which the party is entitled to a jury trial, the case, on motion, should be transferred as a matter of right to the common-law docket to be tried by jury. The court has not right to refuse such transfer unless the case be purely equitable, in which case it has discretionary power as to the transfer, and may, at its discretion, obtain the advisory aid of a jury in coming to a correct conclusion upon any question of fact involved in the issues to be tried. The Constitution of this state guarantees the right of jury trial. This means a trial according to the course of the common law, and secures the right only in cases where a jury trial was customarily used at common law; but in cases of purely equitable cognizance a trial by jury is not a matter of right, but it is addressed to the discretion of the chancellor." In the later case of *Cominger v. Louisville Trust Co.*, 128 Ky. 697, 108 S. W. 950, 111 S. W. 681, 33 Ky. Law Rep. 53, 884, 129 Am. St. Rep. 322, this court disposed of a similar question in the following language: "The Constitution secures to a litigant the right of trial by jury only in cases where such right existed at common law." This case being purely equitable and the proceeding being unknown to the common law, the chancellor did not err in declining to entertain the motion to transfer the action to the common-law docket for a trial of the issues of fact by a jury.

[5] But, if we were less certain of our position upon this point, we would not direct a reversal of the case if, upon examination, we find the findings and judgment of the chancellor to be correct; for, under section 756 of the Code of Practice, no judgment should be reversed for error occurring during the progress of the trial that did not affect the substantial rights of the complaining litigant.

[6] This brings us to the second ground relied upon for reversal, to wit, that the judgment of the chancellor is not supported by the evidence. Appellants, in the preparation of the case for trial and in the introduction of evidence, based their defense upon the idea that these claimants were not entitled to recover because the contractor himself could not do so. It was not seriously contended that the particular defects in the building, set up and relied upon as supporting the claim for damages, are properly chargeable to the accounts of these particular claimants, and indeed the evidence shows that they are not. Appellants may have a just ground of complaint as to the contractor and others who furnished material or labor, but with those questions these litigants have no concern. The sole question for determination in this case is, Was the material furnished by these claimants of the quality called for in the contract, and did the work,

performed on the buildings by the subcontractors, conform to the requirements of the specifications? If so, they were entitled to a judgment for the respective amounts claimed by them, without regard to the character of work done by the contractor himself or other subcontractors or materialmen. As stated, the only limitation upon their right is that the sum total of all the liens shall not exceed the contract price.

We have examined the record with care and find that, by a decided preponderance, the evidence supports the finding of the chancellor in every particular as to the claim of each of the appellees.

The judgment is therefore affirmed.

STEWART'S ADM'R v. OHIO RIVER CONTRACT CO. et al.

(Court of Appeals of Kentucky. Dec. 12, 1912.)

1. MASTER AND SERVANT (§ 278*)—INJURIES TO SERVANT—SAFE PLACE TO WORK—DANGEROUS APPLIANCE.

In an action for the death of an employé, drowned while rowing a boat across a river, evidence held to show that the employer was not guilty of a breach of duty in failing to warn and instruct the servant, who was a skillful oarsman, of a dangerous appliance.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 954-972, 977; Dec. Dig. § 278.*]

2. MASTER AND SERVANT (§ 279*)—INJURIES TO SERVANT—NEGLIGENCE OF FOREMAN—NEEDLESS PLACING OF SERVANT IN PLACE OF DANGER.

In an action for the death by drowning of an employé while rowing a boat across a river, evidence held to show no failure of a foreman seated in the bow of the boat to exercise care to prevent the deceased from needlessly and recklessly placing himself in a place of danger.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 973-975, 978-980; Dec. Dig. § 279.*]

Appeal from Circuit Court, Estill County.

Action by Elisha Stewart's administrator against the Ohio River Contract Company and others. From a judgment for defendants on a directed verdict, plaintiff appeals. Affirmed.

W. H. Lilly, of Irvine, Grant E. Lilly, of Richmond, and Clarence Miller, of Irvine, for appellant. Jouett & Jouett, of Winchester, and Riddell & Friend, of Irvine, for appellees.

CARROLL, J. [1,2] This action was brought by the administrator of Elisha Stewart against the Ohio River Contract Company, R. J. Armstrong, Robert Vandevender, and George Koehler to recover damages for the death of Stewart, who was drowned while attempting to cross the Kentucky river in a small boat. At the time of his death Stewart was between 15 and 16 years old, and was engaged as a day laborer by the contract company. Vandevender was the

foreman of the company in charge of a crew of men, of whom Stewart was one, and Koehler was the owner of a small gasoline boat with which the boat Stewart was rowing at the time of his death came in contact. The petition averred that his death was caused by the joint and several negligence of the defendants. The action was dismissed as to R. J. Armstrong, and the record shows that a general demurrer of George Koehler to the petition was sustained, with leave to amend, and thereupon the plaintiff filed an amended petition against Koehler, in which he averred, in substance, that, when the boat being rowed by Stewart came near the gasoline boat owned and operated by Koehler, the stern wheel of the gasoline boat was in rapid motion, but Koehler did not by himself or employes keep a lookout to avoid injury to other craft using the river, although he knew that Stewart and his companions were in a small rowboat, and that this boat was close to his, and that he negligently and carelessly failed to keep a lookout for the boat rowed by Stewart, and negligently failed to stop the wheel of his boat in time to avert the danger to the small boat, which was struck by the revolving wheel. To this amended petition a demurrer was also sustained, and, declining to plead further, the petition against Koehler as amended was dismissed, to which exception was taken. After this the case went to trial before a jury, and upon conclusion of the evidence for the plaintiff the trial court directed the jury to return a verdict in favor of the defendants, Vandevender and the contract company. The correctness of this ruling is the only question before us on this appeal, as we do not understand counsel to complain of the ruling sustaining the demurrer.

The evidence shows that Stewart at the time of his death was an intelligent and able-bodied boy, between 15 and 16 years old, and that he had been working for the contract company as a laborer, getting a man's wages, for about four months before his death. The contract company was engaged in building a dam for the United States government on the Kentucky river, and on the day of the accident Stewart and other employes of the contract company, under Vandevender as foreman, were working on the south side of the river. At noon on this day several of the laborers, together with Stewart and Vandevender, crossed the river in a "John boat" for the purpose of eating dinner on the north side of the river. While they were engaged in eating dinner a fleet of logs, about 300 feet long and some 40 feet wide, passed through the lock, and was stationed in the river opposite the point where the men were eating their dinner, and between them and the place at which they worked on the south side. After they had finished their dinner, they started back to

their work, and to avoid lifting the "John boat," which was attached to the north bank, across the fleet of logs, they concluded to row it down the north bank to the end of the fleet and thence across the river. At this time the fleet was stationary in the river, one end of it being attached by a cable to the lock through which it had just passed, and at the other end of the fleet, around which the laborers had to go in their little boat, there was a stern wheel gasoline boat in charge of Koehler. For the purpose of giving the laborers space in which to row their boat down the north bank to the end of the fleet, Koehler, with his gasoline boat, which was attached to the end of the fleet, pushed it out from the north bank, and Stewart and his companions started in the "John boat" down the river, between the north bank and fleet, for the purpose of crossing the river when they reached the end of the fleet. Stewart was seated near the center of the boat, rowing it, with his back to the prow, and facing Curt Edwards. Jim Stewart was in the prow of the boat, and Robert Vandevender was in the stern.

All of the witnesses testify that Stewart rowed down alongside the fleet, and, when a few feet below the gasoline boat, turned to go across the river. After the turn was made, or when it was being made, the revolving stern wheel of the gasoline boat struck the "John boat," causing it to sink. When this occurred, Stewart and some of the others jumped into the river, and Stewart was drowned. The uncontradicted evidence shows that Stewart was used to the river, in the habit of rowing this boat, and was fully competent to manage it. It is also shown, without contradiction, that when he undertook to row the boat across the river, as he had been accustomed to doing, he did so without instruction or direction from Vandevender or any one else. There is really no conflict in the evidence except on one point; and that is, whether the wheel of the gasoline boat was suddenly started when the "John boat" came close to it on its way across the river, or whether it was revolving from the time the "John boat" started. One witness testified that when the "John boat" made a turn to go across the river the wheel of the gasoline boat, which had been stopped, suddenly commenced revolving, and its revolutions drew the "John boat" under the wheel. Other witnesses say that the wheel of the gasoline boat was revolving before the "John boat" made the turn to go across the river.

There is no evidence whatever tending to show that Koehler was guilty of any negligence, and it is clear that the pleadings did not state any cause of action against him; but counsel contend that the case should be reversed as to the contract company and Vandevender, upon the ground that the contract company, as principal, and Vandevender,

der, as its agent and foreman in control of Stewart, were guilty of negligence in permitting Stewart to row the boat, and in failing to warn him of the danger of going too close to the wheel of the gasoline boat, or coming in contact with it.

As before stated, Stewart in rowing the boat had his back to the gasoline boat, while Vandevender, who was seated in the stern of the "John boat," had his face to it, but there is no evidence that Vandevender directed or requested Stewart in any manner or form to row the boat, or gave him any instructions whatever as to the manner in which it should be rowed, although he did tell the men to get ready to go across the river when the dinner hour was over. All the evidence shows that Stewart was an experienced oarsman, accustomed to the river and to the use of this boat, and that he had been in the habit of rowing the men across the river in it, and so the course of the boat and the rowing of it was left entirely to Stewart. Nor is there any evidence that Vandevender knew anything about rowing a boat or had any experience with oars. If, as some of the witnesses say, the wheel of the gasoline boat was stopped when Stewart made the turn to go across the river, and it was suddenly started just as the "John boat" went by it, it can easily be understood how the accident happened, as Stewart, although he may have known he was going too close to the wheel if the wheel had been revolving, did not anticipate any danger from it when it was stopped. On the other hand, if, as some of the witnesses say, the wheel of the gasoline boat was revolving all the time, the accident can only be accounted for upon the theory that Stewart carelessly pulled the "John boat" too close to the revolving wheel. But, whichever one of these theories is correct, no blame can be attached to Vandevender or the contract company. Stewart was the sole responsible agent for the accident, which was due to the fact that Stewart let the boat get too close to the wheel of the gasoline boat.

Nor can it be said that Vandevender, who had no experience in rowing boats, was negligent in failing to instruct or warn Stewart, who was a skillful oarsman. Stewart must have known the exact location of the gasoline boat and the danger that would follow if he rowed too close to it, so that there was no occasion why Vandevender should have given Stewart any instruction or warning.

It is said, however, that the position of Vandevender in the boat gave him a clear and full view of the situation, and that it was his duty, if he saw, or by the exercise of ordinary care could have seen, Stewart about to go into a place of danger, to give him warning. The trouble with this theory is that there is no evidence that Vandevender or any one else knew, or could have known by the exercise of ordinary care, that Stewart was going to put himself in danger until

it was too late to avert it by warning. The whole thing happened in a moment, and from a careful reading of the record we cannot escape the conclusion that the accident was due entirely to Stewart's thoughtless or careless act in rowing too close to the wheel of the gasoline boat, unless it be, as suggested, that the wheel was suddenly started.

We find no evidence in the record that would justify us in applying the well-established rule governing the duty of a master to warn and instruct the servant, or to exercise care to prevent him from needlessly or recklessly placing himself in a place of danger.

The judgment is affirmed.

CITY OF LATONIA v. CARROLL SAME v. HANNIGAN.

(Court of Appeals of Kentucky. Dec. 11, 1912.)
MUNICIPAL CORPORATIONS (§ 513*)—SPECIAL ASSESSMENTS—INJUNCTION—DECREE.

Though defendant, in an action to enjoin collection of street improvement assessments of plaintiffs' lots, to the extent that they exceeded half the value of the lots, made no defense, except as to the value of the lots, after its demurrer to the petition was overruled, yet it being necessary for plaintiffs to plead and prove facts entitling them to the injunction, and their petition and the proof showing the lots to be corner lots, and that they were assessed for improvements on each street, the decree, disregarding the rule that such a lot may be assessed for half its value for the improvement of each street, and that, too, independent of the charge for sewer, and adjudging invalid the total of the assessments in excess of half the value of the lots, was necessarily erroneous, entitling defendant to a reversal.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1188-1206; Dec. Dig. § 513.*]

Appeal from Circuit Court, Kenton County, Criminal, Common Law, and Equity Division.

Actions for injunction, one by Levina Carroll, the other by O. Hannigan, against the City of Latonia. Judgment for plaintiffs; defendant appeals. Reversed, with directions.

John E. Shepard and Stephens L. Blakely, both of Covington, for appellant. Leslie T. Applegate, Lewis L. Manson, and Walker C. Hall, all of Covington, for appellees.

CLAY, C. The questions involved in these two cases are the same, and will be considered in one opinion. During the time that the city of Latonia was a fourth-class city, appellees were the owners of corner lots located in that city. The city of Latonia made certain street, sidewalk, and sewer improvements abutting on and lying along the lots in question, and assessed and levied the cost thereof against the lots, as provided by the charter of cities of the fourth class. Appellees brought these actions against the city of Latonia to restrain it from collecting the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

assessments in excess of one-half the value of the lots. It was charged in the petition that the charter of the city of Latonia limited the amount that might be assessed against each lot to one-half the value thereof, and that it had unlawfully assessed their respective lots in an amount in excess of the sum allowed to be assessed by the statute. A demurrer to each of the petitions was overruled. The city of Latonia then filed an answer in each case, denying the value of the lots as set forth in the petition, and denying that it could assess against said lots only the amounts which the respective petitions alleged could be assessed. Proof was heard as to the value of the lots. On final hearing the chancellor adjudged all the improvement taxes in excess of one-half the value of the lots as fixed by him to be void. Since the filing of these actions, the city of Latonia has been annexed to and become a part of the city of Covington. To reverse the judgments entered by the chancellor, the city of Covington has prosecuted these appeals in the name of the city of Latonia.

The precise questions herein involved were before this court in the cases of *City of Covington v. Schlosser*, 141 Ky. 838, 133 S. W. 987, *City of Covington v. Mason*, and *City of Covington v. Conners*, 141 Ky. 838, 133 S. W. 987, where it was held that under a statute providing that the city had the right "to improve the streets or other public ways at the cost of the owners of ground fronting or abutting thereon," and that the cost of such improvements should not exceed one-half the value of the ground after the improvements were made, excluding the value of buildings thereon, the city had authority to assess against the owner of a corner lot an amount not exceeding one-half of the value for the improvement of each street, independently of the charge against the other street. It was also held that sewers are not included in the words "streets or public ways," and that the limitation upon the cost of improving streets or public ways, contained in the charter of cities of the fourth class, did not include sewer construction, and that for this an additional charge could be made under the statute, authorizing an assessment not exceeding one dollar per front foot of the abutting property for the construction of sewers. The only difference between the above cases and the cases under consideration is that in the former the attorney for the city made the affirmative defense that the lots were corner lots, and that the city had authority to assess said lots in an amount not exceeding one-half of its value for the improvement of each street, independently of the charge against the other street, and independently of the charge for sewers; whereas, in the cases at bar, the only defense made by the city, after its demurrers were overruled, was as to the value of the lots owned by appellees.

It is insisted by counsel for appellees that as no affirmative defense was made by the city, based on the fact that the lots were corner lots, and that as the petitions were good in part, and therefore not demurrable, there should be no reversal of these cases. As appellees, however, are seeking to enjoin the collection of improvement taxes on the ground that they were void, it was necessary for them to plead and prove facts showing that they were entitled to the relief asked. Their petitions show that the lots in question are corner lots, and that these lots were assessed for street and sewer improvements on each street. The same facts are shown by the proof. The chancellor, disregarding the rule that the city had the right to assess against the owner of a corner lot an amount not exceeding one-half of its value for the improvement of each street, independently of the charge against the other street, and independently of the charge for sewer construction, adjudged that all the improvement and sewer construction assessments in excess of one-half the value of each of the lots was void. That being true, it follows that the judgments are necessarily erroneous, and, being erroneous, they should be reversed at the cost of appellees.

Wherefore the judgment in each case is reversed with directions to proceed in conformity with this opinion.

GRANT v. SEELYE.

(Court of Appeals of Kentucky. Dec. 12, 1912.)

LANDLORD AND TENANT (§ 164*)—DANGEROUS OR DEFECTIVE CONDITION OF PREMISES—INJURY TO TENANT.

On leased premises there was a privy consisting of an excavation in the ground, and a frame structure above, resting at each of the four corners on a foundation, with a space of from four to five inches in front between the floor of the structure and the ground, showing only when the door was open; the excavation being about twelve inches from the front. While plaintiff, a child of nine, was running or walking toward it, her foot slipped and went into the opening between the floor and the ground, and she was thereby injured. *Held* that, as the condition of the building was not dangerous or defective, it imposed no liability on the landlord.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 630-641; Dec. Dig. § 164.*]

Appeal from Circuit Court, Jefferson County, Common Pleas Branch, Second Division. Action by Hazel Seelye, by her next friend, W. S. Seelye, against Robert Grant. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

O'Neal & O'Neal, of Louisville, for appellant. Lee Hamilton, W. A. Heck, and Strother & Hamilton, all of Louisville, for appellee.

CLAY, C. The plaintiff, Hazel Seelye, an infant nine years of age, suing by her father

and next friend, W. S. Seelye, brought this action against the defendant, Robert W. Grant, to recover damages for personal injuries alleged to have resulted from an accident occasioned by the dangerous and defective condition of the premises which the defendant had leased to W. S. Seelye. It was charged in the petition that W. S. Seelye had rented the premises in question under a contract and agreement on the part of defendant to maintain the house and premises in good and proper repair; that he permitted the privy or vault in the back yard of said premises to be and remain in a dangerous and defective condition, and failed to repair same according to the contract of rent; that this condition was unknown to plaintiff, but known to the defendant, or could have been known to him by the exercise of ordinary care; that while going to the privy or vault plaintiff's left foot went into the unguarded and defective vault, thereby causing her to fall and sustain permanent injuries to her leg. By amended petition plaintiff set up the dangerous, defective, and unsafe condition of the vault, and pleaded that at the time of the rental of the premises the defendant concealed the dangerous and defective condition thereof from the lessee, W. S. Seelye, and the plaintiff, Hazel Seelye. Defendant's demurrer to both the original and the amended petitions being overruled, he filed an answer in four paragraphs. The first paragraph denied the allegations of the petition. In the second and third paragraphs he set up the original lease between him and W. S. Seelye, and pleaded that, under the lease, the lessee himself agreed to keep and return the premises in good order and repair, and that the lessor was not to be liable for any damage done, or injury resulting from any failure on his part to keep the premises in repair. In the fourth paragraph he pleaded contributory negligence on the part of the plaintiff. Trial was had, and the jury returned a verdict in favor of plaintiff for \$300. Judgment was entered accordingly, and the defendant appeals.

The evidence shows that plaintiff's parents were tenants in a small piece of property owned by defendant, located on Almstead avenue, Louisville, Ky. They held said premises under a lease dated July 2, 1910. In the rear of the premises is a privy or vault. The privy consists of a vault built in the ground, and a frame structure above. The frame structure rests at each of the four corners on a foundation. It was built this way to prevent the floor from rotting, and for purposes of ventilation. In front there is a space of from four to five inches between the floor of the frame structure and the ground. The vault itself is set back about twelve inches from the front. When the door is closed, there is no opening between the floor and the ground, and, when it is opened, there is an opening of four or five inches be-

neath the floor, and within the space covered by the door. The evidence for the plaintiff is to the effect that on September 10, 1910, she started to the privy. She was either running or walking at the time, and, when she reached the privy, her foot slipped and went into the opening between the floor of the privy and the ground. Her leg was badly injured, and she was compelled to remain in the house for eight months on account of the injury. While plaintiff's father and mother both testify that plaintiff's leg had never been injured before, the affidavits filed on motion for new trial, based on the ground of newly discovered evidence, show that she was paralyzed to a certain extent in the limb which it is claimed was injured. Plaintiff's father says that they moved into the premises on Saturday afternoon. On Sunday the defendant came around to collect his rent. He then called defendant's attention to the opening between the floor of the privy and the ground, stating at the time that he had small children, and he was afraid they would be injured unless the opening was closed. Defendant agreed that, if plaintiff's father and mother would remain on the premises, he would remedy the defect.

Counsel for defendant earnestly insist that the trial court erred in refusing to give a peremptory in defendant's favor. Passing the question of defendant's liability, even if a dangerous condition of the premises had been shown, we conclude that the condition of the privy was not such as to impose any liability on the defendant for the injuries which plaintiff received. The opening complained of was only four or five inches high. The opening was entirely lateral. The only way that one could get his foot or leg into the opening was to slip, as plaintiff did, or get into a reclining position and place his foot into the opening. Manifestly, if there had been a lattice in front of the privy, such as may be frequently found on premises like those in question, and there had been a gate, the bottom of which was four or five inches from the ground, and plaintiff had slipped and fallen under this gate, it could not be pretended that the condition of the gate was dangerous, and that the landlord should respond in damages. Indeed, such openings may be frequently found under steps, chicken coops, fences, porches, benches, and the like. They are not dangerous in the sense that injury to persons using the premises may be reasonably anticipated to result from their presence. The only danger is when one falls, as did the plaintiff. In this sense nearly every structure is dangerous. If the sill of the privy in question had extended to the ground, it would have been equally dangerous under the same circumstances, for, having slipped and fallen, the plaintiff's leg would have struck solid material instead of the opening, and might have been broken instead of bruised. Being of the opinion that the condition

of the privy was not dangerous or defective, and the defendant is not liable in any event for the injuries which plaintiff received, we conclude that the court erred in failing to direct a verdict in favor of the defendant.

Judgment reversed and cause remanded for proceedings consistent with this opinion.

CAMPBELL et al. v. OFFUTT.

(Court of Appeals of Kentucky. Dec. 18, 1912.)

1. BILLS AND NOTES (§ 106*)—CONSIDERATION—LEGALITY.

Defendant agreed to pay a share of the expenses of a candidate for an office in consideration of his appointment by such candidate, if elected, to the position of revenue agent. He then agreed with an attorney to employ him as attorney, if appointed, and pay him a percentage of the fees of his office, in consideration of his payment of one-half of such election expenses. The attorney procured the money to carry out the agreement by executing a note. Such attorney having died, plaintiffs paid the note, and received a note from defendant for the amount accompanied by an agreement that, if appointed, he would employ them as his attorneys, in which case the note would be void. The candidate was not elected, and plaintiff was not appointed. *Held* that, the consideration for the note being an illegal agreement, the note was unenforceable.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 219, 225-232; Dec. Dig. § 106.*]

2. CONTRACTS (§ 124*)—ILLEGALITY OF OBJECT—PUBLIC POLICY.

An agreement by a person seeking appointment to a public office to employ certain persons as his attorneys, if appointed, and pay them a part of the income of the office, is contrary to public policy, and void.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 576-585; Dec. Dig. § 124.*]

3. BILLS AND NOTES (§ 106*)—CONSIDERATION—LEGALITY.

Where attorneys advanced money to a candidate for office, and received his note accompanied by an agreement that the note would be void if, upon his appointment, he employed such attorneys, and they subsequently advanced another amount upon the same consideration and for the same purpose, the note given for this second amount was void, although not mentioned in the collateral agreement.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 219, 225-232; Dec. Dig. § 106.*]

Appeal from Circuit Court, Jefferson County, Common Pleas Branch, Third Division.

Action by W. G. Campbell and another against R. L. Offutt. Judgment for defendant and plaintiffs appeal. Affirmed.

Hardin H. Herr, of Louisville, for appellants. Edwards, Ogden & Peak, of Louisville, for appellees.

HOBSON, C. J. [1] Appellants W. G. Campbell and A. B. Young, who are attorneys practicing law as partners, brought this suit against R. L. Offutt to recover on two notes executed by him to them, one dated January 30, 1907, and due one year after

date, the other for \$66.66, dated May 27, 1907, and due eight months after date. Offutt pleaded and showed in substance that the notes originated in this way: In 1906 Henry Bosworth was a candidate for the Democratic nomination for Auditor of the state of Kentucky at a primary election held on November 3d of that year. Offutt entered into an agreement with Bosworth, through H. B. Hines, by which he was to pay a certain portion of Bosworth's expenses in the primary election, in consideration of which Bosworth was to appoint him as revenue agent of the state of Kentucky for the state at large. After this agreement was made with Bosworth, Offutt made an agreement with Dan P. Young, an attorney living in Louisville, by which Young was to pay one-half of the amount he was required to pay Bosworth, and Young was to be employed by him as his attorney and receive a certain per cent. of the fees of the office for his services. The amount which he was called on to pay Bosworth was fixed at \$400, and Young, with another person, executed his note to the Western National Bank of Louisville for \$200, and paid the money to Offutt, and he paid it with \$200 of his own money to Bosworth's agent. After this had been done, and while the note for \$200 was still in the bank, Young died. After his death, R. L. Offutt made an arrangement by which in consideration of their paying the note in bank he agreed to employ appellants as his attorneys as revenue agent just as he agreed to employ Dan P. Young. They paid the \$200, and he executed the note for \$200 to them. Subsequently it was learned that his share of the campaign expenses was \$133.33 more than he had paid, and he thereupon paid one half of this, appellants paying the other half and he executing to them a second note for \$66.66 on May 27, 1907. On the same day the note for \$200 was executed a written contract was made between the parties setting out their agreement.

The note and the contract are as follows:

"Jan. 30, 1907. One year after date I promise to pay to the order of Campbell and Young, attys, two hundred and no/100 dollars for value. R. L. Offutt."

"Louisville, Ky., Jan. 30, 1907. This agreement made and entered into this day and date above written witnesseth for and in consideration of a note made on the above date, signed, executed and delivered by R. L. Offutt to Campbell and Young, attorneys, the said firm of Campbell and Young bind themselves to pay the amount of \$200.00 to the Western National Bank in satisfaction of a note held by said bank against Daniel P. Young and R. L. Offutt. It is admitted by the parties to this agreement that the execution of said note was to meet the assessment against said R. L. Offutt in the Democratic primary held Nov. 3, 1906, whereby

the said R. L. Offutt is to receive on Jan. 1, 1908, the appointment of revenue agent for the state at large, and contingent upon said appointment agrees and binds himself to employ as his attorney the said firm of Campbell and Young; the said attorneys agree to do the legal work connected with said office and to accept as payment in full for their services an amount equal to one half of the income of said office. In the event this said appointment with the subsequent employment of Campbell and Young is made, the note held by Campbell and Young against R. L. Offutt and of the above written date shall be null and void. Campbell & Young, per Campbell. R. L. Offutt."

On these facts the case was submitted to a jury who found for the defendant, and the plaintiffs appeal.

We deem it necessary to consider only one question in the case, and that is whether the contract is one which the law will enforce. It is insisted for appellant that he makes out a prima facie case when he produces his notes, and shows that they were given for money paid, and that he is not affected by the illegal contract between R. L. Offutt and Daniel Young if the contract was illegal. But this case does not come within the principle relied on. The note of January 30th and the written contract of the same date must be treated as one transaction, and the two papers must be read together.

[2] The written contract discloses the fact that Offutt, in consideration of the payment of certain money by Campbell and Young, agreed to employ them as his attorneys when appointed state revenue agent, they to do the legal work connected with the office, and to accept as payment in full for their services an amount equal to one-half of the income of the office. Such an agreement is contrary to public policy, and is void. If Offutt had secured the office and had refused to employ Campbell and Young as his attorneys to attend to the business of the office and they had sued him upon this contract, no court would have enforced it, or given damages for its breach. The law requires of a public officer that he shall use his best skill and judgment for the protection of the public interest, and an agreement before his appointment to divide the fees of the office with an attorney, if sustained might seriously cripple the public service; for in this event the public would secure the services of an attorney in some instances who would offer the best terms to the official to secure the employment. It is not material here that Offutt failed to get the office by reason of the fact that Bosworth was not elected Auditor, and it is not material that the attorneys would in fact have discharged their duties faithfully and well. The agreement, being one which the law will not tolerate, cannot be enforced. The consideration of

the transaction is the illegal agreement, and, as the notes rest upon an illegal transaction, they cannot be enforced.

[3] No sound distinction can be drawn between the \$200 note and the smaller note for \$66.66; for, although the written contract is silent as to that note, it is manifest from all the facts that it was executed upon the same consideration as the larger note and for the same purpose; the deficiency in the amounts paid to cover the expenses having been discovered after the contract of January 30th was drawn up. If appellants had simply paid the money without taking the notes of Offutt for it, they could not recover it. The fact that they took his notes for it adds nothing to their rights; for the notes are without consideration. *Love v. Buckner*, 4 Bibb, 506; *Davis v. Hull*, 1 Litt. 9; *Price v. Caperton*, 1 Duv. 208; *Field v. Chipley*, 79 Ky. 260, 42 Am. Rep. 215; *Lucas v. Allen*, 80 Ky. 681; *Schneider v. Local Union*, 116 La. 270, 40 South. 700, 5 L. R. A. (N. S.) 891 and note, 114 Am. St. Rep. 549, 7 Ann. Cas. 868; *Livingston v. Page*, 74 Vt. 356, 52 Atl. 965, 59 L. R. A. 336, 93 Am. St. Rep. 901, and cases cited.

Appellants rely on *Commonwealth v. Sheeran*, 145 Ky. 361, 140 S. W. 568, 37 L. R. A. (N. S.) 289; but that case involved only the question whether such a contract was a sale of the office or a deputation thereof within the purview of section 8740, Ky. St., and in that case we said that the question of the validity of the contract was not before us.

We therefore conclude that the circuit court should have instructed the jury peremptorily to find for the defendant. This conclusion makes it unnecessary for us to consider other questions made in the case.

Judgment affirmed.

TYSON'S ADM'X v. ILLINOIS CENT. R. CO. et al.

(Court of Appeals of Kentucky. Dec. 12, 1912.)

JUDGMENT (§ 829*)—FEDERAL COURT—CONCLUSIVENESS IN STATE COURT—ERRONEOUS JUDGMENT.

A judgment by the United States Circuit Court, from which no writ of error has been taken, rendered in that court after it has sustained its own jurisdiction and refused to remand the action, cannot be collaterally attacked in a state court as one absolutely void for want of jurisdiction, and, until reversed by a proper proceeding in the United States Supreme Court, is binding upon the parties, and must be given force when set up in an action in the state court.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1510-1515; Dec. Dig. § 829.*]

Appeal from Circuit Court, Muhlenberg County.

Action by Joseph Tyson's administratrix against the Illinois Central Railroad Company and others. Judgment for defendants, and plaintiff appeals. Affirmed.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Index

B. F. Procter, of Bowling Green, Belcher & Sparks, and T. O. Jones, all of Greenville, and Paul C. Gaines, of Frankfort, for appellant. Trabue, Doolan & Cox, of Louisville, C. L. Sivley, of Chicago, Ill., and Taylor & Eaves, of Greenville, for appellees.

NUNN, J. In February, 1906, appellant filed her petition in the Muhlenberg circuit court against the Illinois Central Railroad Company and one or two individuals who were residents of that county asking damages for the negligent killing of her husband. She alleged, in substance, that her husband's death was caused by the joint and concurrent negligence of all the defendants. At the March, 1906, appearance term of the court, the railroad company filed its petition for a removal of the case to the United States Circuit Court for the Western District of Kentucky. The petition charged, in effect, that the joinder of the resident defendants with the railroad company was for the purpose only of depriving the railroad of its right to remove the case from the state circuit court to the United States Circuit Court, and was therefore fraudulent. The state court overruled the motion to remove, proceeded to try the case, and in September, 1906, rendered a judgment in favor of the plaintiff therein for \$5,000. An appeal was prosecuted from that judgment to this court which in March, 1908, reversed the lower court, and remanded the case for another trial. During the prosecution of the case in the state circuit court and the Court of Appeals, the railroad company had a transcript of the record in the Muhlenberg circuit court, as it existed at the time its motion to remove was overruled, made and filed in the United States Circuit Court on November 27, 1905, and had the case docketed in that court. It appears that the case was continued from term to term in the United States Circuit Court by consent, but without consent as to jurisdiction, as appears of record, until November 28, 1908, at which time it appears that the case was tried before a jury which rendered a verdict against the plaintiff, appellant herein, and her action was dismissed. On a return of the case by this court to the state circuit court, the railroad company filed an amended answer in which it pleaded the proceedings and orders made in the case in the United States Circuit Court, and that judgment was rendered in its favor in that court, and had made and filed with its amended answer a copy of the judgment and all the proceedings in that court. Appellant filed a demurrer to this amended answer, which the court overruled, and, as she failed to plead further, dismissed her action.

Appellant admits that the judgment rendered by the United States Circuit Court,

it being pleaded in the amended answer, defeats her right of recovery in this action, provided the case of *C. & O. Ry. Co. v. McCabe*, Administratrix, 213 U. S. 207, 29 Sup. Ct. 430, 53 L. Ed. 765, is followed. She contends, however, that it has been modified by the following cases: *Enos v. Kentucky Distilleries & Warehouse Co.*, 189 Fed. 342, 111 C. C. A. 74; *Stevenson v. Illinois Central R. R. Co.* (C. C.) 192 Fed. 956; *Illinois Central R. R. Co. v. Sheegog*, 215 U. S. 308, 30 Sup. Ct. 101, 54 L. Ed. 208; *Chicago, B. & Q. Ry. Co. v. Willard*, 220 U. S. 419, 31 Sup. Ct. 460, 55 L. Ed. 521. She contends that these cases modified the *McCabe* Case, supra, with respect to the force and validity of the orders of a United States Circuit Court made in a case of which it has no jurisdiction. This is apparently true to some extent, but the following part of the opinion in the case of *C. & O. Ry. Co. v. McCabe*, etc., supra, has not been overruled nor modified by any of the opinions referred to, to wit: "Conceding that, except for the principle of comity, the state court may decide the question of jurisdiction for itself, in the absence of an injunction from the federal court in aid of its own jurisdiction, or a writ of certiorari requiring the state court to surrender the record under the act of 1875 [Act March 3, 1875, c. 137, § 7, 18 Stat. 472 (U. S. Comp. St. 1901, p. 512)], is the state court obliged to give effect to the judgment of the United States Circuit Court, from which no writ of error is taken, and rendered in the federal court after it has sustained its own jurisdiction and refuse to remand the action? In view of the fact that the question is a federal one, and that the state court is given no right to review or control the exercise of the jurisdiction of the federal court, we think that such federal judgment cannot be ignored in the state court as one absolutely void for want of jurisdiction, and that such judgment, until reversed by a proper proceeding in this court, is binding upon the parties, and must be given force when set up in an action." According to the authorities cited by appellant, if a writ of error had been prosecuted from the judgment of the United States Circuit Court to the Supreme Court of the United States, the judgment by that court would certainly have been reversed, but none was taken. Conceding that the United States Circuit Court acted erroneously, that it had no jurisdiction, it was within its province to consider whether or not it had jurisdiction, and it assumed it and rendered the judgment referred to. The only question is: Can this court ignore that judgment? The opinion in the case of *C. & O. Ry. Co. v. McCabe*, etc., supra, expressly says we cannot.

For these reasons, the judgment of the lower court is affirmed.

BARGER v. BARGER (two cases).

(Court of Appeals of Kentucky. Dec. 13, 1912.)

1. APPEAL AND ERROR (§ 1109*)—DEATH OF PARTY—OPERATION—TIME OF TAKING EFFECT.

A judgment relates to the date of submission, so that the death of either party after submission is not material.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4405-4409; Dec. Dig. § 1109.*]

2. APPEAL AND ERROR (§ 781*)—DISMISSAL—WANT OF ACTUAL CONTROVERSY.

Where a wife appealed from the judgment in her action for divorce and alimony, and pending her appeal the defendant died, leaving the widow entitled to rights in his estate on renouncing the provisions of the will, so that only a moot question is presented, the appeal would be dismissed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3122; Dec. Dig. § 781.*]

3. DIVORCE (§ 194*)—APPEAL—COSTS.

Where a wife, appealing from the judgment in her action for divorce, has no means of her own, the costs of the appeal, upon dismissal after the husband's death, must be paid out of his estate.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. § 580; Dec. Dig. § 194.*]

Appeal from Circuit Court, Clay County.

Action for divorce and alimony by Elizabeth Barger against A. J. Barger. From the judgment, plaintiff appeals. Dismissed.

A. D. Hall, of Manchester, for appellant. O'Rear & Williams, of Frankfort, for appellee.

HOBSON, C. J. These appeals were submitted September 27th. Since then appellee, A. J. Barger, has died. A motion is now entered to dismiss the appeals to which appellant, Elizabeth Barger, objects.

[1] The rule is that the judgment relates to the date of submission, and that the death of either party after submission is not material.

[2] But this is an action by the wife for divorce and alimony. The defendant having died, only a moot question is now presented. The widow is entitled to the rights in the estate of her deceased husband which the statute confers on her if she renounces his will which she may do as provided by law.

[3] The cost of the appeals must be paid out of the husband's estate, as she has no means of her own.

Appeal dismissed, at the cost of appellee.

McCAIN v. JOINER.

(Court of Appeals of Kentucky. Dec. 12, 1912.)

1. QUIETING TITLE (§ 44*)—ACTIONS—EVIDENCE.

In a suit to quiet title, evidence held insufficient to warrant a finding that the land

which plaintiff claimed was included in a 99-year lease.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. §§ 89-92; Dec. Dig. § 44.*]

2. APPEAL AND ERROR (§ 1009*)—REVIEW—FINDINGS OF FACT—EQUITY CASES.

In a suit to quiet title, findings of fact by the chancellor on conflicting evidence will be deferred to upon appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3970-3978; Dec. Dig. § 1009.*]

Appeal from Circuit Court, Trigg County.

Action by J. W. B. Joiner against John H. McCain. From a judgment for plaintiff, defendant appeals. Affirmed.

W. H. Hooks and Kelly & King, all of Cadiz, for appellant. Max Hanberry, of Cadiz, for appellee.

CLAY, C. Plaintiff, J. W. B. Joiner, brought this action against defendant, John H. McCain, to quiet title to an acre and a half of land lying in the southeastern part of Trigg county. The defendant denied plaintiff's title, and pleaded title in himself. He also asked damages for the cutting of certain timber by plaintiff, and on final hearing the chancellor gave judgment in favor of plaintiff. Defendant appeals.

It appears that plaintiff and defendant own adjoining tracts of land. Between the two tracts is a lane which has been used by plaintiff and defendant and their grantors and the traveling public generally for 35 or 40 years. At one point the lane makes an oblique turn, and the tract of land in controversy lies in the angle thus made. Plaintiff owns several tracts of land which were conveyed to him by his father in 1888. Plaintiff claims title to the tract in controversy both by record and by adverse possession. The deed to him from his father conveys "tract No. 4, containing one acre and a half, more or less, in the southwest corner of tract No. 1." Tract No. 1 adjoins the tract in controversy, which lies on the southwest and between it and the lane. The proof shows that the tract in controversy has been in cultivation and under fence ever since plaintiff acquired title. Prior to that time it was under fence and in cultivation by his father for 25 or 30 years. Defendant claims that the description in the deed to plaintiff from his father is too vague and indefinite to be valid. Whether or not this be true, we deem it unnecessary to decide, for plaintiff himself has had adverse possession of the tract in controversy for more than the statutory period.

[1] Defendant, however, insists that the evidence shows that plaintiff held under a 99-year lease, and that his holding was not, therefore, adverse. Defendant and one other witness say that plaintiff admitted that he held under a lease, while another witness claims to have seen a 99-year lease, but was unable to say that it covered the land in

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

controversy. This lease, it is claimed, was in possession of plaintiff's brother. A subpoena duces tecum was issued for the latter directing him to produce the lease in question. The record is silent as to the result of this investigation. Certain it is that the lease was not produced, and we are not inclined to hold that the existence of the lease was proved, in view of the vague and unsatisfactory evidence on the question, and of the improbability that all the other tracts of land were conveyed by deed, while the tract in controversy, consisting of only an acre and a half, and that of very little value, was leased for a period of 99 years.

[2] It is by no means clear that defendant's deeds cover the land from which it is claimed plaintiff cut certain timber, and there is no evidence that defendant held that portion of the land by adverse possession. The evidence upon this and other questions being conflicting, and such as to leave the mind in doubt, the case is one which makes it peculiarly appropriate that we should follow the conclusion reached by the chancellor. *Byassee v. Evans*, 143 Ky. 415, 186 S. W. 857; *Wathen et al. v. Wathen*, 149 Ky. 504, 149 S. W. 902; *Austin et al. v. National Bank of Scottsville*, 150 Ky. 113, 150 S. W. 8. Judgment affirmed.

BREEDEN v. COMMONWEALTH

(Court of Appeals of Kentucky. Dec. 13, 1912.)

1. CRIMINAL LAW (§ 595*)—CONTINUANCE—MATERIALITY OF EXPECTED EVIDENCE.

In a prosecution for shooting and wounding with intent to kill, evidence expected to be shown by defendant's absent witnesses, to the effect that they saw the person shot at the time of the shooting, and that he either had his hand in his pocket, or was attempting to take it out, when defendant fired, that a few days before the shooting he told them that he was going to kill the defendant on sight, which threat was communicated to defendant, was material.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1323-1327; Dec. Dig. § 595.*]

2. CRIMINAL LAW (§ 600*)—CONTINUANCE—ADMISSIONS TO PREVENT CONTINUANCE.

Cr. Code Prac. § 189, provides that on application for a continuance at the same term at which the indictment is found, for the absence of a material witness, where defendant makes affidavit as to the facts which such witness will prove, the continuance shall be granted, unless the attorney for the commonwealth admits that the facts are true. Defendant, put on trial at the same term at which he was indicted, filed affidavits in proper form for a continuance for absent witnesses, who would testify to material facts, and the commonwealth's attorney refused to admit the truth of the facts offered to be proved. *Held*, that the refusal of a continuance was reversible error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1342-1347, 1604; Dec. Dig. § 600.*]

3. HOMICIDE (§ 310*)—ASSAULT WITH INTENT TO KILL—TRIAL—INSTRUCTIONS ON SHOOTING IN AFFRAY.

In a prosecution under Ky. St. § 1166, for shooting with intent to kill, an instruction on the offense of shooting in sudden affray, defined by Ky. St. § 1242, and which is a degree of the offense of shooting with intent to kill, was proper.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 657-661; Dec. Dig. § 310.*]

4. CRIMINAL LAW (§ 1173*)—TRIAL—INSTRUCTIONS—DEGREE OF OFFENSE.

Under Cr. Code Prac. § 239, which provides that if there be a reasonable doubt of the degree of the offense which defendant has committed he shall only be convicted of the lower degree, the failure to so instruct, when the evidence is calculated to raise such a reasonable doubt, is reversible error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3164-3168; Dec. Dig. § 1173.*]

Appeal from Circuit Court, Whitley County.

John Breeden was convicted of malicious shooting and wounding with intent to kill, and he appeals. Reversed.

Tye & Siler, of Williamsburg, for appellant. James Garnett, Atty. Gen., and O. S. Hogan, Asst. Atty. Gen., for appellee.

CLAY, C. Defendant, John Breeden, shot and wounded Alvis Sharp. He was indicted by the grand jury of Whitley county for the offense of malicious shooting and wounding with intent to kill. He was tried and convicted and given an indeterminate sentence in the penitentiary of from one to five years. From the judgment of conviction, he appeals.

According to the evidence for the commonwealth, Alvis Sharp was going down the street with his hands by his side, when the defendant, Breeden, stepped out from behind a post and fired at him four times. Two of the shots took effect. According to the evidence for defendant, Sharp had threatened to kill the defendant on sight, and these threats had been communicated to the defendant. The defendant did not know Sharp was in Kentucky, and at the time of the shooting was on his way home. While walking down the street, he saw Sharp a few feet away. Sharp had his hand in his pocket and was trying to get it out, and, believing that Sharp intended to kill him, defendant fired at him.

[1, 2] The indictment was returned at the September term, 1911, of the Whitley circuit court. The trial took place at the same term. The defendant filed an affidavit for continuance on account of the absence of several witnesses. The affidavit is in proper form, and shows due diligence. It shows that two or three witnesses, if present, would testify to the fact that they saw Sharp at the time of the shooting, and that he either had his hand in his pocket, or was attempting to get it out, when the defendant fired. It shows that three or four other witnesses would testify to the fact that a few days

before the shooting Sharp told them he was going to kill the defendant on sight, and that they communicated this fact to defendant. Of the materiality of this evidence, there can be no doubt. The court forced the defendant into trial without requiring the commonwealth to admit as true the facts which the affidavit stated the absent witnesses would testify to.

By section 189 of the Criminal Code, it is provided that "when the ground of application for a continuance is the absence of a material witness, and the defendant makes affidavit as to the facts which such witness would prove, the continuance shall be granted, unless the attorney for the commonwealth admit upon the trial that the facts are true." By an amendment to section 189, adopted May 15, 1886 (Acts 1885-86, c. 1145), it was provided that upon such application "the attorney for the commonwealth shall not be compelled, in order to prevent the continuance, to admit the truth of the matter which it is alleged in the affidavit such absent witness or witnesses would prove, but only that such witness or witnesses would, if present, testify as alleged in the affidavit," with a further provision that the commonwealth is permitted to controvert the statements of such affidavits by other evidence, etc. It is further provided that the provisions of the amendment section shall not apply to a motion for continuance, made at the same term at which the indictment in the action is found.

In interpreting the foregoing provisions of the Code, we have frequently held that the commonwealth's attorney will not be entitled to force the defendant into trial at the indictment term without admitting the facts which the defendant's affidavit for continuance shows could be proved by the absent witnesses to be true. *Wiggins v. Commonwealth*, 104 Ky. 765, 47 S. W. 1073, 20 Ky. Law Rep. 908; *Hardesty v. Commonwealth*, 88 Ky. 537, 11 S. W. 589, 11 Ky. Law Rep. 43; *Pace v. Commonwealth*, 89 Ky. 204, 12 S. W. 271, 11 Ky. Law Rep. 407. In this case the commonwealth's attorney refused to do this. The court therefore erred in refusing the defendant a continuance.

[3] The defendant was indicted under section 1166, Kentucky Statutes, for the offense of shooting and wounding another with intent to kill. The court gave an instruction on this offense, and also on the offense of shooting in sudden affray, defined by section 1242, Kentucky Statutes, which is a degree of the offense defined by section 1166. This was proper. *Williams v. Commonwealth*, 102 Ky. 381, 43 S. W. 455, 19 Ky. Law Rep. 1427.

[4] While the court gave a general instruction on reasonable doubt, as required by section 238, Criminal Code, he failed to give the instruction required by section 239, Crim-

inal Code, which is as follows: "If there be a reasonable doubt of the degree of the offense which the defendant has committed, he shall only be convicted of the lower degree."

We have frequently held that, where there is evidence introduced which might be calculated to raise a reasonable doubt of the degree of the guilt of the accused, the jury should be instructed in the language of this section, and the failure to do so is reversible error. *Williams v. Commonwealth*, 80 Ky. 313; *Demaree v. Commonwealth*, 82 S. W. 231, 26 Ky. Law Rep. 507.

In several instances the court erred in rejecting testimony of certain witnesses to the effect that Sharp, a few days before the shooting, stated to them that he would kill the defendant on sight, and that these threats were communicated to the defendant.

For the reasons indicated, the judgment is reversed, and cause remanded for new trial consistent with this opinion.

SHIELDS' ADM'RS v. ROWLAND.

(Court of Appeals of Kentucky. Dec. 10, 1912.)

1. APPEAL AND ERROR (§ 1060*)—PREJUDICIAL ERROR—MISCONDUCT OF COUNSEL.

In an action for assault and battery, where the plaintiff's attorney, over an adverse ruling, persisted in asking questions of several witnesses as to sickness caused plaintiff's wife and baby upon seeing him, the judgment for an amount of damages which may be attributed to sympathy caused thereby will be reversed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4135; Dec. Dig. § 1060.*]

2. WITNESSES (§ 350*)—EXAMINATION—SCOPE—CONVICTION OF OFFENSE.

Though it is proper to ask a defendant in an action for assault and battery if he had been convicted of a felony, he having testified that he had not, further questions as to a charge upon which he had been indicted, tried, and acquitted were improper.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1140-1149; Dec. Dig. § 350.*]

3. DAMAGES (§ 181*)—EVIDENCE—FINANCIAL STANDING—PUNITIVE DAMAGES.

Defendant could properly be examined as to his financial condition, where, under the pleadings, an instruction on punitive damages could have been given, even though the court instructed that no punitive damages were authorized.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 473, 474, 499; Dec. Dig. § 181.*]

4. ASSAULT AND BATTERY (§ 42*)—"PUNITIVE DAMAGES"—EVIDENCE.

In an action for assault and battery, evidence held to require a submission to the jury of the question of punitive damages, which are damages allowed, not as a compensation, but as a punishment for a wrong, willfully and maliciously done.

[Ed. Note.—For other cases, see Assault and Battery, Cent. Dig. § 56; Dec. Dig. § 42.*]

For other definitions, see Words and Phrases, vol. 7, pp. 5851, 5852; vol. 8, p. 7775.]

5. ASSAULT AND BATTERY (§§ 38, 39, 40*)—MEASURE OF DAMAGES.

In an action for assault and battery, plaintiff may recover such a sum as will compen-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

sate him for the mental or physical suffering, or both, which are the proximate result of the injury, and, if the assault was willful, malicious, and unjustified, the jury may also award punitive damages in their discretion, not exceeding in all the sum claimed in the petition.

[Ed. Note.—For other cases, see Assault and Battery, Cent. Dig. §§ 53-55; Dec. Dig. §§ 38, 39, 40.*]

6. ASSAULT AND BATTERY (§ 13*)—INSTRUCTIONS—SUPPORT IN EVIDENCE.

The mere fact that the assaulting party during the fight retreated a few steps before seizing a weapon does not amount to a withdrawal, so as to make the other party guilty of a fresh assault in following him up.

[Ed. Note.—For other cases, see Assault and Battery, Cent. Dig. § 11; Dec. Dig. § 13.*]

7. ASSAULT AND BATTERY (§ 34*)—EVIDENCE—ABUSIVE LANGUAGE.

Though abusive language will not justify an assault, it is admissible in mitigation of punitive damages.

[Ed. Note.—For other cases, see Assault and Battery, Cent. Dig. §§ 47-50; Dec. Dig. § 34.*]

8. ABATEMENT AND REVIVAL (§ 69*)—DEATH OF PARTY—DISMISSAL.

Where, pending appeal, the defendant in an action for damages for assault and battery dies and the case is reversed, the action should be dismissed under Ky. St. § 10, stating what personal injury actions shall survive the death of a party.

[Ed. Note.—For other cases, see Abatement and Revival, Cent. Dig. §§ 349-354; Dec. Dig. § 69.*]

Appeal from Circuit Court, Spencer County.

Action by C. M. Rowland against A. M. Shields. Judgment for plaintiff, and defendant's administrators, defendant having died, appeal. Reversed and dismissed.

John S. Kelley, of Bardstown, and S. K. Baird, of Taylorsville, for appellants. W. H. Fulton and Frank E. Daugherty, both of Bardstown, for appellee.

LASSING, J. C. M. Rowland instituted suit in the Nelson circuit court against Dr. A. M. Shields, in which he sought to recover damages for assault and battery. The case was transferred to the Spencer circuit court, where, upon a trial before a jury, the plaintiff recovered a verdict for \$750. Judgment was entered upon the verdict, and the motion and grounds for new trial was overruled. Thereafter the defendant died, and his personal representatives perfected and prosecute this appeal, and seek to have the judgment set aside upon several grounds, chief of which are, first, misconduct of counsel for appellee during the trial; second, error of the court in admitting incompetent evidence; and, third, error in instructing the jury.

The facts out of which the litigation grew are as follows: Appellee, a blacksmith by trade, was doing a general blacksmith business in Chaplan, in the east end of Nelson county. Shields, the decedent, was a practicing physician in the same town. Appellee had been doing Shields' blacksmith work, and upon a day early in January, 1910, was doing some work for him on a buggy. Dr.

Shields went to the shop and complained of the manner in which it was being done. He and appellee walked out of the shop, under a shed adjoining it, and had some words about the business. They differ as to how the controversy arose. From the testimony of the witnesses, none of whom saw the beginning of the fight, it is not altogether clear how it began. Appellee testifies that, when the doctor complained that the work was not satisfactory to him, he told him, if it was not, to take his work and go elsewhere, that thereupon the doctor struck him in the face, and in this way the altercation commenced. The doctor testified that he said to appellee that one of his horses had been improperly shod, that a crooked shoe had been put on the horse, and that it had lamed him, and thereupon appellee called him a damned liar, and then he struck him. Immediately following this, according to the decided weight of the evidence, appellee knocked the doctor down as many as three times; and, after he had knocked him down the third time, the doctor drew his knife and advanced upon appellee, whereupon appellee seized a pair of bolt tongs and struck at him, but missed him. Appellee thereupon seized a piece of iron, but, for some reason, failed to strike the doctor with the iron, and backed into the office door, inside of which was a horse clipping or other machine, over which both fell. At this time the doctor was cutting at appellee with his knife, but, before any serious damage had been done, bystanders separated them, and the altercation ended. The doctor testified that appellee cut him with a knife upon both of his hands during the altercation. Appellee denies this, and states that he had no knife; and no witness other than the doctor testifies to his having a knife, although two or three of the witnesses testify that following the altercation they saw wounds upon the doctor's hands, which looked like they might have been made by a knife or sharp instrument, and also rents in his clothing, which appeared to have been made by a knife. There is evidence introduced to the effect that the clothing which the doctor exhibited to these witnesses shortly after the difficulty was not the same which he had on at the time of the altercation. The injury to appellee consisted of a gash on the side of the neck, which little more than drew the blood. It was an inconsequential injury. Immediately following this difficulty the suit for damages growing out of the assault was filed.

[1] Upon the trial appellee's counsel attempted by several witnesses to show that following the difficulty appellee went into his house, where his wife, who had shortly theretofore given birth to a baby and was sick in bed, upon seeing her husband and learning of the difficulty, became so nervous and frightened that she became sick and her flow of milk ceased, in consequence of

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

which their young baby did not receive sufficient nourishment, and its growth and general health were greatly retarded and injured. Counsel for appellants strenuously objected to this line of interrogation, and the court sustained the objection; but, in spite of this fact, counsel for appellee proceeded with this line of interrogation until the jury could not have failed to understand that the effect of the injury inflicted by the doctor upon appellee had resulted in making the latter's wife sick, and materially injured the health and retarded the growth of the baby. The injury to appellee was slight; and, as the court did not authorize the jury to award punitive damages, we are unable to understand upon what theory \$750 could have been awarded, unless it was, in a measure, to compensate appellee for the injury which resulted to his wife and baby through the nervous shock received by her when she discovered that her husband had been injured. Evidence of this character was evidently offered by counsel for appellee for the purpose of increasing the damage. He could have had no other possible end in view; and, when the trial judge had sustained the objection to this line of interrogation, counsel should not have pursued it further. We would not hold, if these questions had been asked but a single witness, that it was a reversible error; for counsel may have felt that, if the sickness of his client's wife and the injury to his child's health resulted from a nervous shock brought on by the sight of appellee's injury, at the hands of the doctor, he was entitled to recover for this as an element of damage. But, when the court had ruled against him and held that this evidence was not competent, it was error for counsel to proceed, in spite of the ruling of the court, in trying to bring these matters to the attention of the jury. Where the admonitions of the court are disregarded and his rulings, which should at all times guide counsel in the conduct of the trial, are ignored and a judgment is recovered which may, in part, be attributed to an advantage gained by an improper line of interrogation, it should not be permitted to stand. There are two ways in which courts can control counsel and keep them within proper bounds in the conduct of trials. One is by summarily punishing the offending counsel; and the other is to deprive him of the fruits of victory won while pursuing improper methods. The trial court, when he ruled that this line of interrogation was improper, should have, by mandatory process, enforced obedience to his ruling. Inasmuch as he failed to do this and the verdict of the jury may have been influenced by this improper line of interrogation, the trial court should have awarded appellants a new trial upon this ground. *Marcum v. Hargis*, 104 S. W. 693, 31 Ky. Law Rep. 1117; *L. & N. R. Co. v. Reaume*, 128 Ky. 90,

107 S. W. 290, 32 Ky. Law Rep. 946; *L. & N. R. Co. v. Payne*, 133 Ky. 539, 118 S. W. 352, 19 Ann. Cas. 294.

[2] The next ground of complaint is that the court erred in the admission of incompetent evidence. Counsel for appellee, when examining the doctor, asked him if he had not been convicted of a felony, to which question objection was made. This was a proper question, and the court correctly held it to be such; but, when it was shown by the answer that he had not been convicted of a felony, his further interrogation relative to a charge, upon which he had been indicted, tried, and acquitted, was error, and the evidence upon this point should not have been permitted to go to the jury.

[3, 4] It is next insisted that the court erred in permitting the doctor to be interrogated relative to his financial condition. This objection is based upon the idea that appellee was not entitled to an instruction authorizing an award of punitive damages. The point would be well taken if no instruction authorizing punitive damages was in fact authorized; but we are of opinion that the trial court erred in holding as a matter of law that appellee was not entitled to an instruction authorizing punitive damages, if, as a matter of fact, the doctor made an unprovoked, willful, and malicious assault upon appellee. Indeed, we know of no case where an instruction authorizing punitive damages could with more propriety be given than in a case of this character. Punitive damages are allowed, not as a compensation for injury, but as a punishment for a wrong, willfully and maliciously done. If the allegations of the petition are true, appellee was entitled to an instruction authorizing an award of punitive damages. Hence the court did not err in permitting the introduction of evidence bearing upon the financial standing of appellants' intestate.

The only remaining question is the complaint that the court did not properly instruct the jury. No serious objection can be raised to instruction No. 1. It presents the law of the case, both from the standpoint of the claim as asserted by appellee and the defense as interposed by the doctor. Instruction No. 2 did not fully present the measure of damages.

[5] Upon this point the court should have told the jury: "If you find for the plaintiff, you will award him such sum as you believe from the evidence will compensate him for the mental or physical pain or suffering, one or both, if any, endured by him as the direct and proximate result of his injury; and, in addition to actual damages, if you find from the evidence that the assault was willful, malicious, and without justification, you may, in your discretion, award him punitive damages, not exceeding in all, however, the sum of \$2,000, the amount claimed in the petition."

[6] Instruction No. 3 was unauthorized.

The court seems to have been influenced in giving this instruction by the idea that there was at some time during this combat, a cessation of hostilities; and that there was evidence tending to show that appellee withdrew from the contest. We do not so view the evidence. From the testimony of all the witnesses, including the principals to the affray, it is apparent that there was but one difficulty. It was a continuous fight from start to finish. When so viewed, the instruction should not have been given. Just what effect this instruction had on the verdict of the jury cannot be determined. The jury may have believed the doctor's version of the difficulty, that appellee, in fact, assaulted him, and that he acted only in self-defense; and yet, under this instruction, they would have been warranted in finding against the doctor; if they regarded appellee as retreating, after he had knocked the doctor down the third time, a few steps just before he seized the bolt tongs. When viewed in this light, it is apparent that this instruction may have been highly prejudicial. It should not have been given.

[7] There was evidence to the effect that before the doctor struck appellee, if he did strike the initial blow, appellee had used toward him abusive and insulting language, such as was calculated to provoke an assault. Now, while evidence of such language cannot be given in justification of an assault, it was proper that it should have gone to the jury as a circumstance to be received by the jury in mitigation of exemplary or punitive damages, in the event the jury found against the doctor in any sum in excess of the actual damage, to which the evidence showed he was entitled. The court should have in appropriate language told the jury the purpose for which this evidence was admitted.

[8] For the reasons indicated, the judgment is reversed, with directions to the trial court to enter an order dismissing the petition, inasmuch as under section 10, Ky. St., as construed by this court in *Anderson v. Arnold*, 79 Ky. 370; *Lewis' Adm'r v. Taylor Coal Co.*, 112 Ky. 845, 66 S. W. 1044, 23 Ky. Law Rep. 2218, 57 L. R. A. 447, it is an action which does not survive, and cannot be prosecuted against the personal representatives of a deceased wrongdoer.

CAMPBELL COUNTY v. WRIGHT.

(Supreme Court of Tennessee. Nov. 30, 1912.)

1. COURTS (§ 246*)—COURT OF CIVIL APPEALS—JURISDICTION OF CONSTITUTIONAL QUESTIONS.

Under Acts 1907, c. 82, § 7, providing that the jurisdiction of the Court of Civil Appeals shall extend to all cases brought up from courts of equity or chancery courts, except cases, among others, involving the constitutionality of statutes, and to all cases tried in the circuit and common-law courts in which appeals or writs of error may be applied for, such court

has no jurisdiction of a constitutional question, whether it arises on an appeal from circuit or common-law courts or the equity courts.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 743-747, 748; Dec. Dig. § 246.*]

2. COURTS (§ 246*)—COURT OF CIVIL APPEALS—JURISDICTION OF CONSTITUTIONAL QUESTIONS.

Under Acts 1907, c. 82, § 7, excepting cases involving the constitutionality of statutes from the jurisdiction of the Court of Civil Appeals, and Acts 1909, c. 192, providing that, where the Supreme Court or Court of Civil Appeals is of the opinion that jurisdiction of an appeal is in the other court, it shall be its duty to transfer the cause to such other court, which shall cause it to be entered on its trial docket and try and dispose of it, the only jurisdiction of the Court of Civil Appeals over an appeal involving a constitutional question is to transfer the case to the Supreme Court.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 743-747, 748; Dec. Dig. § 246.*]

3. CERTIORARI (§ 28*)—SUPREME COURT—REVIEW OF JURISDICTION.

Where the Court of Civil Appeals erroneously assumed jurisdiction of and determined an appeal involving a constitutional question, instead of transferring it to the Supreme Court, as required by statute, its error in failing to enter the order of transfer gives the Supreme Court jurisdiction to review the appeal by certiorari.

[Ed. Note.—For other cases, see Certiorari, Cent. Dig. §§ 83, 41; Dec. Dig. § 28.*]

Certiorari to Court of Civil Appeals.

Action by W. H. Wright against Campbell County, originally brought before a justice of the peace. A judgment of the circuit court, affirming a judgment for plaintiff, was reversed by the Court of Civil Appeals, and the suit dismissed, and the case is brought to the Supreme Court by certiorari. Judgment of the Court of Civil Appeals reversed, and judgment rendered for plaintiff, in accordance with the judgment of the circuit court.

Owens & Taylor, of La Follette, for plaintiff. John Jennings, Jr., of Jellico, for defendant.

PER CURIAM. This action was originally brought before a justice of the peace of Campbell county to recover for services performed by the defendant in error as registrar of the La Follette precinct of the First district of Campbell county. The service was alleged to have been rendered prior to the August election in 1910. Judgment was recovered before the justice of the peace, and from this an appeal was prayed to the circuit court of the county, where the judgment was affirmed to the amount of \$16.50 and the costs of the suit. From this judgment the county prayed an appeal to the Court of Civil Appeals, where the judgment of the circuit court was reversed, and the suit dismissed. The case was then brought to this court by the writ of certiorari.

It was stated in the opinion of the Court of Civil Appeals that no question was made in that court about the value of the services, but that the only question was as to the con-

stitutionality of chapter 419 of the Acts of 1911. It was said in that opinion that the act referred to was held unconstitutional in the circuit court, and therefore the defendant in error was permitted to recover there. The Court of Civil Appeals, on the contrary, held the act constitutional, and for that reason denied the defendant in error any recovery. So it appears that the only matter for consideration in the Court of Civil Appeals, and the only thing that was examined and determined, was the question of the constitutionality of the act of the Legislature referred to.

We are of the opinion that in undertaking to dispose of the constitutional question that court acted beyond its powers. Chapter 82, Acts of 1907, which created that court, declares in section 7: "That the jurisdiction of said Court of Civil Appeals shall be appellate only, and shall extend to all cases brought up from courts of equity or chancery courts, except cases in which the amount involved, exclusive of costs, exceeds one thousand dollars, and except cases involving the constitutionality of the statutes of Tennessee, contested elections for office, state revenue, and ejectment suits, and to all civil cases tried in the circuit and common-law courts of the state, in which appeals in the nature of writs of error, or writs of error may be applied for for the purpose of having the action of said trial court reviewed. In all cases in which appellate jurisdiction is herein conferred upon said Court of Civil Appeals, the appeals and appeals in the nature of writs of error from the lower court shall be taken directly to said Court of Civil Appeals; and said court, or any judge thereof, is hereby given the same power to award and issue writs of error," and writs of "certiorari and supersedeas, which the Supreme Court has heretofore had in such cases, returnable to said Court of Civil Appeals. The practice in such cases in said court shall be the same as is now prescribed by law for the Supreme Court. In all cases in which appellate jurisdiction is not conferred by the terms of this act upon said Court of Civil Appeals, appeals therefrom shall be direct to the Supreme Court, and in such cases, writs of error, certiorari, and supersedeas shall be issued by and made returnable to the Supreme Court, as is now provided by law; and in such cases the Supreme Court shall have exclusive jurisdiction, and shall try and finally determine the same, and shall not, after this act takes effect, assign the same for trial by the said Court of Civil Appeals."

By chapter 192 of the Acts of 1909 it was provided that in all appeals taken from either the chancery, circuit, or county courts of this state to the Supreme Court, or to the Court of Civil Appeals, if the court to which any such case should be appealed should be of opinion that the jurisdiction to try and

determine the same was not in said court, but in the other appellate court, it should be the duty of said court, if it should be the Court of Civil Appeals, to transfer the cause to the Supreme Court for trial, and that the Supreme Court should cause any such case so transferred to it to be entered upon its trial docket, and try and dispose of the same as though the appeal had been directed to the Supreme Court; and in like manner, if the Supreme Court should be of opinion that the jurisdiction to try and determine any such case appealed to it was with the Court of Civil Appeals, it should be the duty of the Supreme Court to transfer any such case to the Court of Civil Appeals for trial, which latter court should cause any such case to be entered upon its docket, and try and dispose of the same, as though the case had been appealed directly to that court, and that no writ of error or other process should be necessary to give the court to which any such cause had been transferred jurisdiction either of the parties or of the subject-matter of the litigation.

[1] Under section 7 of chapter 82 of the Acts of 1907, supra, it is clear that the jurisdiction of constitutional questions is withheld from the Court of Civil Appeals. It is true that this particular subject is not repeated in the sentence of that section which confers jurisdiction upon the Court of Civil Appeals of cases coming from the circuit courts of the state; but there could have been no reason why that court was denied jurisdiction of this class of subjects in cases coming from the chancery court, if it was to exercise such jurisdiction in cases appealed to it from the circuit court. We are of the opinion that, under a true construction of section 7, it was intended by the Legislature to withhold entirely from the Court of Civil Appeals jurisdiction of constitutional questions. *Railroad v. Bryne*, 119 Tenn. 278, 325-329, 104 S. W. 460.

[2] In the present case, there is no question, as we have stated, except the constitutional question, and the Court of Civil Appeals had no jurisdiction except to transfer the case to this court, under the act of 1909 above reproduced. We think, also, the better opinion is that this course should be taken by the Court of Civil Appeals whenever it appears in any case in that court that any question involving the constitutionality of an act of the Legislature is bona fide made and relied on therein.

[3] The question now to be determined is whether the present case is properly before us, although no order of transfer was made. We are of the opinion that it is, because of the error of the Court of Civil Appeals in failing to enter an order making the transfer required by the act of 1909; that is, its error in failing to enter the proper judgment to get the case off its docket.

EASTER v. EASTER et al.

(Supreme Court of Missouri, Division No. 2.
Nov. 13, 1912. Rehearing Denied
Dec. 10, 1912.)

1. TRUSTS (§ 86*)—RESULTING TRUSTS—BURDEN OF PROOF.

One seeking to establish a resulting trust in real estate on the ground that his money went into the purchase thereof, while the legal title was taken in the name of another, has the burden of proving clearly and convincingly the fact.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 128; Dec. Dig. § 86.*]

2. TRUSTS (§ 89*)—RESULTING TRUSTS—EVIDENCE—SUFFICIENCY.

Evidence held not to establish a resulting trust in real estate, on the theory that plaintiff's money went into the purchase of the property, legal title to which was taken in the name of defendant.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 134-137; Dec. Dig. § 89.*]

Appeal from Circuit Court, Jackson County; Walter A. Powell, Judge.

Action by Warren W. Easter against Charles R. Easter and another. From a judgment for plaintiff, defendants appeal. Reversed, with directions to enter judgment for defendants.

McCune, Harding, Brown & Murphy, of Kansas City, for appellants. Ed El. Aleshire and S. S. Gundlach, both of Kansas City, for respondent.

BLAIR, C. Warren W. Easter, the plaintiff, and defendant Charles R. Easter are brothers, and defendant Elizabeth R. Easter is the latter's wife. For about 10 years the brothers were partners in the restaurant business, and this suit was begun by plaintiff to recover an interest in a certain lot in Kansas City the title to which was taken May 11, 1901, in the name of defendant Elizabeth, but which plaintiff contends was bought with partnership funds and for the partnership. From a decree vesting title as to an undivided one-fifth of the property in the plaintiff and defendant Charles R., as partners, both defendants have appealed.

Counsel do not differ materially as to the law of the case, the real controversy being as to the sufficiency of the evidence to support the findings that partnership funds were employed in the purchase. Since the principal question to be determined is purely one of fact, it becomes necessary to review the evidence in the case.

The partnership between the brothers began in 1892, and they conducted the business until some time in 1895, when it was sold on deferred payments which the purchaser soon found himself unable to meet, and the partnership again resumed the business and prosecuted it continuously until in 1902. The evidence does not show the profits of the business to have been very large prior to the sale mentioned, though there is evidence

the firm made some money. In 1894 Charles R. Easter married the defendant Elizabeth R. Easter, who appears to have had some knowledge of the restaurant business and to have been both capable and economical. Some time after resuming business in 1895 the two brothers began to save a little money, and by June, 1899, had accumulated \$105 each by means of payments separately made on building and loan stock. In June, 1899, the two purchased the interest of another brother in property at Lexington, paying \$50 each and executing a note for \$75 for a balance. At this time plaintiff withdrew all his money from the building and loan, and Charles R. borrowed \$50 from the association, withdrawing the balance two months later. The business was prosperous thenceforward, and May 11, 1901, the property here involved was purchased; the title being taken in the name of Elizabeth R. Easter, and the purchase price of \$7,000 being paid as follows: \$500 in cash; \$2,000 in property conveyed to Elizabeth R. Easter by her mother for use in effecting the purchase; and the balance was secured by a first and second deed of trust for \$3,500 and \$1,000, respectively. The owner of the property had no dealings with plaintiff; the whole of the business, including his contract to erect a two-story building on the lot he sold, being transacted by Elizabeth R. and Charles R. Easter. An error in the estimate of the width of the lot resulted in a credit of \$300 on the note secured by the second deed of trust, and the balance of \$700 was paid, as due, in monthly installments of \$75; the greater portion of the amount being paid between May 11, 1901, and May 15, 1902. These payments were made by Mrs. Easter, usually; none of them being made personally by plaintiff.

From the beginning plaintiff was addicted to the use of intoxicants, and the evidence is clear that he spent some time and considerable money in indulging his appetite for drink. Apparently disinterested witnesses testified that for a long time he was constantly under the influence of liquor, and he admits the habit, but denies expending any considerable amount of money in indulging it. At any rate, in 1899 his condition had become such that he thought it proper to take what is commonly called the "Keeley Cure," and did so. Thereafter he began drinking again, and his health seems subsequently to have been very poor.

In 1902 plaintiff, who is usually called "Wirth" by the witnesses, executed to defendant Charles R. Easter a bill of sale of the stock and fixtures "together with the good will of such restaurant business heretofore conducted at 420 West Ninth street, Kansas City, Mo., under the name of 'Easter Bros.' It being the intention of said Warren W. Easter to convey to said Charles R. Easter all his interest in and to the above-

described property and business." This instrument was dated July 30, 1902, and the recited consideration was \$500. The consideration was paid, the evidence shows, in semimonthly installments of \$15.

Plaintiff testified he and his brother had no settlements and made no division of profits at all during the time the partnership existed, but that Charles R. simply kept all the firm's money after the expenses were paid; that until 1899 the profits were small and were absorbed by rent paid which amounted to \$70 per month. He was unable to state what profits the firm was making at the time the removal to the new building (1901) occurred, the nearest approach being: "Well, we were doing a very good business, a very good business, and, so far as the volume goes, I do not know; it might have been over \$100 a month, probably, clean cash." He further testified the firm had \$600 or \$700 on hand in May, 1901; that he and Charles R. Easter agreed to purchase the lot at 420 West Ninth street and have the title put in the name of Charles' wife. He testified positively he personally participated in the negotiations for the lot, but it clearly appeared he did not do so. He was unable to tell by or to whom the money was paid, from what source it came or what the amount of it was, and finally admitted he did not know that it was paid at all. He said that both he and his brother had access to the money drawer, that each took money as he wished, leaving a ticket in the money drawer, and that a book account of what each received was kept by the firm. The book was not produced, nor was any effort made to secure its production, so far as the record shows. There is so much of contradiction, uncertainty, and clear mistake in plaintiff's testimony that it may be properly characterized as quite incoherent.

Lawrence Easter, another brother, testified that defendant Charles told him at one time in 1895 or 1896 the firm had building and loan stock to the amount of "possibly \$400 to \$600, something like that, \$500, I don't remember the amount," accumulated in "a few years, a year and half," and that after 1902 plaintiff wanted to go back to the restaurant, but Charles R. would not permit it, stating that Wirth "was breaking down in health and had plenty and didn't have to work." Witness declared he frequently asked Charles R. to take Wirth back with him. He further stated that in 1901 he had heard Charles R. say the firm was making \$300 to \$400 per month, but acknowledged Charles R. offered to sell the business to him for \$700. James Drummond testified that in 1906 Charles R. Easter said to him that: "Weezle and Jessie was continually after him to let Wirth go back in the business. Now Wirth don't have to work. He has plenty to take care of him, and I intend to see he is taken care of as long as he lives."

Mrs. Drummond and Mrs. Whitsett (sisters of the Easters) testified Mrs. Easter told them in February, 1903, that if anything happened to her husband Wirth "would get his part just the same." Walter Whitsett, a brother-in-law, testified that Charles R. Easter, speaking of the proposed purchase of the lot in question, told him he and Wirth were talking about buying it, but he (Easter) "had a hard time to get Wirth's consent to it; he was scared to risk his money in it, and thought they might lose everything they had, and he discouraged him every time he approached him about the matter"; that Charles R. also told him "they had talked it over and concluded to have the deed put in his wife's name for their own convenience. Witness also said Charles R. had told him he and Wirth were to put \$2,000 to \$3,000 into the purchase of the lot at the first.

There was also evidence from these and other witnesses as to other alleged admissions, but they were inferences of the witnesses, as appeared in each instance, and lacking in probative force.

Charles R. Easter and his wife both testified that the \$500 cash payment made on the lot was composed of \$250 of Mrs. Easter's money, paid her by her mother for the board of Cora La Rose, Mrs. Easter's younger sister, and \$250 which belonged to Charles R. Easter personally. They denied the admissions attributed to them, and detailed the manner in which they purchased the lot in question, and in respect to this were corroborated in the main by the former owner. The subsequent payments were made, they said, from the rent from the building, about \$125 per month, and Charles R.'s share of the profits from the restaurant business. As to Wirth Easter's dissolute habits they were corroborated by Cora La Rose, by a bartender, and another disinterested witness. They offered in evidence the cashbook of a building and loan association showing that Wirth and Charles R. Easter had \$105 each with the association in 1899 and that the money was withdrawn by each of them in the summer of that year. They produced a list of payments made to Wirth Easter, subsequent to the date of the bill of sale in evidence, totaling seven hundred and some dollars. It appeared from their evidence and that of plaintiff that the firm of Easter Bros. paid no rent to Elizabeth or Charles R. Easter. Defendants testified this was the result of a promise to plaintiff that they would buy the lot and put up the building and charge the firm no rent if he (plaintiff) "would brace up and quit drinking" and attend better to business. The rental value of the room occupied by the restaurant was about \$25 per month. According to the evidence for defendants, no books, as between the partners, were kept; the profits being divided when there were any. For some time after the dissolution of the partnership and after the pay-

ment of the \$500 due plaintiff according to the terms of the bill of sale, Charles R. Easter continued to furnish some money to plaintiff directly or pay it to his brothers or sisters for caring for him, but in 1905 refused to provide for him further. Two of the sisters, according to their testimony, attempted to get him to take plaintiff back, but he refused. It appears Charles R. also contributed to the support of another brother.

[1] The question in this case is whether the cash payment of \$500 made on the lot purchased in 1901 was partnership money. In order to establish a resulting trust in this case it must be shown that partnership money went into the purchase of the lot. On plaintiff rests the burden to make this appear so clearly, cogently, and convincingly as to leave no reasonable doubt on that head. Counsel do not differ as to this.

[2] Has plaintiff met the requirements of the rule? We think not. That the partnership had funds at the time is not sufficient. They must be shown to have gone into the property. To meet the denial of defendants and the fact that plaintiff personally took no part of any kind in the negotiations and had no interest in the property turned in on the purchase of the lot, resort is had to testimony as to statements made by Charles R. Easter in contemplation of the purchase and admissions said to have been made by him and Elizabeth R. subsequent thereto. As to the former they clearly appeared, in several instances, to have been unconsciously amplified by inferences drawn by the witnesses from the mere fact that a partnership in the restaurant business existed between the brothers. In other instances the alleged declarations might as clearly indicate an intent of Charles R. Easter and his wife to purchase as an intent of the partners to do so.

So far as the admissions coming after the purchase are concerned, what has just been said applies to some of them, and others have no direct reference to the property in question. Mrs. Elizabeth Easter's statement in February, 1903, is explicable as a reference to the unpaid balance due plaintiff under the bill of sale. Mr. Whitsett's testimony shows that plaintiff was objecting to the purchase, was afraid to participate in it, and was opposing it. It also appears from his testimony that the plan at that time, the one plaintiff was considering, was that Easter Bros. were to put \$2,000 to \$3,000 into the property in order to get the lot and get a building erected thereon. The actual purchase made was not in accordance with this plan. It is beyond dispute that \$2,000 of the \$2,500 payment made at the time of purchasing the lot consisted of property belonging to Elizabeth Easter's mother in which plaintiff had no sort of interest, and we think it satisfactorily proved that \$240 of the remaining \$500 was money of Mrs. Easter derived from payments made her by her mother in consid-

eration of her caring for her sister, Cora La Rose. This leaves but \$260 in which plaintiff could have an interest. Clearly, then, the plan under consideration at the time Charles R. Easter talked with Whitsett, taking Whitsett's testimony as true, was not the one adopted in the purchase.

Further, plaintiff's unexplained conduct in signing the bill of sale (and we agree with the trial court he did execute it) without giving any attention to the interest he now claims in the realty, and the fact he seems never to have concerned himself about it until the property had greatly increased in value, are not in full accord with his position in this case. He apparently took no part at any time in the management of the property or the collection of the rents—gave it no attention whatever, so far as this record shows. Plaintiff's own testimony is valueless. It may be possible his incoherency, lack of memory, and self-contradiction are due to the effects of his unfortunate habits; but, whatever their cause, they cannot themselves constitute evidence in his favor. The record does not indicate any willful misstatement of facts by any witness, but rather that those for plaintiff have mingled inferences with unguarded and ambiguous statements of defendants and have permitted themselves to assume from the partnership in the restaurant business a partnership in everything.

In view of these facts and the rule to which we have already adverted, this judgment ought to be and is reversed, and the cause remanded, with direction to the trial court to enter judgment for defendants.

ROY, C., concurs.

PER CURIAM. The foregoing opinion of BLAIR, C., is adopted as the opinion of the court. All the Judges concur.

DULCE REALTY CO. v. STAED REALTY CO.

(Supreme Court of Missouri, Division No. 2.
Nov. 13, 1912.)

1. EASEMENTS (§ 3*)—PRIVATE WAY.

Where there was a partition creating an easement in an alley in favor of all the parcels conveyed, such easement became incident and appurtenant to such parcels, and passed as appurtenant thereto in subsequent conveyances by or without the word "appurtenances," so long as such estates existed as distinct estates, unless it was abandoned or extinguished in some way.

[Ed. Note.—For other cases, see Easements, Cent. Dig. §§ 8-12; Dec. Dig. § 3.*]

2. BOUNDARIES (§ 21*)—OWNERSHIP OF FEE.

Where deeds in partition reserving an easement in a private alley to the different parcels did not expressly convey the fee of the alley to any one, it is presumed that, as in case of a public way, the owners of the abutting property hold the fee to the center, so that an abutting owner had no title in the opposite half thereof, unless it was established by the statute of limi-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

tations as the mere destruction or abandonment of the easement would not give such a title.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. § 131; Dec. Dig. § 21.*]

3. EASEMENTS (§ 30*) — EXTINGUISHMENT — NONUSER.

An easement acquired by a deed cannot be lost by mere nonuser.

[Ed. Note.—For other cases, see Easements, Cent. Dig. §§ 77-79; Dec. Dig. § 30.*]

4. ADVERSE POSSESSION (§ 80*) — EXTENT — COLOR OF TITLE.

A quitclaim deed from the owners of land abutting on a private alley and purporting to convey such alley is not sufficient as color of title, where it described the strip as "known as a private alley," as it is a confirmation of the alley rather than an impeachment.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 463-467; Dec. Dig. § 80.*]

5. EASEMENTS (§ 9*)—HOSTILE CHARACTER—SUFFICIENCY.

Where the beginning of the possession of a private alley by an owner of property abutting one side of it was originally with the permission of the owner of the property abutting the other side, who owned the fee to the center, and such possession was under no adverse claim of right until shortly before the commencement of suit to compel the removal of a building constructed thereon, and to enjoin the threatened construction of another, there was no claim of right sufficient to support a title by limitations.

[Ed. Note.—For other cases, see Easements, Cent. Dig. §§ 25, 27-33; Dec. Dig. § 9.*]

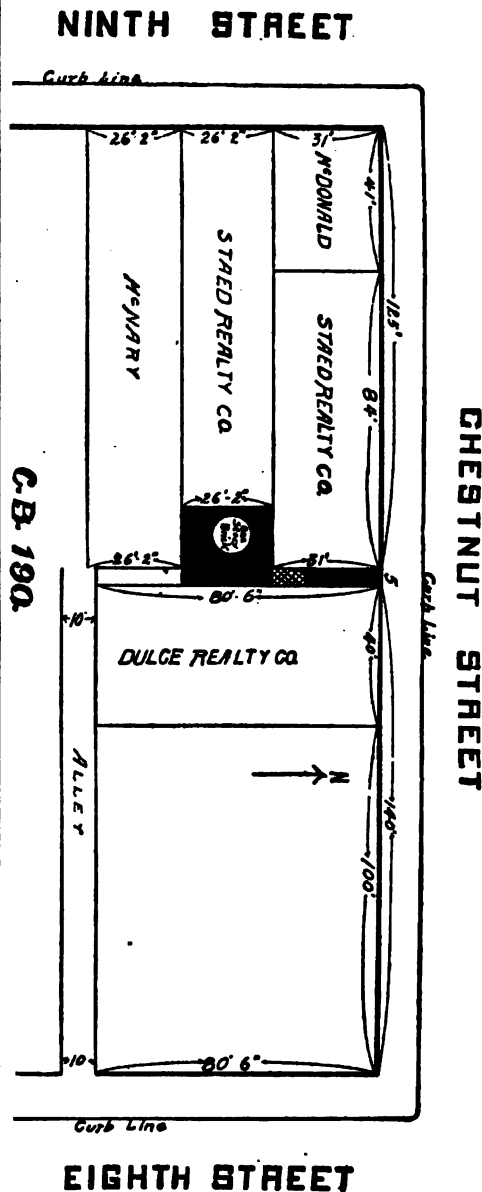
Appeal from St. Louis Circuit Court, Moses N. Sale, Judge.

Injunction by the Dulce Realty Company against the Staed Realty Company. From a decree for plaintiff, defendant appeals. Affirmed.

This is a proceeding in the circuit court of the city of St. Louis to enjoin the construction of a building on an alleged private alley, and to compel the removal of one already constructed. Pending the suit and before the trial, the building in contemplation by the defendant at the beginning of the suit was constructed. There was a decree for plaintiff requiring the demolition of both structures, and restraining any future obstructions to the alley. Defendant has appealed.

The land in controversy is located in city block 190, bounded north by Chestnut street between Eighth and Ninth streets. In 1854 the Lucas heirs were the owners of all the property abutting on the alleged alley. In that year they made partition by deeds to each one of them for separate parcels of the land. In all those deeds the land included in the alleged alley in controversy was described as "a space supposed to be five feet wide left by all concerned for an alley." The plaintiff now owns 40 feet fronting on Chestnut street and running south 80 feet 6 inches to a private alley 10 feet wide which runs east to Eighth street. The defendant owns two tracts. One tract was acquired in 1891, and is 84 feet fronting on Chestnut street running south 31 feet; the

east line of it being the west line of the alley. The other tract acquired by defendant in 1894 fronts 26 feet 2 inches on Ninth street, and runs east 125 feet to the alley, the east end of it being south of and adjacent to the other tract of defendant. The relative positions of those tracts with reference to the alley are shown on the following plat:



In that partition the land east of the alley was assigned to Henry S. Turner and wife, and the chain of title thereto down to the plaintiff is as follows: April 28, 1856, Turner and wife conveyed it without mentioning the alley to Henry L. Patterson, who on May 1, 1856, conveyed to James H. Lucas,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

describing it as bounded "west by an alley five feet wide." On April 6, 1872, James H. Lucas conveyed it to Robert J. Lucas as trustee for Joseph D. Lucas, describing it as bounded "south by alley and west by Gardiner and others." On November 16, 1875, Robert J. Lucas, as trustee, conveyed it to Joseph D. Lucas by the same description as in the last deed. There is no explanation in the evidence as to why those two deeds described the land as bounded "west by Gardiner and others." In 1903 Joseph D. Lucas died, devising all his property to his wife, who, on November 29, 1904, conveyed it to Wm. Bunning, and by a quitclaim deed of the same date she conveyed a strip five feet wide corresponding to the 5-foot alley to said Bunning, describing it by metes and bounds, but not stating that it was an alley, and also a strip corresponding to the 10-foot alley, but not describing it as an alley. On November 29, 1904, Bunning conveyed the property east of the alley to Hannah R. Daugherty, and also by a quitclaim deed conveyed the 5-foot and 10-foot strips to Daugherty, not calling them alleys. On May 16, 1907, Daugherty conveyed the property east of the alley to the plaintiff, and also conveyed with it the two strips by quitclaim deed, as it was described in the deed to him. All the deeds in the plaintiff's chain of title to the land east of the alley conveyed the land with its appurtenances. The chain of title from the Lucas heirs to the land west of the alley was not put in evidence. On January 30, 1885, Robert S. McDonald conveyed the land fronting 84 feet on Chestnut street immediately west of the alley, running south 31 feet, describing it as bounded east by a private alley, to Robert N. Noonan, trustee for Josephine Noonan. On January 3, 1889, the Noonans conveyed it to Alfred D. Ryan, trustee for his wife, describing it as bounded east by a private alley, and on February 11, 1891, the Ryans conveyed it by the same description to John Staed, Patrick M. Staed, and Patrick J. Staed, and on the same day the Ryans conveyed to the Staeds by quitclaim deed for the expressed consideration of \$5 "a parcel of land in block 190 of said city of St. Louis, being known as a private alley and fronting on the south line of Chestnut street about 5 feet more or less, by a depth southwardly of about 31 feet, the west line thereof being 125 feet east of the east line of Ninth street, and bounded on the north by Chestnut street, west by property conveyed to Staed et al., by deed dated February 11, 1891, and east by Lucas." At the time of the conveyance to the Staeds, there were two-story brick buildings fronting on Chestnut street on both sides of the alley, the walls being five feet, three and a fourth inches apart. The west building extended south 31 feet, and the wall next to the alley was without openings, except a window near the south end in the second story. The

wall on the east side of the alley was without openings, and extended further south than that on the west side. On both sides of the alley fences ran south from the corners of those buildings to the 10-foot alley. Those fences remained there until shortly before this suit began. The alley was open in 1891 from Chestnut street to the 10-foot alley. There was no opening or gate in the fence on the east side of the alley.

In 1892, the north end of the alley for a distance of about 21 feet was inclosed by wooden framework and doors on the north and south and with a roof and floor, and the room thus formed, hereinafter called the "cigar store," was occupied most of the time by cigar men, and a part of the time by a bootblack and by a brick man. It rented at \$10 a month up to the time of the trial. On April 18, 1894, the Staeds conveyed to the Staed Realty Company land described as follows: "A lot of ground in city block 190 of said city of St. Louis, beginning at a point in the south line of Chestnut street 41 feet east of Ninth street; thence east along south line of Chestnut street 84 feet to west line of private alley; thence south along west line of private alley parallel to Ninth street 31 feet to the northeast corner of property now or formerly of Wolff et al.; thence west parallel to Chestnut street 84 feet to the southeast corner of property of Robert S. McDonald; thence north parallel to Ninth street 31 feet to the point of beginning." No deed to the defendant was in evidence for the 26 feet 2 inches fronting on Ninth street; but on October 24, 1894, the defendant executed a deed of trust describing it as follows: "A lot of ground in said city block 190 containing a front of 26 feet 4 inches, more or less, on the east line of Ninth street, by a depth eastwardly of 125 feet, more or less, to a private alley five feet wide. Bounded on the west by Ninth street, east by a private alley, south by a lot now or formerly of S. J. Fisher et al., and north by a line 31 feet south of the south line of Chestnut street."

On April 8, 1901, the defendant executed a deed of trust on property described as follows: "A lot of ground in block 190 of said city of St. Louis, fronting 26 feet and 2 inches on the east line of Ninth street, by a depth eastwardly of 125 feet, more or less, to the west line of a private alley 5 feet wide, and bounded on the north in part by property also conveyed in said deed, and in part by property formerly of R. S. McDonald, and on the east by a private alley, and on the south by property formerly of Minnie L. Siegrist, and on the west by Ninth street; and also a lot of ground in said block having a front of 84 feet on the south line of Chestnut street, by a depth southwardly of 31 feet, more or less, to the northern line of property first described in said deed. Bounded on the north by Chestnut

street, on the east by said private alley 5 feet wide, on the south by the property first described in said deed, and on the west by a line 41 feet, more or less, east of the east line of Ninth street."

On May 6, 1907, the defendant executed a deed of trust on property described thus: "Parcel 1. That part of city block numbered 100, beginning in the south line of Chestnut street at a point 41 feet, more or less, east of the southeast corner of Ninth and Chestnut; thence east on the south line of Chestnut 84 feet, more or less, to a private alley 5 feet wide; thence south with the west line of said private alley 31 feet, more or less, to the northeast corner of property formerly owned by M. A. Wolff, and now owned by Staed Realty Co.; thence west and parallel with Chestnut street 84 feet more or less, to the southeast corner of premises now or formerly owned by R. S. McDanold; thence with east line of said last mentioned premises 31 feet to the place of beginning. Parcel 2. That part of said city block 100 beginning on the east line of said Ninth street at a point 31 feet, more or less, south of the southeast corner of said Ninth and Chestnut streets, running thence eastwardly 125 feet, more or less, to the west line of a private alley 5 feet wide, at a point thereon which is the southeast corner of parcel 1, above described; thence southwardly with the west line of said private alley 26 feet 4 inches, more or less, to the property now or formerly of Minnie L. Siegrist; thence westwardly with the north line of said property of Siegrist 125 feet to the east line of Ninth street; thence northwardly with the east line of Ninth street 26 feet 4 inches to the place of beginning."

Mr. John Staed testified for defendant as follows: "Mr. Farley, the real estate agent, occupied this property east of this five feet, and was a tenant of Mr. Lucas. That is the property now owned by the Dulce people and occupied by Waide & Willis. For a great many years Thomas Farley, real estate agent, occupied that as his office. Q. During all that time did that property belong to Joseph Lucas? A. I suppose so. I do not know who it belonged to, but I think he was Lucas' agent." Cross-examination: "Q. This construction that covered that five feet on the front there on Chestnut street is that brick or stone, or what? A. You can look at it there and see. I think it is wood myself. I never examined it very sharp. My brother got it built. I didn't build it. Q. Isn't it a fact that Farley built it there? A. Not that I know. I am sure he never did build it. I would know something about it if he did. Q. Who was in charge of the Staed Realty Company's affairs 15 years ago? A. Well, my brother was the leading man, and I was secretary and treasurer then. I paid all the bills. Q. The Staed Realty

Company didn't own this property originally, this 84 feet; it was owned by you and your brother and a number of others? A. It was the same stockholders as we have now. Q. It was owned by you severally? A. Yes, sir. Q. Who was managing that property then—handling it? A. I got the money out of the rents and paid the bills. I have been always getting the rents and tending to that property. We had Mr. McMenamy collect some rents and Mr. Brennan collect some and Mr. Farley. Mr. Farley just collected for that cigar place. That was all he collected. He collected \$10 a month and gave it to me. He gave me \$10 a month during a period of 12 or 13 years I suppose. He charged a commission of 3 per cent. Q. Why did he collect for that and the others collect for the balance of your property? A. Well, Brennan had been collecting for the other offices there, and my opinion is that Mr. Farley asked me to give him some of our collections, and we commenced with that, I think. Q. He collected that because he had built that shack, had he not? A. No; he did not build the shack. I don't think so. My brother told me he got the shack built. That is all I know about it. Q. You say your brother told you he built the shack there? A. Yes, sir; I paid for it. I was treasurer and paid all the bills at that time. Q. Who did you pay for it? A. My opinion is, I gave him the money to pay the men who built the shack there. I don't remember who built it. It is such a long time ago I have not any account of it now. My brother attended to that part of the business which I have to attend to now since he died. He attended to the building associations and several things of that kind. We managed it between us. We didn't have any fixed thing about it. We were all one, you might say. Q. I will ask you this question. I will ask you whether or not it was your intention when you took possession of that property and all the time you have occupied it to claim it as owner, or whether you did claim it as owner? (Objected to by plaintiff.) A. My intention was, of course, that it was our property. They had neither a door or window or anything else to show they had any claim to it. They had an alley to the rear of their own lot."

Mr. Levy, a tenant of the defendant and a real estate man, testified that the side walls of the cigar store were the brick walls of the adjoining buildings, and that there was a fence 10 feet high across the alley 31 feet south of Chestnut street which has been there for 16 years. He also testified there was a fence on the west side of the alley and a fence from the brick building on the east side of the private alley that ran out into the 10-foot private alley.

It was the custom of the revenue department of the city to assess private alleys to the adjoining owners. Up to 1900 defendant

paid taxes on 87 feet 9 inches on Chestnut street front and 125 feet deep fronting on Ninth street. After that it paid on 89 feet fronting on Chestnut street. At the time the cigar store was built there was an ordinance requiring a building permit from the building commissioner before any building could lawfully be erected, and further providing that no permit should issue for a frame or wooden building in that district, and making it a misdemeanor to violate that ordinance. No such permit was issued for the construction of the cigar store. Just prior to and at the time of, the bringing of this suit, the defendant was excavating for the purpose of constructing a building on the east end of its tract which fronts on Ninth street, with the intention on the part of defendant of constructing that building on the alley with its east wall flush with the east line of that alley. Pending the suit and before the trial such building was constructed one story high.

Daniel Dillon, of St. Louis, for appellant. Richard A. Jones, of St. Louis, for respondent.

ROY, C. (after stating the facts as above). [1] 1. It may help us to understand the questions involved if we first determine what the rights of the owners of the property abutting on the alley were prior to the beginning of the controversy. The Lucas partition deeds created an easement in the alley in favor of those parties, and such easement was appurtenant to the several tracts of land and passed to the grantees through the mesne conveyances down to the parties to this controversy, unless it has been abandoned or extinguished in some way. Washburn on Easements, § 13, says: "The owner of an easement in another's land has neither the general property in nor seisin of the servient estate, though he may, by holding a fee in the estate to which such easement is appurtenant, have an estate of inheritance in the easement. And from being something impalpable, of which a seisin cannot be predicated, easements are classed with incorporeal hereditaments, and are so designated in the definitions thereof." Where, therefore, one grants or reserves a right of easement over one parcel of land in favor of another, such easement, by such act of creation or annexation, would become incident and appurtenant to such estate respectively, and pass as appurtenant in after conveyances by, or even without, the word "appurtenances," so long as such estates should subsist as distinct estates in different proprietors.

[2] 2. At the time of that partition the Lucas heirs owned all the land, including that in the alley. The deeds did not expressly convey the fee in the alley to any one. It is a well-known rule that, in the absence of evidence to the contrary, it will be presumed that the owners of property abutting on a public way hold the fee to the center of the way. In *Holmes v. Bellingham*, 7 C. B. N.

S. 329, decided by the English Court of Common Pleas in 1859, Chief Justice Cockburn said: "The same principle which applies in the case of a public road, and which is the foundation of the doctrine, seems to me to apply with equal force to the case of a private road. That presumption is allowed to prevail upon grounds of public convenience, and to prevent disputes as to the precise boundaries of property; and it is based upon this supposition, which may be more or less founded in fact, but which at all events has been adopted, that, when the road was originally formed, the proprietors on either side each contributed a portion of his land for the purpose. I think that is an equally convenient and reasonable principle whether applied to a public or to a private road; but in the latter case it must, of course, be taken with this qualification, that the user of it has been qua road and not in the exercise of a claim of ownership." That case was cited with approval in *Dill v. Board of Education*, 47 N. J. Eq. 421, 20 Atl. 739, 10 L. R. A. 276. It is thus seen that the defendant has no title in any event to the east half of the alley, unless it has established title by the statute of limitations. The mere destruction or abandonment of the easement would not give defendant title to the east half of the alley.

[3] The easement was acquired by deed and the cases are practically unanimous to the effect that an easement so acquired cannot be lost by mere nonuser. *Dill v. Board of Education*, supra; *Structural Co. v. Distilling Co.*, 189 Mass. loc. cit. 153, 75 N. E. 85; *Wiggins v. McCleary*, 49 N. Y. 346. The deed made in trust for Joseph D. Lucas by James H. Lucas in 1872 and the trustee's deed to Joseph D. Lucas made in 1875 do not mention the alley, and state that the land therein conveyed was bounded in the west by the land of Gardiner et al. There is no other evidence of any kind in the case that Gardiner owned the land west of the alley or claimed the alley. On the other hand, all the evidence in the case shows that the alley was there and undisputed by anybody at the time those deeds were made. We are justified in regarding those recitals as to Gardiner et al. as being made by some inadvertence.

3. In 1891, when the Staeds became the owners of the land on the west side, Joseph D. Lucas owned on the east side of the alley. Lucas, as his name indicates, is supposed to have been one of the family who created the alley; and he had owned his land for 19 years. The Staeds were notified by their deeds that the alley was there. It was open from Chestnut street to the 10-foot alley on the south. All concerned knew of it, and no one was hostile to it.

[4] It is claimed now that the quitclaim deed from the Ryans for the 5-foot strip gave the Staeds "color of title." If so, it was decidedly "off color," for it stated that

the strip was "known as a private alley." We construe that deed, not as an impeachment of the alley, but as a confirmation of it, and we think it was so considered at the time it was made, by the parties thereto.

[5] Such being the condition of the alley and the attitude of the parties towards it in 1891, we are interested in discovering how the cigar store got in there in 1892. Did the Staeds put it there with the intention to permanently hold the strip as their own? We are justified in drawing the inference that they were experienced in real estate matters. They knew the requirements as to building permits, and as to the illegality of wooden structures in that district. They do not seem to have regarded that structure as of sufficient importance to require a conformity with the law as to it. It must have cost very little to construct it, and it rented for \$10 a month. Lucas is dead. Patrick M. Staed, a former sheriff of St. Louis, who attended to the building of it on the part of the Staeds, is dead. Mr. John Staed, who testified for the defendant, did not even know who built it. He said: "My brother told me he got the shack built. That is all I know about it. I was treasurer and paid all the bills at that time. My opinion is I gave him the money to pay the men who built the shack there." On the other hand, Mr. Farley was a real estate man, had an office in the Lucas property, and was Lucas' agent. The Staeds had a real estate man, who, as their agent, collected all their rents except for this cigar store. The rent on that for about 12 years was collected by Farley, Lucas' tenant and agent. On that question Mr. John Staed testified: "Q. Who was managing that property then—handling it? A. I got the money out of the rents and paid the bills. I have been always getting the rents and tending to that property. We had Mr. McMenamy collect some rents and Mr. Brennan collect some, and Mr. Farley. Mr. Farley just collected for that cigar place. That was all he collected. He collected \$10 a month, and gave it to me. He gave me \$10 a month during a period of 12 or 13 years, I suppose. He charged a commission of 8 per cent. Q. Why did he collect for that and the others collect for the balance of your property? A. Well, Brennan had been collecting for the other offices there, and my opinion is that Mr. Farley asked me to give him some of our collections, and we commenced with that, I think." The fact that Farley was Lucas' tenant and agent and collected the rent on the cigar store while the rents of the Staed property were collected by another agent is a strong circumstance in favor of the inference that the cigar store was not built in opposition to Lucas, but with his consent

and permission, at least. On the other hand, Mr. Staed stated only his "opinion" and what he "thought" as to what the facts were. Immediately following 1892 the west part of the alley was assessed to the Staeds, but not all of it until 1900. In 1894 the deed was made to the Staed Realty Company. It has been suggested that the reason the alley was mentioned in that deed was because the conveyancer followed former deeds by copying. In the statement of facts the descriptions in the various deeds of trust thereafter executed by the defendant are given. A comparison of those descriptions will show that the conveyancer did not always follow copy, but did always clearly call for the alley. In addition to those facts, the defendant acquired the south tract fronting 26 feet 2 inches on Ninth street in 1894. Its deed was not put in evidence, but about the same time it executed a deed of trust on its new purchase which called for the alley. If that alley got into that deed of trust purely as the result of copying, those experienced real estate men interested in the defendant company were surely the victims of their conveyances.

The claim is made by the appellant that the evidence shows that the part of the alley covered by the new building was prior to the construction of that building included in the defendant's yard. The evidence does not support such contention. Some parts of it are capable of that construction, but the whole of it taken together, including that of defendant's witnesses, shows that there was a fence between that part of the alley and defendant's yard. Up to the time when defendant prepared to build that new building just before this suit was begun, it had never pretended to claim that part of the alley.

We are driven to the conclusion from the facts that the beginning of the possession of the cigar store by the Staeds was originally with the permission of Lucas, and that such possession was not under any adverse claim of right until very shortly before this suit was brought. No possession can result in title by limitations, unless the same is under a claim of right or color of title. *Bowman v. Lee*, 48 Mo. 335; *Fugate v. Pierce*, 49 Mo. 441; *Dalby v. Snuffer*, 57 Mo. 294; *Bradley v. West*, 60 Mo. 33; *Baber v. Henderson*, 156 Mo. 566, 57 S. W. 719, 79 Am. St. Rep. 540; *Heckescher v. Cooper*, 203 Mo. 278, 101 S. W. 658.

The judgment is affirmed.

BLAIR, C., concurs.

PER CURIAM. The foregoing opinion is adopted as the opinion of the court. All concur.

MATHIS v. WABASH R. CO.

(Supreme Court of Missouri, Division No. 1.
Nov. 30, 1912.)

APPEAL AND ERROR (§ 777*)—DISMISSAL—ON CONSENT.

Where parties upon appeal filed a stipulation reciting that the case has been fully settled, and that an order of dismissal at the cost of appellant may be entered, the appeal will be so dismissed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 8120; Dec. Dig. § 777.*]

Appeal from Circuit Court, Macon County; Nat M. Shelton, Judge.

Action by Hiram H. Mathis against the Wabash Railroad Company. Judgment for plaintiff, and defendant appeals. Dismissed.

J. L. Minnis and N. S. Brown, both of St. Louis, and Guthrie & Franklin, of Macon, for appellant. R. W. Barrow and B. R. Dysart, both of Macon, and John T. Barker, of La Plata, for respondent.

GRAVES, P. J. Since the submission of this cause the parties by and through their counsel of record have entered into a stipulation as follows, omitting caption and signatures: "This case having been fully settled, and the amount heretofore agreed upon having been fully paid, it is hereby agreed and stipulated that the following order be entered upon the record of the court: Now comes the appellant and dismisses his appeal. Wherefore it is considered by the court that said appeal be and the same is hereby dismissed at the cost of the appellant."

Let the appeal be dismissed, and the judgment entered for costs as in the stipulation stated. All concur.

FIRST NAT. BANK OF PLATTSBURG v. RENICK et al.

(Supreme Court of Missouri, Division No. 2.
Nov. 13, 1912. Rehearing Denied Dec. 10, 1912.)

1. BILLS AND NOTES (§ 518*)—CONSIDERATION—EVIDENCE.

Evidence, in a suit to set aside a deed of trust executed in 1898 to the grantor's children to secure notes to the amount of \$30,000, based upon a note for \$6,000 executed in 1874 by grantor to his then wife, held to sustain a finding that the \$6,000 note was without consideration.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1816-1821; Dec. Dig. § 518.*]

2. FRAUDULENT CONVEYANCES (§ 104*)—TRANSACTIONS—CREDITORS.

Where the rights of creditors are involved, financial transactions between husband and wife are looked upon with suspicion.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 337-344; Dec. Dig. § 104.*]

3. APPEAL AND ERROR (§ 1096*)—REVIEW—SUBSEQUENT APPEAL—EVIDENCE.

In examining the trial court's conclusions on the facts in an action to set aside a deed

of trust, the reviewing court could consider the lapse of time, the discrepancy between the present testimony and that given on a former trial, and the fact that the changes made in the testimony conformed to the needs of the parties introducing the witnesses, as determined by the former decision.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4353-4357; Dec. Dig. § 1096.*]

Appeal from Circuit Court, Lafayette County; Sam Davis, Judge.

Suit by the First National Bank of Plattsburg against Bessie M. Renick and others. From judgment for plaintiff, defendants appeal. Affirmed.

John A. Cross, of Lathrop, and J. W. Boyd, of St. Joseph, for appellants. W. S. Herdon, of Plattsburg, and Culver, Phillip & Spencer, all of St. Joseph, for respondent.

BLAIR, C. This is a suit to set aside a deed of trust executed June 25, 1898, by Emanuel S. Fry to his three children to secure notes amounting, with interest, to about \$30,000. On the same day the deed of trust was executed, Fry conveyed all his other property, and the present plaintiff instituted an action against him, attaching the 220 acres of land covered by the deed now assailed. In that action there was judgment for defendant on the plea in abatement and for plaintiff on the merits. On plaintiff's appeal the judgment on the plea in abatement was reversed and the cause remanded, and on retrial the attachment was sustained. The land now involved was bought by plaintiff at execution sale under the judgment. The opinion of this court in that case (168 Mo. 492, 68 S. W. 348) states the facts as then proved, and it was there held the trial court might well have directed a verdict sustaining the attachment. On the trial of this case the principal evidence for defendants was given by the same witnesses who testified for defendant Fry in the attachment proceedings.

The action of this court in reversing the judgment and remanding the former case was in part predicated upon the conclusion that there was no evidence in the record (168 Mo. loc. cit. 514, 68 S. W. 348) tending to show there was any consideration for the notes secured by the deed of trust now sought to be set aside. The record disclosed that the notes mentioned depended for their consideration upon a note for \$6,000 executed in 1874 by Emanuel S. Fry to his then wife for one-half the sale price of Virginia lands given the wife by her father. In that case it appeared the note was executed without any previous agreement respecting it, after the husband had reduced the proceeds of the lands to his possession. The evidence in the former case chiefly consisted of depositions, and these were offered in the present case in proof of the character of the testi-

mony of the principal witnesses in the former case; they being also the principal witnesses in this case. As to what the character of that testimony was in the attachment proceedings, reference, for the sake of brevity, is made to the decision of this court in the attachment proceedings. In that case, on retrial, the circuit court directed a verdict sustaining the attachment, and no appeal seems to have been taken.

[1] It also appeared in evidence in the present case that in other cases instituted by other creditors of Fry the depositions of some of the witnesses had been taken, and that in no instance, prior to the institution of the present suit, had the testimony as to the facts indicating a want of consideration for the original \$6,000 differed materially from that in the attachment proceedings first mentioned.

The evidence now discloses that some of the witnesses have a recollection of the circumstances under which the \$6,000 note was executed and delivered entirely different from that they had when their testimony was previously taken. Under these circumstances the trial court refused to believe them and found for plaintiff, and defendants appealed.

[2] In *First National Bank of Plattsburg v. Fry*, 168 Mo. loc. cit. 513, 68 S. W. 354, it was said of the very transaction involved in this case that, "when the rights of creditors are involved, transactions like this between husband and wife are to be scrutinized with the most jealous care." It was further pointed out that the presumption was that the deed from Deyerle and wife to Mrs. Fry, and that from Fry and wife to Chapman, were acknowledged February 28, 1874, and that the presumption was these deeds were delivered on the day they were acknowledged, and therefore two days before the execution of the note from Emanuel S. Fry to his wife, which bore date March 2, 1874. Since defendants' position is that the trial court was wrong in finding from the evidence that the \$6,000 note was without consideration, it becomes necessary to examine the evidence in this record.

That the character of the evidence before the trial court may be understood, excerpts therefrom may prove enlightening. J. D. Deyerle, one of defendants' principal witnesses, had testified in 1898 that the deed to Fry and wife from Deyerle, and the deed from Fry and wife to Chapman, were both acknowledged on the same day, and delivered on the day they were acknowledged. In 1907 he testified that the deeds were not delivered until two or three days after they were acknowledged. During his cross-examination the following occurred: "Q. You say to-day, nine years later, that you were mistaken when you made these answers to these questions, and you also say that you can give no reason for saying why your memory

to-day is better than it was nine years ago: is that right? A. Only by my recollection, sir. Q. Now, the fact in the matter was this, Mr. Deyerle: You gave your testimony in 1898, and you know this case was tried after that, don't you? A. Yes, sir; I heard it. Q. You know from Mr. Fry that it was tried? A. Yes, sir. Q. Mr. Fry told you that the case went to the Supreme Court of Missouri, didn't he? A. Yes, sir. Q. And he told you that the Supreme Court of Missouri had reversed the decision, didn't he? A. Yes, sir. Q. And Mr. Fry told you that the Supreme Court, in reversing that decision, had held that there was no consideration for the note that was given by him to his wife, the \$6,000 note referred to in your testimony, unless it could be shown that an agreement existed between him and his wife, before the note was executed, that the note was to be given in consideration of her deeding this land to Mr. Chapman, joining in the deed to Mr. Chapman. He told you that, didn't he, in substance? A. I don't exactly know the circumstances; something to that effect. Q. And he told you it was necessary to get evidence to that end, didn't he? (Objected to by counsel for defendants, because the defendants are not bound by any conversation he had with E. S. Fry.) Q. He told you that it was necessary to get evidence to that effect to show that this agreement existed between him and his wife before the deeds were executed, didn't he, in substance, sir? A. No, sir. Q. He didn't tell you that? A. No, sir. Q. Then they took your deposition over, didn't they? A. Next time they came. Q. That is the time that Mr. Fry came here and told you about what the Supreme Court had decided? A. Yes, sir. Q. When it became necessary to take your deposition over the second time, the Supreme Court had decided the case, hadn't it, sir? (Objected to as hearsay testimony.) A. I don't know. Q. You know it from what Mr. Fry told you? A. That they had reversed the case back? Q. And he told you the facts you said he told you? A. Yes, sir. Q. And then your deposition was taken the second time? A. Yes, sir. Q. And then when they took your deposition over the second time you changed your testimony from what it had been on the first trial? A. Yes, sir."

With reference to the same matter, the delivery of the deeds, etc., the same witness further testified: "Q. Didn't you say to me, on cross-examination, that Mr. Fry had explained to you that the Supreme Court of Missouri had reversed the judgment in the case of the Bank v. Fry, and explained to you why they had reversed it? Did you not make that admission yourself on your cross-examination? A. Yes, sir; I believe I did. Q. That is true, isn't it? A. Yes, sir. Q. Now, I say that it was after the time that Mr. Fry had explained to you the decision

that you first made the statement that the two deeds we have been talking about were not delivered until three days after they were acknowledged? A. Yes, sir. Q. You had never made any such statement as that before? A. No, sir. Q. At that time you made the statement that they were delivered on the same day they were acknowledged, and you now say you were mistaken when you made that statement? A. Yes, sir. Q. When did your father make the deed to you for your share of this land? A. I have forgot that date now, sir. Q. About what time? A. The Franklin county land, you mean that division? Q. Yes. A. I think, sir, about six months after. Q. That is your recollection now that it was six months after? A. Yes, sir. Q. Don't you know it was two years after? A. No, sir. Q. Didn't you state in your deposition it was the 2d day of November, 1876? A. My deed? Q. Yes. A. I don't remember, sir. Q. You do not remember whether that was correct or not? A. Made the deed to me? Q. Yes, sir; you don't remember if that is correct or not? A. No, sir. Q. Why can't you remember a transaction of that kind, which was a business transaction in which you were interested, but you can remember the statement made by your sister to your brother-in-law 33 years ago—a transaction in which you were not particularly interested? A. I cannot say, only from my memory. Q. There was nothing particular to impress this transaction on your mind, was there? A. No, sir. Q. Now, what did your father say to you when he made the deed to you of your portion of the land? A. Just made me the deed; turned it over to me. Q. Don't you recall what he said to you at the time? A. No, sir. Q. And were you present when he made the deed to your sister, Mrs. Chapman, for her portion of the land? A. Yes, sir. Q. Do you remember what he said to her at that time? A. No, sir; I can't remember, sir. Q. The deed to Mrs. Chapman for her portion of the land and the deed to you for your portion of the land was made after the deed was made to Mrs. Fry for her portion of it? A. Yes, sir; it was. Q. Yet you don't recall what occurred when these deeds were made? A. Not exactly. Q. Yet you were personally interested in this matter? A. Yes; as far as my own deed. Q. You cannot recall those things, and you do recall the conversation between your sister and her husband when the deed was made to her? A. Yes, sir. Q. What else occurred on that day besides these transactions? A. You mean when the deed was made? Q. When the deeds were delivered and your sister remarked to her husband, 'Where is the note?' and her husband turned to you and asked if you could get him a blank note, etc., what other conversation occurred there on that day? A. I cannot recall, sir. Q. You don't recall anything else that occurred on that day? A. No, sir."

Henry S. Deyerle's deposition had been twice previously taken and in neither instance had he testified to any conversation between Fry and his wife indicating a previous agreement between them that Fry was to give his note to her in consideration of his receipt of the purchase money and notes for the Virginia lands. In this case he testified to such a conversation, but was unable to explain why he remembered it 33½ years after the transaction, when he failed to remember it on the occasions when his deposition was taken 6 and 10 years before his testimony in the present case was given.

The substance of the testimony of Henry S. Trout, so far as it was competent and admissible, was that on February 27, 1874, the day the deeds were drawn, he heard Mrs. Fry direct the conveyancer to make the notes or bonds Chapman was to give for the deferred payments payable to Emanuel S. Fry, saying she "had an understanding and agreement with him which was satisfactory to her as to the amount of the purchase money." According to Trout, this was Mrs. Fry's language, and he claimed to have a distinct recollection of it. His testimony was given 33 years after the alleged occurrence, and followed a conversation with E. S. Fry in regard to the matter. The witness remembered scarcely anything else which occurred at or near the date of the drafting of the deed. He was unable to remember the date of Mrs. Fry's marriage, though assigning his cousinly interest in her affairs as the reason the conversation to which he testified was impressed upon his memory. He was 65 years of age when his testimony was taken.

C. W. Chapman, testifying 33 years after the fact, claimed to remember seeing his grandfather, Benjamin Deyerle, hand to Mrs. Fry something at some time during the spring of 1874, and say to her that they were the papers to the Franklin county land. He did not remember that Mrs. Fry said anything at all on that occasion, though it was at that time, according to J. D. Deyerle, Mrs. Fry asked for and received the \$8,000 note from her husband.

Emanuel S. Fry's deposition had been taken several times before the trial in this case. In his deposition taken in 1898, 24 years after the event, he testified concerning the happenings at the time of the allotment of the Virginia lands by his wife's father thus: "A. The land was all together, and it would have to be divided—about forty or forty-five hundred acres of land—into four different lots between four different children. Each one was to have one-fourth of the land, of course, I was to have my wife's, as she was one of the children. After talking a while, Mr. Chapman remarked, says, 'I will give you \$12,000 for your part [my part] of the land.' I told him I didn't know anything about the price of land in

that country; and Mr. Deyerle was sitting there in his seat. Of course, I didn't live out there, and didn't know the worth of land there. I just remarked to him I would leave it to Mr. Deyerle, knowing that I didn't know anything about what that land might be worth, property like that, whether I should take it or not—take the \$12,000 or not. The old gentleman said—he just remarked: 'Fry, I believe that is a good price.' I told him 'All right.' Mr. Deyerle gave his decision. He said 'All right'; he would give it. I thought it was right, what they said; and they were to write out the deed—old Mr. Deyerle. Young David Deyerle was there."

In his testimony in this case he details an alleged conversation in which he, his wife, and his wife's father participated, in which the wife took the part he had assigned himself in his previous testimony, and in which she also stated that he (Fry) had agreed to give her his note for \$6,000 for one-half the purchase price of the land. Trout, who was present, remembers the conversation quite differently.

Fry had previously testified, also, when asked, "Then why did you give her [his wife] your note?" as follows: "A. Because I thought it was right. Mr. Deyerle deeded it to both of us. He remarked, 'Had we better draw this deed to you?' She said: 'No; let Mr. Fry have half of it.' I had the deed recorded, wrote up, and I gave her my note for half of it."

In this case he details a conversation at the time of the delivery of the deeds, in which he makes it appear that the reason for his executing the \$6,000 note was the alleged agreement at the time of the division of the land—a conversation which, it appears, he had not recalled until after this court handed down its opinion in the attachment proceedings.

The significance of the changes in the testimony of Fry and the Deyerles is considerable, when it is recalled that they were made after this court had held the \$6,000 note without consideration because of its delivery, without previous agreement, after Fry's reduction to possession of the purchase money and notes given by Chapman for the land, and after Fry had advised these witnesses of the decision and of its purport.

In addition, neither Fry nor his children had ever treated the notes to the latter as an existing liability. He was made their guardian and curator about 1885, regularly settled his accounts as such, and as they became of age took from each of them a receipt in full of all sums in his hands due from him to them; and at no time during the pendency of this guardianship did he charge himself with the notes alleged to have been successively executed to them in renewal of the \$6,000 note, though regularly

making the usual affidavit to the effect that in his settlements he had charged himself with all moneys and property in his possession belonging to them. Further, Fry kept accounts against his children for sums advanced to or for them, charging them with a total of about \$4,000, but crediting none of these charges on the notes to them. Had these credits been entered as of the dates they were charged in the account kept by Fry, the notes secured by the deed of trust here in question would have been most materially reduced. Again, the attitude of the children, after the deed of trust was executed and recorded, but ill consisted with the idea that they regarded the notes as valid and justly enforceable obligations. The land has been rented mainly to Mrs. Emanuel S. Fry (a second wife), and the proceeds and more, in excess of taxes and interest on the prior mortgage, have been expended in Fry's litigation with his creditors, though this is the first case in which the alleged interests of Fry's children have been directly assailed.

[3] In view of the rule heretofore mentioned and the character of the evidence in this case, as indicated above, the finding of the chancellor on the evidence, to the effect that the \$6,000 note was executed without consideration, ought not be overturned. The lapse of time, the discrepancy between the testimony formerly given and that given at a later period, the fact that the changes made so exactly conformed to the needs of appellants, as pointed out by this court in its former decision, the fact that Emanuel S. Fry, who is the most active personage in all this litigation, reported the reversal to the Virginia witnesses and explained to some, at least, of them exactly what was needed to meet the decision, and that then he and these witnesses again gave their testimony with the very substantial changes necessary to support appellants' contention in this case, all these things are to be borne in mind when examining the accuracy of the trial court's conclusion as to the facts. Moore on Facts, §§ 893, 1059.

The judgment should be and is affirmed.

ROY, C., concurs.

PER CURIAM. The foregoing opinion of BLAIR, C., is adopted as the opinion of the court. All the Judges concur.

KINCER v. KINCER et al.

(Supreme Court of Missouri. Division No. 2. Nov. 13, 1912. Rehearing Denied Dec. 10, 1912.)

1. DEEDS (§ 196*)—EXHIBITION—FATHER TO SON—UNDUE INFLUENCE—PRESUMPTIONS—BURDEN OF PROOF.

Where a father, nearly 93 years of age, nearly blind, and confined to his bed, conveyed all his real estate to the son with whom he

was living and by whom he was being cared for, for a nominal consideration, and there were other children to whom no advancements were made, it will be presumed that the deeds were the result of undue influence, and the burden was on the grantee to show the contrary.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 587-593, 649; Dec. Dig. § 196.*]

2. DEEDS (§ 211*)—VALIDITY—UNDUE INFLUENCE.

Evidence held to require a finding that deeds executed by a father to his son were the result of undue influence and invalid.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 637-647; Dec. Dig. § 211.*]

Appeal from St. Louis Circuit Court; Moser N. Sale, Judge.

Action by Pearl Kincer against John Kincer and others to set aside certain deeds of real property. Judgment for defendants, and plaintiff appeals. Reversed and remanded, with directions.

Martin Kincer on December 7, 1906, made two quitclaim deeds for two different tracts of real estate in the city of St. Louis to his son John Kincer. The father died January 13, 1908, and the plaintiff, his granddaughter, sued to set aside those deeds on the ground of undue influence. From a decree dismissing her bill, she has appealed.

Martin Kincer was 93 years of age when he died. He had been blind in one eye since early life, and the vision of the other eye had gradually faded until he was nearly blind. He was so deaf that it was necessary to get close to him and shout almost in his ear to make him hear. In January, 1903, he fell and broke his hip, and was thereafter confined to his bed until his death. It was necessary for him to take "physic," as a result of which his bed was sometimes made unclean. After the execution of the deeds in question, and in August, 1907, there was an inquiry in the probate court as to his sanity. The jury went to his house and asked him his reasons for making the deeds to John. He answered that he had done so because John had taken care of him for a number of years and had promised to take care of him as long as he lived. The jury unanimously found that he was of sound mind. The deeds were ordinary quitclaim deeds, expressed to be made in consideration of \$10, and without any reservations or conditions. He had lived for many years in north St. Louis, and had been engaged in the wood business, and at one time had a grocery store. He had been out of business for 30 years. At the time of his retirement, he owned a double brick building at 2810 Broadway, in part of which he lived, and rented the other to a tenant. He also owned property on Ninth street, on which were three tenements, all rented for residences. Whether they were in separate buildings, or all in one building, does not clearly appear from

the evidence. Up to the time of his death, the rents on that part of the property not occupied by himself and his son John were about \$70 a month, running back for many years. His wife had died about 1888. His eldest son Abner, 64 years of age at the time of the trial, was married at 21 and went to himself; his father furnishing him \$500 to go into the grocery business which was soon sold, and the money was repaid. Abner separated from his wife, who lived in one of his father's houses, paying rent with reasonable promptness. Abner's son, Arthur, testified that, soon after his grandfather was hurt, his aunt Amelia, the wife of his Uncle John, came to his mother's house, who was confined in bed, just recovering from an operation, and notified his mother that she would have to pay more rent or move. They had been paying \$12, and it was raised to \$14. There was no evidence of ill will between Abner and his father. Martin, Jr., another son, married in 1882 and was on a farm for five years, then came back to St. Louis. He seems never to have prospered. He was assisted in various ways by his father to the extent of about \$2,500. He died in 1900, leaving a widow and six or seven children, three of whom are minors. There is no showing in the evidence that there were other than kind feelings between his family and his father. Sarah, a daughter, married young and died, leaving one son, Martin Cranford. Neither he nor his mother ever had any advancements, and there is no showing of ill will between Martin Kincer, Sr., and them. Mary, another daughter, was twice married, and subsequently lived with another man under questionable relations. She at various times received assistance from the father not amounting in all to more than \$100. She testified in behalf of the defendant and stated that about 1895 her father told her that he had given the three oldest brothers all he ever intended to give them, and that he was not going to give her anything because she did not behave herself. In her evidence the following occurred: "Q. Do you know whether or not he made any advancements or had given anything to your other brothers? A. Yes, sir; I have heard him say so time and again, and I know of him advancing money to my brother Marty. Q. Do you know of his advancing money to any of your other brothers? A. No, sir; only what he said himself." William, the third son, married early in life and went to himself, always living in close vicinity to his father. About 1882 he built a house next door to his father and lived there until his death in 1900. About the time of John's marriage, the sister Mary came home to her father's, and the father wanted the use of Will's buggy to bring up Mary's trunk, and it was refused. The father built a spite fence

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

between him and William, and William's children put up a flag by the fence with the word "rats" on it. In a few years the fence was taken down. There was more or less intermittent visiting between William's family and his father. There were never any advancements made to William or his family. He left a widow and four children, of whom the plaintiff is one. They are all self-sustaining, but earn their living by work; one of them being a member of the police force. John, the youngest son, and the principal defendant herein, was 51 years old at the time of the trial. He lived in his father's home all his life. He was married about 1890. He has had five children, or whom three are living. Immediately after John's marriage, his father gave him all the household goods, and John testified that after that time his father never had any personal property. There was evidence tending strongly to prove that John was never in any business prior to the making of the deeds except to do the repair work for his father and occasionally odd jobs for neighbors.

In the proceeding in the probate court concerning the sanity of his father, John's deposition was taken, and it was read on the trial by the plaintiff. In that deposition he said, speaking of his father: "Q. When did he own any personal property? A. He did before I was married. Q. And you are positive that within the last 10 years he has not owned a bit of personal property? A. Not a penny. Q. Nothing at all? Did he have any horses or wagons, or anything of that nature? A. No, sir. Q. Have you been engaged in business ever since you were married? A. No, sir. Q. Have you been engaged in business for the last 10 years? A. No, sir. Q. And since you were married you say he has had no personal property? A. No, sir; not since the day after I was married. Q. Since that time he has had no personal property at all? A. No, sir. Q. From the very first day you were married, he has owned no personal property at all? A. The second day he didn't; the first day we didn't get settled down. Q. When you were married, where did you settle down? A. Right there in the house. Q. 2810 North Broadway? A. Yes, sir. Q. On the second day after you were married, what did he give you? A. The household goods; household property. Q. What did he ever do with the real estate that he owned? A. What did he ever do with it? Q. Yes. A. I bought it down here on the 7th day of December, 1906. Q. You bought it from your father? A. Yes, sir. Q. What did you give him for it? A. \$10. Q. Did you give him the actual money? A. Yes, I gave it to him, and he turned around and gave it to the little boy; said he didn't have any use for it. Q. What little boy? A. My son."

And also in regard to the real estate and

his own employment he said: "Q. How did he happen to transfer to you? A. Because he said he couldn't be bothered with people running to him, and he wanted me to take it and do just as I pleased with it; sell it or keep it, just as I pleased. He wanted me to sell at once, but I told him I wouldn't; that I would keep it as long as he lived. Q. And you never asked him to turn it over to you? A. No, sir; he had often said he wanted me to take the property; that he wanted me to have it, and he couldn't be bothered with it. Q. When did he say that? A. Since he was in bed; anyway, since he got hurt, and before that; I kept telling him 'No.' Q. Up until December, 1906, this property has been bringing in a rental of about \$70 a month, hasn't it? A. Somewhere around there; that is, if we got it all. Q. That is, it averaged around there? A. Yes. Q. That would be about \$700 or \$800 a year? A. Yes. Q. And that has been going on for the last 10 years? A. Yes. Q. What became of all that money? A. Used it for repairs, for streets, all sorts of things; all work necessary to be done around—lumber, bricks, anything needed for repairs for the streets. Q. Do you mean to convey the idea that all the money taken in in rent has been used in repairing the buildings and in fixing up the streets? A. Not all of it; most all of it. Q. None of that money has been used to support the old gentleman? A. None to amount to anything, only once in a while we have some spare money and buy him something with it; sometimes get him some underclothes, such as that. Q. None of that money has been used to maintain your family? Your own household? A. It might be a little; not much of it; very little. Q. You have collected that money yourself? A. Yes, sir. Q. For your father up to the time of this transfer? A. Yes, sir. Q. Have you kept any record of what you took in? A. No, sir. Q. How long have you been in the business? Have you been in business during all of the last 10 years? A. I have been working around at building, patching up—odd jobs and so on. Q. What do you mean by that? A. Carpenter work. Q. How long have you been in saloon business? You say you are in the saloon business now? A. Yes, sir; going on six months. Q. Prior to that time you were in the carpenter business? A. Yes, sir. Q. You have followed the carpenter business, with the exception of the last six months, for the last 10 years? A. No, no; not for the last 10 years. Q. How long have you followed the carpenter business? A. About two years. Q. Prior to that time what did you do? A. Patched around for the neighbors, and did my own work; patching up around on the property where it needed it. Q. How long did you work around that way? A. About 20 years, I guess; maybe 25 years. Q. In that way, how much did you make a month? A. A

month? Q. Yes. A. I can't tell about that; when I worked at carpenter work I got \$23 a week, when I worked steady. Q. Working for yourself? A. Not working around; when I worked steady. Q. I don't mean when you were working steady. You say for about 10 years you were working around at patching for yourself? A. For the old man. Q. For your father? A. Yes, sir. Q. How long did that last? A. Up until the day I got it for myself. Q. And since you have been engaged in the saloon business also? A. No, sir. Q. Then the only real income you ever did make was at carpenter work? A. Yes. Q. And that's about three years ago? A. Yes. Q. You worked how long at the carpenter business steady? A. About a year, I guess, off and on. Q. How much did you make a week? A. About \$23 a week; I worked off and on for a year; I guess I made about eight months out of it all. Q. So for eight months that you worked as a carpenter you got \$23 a week? A. Yes, sir. Q. And you have now been in the saloon business about six months? A. Yes. Q. Have you made a large amount of money in the saloon business? A. No; I don't even make good wages out of it. Q. There is not much doing, then, in the saloon business? A. No; there's not much doing in the saloon business. Q. When were you married; what did you have outside of what your father gave you? A. I didn't have anything except my clothes and some few little things. Q. And 10 years ago, what property did you have? A. Nothing more than I had before. Q. Did your wife, when you were married, have any money? A. No, sir. Q. And as a matter of fact, with the exception of the eight months that you worked as a carpenter, you have really lived out of your father's rents, have you not? A. No, sir. Q. How did you live then, if you didn't live out of the money received from the rents? A. I used my own money for food bills and such things as that. Q. It appears from your statement that for almost nine years you worked for your father? A. I worked for him as long as he was able to be around and take care of his business. Q. Where did you get the money to live on? A. Where did I get it? Q. Yes. A. Well, I got along with what little I made working around, and what little he gave me. Q. That's the point I want to bring out, that, as a matter of fact, you and your wife have lived off the income of the property? A. No, we didn't; I made money working around, patching and so on. Q. So you don't mean to convey that you have not made any money for the last nine years. A. I made money working around for the neighbors and other people, patching up and fixing up things for them. Q. How much money a week or month did you make working around in this way? A. I can't tell you; I don't know exactly; all I know is I done the old man's work and my own work and I worked for the neigh-

bors, patching up and fixing up for them at odd times, whenever I had anything to do. Q. Estimate in your own way how much you made a week? A. About \$8 or \$10, sometimes \$6, sometimes as much as \$20; I can't tell you just how much I did make. Q. How large a family have you? A. I have three children. Q. How old is the oldest child? A. Going on 19—no, going on 18. Q. How young is the youngest one? A. Eleven years old. Q. Have you dead children too? A. Yes, sir. Q. How many? A. Two. Q. You have had five children altogether? A. Yes, sir. Q. Now, for the past 10 years, your father's estate has been under your management and control? A. Yes, sir. Q. And during this period of time you have had charge of everything? A. Yes, sir. Q. Now, for the past five years, he has not been out of the house, directing and taking care of anything? A. No, sir."

Yet, after testifying as above in the deposition he testified on the trial as follows: "Q. You were questioned in your deposition regarding your employment during your entire life: Did you ever work? A. Yes, sir. Q. What occupation? A. Railroad, carpentering, and machinist. Q. What railroad did you work for? A. St. Louis, Kansas City & Northern, now the Wabash. Q. How long did you work for them? A. Pretty nearly 18 or 14 years."

It his deposition, the defendant stated that his father gave to the notary, Mr. Hauschulte, at the time the deeds were acknowledged, his reasons for making the deeds as follows: "Q. Did Mr. Hauschulte come down to the house? A. He came down to the house; yes. Q. And he saw your father attach his mark to this deed? A. Yes, sir. Q. And it was after that that you gave him the \$10? A. I gave him the \$10 while Hauschulte was having the deeds made out. I told Mr. Hauschulte to come down to the house; that the old man wanted to see him. When he come there at the house, the old man told him that he wanted me to have the property; that he wasn't able to handle the business; people running there to rent it or to buy it, and he couldn't handle it and didn't want to be bothered with it. He said he wanted me to have it and do as I pleased with it, and told Mr. Hauschulte to make out the deeds. Q. So Mr. Hauschulte went to make out the deeds? A. Yes. Q. But while he was making out the deeds you gave the \$10 to your father? A. Yes, sir. Q. And then he gave it to the little boy? A. Yes, sir. Q. And then Mr. Hauschulte brought down the deeds? A. No, he sent for me—he sent for me and I went to his office, and he said he would have the deeds there in a couple of days. And when he fetched them there, the old man signed them."

During the examination of Mr. Hauschulte, the following occurred: "The Court: He didn't say anything concerning the reason

why he was transferring all of this property to John? A. No, sir." While not asked especially about it, Mr. Hauschulte's evidence clearly showed that he drew the deeds at John Kincer's direction, and that he did not see John's father about it until the deeds were acknowledged. In his testimony at the trial, in regard to his father's reasons for making the deeds, John Kincer said: "Q. What did your father say to you about that? A. He said to me, 'John, about the will, we had better make a deed and be sure that the will don't get destroyed, for them people next door,' he said, 'are mean enough to do anything.' That is exactly what he said. 'They are dirty enough to do anything,' he said. 'Them people will do anything to make away with that will, and the best thing we can do is to call Hauschulte and let him make a deed so they won't bother you.' Q. What did you say? A. I said I thought the will was just as good as the deed, and he said they might make away with it and it get destroyed, and he said, 'You tell Mr. Hauschulte to come up in the morning and I will make out a deed,' and I went next morning and told Mr. Hauschulte."

The first will was made about 1895, and the second on September 25, 1903. Mr. Hauschulte wrote them both. He could not state what the contents of the first will were. He stated that it was destroyed when the last was written, and the last one was left in his charge until the death of the testator. Mr. Maune, who witnessed both wills, testified that their contents were the same.

It was conceded at the trial that Martin Kincer, Sr., kept a book in which he set down the amounts furnished his children by him. That book shows about \$2,500 furnished Martin, Jr., most of which was before 1896. After that the amounts furnished him gradually diminished until they ceased in 1898, and the book did not show anything furnished any of the children after that year. That book did not show that any of the children except Martin, Jr., and Mary had received anything. John and his wife had charge of the father and personally cared for him until his death, and they were kind and attentive to him.

McShane & Goodwin, of St. Louis, for appellant. Walther & Muench, of St. Louis, for respondents.

ROY, C. (after stating the facts as above). We have no difficulty in finding that Martin Kincer was sane when the deeds were made. But that is all that can be said in support of the deeds in controversy. Owing to his old age and afflictions, he was a prisoner in his own house. He was kindly treated, but John had full dominion over his body and over the management of his property and its income.

[1] The law raises a presumption that the deeds were the result of his undue influence over his father, and calls upon him to ex-

plain that they were not the result of such undue influence. In the absence of such explanation, the presumption becomes absolute. The defendant has utterly failed to make a satisfactory explanation.

[2] The claim is made that the other children were a burden to their father, and that John was the only one who was a comfort to him. None of the other children was very successful in life. Martin was almost constantly in need of assistance, and got more or less of it down to about 1898. Mary had received about \$100. Abner, Sarah, and William were under no pecuniary obligation to their father in the way of advancements. All the other children had, early in life, passed out of the home nest. John alone remained at home. There is no escaping the conclusion from the evidence that his father financially supported him all his life; that support being supplemented to a very limited extent by John's income from odd jobs. That is clearly shown by his own evidence. In comparison with what he received, even Martin, Jr., got very little. The storms beat heavily upon the heads of his brothers and sisters, but John was always safely sheltered "in his father's house." From a financial standpoint, there was no cause for such conveyances. The income of the property was more than sufficient to pay for his support and care, even after his affliction.

In *Martin v. Baker*, 135 Mo. loc. cit. 505, 36 S. W. 372, property was transferred to a child in consideration of support. The income of the property was sufficient for that purpose. The court said: "That the contract thus secured was most unreasonable and unfair cannot be doubted. From the character of the contract, the relationship of the parties, and the mental condition of the grantor, considered alone, we would be bound to draw the inference that improper influences were brought to bear in securing the deed." In that case there was a provision for a forfeiture in case of a failure to support the grantor. Not so here. No rights were reserved. John could have sold the property at once; and then, with one reckless investment of the proceeds, all might have been over and the grantor a pauper. In the making of those deeds, only John was cared for. The father and his other children were ignored. It is claimed that the deeds were made because of coolness between the grantor and the family of his son William and because of the bad conduct of Mary. The coolness that existed 20 years before was caused by the fact that the father did not think that William was at that time kind enough to Mary. He surely did not disinherit Mary on account of her misbehavior, and also disinherit William's family because William was not kind to Mary. In any event, that furnishes no reason why he should repudiate his other children.

John acquired the entire management of his father's property about 10 years before

the latter's death, and it was just about that time that the father ceased to aid any of his children. The book of advancements shows that fact. His father was not then crippled, and needed no special care, yet his income was all appropriated by John; he of course, paying the necessary expenses. At that time there was a will, which was written about 1896. We presume that it was different from the will of 1903, because it is not reasonable to presume that it would be destroyed and replaced by a duplicate of it. After being injured in January, 1903, he made a will in September of that year, giving everything to John, and then followed the making of the deeds in 1906. The defendant gave several different explanations as to why those deeds were made. In his deposition he stated that his father made the deeds to him because he did not want to be bothered with it. On the trial he stated that the reason his father gave for making the deeds was because the people next door were mean enough to do anything, and that they might make away with the will. That is a very different reason from the other, and moreover it is irrational. The will was in the keeping of Mr. Hauschulte, and there was no reason to suppose that William's family could get control of it.

The law does justify a parent in favoring one child over another in the gift of property. It permits him to obey the dictates of his affections in that matter; and such parental affection is no mark of undue influence. Those are rules guarded with great care by this court, but they stand side by side with the presumption above spoken of. If the parent is free, he may prefer one child over another of equal merit, giving no reason therefor. But whenever one of his children has the care and management of his property, any preference given to such child during such relation must be shown to be of the utmost fairness. *Street v. Goss*, 62 Mo. loc. cit. 229. In that case it was said: "There exists, therefore, no necessity to show fraud or imposition practiced upon him who bestows the confidence; but simply to show that, during the pendency of such intimate relations, the conveyance in question was made." In *Hall v. Knappenberger*, 97 Mo. loc. cit. 511, 11 S. W. 239, 10 Am. St. Rep. 337, it was said: "If, in such circumstances, a gift of any considerable value be bestowed by the one who reposes confidence upon the one in whom confidence is reposed, such gift is presumptively void. The burden is cast upon the recipient of the gift; and it belongs to him to show the absolute fairness and validity of the gift, and that it is entirely free from the taint of undue influence." In this case, in addition to being his father's agent, John was his nurse. It was held in *Dingman v. Romine*, 141 Mo. loc. cit. 475, 42 S. W. 1087, that there is no relation between men more calculated to make the

will of one subservient to that of the other than the relation of patient and nurse. That relation existed between John and his father in addition to the fiduciary relation.

We cannot do otherwise than stamp with our disapproval the transaction here involved, and we reverse the decree and remand the cause, with directions to enter a decree in favor of the plaintiff.

BLAIR, C., concur.

PER CURIAM. The foregoing opinion is adopted as the opinion of the court. All concur.

DAMAN v. REMME et al.

(Supreme Court of Missouri, Division No. 1.
Nov. 30, 1912.)

1. DEEDS (§ 120*)—TITLE CONVEYED—EVIDENCE—SUFFICIENCY.

Evidence held to support a finding that the grantee in a warranty deed conveying in fee the legal title to the entire property described, though the beneficial interest of the grantor was only an undivided third interest, acquired the beneficial interest in the entire property, in view of the agreements of the parties in interest.

[Ed. Note.—For other cases, see *Deeds*, Cent. Dig. §§ 375-393, 401, 407-412, 416-454; Dec. Dig. § 120.*]

2. APPEAL AND ERROR (§ 1011*)—FINDINGS—CONCLUSIVENESS.

A finding on conflicting evidence will not be disturbed, though the Supreme Court doubts its correctness.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3983-3989; Dec. Dig. § 1011.*]

Appeal from St. Louis Circuit Court; Virgil Rule, Judge.

Action by William Daman against Charles T. Remme, executor, and others. From a judgment for defendants, plaintiff appeals. Affirmed.

This is an action at law, instituted in the circuit court of the city of St. Louis, by the plaintiff against the defendants for the partition and sale of certain real estate situate in said city, particularly described in the pleadings.

The facts of the case are few, and all but one of them, which will be presently noted, are undisputed.

A trial was had which resulted in a judgment for the defendants, denying partition, and after taking the proper preliminary steps therefor the plaintiff appealed the cause to this court.

The undisputed facts are as follows: The plaintiff and his son, John Daman, some years prior to the institution of this suit, bought the lot in controversy for the sum of \$2,000, paying \$1,000 of the purchase money in cash, the balance thereof remaining a lien thereon, and for their common convenience the title thereto was taken in the name of

John; that subsequently the plaintiff and his said son sold an undivided one-third interest therein to the defendant Charles T. Remme, the legal title still remaining in John; that after selling the first one-third interest to Chas. T. Remme they improved the property by constructing thereon three dwelling houses, and placed all of them in the hands of said defendant, who collected the rents, paid the taxes, interest, and repairs; that in order to pay for the construction of the houses three loans, secured by mortgage, aggregating \$7,500, were placed upon the property; that the property, at the date of the trial, including the improvements, was worth between \$10,000 and \$12,000; that some four years thereafter John sold his remaining interest in said lot to said defendant, and by deed in proper form conveyed to the latter the legal title to the entire property, including (without authority to so do, as is claimed by plaintiff) the one-third interest therein which plaintiff claims still belongs to him.

This claim of ownership by plaintiff is denied by defendants; they declaring that the defendant Chas. T. Remme purchased said one-third interest from the plaintiff in the manner to be presently stated. That fact is the disputed question in this case, as before mentioned.

In order to sustain the issues on behalf of the plaintiff, he testified in his own behalf, in substance, as follows: That in the month of March, 1900, he and his son John purchased of the defendant Chas. T. Remme 250 shares of the capital stock of the St. Louis Gasoline Motor Company for the consideration of \$4,000, paid for in the following manner: John, in order to pay for his interest in said shares of stock, conveyed by the deed last mentioned, though absolute in form only, his one-third interest in said real estate to said Chas. T. Remme, and that he (the plaintiff) and his wife, in payment of his interest in said stock, executed to said Remme their promissory note for \$2,000. That said transaction took place in Remme's office, and that the stock was then and there delivered to them, and that they there delivered the deed and note to Remme. That while John conveyed the fee to the entire property to Remme it was stated at the time, and understood and agreed to by all of them, that the deed was to convey only the one-third interest owned by John, and that plaintiff was to retain his one-third interest therein; also that Remme verbally agreed to hold said one-third interest for the use and benefit of the plaintiff.

John Daman, the son of the plaintiff, was called as a witness for plaintiff; and while his memory was poor, and he could remember but little at first as to what occurred at the time of the transaction, later, however, being recalled, his memory was better, and his testimony substantially corroborated that of the plaintiff. He also testified that he signed the \$2,000 note with his father, which

fact was denied by both father and son on first examination.

This was all the evidence introduced by plaintiffs.

The defendant Dr. Charles T. Remme, since deceased, in order to make out the defense, testified, in substance, as follows (this statement of the defendant's evidence, after a careful verification of the same with the record, is taken substantially from the statement of the case made by counsel for defendants): That he had managed the said property for about three years prior to March, 1900, and up to that time had advanced \$3,040 more than he had collected on account of the property; that at the time plaintiff and his son made overtures regarding the purchase of his shares in the St. Louis Gasoline Motor Company there was an outstanding indebtedness on the property of \$6,750, secured by deeds of trust, \$212 due on past-due interest notes, and \$3,040 due him for advances, making a total of \$10,002; that he explained this indebtedness to plaintiff, and told him that he did not think the property was worth over \$12,000; that he was willing to sell his Motor Company shares for the interest of plaintiff and his son in the real estate and a note for \$2,000, signed by plaintiff, his wife, and son; that this proposition was accepted, and the papers were drawn accordingly; that the plaintiff and his son attended to the preparation and execution of the deed, and the defendant attended to the drafting of the note; that in pursuance of this agreement he delivered the stock to plaintiff and his son, and they executed and delivered to him their joint note for \$2,000, dated March 7, 1900, and plaintiff's son and wife executed and delivered to him a warranty deed, conveying to him the full fee-simple title to the Shaw avenue property.

Defendant also testified that he had been in the exclusive possession and control of the property, claiming it as his own, since March 7, 1900, the time when the above transaction was closed; that after that date he did not consult with plaintiff regarding the management or repairing of the property, nor render to him any statement or account; that from March 7, 1900, until February, 1908, plaintiff did not make any inquiry regarding the property, nor ask for a statement or accounting, or claim any interest therein; that in the month of February, 1908, plaintiff called upon defendant and demanded that he account to plaintiff for his alleged share of the property, and that he convey to plaintiff such share; that he thereupon stated to plaintiff that he (plaintiff) had no interest in the property; that it was owned exclusively by defendant; and that he would not recognize plaintiff's claim.

Mr. Charles N. Noble, an attorney practicing at the St. Louis bar, testified that he had represented Dr. Remme in this transaction, and had prepared the note for \$2,000 and attended to its execution; that William Dam-

an, his wife, Maggie Daman, and his son, John H. Daman, called at his office and signed it; that plaintiff and his son said, in substance, at that time that this note for \$2,000 was given in settlement of a balance then due to Dr. Remme, after plaintiff and his son had given to defendant a deed.

William P. Bently and Sullivan & Wallace, all of St. Louis, for appellant. Rassieur, Schnurmacher, Rassieur & Kammerer, of St. Louis, for respondents.

WOODSON, J. (after stating the facts as above). There are a number of legal propositions stated and discussed by counsel in their briefs for the respective parties to this action, most of which are questions of procedure; but the view we have taken of the case renders it unnecessary for us to consider any question of procedure.

[1] As previously stated, there is but one disputed fact in this case, and that one is: Was it the intention and agreement of the parties to the transaction in question that the warranty deed from John Daman, dated March 7, 1900, purporting, on its face, to convey to Charles R. Remme a fee-simple title to the entire property described therein (the property in controversy), should convey to him only the undivided one-third interest therein which belonged to grantor therein?

That question was fairly and squarely presented to the trial court, without the aid of a jury, and, after hearing the evidence introduced by the respective parties to the action, it decided that question against the plaintiff.

After a careful reading of all the evidence presented by the record upon that question, we are fully satisfied that the finding of the court is sustained by a clear preponderance of the evidence; and that the finding and judgment of the trial court was correct.

The memory of both the plaintiff and that of his son John was poor, and their testimony was hesitating, doubting, incoherent, and contradictory, wanting in weight and destitute of conviction; while that for the defendants was clear, positive, and unequivocal, carrying conviction of its truthfulness to all who heard or read it.

[2] In addition to that, the judge who tried the case had the witnesses before him, observed their demeanor upon the witness stand, and heard their testimony as it fell from their lips, and consequently was in a much better position to weigh their evidence and pass upon the credibility thereof than this court is.

Under those circumstances, even though this court should doubt the correctness of the finding of the trial court, we would not feel justified in disturbing that action of the court without a stronger showing was made than is here presented by this record.

Under such circumstances, even in equity

cases, we differ largely to the findings of the chancellor, and rarely disturb his findings, except where the findings are against the great weight of the evidence. *Huffman v. Huffman*, 217 Mo. 182, 117 S. W. 1.

Finding no error in the record, the judgment is affirmed. All concur.

SMITH et al. v. MACK.

(Supreme Court of Arkansas. Dec. 23, 1912.)

1. USURY (§ 113*)—ELEMENTS—BURDEN OF PROOF.

The burden is upon the party pleading usury to prove that excessive interest was paid to the lender, or that a bonus or commission was paid to the lender's agent with his knowledge, or under circumstances from which his knowledge will be implied, which commission when added to the interest would exceed the lawful rate.

[Ed. Note.—For other cases, see *Usury*, Cent. Dig. §§ 308-323; Dec. Dig. § 113.*]

2. USURY (§ 57*)—ELEMENTS—AGENT OF BORROWER.

The payment of a bonus by a borrower to his own agent for procuring a loan does not make the transaction usurious.

[Ed. Note.—For other cases, see *Usury*, Cent. Dig. §§ 128, 129; Dec. Dig. § 57.*]

3. USURY (§ 117*) — SUFFICIENCY OF EVIDENCE.

Evidence, in a foreclosure action on secured notes given for a loan, wherein the defense was usury, held to sustain findings that the person to whom the bonus was paid for procuring the loan was the borrower's own agent, and that neither the lender nor any one acting for him received any bonus.

[Ed. Note.—For other cases, see *Usury*, Cent. Dig. §§ 328-340; Dec. Dig. § 117.*]

Appeal from Circuit Court, Greene County; Chas. D. Frierson, Judge.

Action by C. A. Mack against J. A. Smith and others. From a decree for plaintiff, defendants appeal. Affirmed.

C. A. Mack brought this suit against appellants to recover \$10,642.50 on two promissory notes and interest, and to foreclose a mortgage upon lands in Greene and Poinsett counties, given to secure the payment thereof. The answer admits the execution of the notes and mortgage and pleads usury in bar of the recovery, alleging that appellee agreed to make said loan, charging interest at the rate of 10 per cent. per annum from date until paid and an additional sum of \$1,000 as bonus for the forbearance and use of the money, which was paid to his agent and attorney, who delivered the amount of the loan to appellants; the money having been deposited by Mack with his said agent, D. J. Beauchamp, and the said Mack having full knowledge and consenting for his said agent to demand and receive said \$1,000. Alleged further that the notes sued upon are void for usury, and the mortgage likewise, and prays that the same be surrendered up and cancelled and the cloud upon their title removed.

It appears from the testimony that appellants had been trying to procure a loan of about the sum of money which they finally borrowed, with which to purchase certain lands in Greene and Poinsett counties, the acreage of which had not been exactly determined; that J. A. Smith had offered to pay any one who would procure them the loan of the amount, upon five years' time, \$1,000 for the service; that G. W. Cox had been attempting to procure the loan, but none of them had succeeded in doing so. J. A. Smith testified: That he had been in Memphis, trying to negotiate the loan, and it occurred to him that he could procure it from C. A. Mack. That he went to him upon his return from Memphis, told him he desired the loan for the purpose of buying certain lands, which were worth \$10 or more per acre; that he would secure the loan by mortgage upon the lands, and, in addition, upon the farm of one of the appellants, Virginia Thompson, in Greene county. That Mack intimated that he was favorable to the proposition and, after an hour's absence, returned, when they had another conversation. Mack said he had investigated the matter a little during the time, and one or two people told him it was a good loan, and he said further: "'I understand, Joe, that you have offered a bonus of \$1,000 to anybody that will loan you this money.' I looked at him a short time, long enough to get his expression, and saw that he knew something about this \$1,000, and I told him, 'Yes.' He said: 'That \$1,000 looks good to me, and, if I make the loan, you will have to give it to me.' I told him, 'All right.'" That thereafter Mack went to the bank to make the necessary arrangements, returned, and said the money would be forthcoming when the title was approved by Mr. Beauchamp, who was not then in the city. That it was arranged that evening or the next morning that Beauchamp, in Mack's behalf, and Williams, in behalf of his associates, should go to Harrisburg and investigate the title of the land that was about to be purchased. That they went there. George Cox informed the witness that Beauchamp had telephoned from Harrisburg for him to tell Williams to have the \$1,000 placed in the bank and inform him by phone that it had been done, or that matters at that end of the line would not be fixed up. This was done. Witness made no arrangement with Mack about how the \$1,000 should be paid, and at no time had he had any conversation with Beauchamp about this \$1,000, or asked him to assist him in procuring the loan. The next day the notes and mortgages were executed and delivered in Mr. Beauchamp's office, the check for the \$1,000 having been first turned over to him. That witness had never made any agreement with Beauchamp, nor had any conversation with him, relating to any compensation to be paid to him for procuring the loan, and in answer to this question said:

"Q. Did you know who was getting the \$1,000 at the time you were making the check to Beauchamp? A. Mr. Mack was the man I was paying this money to, and the reason I gave it to Beauchamp was that Mack told me that Beauchamp was his attorney and would attend to the matter for him, and that is why I gave the check to Beauchamp. Otherwise I would have given it to Mr. Mack." Witness said further that he had never had any conversation with Cox at any time, in which he was told that Beauchamp would procure the loan and that he must be paid for it. The lands were purchased and the deed of conveyance made to C. A. Mack, for a consideration of \$10,642.50. He later, for the same consideration, made a quitclaim deed to appellants at the time of the execution of the mortgage.

J. W. Williams, another appellant, testified: That the lands were purchased from J. H. Vandever, for something in excess of \$10,600, and the title was taken in the name of C. A. Mack. That he went to Harrisburg to close out the trade with Beauchamp, who gave Vandever his personal check to cover the consideration. It was witness' understanding that they were to pay Mack \$1,000 additional, to be embodied as a part of the principal in the mortgage, and he did not understand until after he returned from Harrisburg that the transaction had been arranged otherwise. He then joined with the others in executing a note for \$1,000, but did not know to whom the money realized thereon had been paid. That he represented the firm when he went with Mr. Beauchamp to look up the titles and supposed that Mr. Beauchamp represented Mack. Did not remember that Beauchamp said anything about who he represented. That he did not represent witness, and that he had never spoken to him about representing him, nor with his associates, nor agreed to pay him anything, nor had he spoken to him about procuring a loan from Mack. This witness admitted that he had offered a bonus to other parties if they would get the money for appellants, but that he had never had any conversation with Mack or Beauchamp in regard thereto, and could not recall any conversation with Mack to the effect that he refused to make the loan after reconveying the lands for the additional \$1,000. He understood Mack to refuse to make the loan because it had originally been for five years, but consented to do so if it was to be for one and two years. He denied that Cox had any conversation with him, in which he stated that he thought Beauchamp could get the loan if he would pay him \$1,000 to do so, and also that he had any conversation in his office, or Cox's, in which Cox told him the \$1,000 they put up goes to Beauchamp. The only thing said about \$1,000 in his presence was that they were paying Clyde Mack \$1,000 more than he was paying for the land. That he knew nothing of what became

of the \$1,000 other than what they told him. He had never employed Cox to represent him. He acknowledged he and his associates were ready to pay any one \$1,000 that secured money for them, and he believed the bonus was to be included in the principal and mortgage.

Wright also denied any conversation with Cox, in which he had been informed that they could procure the loan through Beauchamp by paying him (Cox) \$1,000.

Mack testified: That he had not employed Beauchamp in this or any other matter as his agent, and he made the deal to loan the money with Beauchamp. That he never got any part of the \$1,000 paid to Cox and Beauchamp for procuring the loan, and answered further, as follows: "Q. Did you ever have any understanding, tacit or expressed, in any way, that you were to have any part of it? A. Most emphatically not. Q. Have you ever received any part of it from Mr. Cox, or me? A. Not a penny." He said first the appellants wanted the money for five years, and he felt that was too long a time, and afterwards, when Beauchamp came to see him about it, he agreed to let them have it on two years' time. The check covering the consideration for the land was given by Beauchamp personally, because the exact acreage was not known at the time Beauchamp and Williams departed for Harrisburg, and the title was taken in witness' name to protect him until the mortgage was executed. He denied ever having had any conversation with Smith relative to the making of the loan about the bonus, and said it was first broached to him by G. W. Cox, about three weeks before the loan was made. In this conversation, Cox said they would give \$2,000 personal security and a bonus of \$500 in addition to secure the loan. He rejected this and all other propositions after he learned that this would be usurious, and said J. A. Smith had called on him 25 or 30 times before the loan was procured to see if some arrangement could not be made which was satisfactory. He told him if he could get things on a satisfactory basis he could make the loan, and thought he could get the money, if he could cash his time deposits at the bank. This was all he ever said to appellant about getting the money from the bank. That he agreed with Mr. Beauchamp to make the loan on Saturday night between 7 and 9 o'clock, and it was closed on Monday or Tuesday following. That he saw the bank on Monday and made the arrangement that he could draw the money at that time. That, ordinarily, he would have given them a few days' notice before drawing such a large amount, but did not on this, as the deal went on through then. He did not see the bank as stated by Wright at the time. He told Beauchamp he would make the loan at the time the deal was closed. He could only recall one instance when an attorney other than Beau-

champ did anything for him during four or five years before he was testifying. That he had submitted both the propositions of \$1,000 and a purchase and resale of the lands at an advanced price of that purchase proposed by appellants to Beauchamp, and, upon discovering that it would be usurious, had declined to have anything further to do with the loan. About a week before the deal was consummated, he offered to lend the money for one year, to be secured by a mortgage on the lands bought and on Mrs. Thompson's farm. He denied any conversation with J. A. Smith on Saturday before making the loan, and stated the only proposition advanced by Smith or any of the other appellants had been rejected by him. Beauchamp told him the night of the loan that he represented the appellants. Witness never received anything either directly or indirectly, other than the stipulated interest in the notes. He refused to make the loan on the basis proposed by appellants, because they wanted it for five years, and not until the time was reduced to one and two years would he agree to consider it. He was willing to accept Beauchamp's opinion as to the title to the land as a basis for the loan, and appellants never told him that Beauchamp was representing him, and he was not present when the papers were executed and delivered. During the time of the negotiations, he consulted with Beauchamp about the legal phase of the transaction, but all conversations related to matters that arose prior to the Saturday night conversation with Beauchamp, in which he dealt with him as the agent of appellants and agreed to make the loan.

Beauchamp testified that he was an attorney and advised Mack that to make a purchase and resell at an advance of \$1,000 would be but a cover for usury, and G. W. Cox told him after that that appellants were not satisfied because the deal had fallen through. He suggested to Cox that, if the defendants would give them the \$1,000 it was currently rumored would be paid to any one procuring a loan for them, he and Cox would attempt to do so. That Cox went to see the defendant's attorney about 7:30 Saturday evening and informed him that they would pay the money. Witness at once went to see Mack and, after suggesting various deals, all of which were rejected, finally induced him to agree to let them have the money on one and two years' time. Sunday morning, Cox informed him that appellants had accepted the terms and witness was to accompany Williams to Harrisburg to examine the records. Before their departure, witness had arranged with Mack that he should give his personal check for the consideration, which Mack promised to order paid. He further arranged with Cox to be assured the money would be paid over in the event the title was accepted. Having satisfied him-

self as to the title, he took a warranty deed from the vendors, to plaintiff, Mack, who in turn afterwards quitclaimed to defendants. That evening he delivered the deed to appellant Smith, who gave him a check for \$1,000, one-half of which he paid to Cox. Further: "Q. Were you representing the defendants in getting this loan for them? A. I thought I was. I represented them either knowingly or unknowingly, I don't know which. I thought I was representing them, and I know they accepted what I did, and the deal went through just that way, and they paid me the \$1,000, and Clyde Mack never had a cent of that money, or any other money of mine, except whatever store account I had down there. I have paid that just like anybody else does." Said further: That he had never been general attorney for Mack. That there was no understanding then, nor had there been, that he was his attorney. That he transacted some business for Mack, who did not have much business. On cross-examination, he stated that he made all arrangements with Cox, who stated he was representing appellants, which was borne out by the manner in which the arrangements were carried out. He took the title in Mack's name, at the time the land was bought, being fearful that appellants, if they got the title in their name, would refuse to pay the bonus. The only conversation he had with any of the appellants about the matter was on Sunday, and he remarked to Smith, "This is a big transaction, Joe, and I don't like to assume the responsibility of passing on the title." Smith replied that it was all right.

Cox testified that he was at first a partner with appellants, but dropped out about two weeks before the loan was procured. After he learned that Mrs. Thompson's farm would be included as security, he tried to get Mack to lend the money, but he refused when he found the transaction would be usurious. On Saturday night, in a conversation with Beauchamp, he said defendants were willing to pay the \$1,000, and that he (Beauchamp) should try to get the money for them. Accordingly, Beauchamp induced Mack to make the loan, on one and two years' time, which terms the appellant accepted after some hesitancy. They understood that the \$1,000 was to go to Beauchamp, who afterwards divided it with the witness. Witness did not represent Mack, nor did he give him any part of the \$1,000. While Beauchamp was at Harrisburg, he telephoned witness to get up the money, which, as they then agreed, was later done. On cross-examination, he stated he told Smith, on his return from Memphis, that he could get the money from Mack; that he did not tell them he would procure it for them for \$1,000; that his suggestion was gratuitous at the time; that he did not know whether any of them talked to Mr. Beauchamp and agreed to pay him any sum of

money; that Beauchamp fixed up the papers for Mack. In reply to the question if he had not told one of the attorneys that Beauchamp was Mack's agent, and he represented appellants, he said: "You asked me that question, if me and Beauchamp were these people's agents, and I said you could call it anything you wanted to. They told me to get this money, if I could. Q. Did you not say this, 'I was these people's agent, and Beauchamp was Mack's agent'? Or did I not ask you if you were their agent and Beauchamp was Mack's agent, and you said, 'Yes, sir'? A. That may have been what I said. I don't know what arrangement Mr. Mack or Mr. Beauchamp had." He gave defendants to understand that the \$1,000 for Beauchamp must be paid in cash. He had nothing to do with closing out the transaction.

Another witness testified that Smith was very anxious about the loan and came into the store to see Mack 12 or 15 times shortly before it was made; sometimes, several times a day. Another clerk testified about to the same effect.

The court rendered a decree for the amount due upon the notes, and a foreclosure of the mortgage and a sale of the lands, dismissed the cross-complaint, and from the judgment appellants appealed.

Block & Kirsch, of Paragould, for appellants. M. P. Huddleston, of Paragould, for appellee.

KIRBY, J. (after stating the facts as above). [1] The sole question in this case is one of fact. The law is well settled that, "to sustain the plea of usury, it must appear that excessive interest was paid to the lender, or that a bonus or commission was paid to the agent of the lender with his knowledge, or under circumstances from which his knowledge will be presumed, which commission when added to the interest paid, or to be paid to the lender would exceed the lawful rate." The burden of proof is upon the party who pleads usury to show clearly that the transaction was usurious. *Banks v. Flint*, 54 Ark. 40, 14 S. W. 769, 16 S. W. 477, 10 L. R. A. 459; *Vahlberg v. Keaton*, 51 Ark. 535, 11 S. W. 878, 4 L. R. A. 462, 14 Am. St. Rep. 73; *Thompson v. Ingram*, 51 Ark. 547, 11 S. W. 881. In *Leonhard v. Flood*, 68 Ark. 162, 56 S. W. 781, the court said: "Our law visits on a lender, who contracts for usurious interest, however small, a forfeiture of his entire loan and the interest thereon. It follows from the plainest principles of justice that such a defense shall be clearly shown before the forfeiture is declared. Usury will not be inferred from circumstances when the opposite conclusion can be reasonably and fairly reached."

[2] If Beauchamp acted as the agent of the borrowers, alone, in procuring the loan, it makes no difference whether he received

the bonus or not, for what the borrower pays to his own agent for procuring the loan is no part of the sum paid for the loan or for forbearance of money. *Vahlberg v. Keaton*, supra. "To constitute usury, there must be an agreement on the part of the lender to receive and on the part of the borrower to give for the use of money a greater rate of interest than 10 per cent." *Bank v. Murphy*, 83 Ark. 36, 102 S. W. 699.

[3] As already said, the sole question in this case is one of fact. The lender denied positively any agreement to make the loan upon receipt of \$1,000 bonus above the amount of the interest agreed to be paid, and stated that he absolutely refused to make the loan at all when he learned that such a transaction as proposed to him would be usurious; that, later, he was approached by Beauchamp, who insisted upon his making the loan, and agreed to do the work of getting up the papers for nothing if the loan could be arranged. He refused then to make the loan for the time proposed, but later agreed to and did make it for two years. He denied receiving any bonus, and that any one else was acting as his agent in receiving one. Appellants do not deny that they offered to pay the bonus to any one who could procure the loan, and both Cox and Beauchamp stated positively that they procured the loan and received the bonus; Cox insisting with Beauchamp that appellants were still willing to pay the \$1,000, and that the loan should not be permitted to fall through, and that he ought to be able to procure it, and that he would pay him half the bonus if he would assist in procuring the loan or get Mack to make it. These witnesses both testified that they did procure the loan from Mack, that they received the bonus and divided it between themselves, and that Mack had nothing to do with it and did not receive any part of it.

Of course, if appellants were believed, the transaction was usurious; but the evidence is in direct and irreconcilable conflict, and it was passed upon by the chancellor, and we cannot say that his finding and decision is against a preponderance of it.

Such being the case, the decree is affirmed.

GRAND LODGE, A. O. U. W. OF ARKANSAS v. DREHER.

(Supreme Court of Arkansas. Dec. 23, 1912.)

EXCEPTIONS, BILL OF (§ 23*)—INCORPORATING TESTIMONY BY REFERENCE.

A direction in a bill of exceptions, the "clerk here insert testimony," did not authorize consideration as a part of the bill of testimony subsequently transcribed and certified to by the official stenographer, where it did not appear that the transcribed testimony was approved by the trial judge, or filed by the clerk until after the expiration of the time for filing the bill of exceptions.

[Ed. Note.—For other cases, see *Exceptions*, Bill of, Cent. Dig. § 30; Dec. Dig. § 23.*]

Appeal from Circuit Court, Arkansas County; Eugene Lankford, Judge.

Action by Christina Dreher against the Grand Lodge of the Ancient Order of United Workmen of the State of Arkansas. From a judgment for plaintiff, defendant appeals. Affirmed.

Carmichael, Brooks & Powers, of Little Rock, for appellant. Pettit & Pettit, of Stuttgart, and Moore, Smith & Moore, of Little Rock, for appellee.

HART, J. Appellee brought this suit against appellant in the circuit court to recover the amount of a beneficiary certificate issued January 6, 1896, to her husband, Nicholas Dreher, deceased. Appellant filed an answer in which it stated that it had issued the certificate upon an agreement with Nicholas Dreher that the same was issued to him subject to the laws of the order then in force, or which might thereafter be adopted. The answer further states that Nicholas Dreher failed and neglected to pay his dues and assessments for the month of October, 1905, and refused to pay any dues and assessments from and after that time; that he thereby forfeited all rights of a beneficial member, and that he was never reinstated at any subsequent time; that at the time Dreher applied for his benefit certificate there was a law of the order in force to the effect that any member who should enter into the business of selling by retail intoxicating liquors as a beverage should be expelled; and that Dreher, in disregard thereof, entered into the occupation of selling intoxicating liquors as a beverage about the month of July, 1905, and continued until in October, 1905, in the city of Stuttgart, where he resided. Wherefore, it was claimed that he had forfeited all rights as a beneficial member of the association prior to the time of his death, and that Christina Dreher, as his wife and beneficiary, was not entitled to recover on the certificate. The jury found for appellee in the sum of \$1,000, the amount named in the certificate, and the case is here on appeal.

The transcript in this case purports to consist of two separately bound packages of paper, both of which appear to have been filed with the clerk of this court on the same day. The first, which is properly the transcript, contains the pleadings, a skeleton bill of exceptions, containing the charge of the court, the motion for a new trial, orders, and judgment. The only testimony in the skeleton bill of exceptions consists of seven preliminary questions and the answers thereto propounded to Mrs. Christina Dreher, appellee. Then we find a direction as follows: "Clerk here insert testimony." The case was tried at the November term, 1911, of the Arkansas circuit court, and the order overruling the motion for a new trial was made November 7, 1911. In that order it appears

that 60 days was allowed appellant in which to file its bill of exceptions. The skeleton bill of exceptions shows that it was approved and signed by the circuit judge on the 6th day of January, 1912, and on the same day was filed in the office of the circuit clerk. What purports to be the testimony consists of 120 typewritten pages which was filed in the office of the circuit clerk on February 1, 1912. It does not appear to have been examined, approved, or authenticated by the circuit judge. It is now contended by counsel for appellee that the 120 pages of typewritten matter purporting to be the testimony taken at the trial is not properly a part of the bill of exceptions, and is therefore not a part of the record on this appeal.

The grounds upon which appellant seeks to reverse the judgment cannot be reviewed on this appeal without a consideration of the testimony taken at the trial. Therefore, it is insisted by counsel for appellee that the judgment should be affirmed. They rely on the case of *Dozler v. Grayson-McLeod Lumber Co.*, 100 Ark. 244, 140 S. W. 7. There the court held: "Where a bill of exceptions recited, 'The following testimony was introduced before the court and jury, which was all the evidence introduced by either party (insert testimony),' meaning that the clerk should insert the official stenographer's notes of the testimony, and the certificate of the stenographer shows that the testimony was subsequently transcribed, and it does not appear that the transcribed testimony was ever presented to the circuit judge for examination, it did not become a part of the bill of exceptions, and cannot be considered on appeal." See, also, *Int. Order of 12 Knights & Daughters of Tabor v. Jackson*, 142 S. W. 1151. That case is squarely in point. There was no sufficient call for the testimony in the skeleton bill of exceptions. It is certain that nothing that is not reduced to writing can be embodied in the bill of exceptions by reference to it alone. Any other rule would make the final record of a case as uncertain as the memory or the will of the clerk to whom its final making up might be referred, and would place the rights of parties who have judgments of record entirely in the power of the person who eventually makes up the bill of exceptions for this court. In the case at bar the call for the testimony does not identify it, and the 120 pages of typewritten matter which purports to be the testimony taken at the trial was not approved by the judge, and was not even filed by the clerk until after the time given for filing the bill of exceptions had elapsed. The reason for the rule is aptly stated by Mr. Justice Brewer in the case of *A. & N. Railroad Co. v. Wagner*, 19 Kan. 335, as follows: "And in this we appropriate the language of the Supreme Court of the United States in the case of *Leftwich v. Lecanu*, 4 Wall. 187, 18 L. Ed. 388, in which the court

says: 'If a paper which is to constitute a part of a bill of exceptions is not incorporated into the body of the bill, it must be annexed to it, or so marked by letter, number, or other means of identification mentioned in the bill as to leave no doubt, when found in the record, that it is the one referred to in the bill of exceptions.' And these means of identification must be obvious to all. No mere memorandum, intelligible it may be to a single person, even the clerk, but indicating nothing to any one else, will be sufficient. They must be such that any one going to the record can determine what document is to be inserted, or, after insertion, that the clerk has made no mistake. The record must prove itself, and not the record and the testimony of the clerk. The clerk changes; the record endures. And long after judge and clerk are both gone the record, if good, must carry on itself the evidence of its own integrity."

Therefore the judgment will be affirmed.

MAYHEW v. TODISMAN et al.

(Supreme Court of Missouri, Division No. 1.
Nov. 30, 1912.)

1. STATUTES (§ 267*)—AMENDMENT—RETROACTIVE EFFECT.

The amendment of 1909 (Laws 1909, p. 343) to Rev. St. 1899, § 650, giving actions to quiet title, cannot affect judgments recovered prior to such amendment.

[Ed. Note.—For other cases, see *Statutes*, Cent. Dig. §§ 350-359; Dec. Dig. § 267.*]

2. BANKRUPTCY (§ 142*)—ADMINISTRATION OF BANKRUPT'S ESTATE—TITLE OF TRUSTEE.

Under Bankruptcy Act July 1, 1898, c. 541, §§ 70, 70e, 30 Stat. 565, 566 (U. S. Comp. St. 1901, pp. 3451, 3452), providing that the bankrupt's trustee shall take the title of the bankrupt to property transferred in fraud of his creditors, and may avoid any transfer by the bankrupt which any creditor might have avoided and recover the property transferred, the trustee has no title, interest, or estate in land fraudulently conveyed which entitles him to sue to set aside the transfer, under Rev. St. 1899, § 650, as amended in 1909 (Laws 1909, p. 343), providing that any person claiming any title or estate in real property may sue to determine his interest, since the bankrupt was without title or right of action, and a creditor has no interest or estate in the property which his debtor has fraudulently conveyed.

[Ed. Note.—For other cases, see *Bankruptcy*, Cent. Dig. § 222; Dec. Dig. § 142.*]

3. BANKRUPTCY (§ 302*)—ADMINISTRATION OF ESTATE—SUIT TO SET ASIDE FRAUDULENT CONVEYANCE.

A petition by trustee in bankruptcy to set aside a fraudulent conveyance by the bankrupt, under Bankruptcy Act July 1, 1898, c. 541, §§ 70, 70e, 30 Stat. 565, 566 (U. S. Comp. St. 1901, pp. 3451, 3452), providing that the trustee shall have the title of the bankrupt as to all property transferred in fraud of creditors, and may avoid any transfer which any creditor might have avoided for alleged fraudulent transfers, must clearly show that the property is needed to pay claims filed against the bankrupt debtor.

[Ed. Note.—For other cases, see *Bankruptcy*, Cent. Dig. §§ 456, 457; Dec. Dig. § 302.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

4. FRAUDULENT CONVEYANCES (§ 154*)—RIGHT TO SET ASIDE—FAILURE TO RECORD DEED.

Where property was conveyed to a son for his mother, and the deed to the son was recorded, the omission of the mother to record the deed from her son would not vitiate it or give existing creditors a right to complain, although she could not claim the property against those who had given the son credit on his apparent ownership.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. §§ 485-492; Dec. Dig. § 154.*]

5. FRAUDULENT CONVEYANCES (§ 25*)—VALIDITY—CHANGE OF DATE.

Where no rights of creditors intervened, an alteration in the date of a deed from a son to his mother, made after acknowledgment, but before record, will not avoid it as to subsequent creditors of the son.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. § 60; Dec. Dig. § 25.*]

Appeal from Circuit Court, Barry County; F. C. Johnston, Judge.

Action by D. S. Mayhew, as trustee in bankruptcy of Vaughn H. Todisman, against Hattie F. Todisman and others. From a judgment for plaintiff, defendants appeal. Reversed.

The petition, filed May 20, 1908, is entitled as above, and, omitting caption, the description of one lot, not in controversy here, and signature is as follows: "The plaintiff, D. S. Mayhew, represents to the court that upon the — day of December, 1907, Vaughn H. Todisman filed his petition in the District Court of the United States for the Judicial District of Missouri, Southwest Division, and therein prayed to be declared bankrupt; that on the 18th day of December, 1907, the said Vaughn H. Todisman was duly adjudged a bankrupt in said cause; that on the 8th day of January, 1908, the plaintiff, D. S. Mayhew, was duly appointed by said court trustee in bankruptcy, and thereupon accepted the trust and qualified; that on the — day of April, 1908, plaintiff, as such trustee, filed his petition in said United States court for an order to institute, in behalf of all creditors of said Vaughn H. Todisman, an action in the Barry county circuit court to set aside certain deeds executed by said Vaughn H. Todisman to Hattie F. Todisman to certain real estate hereinafter mentioned; that on the 21st day of April, 1908, Hon. A. E. Spencer, a referee in bankruptcy of said United States District Court, heard said petition, and ordered that said petition be sustained and plaintiff, D. S. Mayhew, trustee as aforesaid, authorized and empowered to institute and prosecute this action for the purposes aforesaid, the premises considered. This plaintiff, D. S. Mayhew, trustee, for his cause of action states that Hattie F. Todisman is the lawful wife of M. Y. Todisman; that Vaughn H. Todisman is her son; that said Vaughn H. Todisman is the owner, in fee simple absolute, in and to the following described real estate, lying, being situated, in

the county of Barry and state of Missouri, to wit: Lot three (3) in block five (5) original townsite of Monett, Missouri, and that defendant Hattie Todisman claims, so plaintiff, D. S. Mayhew, is informed and believes, title to the above-described real estate in fee by reason of certain deeds from Vaughn H. Todisman to Hattie F. Todisman conveying to her the above-described real estate, which deeds of conveyance plaintiff asserts and charges to be fraudulent and void by reason of having been made in fraud of creditors of the said Vaughn H. Todisman. Wherefore plaintiff, D. S. Mayhew, trustee in bankruptcy as aforesaid, prays the court to ascertain and determine the estate, title, and interest of said parties hereto, respectively, in and to the above-described real estate, and to determine and adjudge by its judgment, as provided by section 650, Revised Statutes of Missouri 1899, the title, estate, and interest of the parties severally hereto in and to said above-described real estate, and for all other relief."

The evidence, including the original deeds which are presented to this court by the parties for examination, shows that on the 15th day of December, 1902, two deeds were drawn, signed by the respective grantors and acknowledged before D. N. Jewett, justice of the peace for Barry county. One was a warranty deed from M. Y. Todisman and wife, the father and mother of Vaughn H. Todisman, the present bankrupt, to their said son, and was filed for record on the 26th day of March, 1903. The other was a warranty deed from the latter to his mother, and was never filed for record in the form in which it was originally signed and acknowledged, but on the 30th day of January, 1906, the date, both in the body of the deed and in the acknowledgment, was erased, and the last-named date substituted, and it was filed for record, as so changed, on the 2d day of February following. In the meantime Vaughn H. Todisman mortgaged the lot for \$337, which was raised and used in the construction of a party wall in connection with the owner of an adjoining lot. He and his mother explain the alteration in the deed by saying that this mortgage was made by the son because it was ascertained that the record title was in him, and that when it was determined to record the deed they consulted Mr. Jewett, who advised the alteration as affording a solution of that difficulty. Although Mr. Jewett's deposition was read upon the trial, both parties seemed to avoid all mention of the circumstance in his examination; but the deeds speak for themselves, and, in view of the fact that his certificate and signature are not questioned on either deed, his silence, with the acquiescence of both parties, authorizes the assumption that both deeds were delivered on the same day. There is no suggestion in the record that Vaughn H. Todisman became indebted to any consider-

able extent before 1906. The parties, in their testimony, explain the execution of the two deeds by the statement that, the mother having furnished the greater part of the money with which the land had been paid for, this method was pursued to transfer to her the title, the son having no other connection with the transaction than as a mere conduit; and that she failed to record her deed, at first for lack of the money to pay the fee, and then through pure neglect. None of the papers or records of the bankruptcy proceedings are in evidence, and no attempt was made to show the condition of the bankrupt's estate at the time this suit was instituted.

The final judgment was entered September 29, 1908. It cancels the deed which was changed, as above stated, and recorded February 2, 1906, and decrees the title to the lot to be in Vaughn H. Todisman in fee. Motions for a new trial and in arrest of judgment, raising the questions presented here for our determination, were filed by defendant and overruled by the court.

J. T. Burgess, of Monett, for appellants. Sizer & Kemp, of Monett, for respondent.

BROWN, C. (after stating the facts as above). [1] This suit is, by the averments of the petition, founded expressly upon the provisions of section 650 of the Revised Statutes of Missouri 1899. The judgment from which the appeal is taken was entered in 1908, and is consequently unaffected by the amendment of 1909. Laws 1909, p. 343. The question, therefore, suggests itself whether or not the trustee in bankruptcy, who is suing to make the property in controversy available to the creditors of his bankrupt, has selected a remedy available for that purpose, and, if so, whether his petition presents a theory which entitles him to the relief embodied in the judgment.

[2, 3] He depends for his title entirely upon the provisions of section 70 of the bankrupt act (30 Stat. L. 565), which provided that he shall "be vested by operation of law with the title of the bankrupt as of the date he was adjudged a bankrupt * * * to all property transferred by him in fraud of his creditors." This does not avoid the title of the fraudulent grantee. In re Mullen (D. C.) 101 Fed. 413. Nor does it give him a right of action to have the fraudulent conveyance set aside in equity, because the bankrupt had no such right. It is simply such a title as is necessary to enable a creditor to avail himself of the property, under proper circumstances, in satisfaction of his debt. To this end the trustee is made by the same section (70e) the representative of any creditor entitled to the remedy. It provides as follows: "The trustee may avoid any transfer by the bankrupt of his property which any creditor of such bankrupt might have avoided, and

may recover the property so transferred, or its value, from the person to whom it was transferred, unless he was a bona fide holder for value prior to the date of the adjudication." While the creditor cannot avail himself of this remedy, under ordinary circumstances, without obtaining a judgment at law upon his claim, his right to sue at law being arrested by the petition in bankruptcy, it seems reasonable to permit the trustee to protect the right of which the proceeding might otherwise deprive him; but this subdivision does not authorize the trustee to avoid a transfer, unless some creditor, by proper proceeding, might have avoided it in his own favor. In re Economical Printing Co., 110 Fed. 514, 49 C. C. A. 133. He represents the creditor, who, in this case, where no lien is in question, has no greater interest in the property than he would have, had the paper title remained in Vaughn H. Todisman, and the bankruptcy proceeding had not intervened. Argument is not needed to demonstrate that in such case the general creditor has no "title, estate or interest" in the land which entitles him to bring the debtor into court, under the provisions of section 650, to obtain a judicial declaration that he may proceed, by judgment and execution, to avail himself of it for the collection of his debt.

If, however, we disregard the statement that the trustee is proceeding under the provisions of a statute which he has no power to invoke, and examine his petition for the purpose of ascertaining whether it states facts sufficient to constitute the cause of action which the bankrupt act authorizes him to pursue, we find it equally insufficient. Although it states that his bankrupt "is the owner in fee simple absolute" of the property in question, and that he is informed and believes that the defendant claims title in fee to the same "by reason of certain deeds from Vaughn H. Todisman to Hattie F. Todisman. * * * which deeds of conveyance plaintiff asserts and charges to be fraudulent and void by reason of having been made in fraud of creditors of the said Vaughn H. Todisman," it stands upon the title of the bankrupt, and fails to state facts showing that the trustee has the right to proceed in behalf of any such creditor. He has no right superior to that of the creditor whom he represents. Admitting that the conveyances under which the defendant claims are fraudulent, no right to avoid them exists, unless the property is needed to pay the claims filed against the bankrupt debtor; and this should be shown affirmatively by the petition. *Muel-ler v. Bruss*, 112 Wis. 406, 88 N. W. 229; *Prescott v. Galluccio*, 21 Am. Bankr. Rep. 229, (D. C.) 164 Fed. 618.

[4, 5] The plaintiff proved, as a necessary part of his case, that Vaughn H. Todisman acquired the property involved in this controversy by warranty deed from M. Y. Todis-

man and his wife, the defendant here, without the payment of any valuable consideration therefor. It was also in evidence that this conveyance was a part of an arrangement by which the title to the lot was to be conveyed from M. Y. Toddsman, the husband, through the present bankrupt to this defendant, his mother; and that, on the same date and at the same time, another deed was executed by the grantee in the first, who was a single man, to his mother. Were this true, and we have no reason to doubt it, especially in view of the fact that it took place several years before the bankrupt had become indebted, or contemplated the business which resulted in his indebtedness, so far as the evidence shows, the deeds would constitute a full and mutual consideration for each other; and no creditor then existing, or who might thereafter sustain that relation, would have any reason to complain. The omission of the defendant to record her deed would not vitiate it, nor give existing creditors a right to complain. As to subsequent creditors, "it is only when the withholding the instrument from record gives the grantor, upon the faith of the ownership by him of the property conveyed, a fictitious credit, and some one has thereby been misled to his injury, that such failure to record will be held to be fraudulent." *Clark v. Lewis*, 215 Mo. 173, 187, 188, 114 S. W. 604, and cases cited. Nor would the alteration of the deed by changing the date, in 1906, have the effect to divest the title conveyed by it in 1902; nor would that be fraudulent as to any class of creditors, unless it was a part of a scheme participated in by the grantee to give her son a fictitious credit. In such cases she would be estopped from claiming otherwise than according to the terms of the changed deed against those creditors who had incurred the relation by reason of the false impression so produced. *Potter v. Adams*, 125 Mo. 118, 28 S. W. 490, 46 Am. St. Rep. 478, and cases cited.

We have referred so fully to the facts in evidence to show that, while the petition, founded as it is upon the assertion that Vaughn H. Toddsman is the owner in fee simple absolute of the land in controversy, is inconsistent with the assertion that he has conveyed that title, even for the purpose of defrauding his creditors, the evidence, as we understand it, does not tend to support either of these theories, so that it suggests no issue that could properly be included by amendment, were the case remanded for further proceedings. *Carter v. Dilley*, 167 Mo. 564, 67 S. W. 232.

The judgment of the Barry county circuit court is therefore reversed.

PER CURIAM. The foregoing opinion of **BROWN, C.**, is adopted as the opinion of the court. All concur.

MORAN v. STEWART.

(Supreme Court of Missouri. Division No. 2.
Nov. 13, 1912. Rehearing Denied Dec.
10, 1912.)

1. APPEAL AND ERROR (§ 198*)—TIMELY OBJECTION AND EXCEPTION—DIRECTIONS TO COMMISSIONERS.

Error in the directions given the commissioners appointed to ascertain the value of real estate in controversy in a widow's action for dower and damages for forfeiture thereof is not reviewable, where no objection is made or exception taken when the commissioners were appointed and directed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1248-1250; Dec. Dig. § 198.*]

2. APPEAL AND ERROR (§ 266*)—NECESSITY OF EXCEPTIONS—REPORT OF COMMISSIONERS.

Error in the directions to commissioners appointed to ascertain the value of real estate in a widow's action for dower and damages was not reviewable, where no exceptions were saved to the court's approval of the report of the commissioners.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1552-1571; Dec. Dig. § 266.*]

3. APPEAL AND ERROR (§ 77*)—APPEALABLE JUDGMENTS—FINAL JUDGMENT—PRELIMINARY ORDER.

The court's order, in a widow's action for dower, appointing commissioners to set off homestead and dower therein, and directing them how to fix the value of the property, was not a final judgment, but was merely a preliminary order leading up to final judgment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 444-463; Dec. Dig. § 77.*]

4. APPEAL AND ERROR (§ 272*)—NECESSITY OF TIMELY EXCEPTIONS.

It is the duty of the parties in a civil case to immediately except to every erroneous act of the trial court which tends to prejudice their rights, to the end that the court may correct its error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1611-1619; Dec. Dig. § 272.*]

5. DOWER (§ 82*)—ACTION BY WIDOW—DIRECTIONS TO COMMISSIONERS.

In a widow's action for dower, the court need not give written directions on their duties to the commissioners appointed to ascertain the value of the real estate in controversy.

[Ed. Note.—For other cases, see Dower, Cent. Dig. § 321; Dec. Dig. § 82.*]

6. APPEAL AND ERROR (§ 274*)—SUFFICIENCY OF EXCEPTION.

An exception to the order of the court overruling objections to the report of commissioners appointed to ascertain the value of real estate in controversy in a widow's action for dower, is insufficient to present for review error in approving such report.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1631-1645; Dec. Dig. § 274.*]

7. DOWER (§ 99*)—REPORT OF COMMISSIONERS—EXCEPTIONS.

Since Rev. St. 1909, §§ 374, 6713, providing for commissioners to assign dower and homestead, do not require written exceptions to their report, the court may, when written objections are made, determine the correctness

or legality of such report on grounds not mentioned in such objections.

[Ed. Note.—For other cases, see Dower, Cent. Dig. §§ 345-347; Dec. Dig. § 99.*]

8. APPEAL AND ERROR (§ 274*)—FAILURE TO EXCEPT—CURE—DOWER—RIGHT OF COMMISSIONERS.

Failure of the plaintiff, in a widow's action for dower, to save exceptions to the approval of the report of commissioners, was not cured by her motion, made four years later, to set aside the report, nor by her exceptions to the striking of such motion from the files.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1631-1645; Dec. Dig. § 274.*]

9. ADVERSE POSSESSION (§ 62*)—WIDOW'S QUARANTINE—TITLE ACQUIRED.

A widow occupying property under a widow's quarantine cannot thereby acquire an absolute title against the heirs or remaindermen.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 323-332; Dec. Dig. § 62.*]

10. LIFE ESTATES (§ 8*)—ADVERSE POSSESSION.

Possession of one holding a life estate can never become hostile to the remaindermen.

[Ed. Note.—For other cases, see Life Estates, Cent. Dig. §§ 24-28; Dec. Dig. § 8.*]

11. ADVERSE POSSESSION (§ 62*)—RIGHTS OF HEIRS—WIDOW'S QUARANTINE.

By delay during which a widow is permitted to occupy the whole of an estate, the other heirs do not lose their right to apply to the court to assign dower to her.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 323-332; Dec. Dig. § 62.*]

12. DOWER (§ 81*)—MULTIPLICITY OF SUITS—ASSIGNMENT OF DOWER—SEPARATE TRACTS.

Where, in a widow's action for dower, it appeared that defendant was the owner of the remainder in two tracts of land, subject to the widow's quarantine, dower, and homestead rights, the court, in order to prevent multiplicity of suits, properly ordered plaintiff's dower in both tracts to be assigned at the same time.

[Ed. Note.—For other cases, see Dower, Cent. Dig. §§ 312-316; Dec. Dig. § 81.*]

13. DOWER (§ 6*)—MARRIAGE CONTRACT—VALIDITY—EFFECT.

A marriage contract, invalid for want of consideration, could not entitle the widow to any interest in the property of her deceased husband, especially where she repudiated such contract in order to have dower and homestead.

[Ed. Note.—For other cases, see Dower, Cent. Dig. § 9; Dec. Dig. § 6.*]

14. DOWER (§ 99*)—ASSIGNMENT—COMMISSIONERS' REPORT.

The fact that the court, in a widow's action for dower, determined, on the pleadings at a preliminary stage of the trial, that she was entitled to dower in certain land, did not show that the approval of the report of the commissioners, by which she was given no part of such tract, was erroneous.

[Ed. Note.—For other cases, see Dower, Cent. Dig. §§ 345-347; Dec. Dig. § 99.*]

15. DOWER (§ 105*)—DAMAGES FOR DEFOECMENT—RIGHTS.

Since under Rev. St. 1909, § 389, defining the widow's right to dower, a judgment for damages must be special against the interest of the heir or other person wrongfully depriving her of dower in the very land set off to her as dower and homestead, a widow was not entitled to damages against a defendant who had

not deprived her of possession of any part of the land set off to her.

[Ed. Note.—For other cases, see Dower, Cent. Dig. § 189; Dec. Dig. § 105.*]

Appeal from Circuit Court, Andrew County; A. D. Burnes, Judge.

Action by Angie Moran against Samuel B. Stewart. From judgment for defendant, plaintiff appeals. Affirmed.

Action by widow for dower and damages for enforcement thereof. From a judgment assigning dower and rejecting her claim for damages, she appeals.

On February 5, 1891, David Moran, 70 years old, with two adopted children, but no lineal heirs, was united in marriage with the plaintiff, then a lady of 30 summers. They resided in Andrew county, where the husband was possessed of two farms, one a tract of 500 acres and the other a smaller tract of 106 acres. On the smaller farm these victims of the designing Cupid made their home, until 13 months later, when the Grim Reaper, unmindful of the achievements of the aforesaid Cupid, and with a shameless disregard for connubial felicity, entered the Moran home and wantonly struck down the doting husband. When the funeral was over, it was discovered that Moran had devised all his lands to his adopted children except a life estate in the 106-acre tract. By an antenuptial contract, Moran, in consideration of marriage, settled upon plaintiff the 106-acre tract, "during her life or widowhood," and in consideration of rights acquired by that settlement she agreed to waive all claim to dower and homestead in the real estate of her husband. See 173 Mo. 211, 73 S. W. 177, for copy of contract. However, the plaintiff was not at all satisfied with such rights in the 106-acre tract as were given to her by the marriage contract, and during the last 20 years has assiduously sought to enlarge her estate in the realty of her deceased husband. This is her fifth appearance in this court in her efforts to acquire more property than she agreed to accept in full satisfaction of her marriage with Moran. See 122 Mo. 295, 26 S. W. 962; 132 Mo. 73, 33 S. W. 443; 151 Mo. 555, 52 S. W. 377; 173 Mo. 207, 73 S. W. 177.

On the 27th day of November, 1899, she instituted this action against the adopted son of her husband for dower in the 500-acre tract occupied by him, and also claimed damages for the enforcement of her dower in that tract. Defendant pleaded the marriage contract as a bar to plaintiff's dower; but this court held that said contract was not based on a sufficient consideration, and did not bar the plaintiff's right to dower. The first appeal in this particular cause resulted in a reversal and remanding of the cause for new trial. Moran v. Stewart, 173 Mo. 207, 73 S. W. 177. On May 25, 1903 (after the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

cause was remanded by this court), defendant amended his answer so as to admit the plaintiff's right to dower in the 500-acre tract occupied by him, but asserted that he had made several thousand dollars worth of permanent improvements on the property since the death of Moran, and prayed that the value of these improvements be deducted from any dower that might be assigned to her. Defendant in his amended answer also averred that plaintiff was entitled to dower and homestead in the 106-acre tract occupied by her, the said 106-acre tract was equal in value to one-third of all the real estate of her deceased husband, and prayed that dower be assigned to her in all the real estate of deceased, including the 106-acre tract. In plaintiff's reply, she alleges that since the death of her husband she has held the 106-acre tract "by virtue of her right of homestead and quarantine." On November 12, 1903, both parties, after waiving a jury and admitting "the facts set up in the pleadings," submitted the case to the court. The court found the issues in favor of plaintiff, and that she was entitled to dower in the 500-acre tract, with damages for the detention thereof; also, that she was entitled to both dower and homestead in the 106-acre tract.

The court then appointed appraisers to view the property and set off to plaintiff, first, a sufficient amount of the 106-acre tract to equal \$1,500 in value as her homestead, and also a sufficient amount of the remaining lands occupied by the plaintiff and defendant to equal one-third of all the real estate of the deceased; said one-third to include the amount set off as homestead. At the same time the court also made an order directing the commissioners that, in ascertaining the value of the different tracts of land owned by the deceased, they *should not consider any permanent improvements placed upon the lands since the death of Moran*. On February 23, 1904, the commissioners filed their report reciting that they had set off plaintiff's homestead in the 106-acre tract and also the remainder of said 106-acre tract in full of her dower in all of her late husband's lands. When this report was filed, the plaintiff filed objections thereto, alleging, among other things, that the commissioners had placed a value on both tracts of land as of the date of the death of David Moran; that said lands had greatly increased in value since his death; and that the commissioners should have awarded the plaintiff one-third in value of all of said lands at the date of the assignment of her dower and homestead.

By what we suppose is the bill of exceptions in this cause, it appears that the plaintiff's objections to the report of the commissioners were overruled by the court while the plaintiff's attorney was temporarily absent from the courtroom. When he returned on the same day and was informed of the action of the court, he announced his desire

to introduce, in support of said motion, numerous files in other suits in which the plaintiff was or had been a party; and also the will of the late David Moran. Upon objection of the defendant, the court refused to allow these documents to be introduced, on the ground that the offer came too late, whereupon plaintiff saved her exceptions. It does not appear that the plaintiff at any time excepted to the order of the court appointing and directing the commissioners how they should set off the plaintiff's dower and homestead, nor does it appear anywhere that she excepted to the homestead, nor does it appear anywhere that she excepted to the action of the court in confirming and approving the report of the commissioners.

After the commissioners' report was approved, the plaintiff filed a motion for a new trial, which being overruled, she appealed to this court. Later, this appeal was dismissed by the plaintiff as having been prematurely taken. Thereafter, at the May term, 1908 (four years after the approval of the commissioners' report), plaintiff moved the court to set aside its order approving the report of said commissioners appointed to set off dower and homestead, which motion was by the court stricken from the files on the 10th day of November, 1908; and plaintiff excepted. Thereafter, at the November term, 1908, at the request of the plaintiff, the cause was redocketed, and the issue of the plaintiff's right to damages for the detention of her dower in the 500-acre tract tried before the court sitting as a jury, and a judgment rendered in favor of the defendant, holding that plaintiff was not entitled to any damages; whereupon the plaintiff prosecuted this appeal.

For reversal of the judgment, plaintiff contends: (1) That the court erred in directing the commissioners to fix the value of the real estate as of the time of the death of David Moran and not allowing them to consider the enhanced value of the property brought about by the improvements made by defendant; (2) that plaintiff was the absolute owner of the 106-acre tract, and the court erred in assigning her dower in that tract; (3) that the defendant was barred at the time of filing his amended answer from having dower or homestead set off to plaintiff in the 106-acre tract; and (4) that the court erred in not awarding her damages for the detention of her dower by defendant. Other alleged errors of the trial court are complained of, but they are either embraced in the foregoing assignments or found not worthy of attention.

J. W. Boyd, of St. Joseph, and Jas. M. Rea, of Savannah, for appellant. Booher & Williams, of Savannah, and Vinton Pike, of St. Joseph, for respondent.

BROWN, P. J. (after stating the facts as above). [1, 2] I. The main insistence of the

plaintiff is that the court erred in directing the commissioners to ascertain the value of the real estate as of the date of the death of Moran and instructed them not to consider any permanent improvements placed thereon by defendant.

Upon the record, this issue is not properly presented to us for review: First, because plaintiff did not object or except to the action of the court at the November term, 1903, when the commissioners were appointed and directed to disregard the permanent improvements made on the land since the death of Moran; and, second, because no exceptions were saved to the order of the court approving the report of the commissioners.

[3] The action of the trial court in finding plaintiff was entitled to dower in both the 106 and the 500 acre tracts, its order appointing commissioners to set off homestead and dower therein, and directing them how to fix the value of said property, was not a final judgment nor any part thereof. It was only a preliminary order of the court leading up to a final judgment. *Rannels v. Washington University*, 96 Mo. 226, loc. cit. 231, 9 S. W. 569.

If the court erred in its directions to the commissioners, its attention should have been called to the error by a proper exception at the time such error was committed, so that the same could have been corrected then and there.

Section 2028, R. S. 1909, which provides that exceptions may be saved to the "opinion" of the trial court during the progress of trials, does not designate the class or nature of errors which may be preserved for review by bills of exceptions; but it has long been the practice in this state to require exceptions to be preserved to all erroneous rulings and orders of trial courts which tend to produce unjust or erroneous final judgments. It was impossible for the General Assembly to foresee and designate the sundry classes of erroneous rulings, orders, or misconduct of the trial courts which might injuriously affect the rights of the litigants in the final determination of civil cases. It was therefore left to the appellate courts to determine what orders and rulings should form proper matters of exception and the effect of such errors upon the rights of litigants in each concrete case.

It has been held that the following orders made by trial courts, if erroneous and injurious to a litigant, must be excepted to by him when made: Orders awarding changes of venue. *Gibney v. St. Louis Transit Co.*, 204 Mo. 704, loc. cit. 717, 103 S. W. 43. Orders consolidating suits. *Turley v. Barnes*, 67 Mo. App. 237, loc. cit. 240. Orders striking out parts of pleadings. *Linn County v. Bank*, 175 Mo. 539, 75 S. W. 393.

If the trial court erred in directing the commissioners to disregard permanent improvements made on the land of Moran and to assign the homestead and dower of plain-

tiff out of the 106-acre tract, so far as it would go, that error must have been as apparent to plaintiff's attorney at the time the interlocutory judgment was entered and the order made as when the commissioners filed their report at the succeeding term of court; and, no reason being apparent why he failed to except to that interlocutory order when it was made, the objections to the report of the commissioners, made in exact conformity with the order under which they were appointed, comes too late, and cannot be considered on appeal. *Richardson v. Association*, 156 Mo. 413, 57 S. W. 117; *Windes v. Earp et al.*, 150 Mo. 600, 51 S. W. 1044.

[4] In the trial of civil cases, the same duty rests upon plaintiff's as defendant's attorneys to aid the court in every possible way to try the case according to law; and among other duties so imposed is to except to every erroneous or improper act of the trial court which tends to prejudice the rights of their clients. Said exceptions must be saved at the very time such error is committed, to the end that the trial court may correct its error or mistake before it ripens into an erroneous or unjust final judgment.

[5] It was not necessary for the circuit court to have given the commissioners any written directions in regard to their duties. *Chicago, etc., Railroad Co. v. Randolph Townsite Co.*, 103 Mo. 451, loc. cit. 468, 15 S. W. 437.

[6] If no directions had been given to the commissioners and their report had been erroneous under the law and facts, an exception to the order of the court approving this report would have been sufficient to have brought such error here for review; but the abstract does not show that any such exception was saved. An exception was only saved to the order of the court overruling objections to the report.

[7] The statutes do not require written exceptions to the report of commissioners appointed to assign dower or homestead. Sections 374 and 6718, R. S. 1909. The trial court may determine the correctness or legality of such report in whatever manner is satisfactory to it. If written exceptions be filed and overruled, that does not injure either party, because the court can overrule the written objections and still reject the report of the commissioners on grounds not mentioned in such objections. When the report was approved, it became binding; and then the plaintiff should have excepted to the order approving it. This she failed to do. *Richardson v. Association*, 156 Mo. 407, loc. cit. 411, 57 S. W. 117.

[8] The report of the commissioners appointed to assign plaintiff's dower was approved by the circuit court on March 24, 1904, and more than four years thereafter, to wit, on November 20, 1908, the plaintiff apparently having discovered that she had saved no exceptions to the approval of said report, filed a motion praying the court to

set aside its order approving the report, and saved her exceptions to an order of the court striking said motion from the files.

The filing of this last-named motion and the saving of exceptions to the court's action in striking it from the files did not help the plaintiff. When the trial court commits an error to which an exception may be properly saved, such exception must be saved promptly. *Harrison v. Bartlett*, 51 Mo. 170; *City of St. Joseph v. Ensworth*, 65 Mo. 628; *Bond v. Finley*, 74 Mo. App. 22; *Richardson v. Association*, 156 Mo. 407, loc. cit. 411, 57 S. W. 117.

II. Plaintiff further insists that the court committed error in finding that dower should be assigned to plaintiff in the 106-acre tract, because plaintiff was the absolute owner of such tract at the time defendant's amended answer was filed, and that defendant's right to have dower assigned in that tract was barred by the statute of limitations.

[9] The proposition that one occupying the home and plantation of deceased under a widow's quarantine can by that act acquire an absolute title against the heir or remainderman is novel, and wholly untenable.

[10] Under no possible construction of plaintiff's pleading could she have been entitled to anything more than a life estate in the 106-acre tract; and the settled rule of law is that possession of one holding a life estate can never become hostile to the remainderman. *Hall v. French*, 165 Mo. 430, 65 S. W. 769.

[11] Our attention has not been called to any law which would bar the right of an heir to apply to the circuit court to assign dower to a widow who, as in this case, is occupying lands under the right of quarantine. Through filial consideration and affection, heirs often allow the widowed mother to occupy the whole of their father's real estate and enjoy the income thereof for an indefinite period. To hold that heirs should be penalized by forfeiting their interest in the property for such generosity toward a parent would violate the plainest laws of humanity.

A delay on the part of the heir or remainderman in bringing suit for assignment of the widow's dower while she is in possession does not bar the action, because the possession by the widow is not hostile to the heir or remainderman. *Fischer v. Slekmann*, 125 Mo. 166, 28 S. W. 435; *Carey v. West*, 139 Mo. 146, 40 S. W. 661.

[12] In the instant case, at the time of filing his amended answer the defendant was the owner of the remainder in both the 106 and the 500 acre tracts, subject to the widow's quarantine, dower, and homestead rights; and it was altogether proper on his answer for the court to order plaintiff's dower in both tracts assigned at the same time. It is always the policy of the law to

prevent a multiplicity of suits. The plaintiff seems grieved because she received no part of the 500 acres as dower. Her homestead, expressly asserted in her reply, had to be set off in the 106-acre tract; and no doubt the court and commissioners thought it would be more to her interest to have her dower assigned out of the remainder of that tract than to give her part of her dower in another tract and allow the defendant to recover possession of a part of the 106 acres.

[13] In the last brief filed by appellant, she asserts that she is holding the 106-acre tract under the marriage contract, notwithstanding her reply in this cause shows she is holding it under dower and quarantine.

She can have no interest whatever under the marriage contract. She had to repudiate that contract in order to have dower and homestead; and, this court having held that the marriage contract was based upon an insufficient consideration, it is not valid for any purpose.

[14] III. The further contention of plaintiff that, having found that she was entitled to dower in the 500-acre tract, the court erred in approving the report of the commissioners by which she was not given any part of that tract, is unsound. The preliminary trial to determine plaintiff's rights was upon the pleadings, which, as we have seen, were admitted to be true; and from that trial the court could make no final decision as to how much of the land plaintiff's homestead and dower rights would cover. That had to be ascertained and was ascertained by the commissioners when they appraised the land and set off one-third thereof in value to the plaintiff.

[15] IV. Another contention of plaintiff is that she was not allowed to recover damages for deforcement or detention of her dower. The evidence clearly shows that defendant never at any time deprived her of the possession of any part of the land which was set off to her as dower and homestead; consequently there was no evidence upon which a judgment for damages could be based. When all the provisions of the dower law are read together, it becomes apparent that a judgment for damages for deforcement of dower is not a general judgment, but must be a special judgment against the interest of the heir or other person who has wrongfully deprived the widow of dower in the very land which she has succeeded in having set off to her.

Section 389, R. S. 1909, being a part of the article defining the widow's rights to dower, reads as follows: "In all cases of judgments for damages, or yearly allowance in favor of any widow under the provisions of this article, execution thereof shall be awarded only against the estate in which dower shall have been assigned." See *Griffin v. Began*,

79 Mo. 73, and *Reineinan v. Larkin*, 222 Mo. 156, loc. cit. 166, 121 S. W. 307.

Finding no reversible error in the record, the judgment of the trial court is affirmed.

FERRISS and KENNISH, JJ., concur.

STATE ex rel. NOLTE, Sheriff, et al. v. McQUILLIN, Judge.

(Supreme Court of Missouri. Nov. 26, 1912.
Rehearing Denied Dec. 10, 1912.)

1. APPEAL AND ERROR (§ 170*)—APPEAL FROM PROBATE COURT—CONSTITUTIONAL QUESTION.

A constitutional question cannot be raised on an appeal from the probate court, where no such issue was presented at the trial.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 1085-1062; Dec. Dig. § 170.*]

2. EXCEPTIONS, BILL OF (§ 53*)—REFUSAL TO SIGN—DEFENSE—WRIT OF PROHIBITION.

Where a writ of prohibition had been granted by the St. Louis Court of Appeals restraining respondent, a circuit judge, from signing and filing a bill of exceptions on an appeal from an order dismissing an appeal from probate, such writ, whether rightful or wrongful, was a valid reason for respondent's refusal to sign and file such bill of exceptions.

[Ed. Note.—For other cases, see *Exceptions, Bill of*, Cent. Dig. §§ 80-88; Dec. Dig. § 53.*]

3. EXCEPTIONS, BILL OF (§ 53*)—SIGNING—ENFORCEMENT.

While the Supreme Court will grant mandamus to compel circuit courts to sign and file bills of exception, a writ will not be granted where the signing and filing of a bill under the circumstances would be a vain and useless act.

[Ed. Note.—For other cases, see *Exceptions, Bill of*, Cent. Dig. §§ 80-88; Dec. Dig. § 53.*]

4. INSANE PERSONS (§ 23*)—INQUISITION—NEW TRIAL—JURISDICTION.

Rev. St. 1909, § 482, permits the probate court, for just cause appearing during the term at which an inquisition is had, to require the facts to be inquired into by a new jury. Held that, where a person found insane promptly moved to set aside the verdict during the term, the expiration of the term did not oust the probate court of jurisdiction; the statute being directory only.

[Ed. Note.—For other cases, see *Insane Persons*, Cent. Dig. § 30; Dec. Dig. § 23.*]

5. EVIDENCE (§ 82*)—PRESUMPTIONS—JUDICIAL ACTS—PROBATE COURTS.

The acts of the probate courts of the state are presumed to be regular until the contrary is shown.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 104; Dec. Dig. § 82.*]

6. INSANE PERSONS (§ 27*)—INQUISITION—JUDGMENT—APPEAL.

Since probate court decrees adjudging a person of unsound mind are in fieri and may be opened and set aside at any subsequent term of the court in case the person be restored to sanity, as provided by Rev. St. 1909, § 519, no appeal lies therefrom.

[Ed. Note.—For other cases, see *Insane Persons*, Cent. Dig. §§ 37, 38; Dec. Dig. § 27.*]

7. CONSTITUTIONAL LAW (§ 316*)—DUE PROCESS OF LAW—DISMISSAL OF APPEAL FROM PROBATE.

Dismissal of an appeal from an order of the probate court setting aside a verdict finding a person of unsound mind and granting a new trial before another jury did not deprive the petitioners of due process of law, but merely remanded the proceeding to the probate court for trial in the only tribunal designated by the Legislature to determine the issues.

[Ed. Note.—For other cases, see *Constitutional Law*, Cent. Dig. § 938; Dec. Dig. § 316.*]

In Banc. Mandamus by the State on the relation of Louis Nolte, Sheriff of the City of St. Louis, and Edward M. Taylor, to compel Eugene McQuillin, Judge of the Circuit Court of St. Louis City to settle, sign, and file a bill of exceptions. Alternative writ quashed, and peremptory writ denied.

Mandamus to compel the respondent, as judge of the circuit court of St. Louis city, to settle, sign, and file a bill of exceptions in a cause appealed to this court. The proceedings which led up to the issue of our alternative writ are as follows: On March 17, 1911, and during the March term, 1911, of the probate court of St. Louis city, the relator Louis Nolte in his official capacity as sheriff of St. Louis city, filed an information in said court under the provisions of sections 474 and 477, R. S. 1909, alleging that one Clara E. Taylor, a resident of said city, was a person of unsound mind and incapable of managing her affairs. Upon the filing of said information a jury was duly impaneled by said court, which jury, after hearing the evidence, returned a verdict sustaining the allegations of said information. Only 10 of the jurors concurred in the verdict. Judgment was rendered on said verdict declaring the said Clara E. Taylor to be a person of unsound mind and incapable of managing her affairs. During the said March term of said probate court, Clara E. Taylor filed therein her motion to set aside the verdict of the jury, whereupon said probate court made an order reciting the filing of said motion, and further reciting that the court, "not being fully advised of and concerning same, doth take time to consider thereof." No further action was taken by the probate court in said proceeding until July 10, 1911, on which day it entered an order setting aside the verdict of the jury so returned on March 17, 1911, and granting said Clara E. Taylor a new trial. On July 13, 1911, relator Nolte filed in said probate court an affidavit and bond for appeal from the order of said court granting a new trial. The appeal was accordingly granted to the circuit court of St. Louis city and assigned to the division of said circuit court over which respondent presides. On October 2, 1911, said Clara E. Taylor filed with respondent a motion to dismiss the aforesaid appeal from the probate court on the ground that "no appeal lies in the circumstances of this case; the

order granting the same being improvidently and erroneously made," and "because the order setting aside the finding and verdict of the jury was not a final determination of the matter in the probate court, and no appeal would lie from the same." On November 17, 1911, respondent, as judge of said circuit court, sustained said motion and dismissed the appeal;• but, for some reason not recited in relator's petition, respondent on December 1, 1911, set aside and vacated its order dismissing relator's appeal, and reinstated the motion to dismiss on his docket. On January 5, 1911, the motion to dismiss was again sustained, and relators' appeal dismissed. On January 18, 1911, relator Nolte filed in the circuit court what he designates as a "petition" and affidavit for appeal to this court from the order and judgment dismissing his appeal from the probate court. The allegations of this "petition" for appeal will be noted in our opinion. On February 2, 1912, relator Edward M. Taylor also filed with respondent a "petition" for appeal, in which he describes himself as the husband of the aforesaid Clara E. Taylor, and for that and other reasons claimed the right to prosecute an appeal from the respondent's order dismissing the appeal granted by the probate court.

The conclusions we have reached render it unnecessary to decide whether Edward M. Taylor possessed any right to interplead or otherwise inject himself into this litigation. Pursuant to relator Nolte's petition and affidavit for appeal from the circuit court, the respondent on February 3, 1912, granted him an appeal to this court, and also granted him 10 days in which to prepare, have signed, and file his bill of exceptions. Respondent in his return recites that relator Nolte prepared and presented to him a bill of exceptions within the time granted and allowed for that purpose, but that, before said bill of exceptions was settled, signed, and filed, respondent was served with a preliminary writ of prohibition issued by the honorable St. Louis Court of Appeals, which writ prohibits said respondent from taking any further action in the matter of said information against Clara E. Taylor until the further order of said Court of Appeals. Respondent in his return further states that he is willing to comply with our alternative writ and allow, sign, seal, and file the bill of exceptions as prayed by relators, provided he can do so without violating the writ of prohibition issued by the St. Louis Court of Appeals, which said writ of prohibition is still pending and undetermined in said Court of Appeals. Wherefore respondent prays us to determine whether or not said writ of prohibition constitutes good cause why he should not allow, sign, and file said bill of exceptions. Upon the filing of respondent's return, relators move for a judgment on the pleadings.

Max F. Ruler and Randolph Laughlin, both of St. Louis, for relator. Geo. B. Webster, of St. Louis, for Clara E. Taylor. Eugene McQuillin, of St. Louis, pro se.

BROWN, J. (after stating the facts as above). Upon the face of the pleadings, we are requested to compel the respondent to violate a writ of prohibition issued by the St. Louis Court of Appeals. As a ground for this unusual demand, relators insist that said Court of Appeals has no jurisdiction to hear or determine the appeal granted by respondent, and consequently, under the ruling of this court in *State ex rel. v. Norton*, 201 Mo. loc. cit. 24 to 29, 98 S. W. 554, the writ issued by the said Court of Appeals is void. They contend that, by reason of certain constitutional questions inserted by relators in their "petition for appeal," the St. Louis Court of Appeals is deprived of jurisdiction to hear and determine the appeal, and is therefore without power to control or interfere with the appeal by its writ of prohibition. Relators do not contend that any constitutional question was raised while the original cause was pending in the probate court, but assert that the dismissal by respondent of the appeal taken from said probate court violates the following provisions of the Constitution of Missouri: Section 10, art. 2, providing that courts shall be open to every person, etc.; section 30, art. 2, guaranteeing due process of law; and sections 22 and 23, art. 6, granting to circuit courts jurisdiction of appeals from, and supervising control over, probate courts.

[1] A constitutional question cannot legally be injected into a cause appealed from the probate court where no such issue was presented at the trial in such court. A very similar question was presented to us in *Re Strom's Estate*, 213 Mo. 1, 111 S. W. 534, and in that case this court, speaking through Gantt, J., said: "It is elemental in this state that, on appeal from a probate court or a justice of the peace, the circuit court must try the case anew upon the same cause of action that was tried in the probate court or in the justice's court. It is obvious that the two constitutional questions imported into the case presented entirely new issues in the circuit court, issues which the probate court was not allowed to pass on, and this change of the cause of action, so to speak, was unauthorized. The appeal could not give the circuit court greater jurisdiction than the probate court had, or change the course of that appeal from the St. Louis Court of Appeals to this court." It is manifest upon the face of the pleadings that the respondent is not intentionally refusing to perform any official duty.

[2] Whether the writ of prohibition was rightfully or wrongfully issued by the court of Appeals, it appears beyond peradventure that it was issued and served, and it constitutes a valid reason for the respondent's

refusal to sign and file the bill of exceptions. If relators have any valid ground of complaint against any court, it must needs be against the Court of Appeals, which they insist has exceeded its jurisdiction. It would be a novel procedure to convict the honorable St. Louis Court of Appeals of exceeding its jurisdiction in an action to which that court is not a party. To grant the relief relators seek in this action would amount to weaving an additional snarl into the warp and woof of our judicial procedure. Our writ of mandamus certainly ought not to issue against one party because another party has done, or is doing, wrong.

2. However, the petition of the relators harks back to their right to appeal from the order of the probate court granting Clara E. Taylor a new trial on the information which charges that she is a person of unsound mind.

[3] We have many times, through our writ of mandamus, compelled circuit courts to sign and file bills of exceptions. We will not hesitate to thus aid litigants in perfecting their appeals when the facts warrant such action on our part. However, it is our rule in all classes of cases to refuse to require either courts or litigants to perform vain or useless acts. *Darrier v. Darrier*, 58 Mo. 222, loc. cit. 234. *Baker v. Railroad*, 122 Mo. loc. cit. 547 and 548, 26 S. W. 20; *Morris v. Du Puy*, 85 Mo. App. loc. cit. 657. Therefore, if the relators' petition shows on its face that they are not entitled to an appeal, and that, if we compel respondent to sign and file the bill of exceptions, such appeal would not bring up any error which we could review, then no useful purpose would be served should we go through the idle formality of requiring such bill of exceptions to be signed.

[4] Section 482, R. S. 1909, expressly confers upon the probate court the right, if "just cause appear" during the term at which the inquisition was had, to set aside the finding of the jury and require the facts to be inquired into by a new jury. Relators, however, insist that the power of the probate court to set aside the verdict of the first jury expired with the term at which that verdict was returned. It very clearly appears that Clara E. Taylor promptly filed her motion to set aside the verdict of the jury during the term at which it was returned, but the court of its own volition took the motion under advisement until its next term, and then sustained same. Did this continuance of the motion for a new trial until the next succeeding term oust the probate court of jurisdiction to consider or sustain it? We think not. There is nothing in the statutes which warrants such a construction. It would be a monstrous doctrine to penalize a litigant who is not in default by denying her a hearing to which by law she is entitled, simply because the court of its own motion continued her case to a succeeding term. The Constitution of Missouri, § 3, art. 6, requires

this court to prepare and file its opinions in all cases during the term at which such cases are submitted. But this constitutional provision and statutes of similar import have been treated as only directory. *Kralemann v. Sippel*, 57 Mo. App. 598. The motion of Clara E. Taylor for a new trial in the probate court is not set out, nor the substance thereof recited in relators' petition; therefore we will indulge the presumption that said motion contains allegations which amounted to "just cause" for setting aside the verdict of the jury, and granting her a new trial under the provisions of section 482, R. S. 1909.

[5] The acts of probate courts are presumed to be regular until the contrary is shown. *Desloge v. Tucker*, 196 Mo. loc. cit. 601, 94 S. W. 283. The order of the probate court setting aside the first verdict left the cause pending and undisposed of, so that there existed nothing from which to appeal to the circuit court; hence the order made by respondent dismissing said appeal is the only legal order which he could have made.

[6] 3. Decrees of probate courts adjudging persons to be of unsound mind are entirely unlike ordinary judgments. No appeal lies from such decrees for the reason that by the statutes they remain in fieri like a suit pending, and may be reopened and set aside at any subsequent term of the court when the insane person shall be restored to his right mind. Section 519, R. S. 1909; *Dutcher v. Hill*, 29 Mo. 271, loc. cit. 274, 77 Am. Dec. 572; *In the Matter of Marquis*, 85 Mo. 615; *In the Matter of Crouse*, 140 Mo. App. 545, 120 S. W. 666.

[7] The relators' insistence that the dismissal of the appeal by respondent deprives them of due process of law is frivolous. It merely sends them back to the probate court for a trial in the only tribunal designated by the Legislature to hear and determine the issues presented by the information filed in that court by the relator Nolte.

For the reasons recited, our alternative writ of mandamus will be quashed and a peremptory writ denied. All concur, except WOODSON, J., not sitting.

PARKYNE v. CHURCHILL et al.
(Supreme Court of Missouri, Division No. 1.
Nov. 30, 1912.)

1. APPEAL AND ERROR (§ 639*)—DISMISSAL—
GROUNDS—DEFECTIVE RECORD.

Where the abstract of record is a proper abstract of the pleadings and judgment, and there is enough to make the record proper a matter of review on appeal, the appeal will not be dismissed for defects in the abstract.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2787; Dec. Dig. § 639.*]

2. APPEAL AND ERROR (§ 584*)—DISMISSAL—
GROUNDS—DEFECTIVE RECORD.

An abstract of record on appeal which commingles the record proper and matters of

exceptions, so that it is impossible to say what is included for record proper, and what for matters of exceptions, and so that it cannot be determined whether a motion for new trial was preserved in a bill of exceptions or not, and which under the caption "abstract of record" contains pleadings and the judgment, is fatally defective, and leaves for review only the record proper.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2584, 2585; Dec. Dig. § 584.*]

3. APPEAL AND ERROR (§ 518*)—RULINGS ON PLEADINGS—BILL OF EXCEPTIONS—MOTIONS.

A motion to strike out pleadings, if treated as a pure motion, must appear in the bill of exceptions, and not in the record proper, or the ruling thereon is not reviewable on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2342-2355; Dec. Dig. § 518.*]

4. PLEADING (§ 418*)—RULING ON DEMURRER—WAIVER.

A defendant who answers over after the overruling of a demurrer, or a motion in the nature of a demurrer, thereby waives the ruling.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1399, 1403-1406; Dec. Dig. § 418.*]

5. APPEAL AND ERROR (§ 1135*)—RECORD PROPER—REVIEW.

Where the only record on appeal is the record proper, which contains a good petition and a judgment responding to one count thereof, the judgment will be affirmed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4454, 4455; Dec. Dig. § 1135.*]

Appeal from Circuit Court, Wright County; Argus Cox, Judge.

Action by Josephine Parkyne against Charles S. Churchill and others. From a judgment for plaintiff, defendant Laura E. Moody appeals. Affirmed.

J. W. Jackson, of Hartsville, and W. J. Boyd, of St. Joseph, for appellant. E. H. Farnsworth, of Mountain Grove, and Lamar, Lamar & Lamar, of Houston, for respondent.

GRAVES, P. J. By a petition first filed in this cause plaintiff in a single count, sought to have the circuit court ascertain and determine her title to two certain blocks in the town of Mountain Grove, Wright county, Mo. Whilst title was claimed by adverse possession for 10 years, the action should be properly denominated one under old section 650. Later the petition was amended by the addition of another count, setting up facts constituting a resulting trust, but followed with a prayer as under old section 650 to ascertain and determine the interests of plaintiff and defendants in and to the property in dispute. This petition was challenged by demurrer, but this was overruled nisi, and the appealing defendants answered over. That answer reads: "Now comes the defendant Laura E. Moody, and by leave of the court first had and obtained files this, her separate amended answer to plaintiff's amended petition herein, and says that

she denies each and every allegation therein contained, not herein expressly admitted. Defendant Laura E. Moody admits that she claims some right, title, and interest in and to the real estate described in plaintiff's petition. She alleges and says that she is the owner and holds the legal title to the lands described in plaintiff's amended petition aforesaid. Defendant further alleges and says that she is the sole owner, and holds the equitable title to the lands described in the plaintiff's petition aforesaid. For another and further answer and defense the plaintiff's action, the defendant says and avers the fact to be that the plaintiff's action, if any she had, was barred before the filing of the original petition in this action, in this: That any action that the plaintiff may have had accrued and existed more than 10 years before the filing of the original petition herein, which statute of limitation defendant especially pleads in bar of the plaintiff's action." No reply appears in the record, but the cause seems to have proceeded as if the reply had been filed. The judgment after finding the service of process by publication upon all the defendants named, except Laura Moody, and pronouncing a default judgment against them, then proceeds: "The court further finds all the issues for the plaintiff, finds that the plaintiff is the owner in fee and in possession of the land described in the petition herein, to wit, block 6 and 7, in Durham's addition to the original town of Mountain Grove, finds that none of the aforesaid defendants have any right, title, interest, or estate, either in law or equity, in and to the said real estate. Wherefore it is considered, ordered, and decreed by the court that all of said defendants, to wit, Joseph A. Dedmon, S. S. Dedmon, C. C. Dedmon, Elizabeth Durham, E. M. Durham, Adolph A. Durham, Emmett McDurham, Lizzie Kenamore, Catherine A. Hull, Samuel Coleman, J. W. Isom, and Chas. S. Churchill, and the unknown heirs of each and all of the aforesaid defendants and Laura E. Moody, defendants, be, and they are hereby, divested of any and all right, title, interest, and estate, both in law and equity, in and to said block 6 and 7, Durham's addition to the original town of Mountain Grove, and that all right, title, interest, and estate be vested, and the same hereby is vested and quieted in the plaintiff, Josephine Parkyne. It is further adjudged that the plaintiff have and recover of and from the defendant Laura E. Moody all costs in this behalf laid out and expended." It should be noted that the judgment also recited the appearance of Laura E. Moody in person and by counsel. From this judgment Laura E. Moody has appealed. Such states the condition of affairs in the trial court. In this court the defendant appealing is met with a motion to dismiss her

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

appeal. The motion is of length, but its effect is to challenge the sufficiency of the abstract filed in this court. Further outline of the case can be properly omitted in the statement, and additional matter be left to the opinion.

[1] 1. The motion to dismiss the appeal must be overruled. However defective the abstract of record may be as to other matters, there is a proper abstract of the pleadings and judgment. Under the head of "Abstract of Record" appears enough to make the record proper a matter of review by this court, and in such case a motion to dismiss the appeal is never sustained. The question has been so frequently ruled by this court that a mere statement of the situation will suffice. The motion to dismiss the appeal is therefore overruled.

[2] 2. Refusing to absolutely dismiss the appeal, however, does not relieve the defendant of all of the difficulties in this court. Respondent's motion points out many things going to show that we can only consider upon this appeal the record proper. In other words, that all matters of exceptions are precluded from a review here, by reason of defects in the abstract filed. Respondent challenges the sufficiency of this record, and on such challenge stands. She does not brief the merits of the case. To our mind her objections to the abstract of record are well taken. There is a commingling of record proper and matters of exceptions to such an extent that it is impossible to say what is included for record proper, and what included as matters of exceptions. It cannot be determined from this abstract whether the motion for new trial was preserved in a bill of exceptions or not. We have stated above that there is a caption in the abstract of record entitled "Abstract of Record," and under this caption we find the pleadings and the judgment. These matters and a preliminary statement of the case run to take a part of page 13 of the document called, "Statement, Abstract of Record, Brief and Argument of the Appellant, Laura E. Moody." Following the last sentence of the judgment on said page 13 we find: "To the rendition of which judgment the defendant Laura E. Moody then and there objected and excepted. Afterwards, to wit, on the 5th day of March, 1909, and within four days after the rendition of said judgment, the defendant Laura E. Moody filed her motion for a new trial, which motion, omitting caption, is in words and figures as follows." (Here follows motion in full, which we omit.) Upon the very heels of this motion for new trial set out in full as above stated we find on pages 14 and 15 of the so-called abstract the following matter: "Whereupon, the hearing of said motion was continued by consent of the parties until the adjourned March term of this court, to be held on the 12th day of May, 1909, when said motion was, by

order of the court, overruled, to which judgment and order of the court in overruling said motion the defendant by her counsel then and there duly objected and excepted. Thereupon, on the same day, the defendant filed her application and affidavit for an appeal to the Supreme Court, which was by the court granted, and the defendant given until the 1st day of August, 1909, to file her bill of exceptions. On the 17th day of July, 1909, the bill of exceptions in this case was assigned by Argus Cox, judge of the circuit court of Wright county, Mo., and the same was on the 23d day of July, 1909, filed in the office of the circuit clerk of Wright county, Mo. Whereupon the clerk in vacation made and entered of record the following record entry: 'Josephine Parkyne v. Joseph A. Dedmon et al. Now on the 23rd day of July, 1909, comes defendant, Laura E. Moody, by her attorneys, it being within the time allowed by the court to file bill of exceptions and files her bill of exceptions in this cause.' At the beginning of the trial the following agreement between the parties to this suit was taken and entered of record." Under the caption "Evidence in the Cause," as above set out, we find the next 15 pages setting out the evidence heard upon the trial, and then, on page 30 of the document, is this conclusion: "Defendants offered in evidence a deed from Charles S. Churchill to Laura E. Moody, conveying his interest in these lots to her. Defendants thereupon rested in chief. Plaintiff rested. Defendant rested." On page 31 is found the "Assignments of Errors." Pages 32 and 33 the "Points and Authorities." The remaining two pages is what is called the "Argument."

From this brief outline it is clear that it does not appear whether a motion for new trial was ever preserved in a bill of exceptions. It is placed under the caption of "Abstract of Record." A bill of exceptions is not mentioned until we reach page 15 of the document here challenged. On that page we have a recital of its filing and the record entry showing its filing. After this there is no mention of a motion for new trial. After this mention of a bill of exception we have the evidence set out, and we might possibly be justified in concluding that such evidence was in the bill of exceptions, although there is no statement that it was in fact preserved therein. But the motion for new trial and the exception to the action of the court in overruling it are not so advantageously located. This comes before the mention of a bill of exceptions, and under the heading of "Abstract of Record." The abstract filed by applicant is fatally defective, and leaves for our consideration only the record proper. *Jackson v. Bolt & Nut Co.*, 238 Mo. loc. cit. 660, 141 S. W. 1128; *Kolokas v. Railroad*, 223 Mo. loc. cit. 460, 122 S. W. 1082, and causes there cited and reviewed therein.

[3, 4] 3. With all matters of exceptions beyond our review several points made in the brief become unavailing. The motion to strike out is a lost error, for, if it be treated as a pure motion, its place is in the bill of exceptions, and not in the record proper. If, on the other hand, it be treated as a demurrer, it is a part of the record proper, but cannot be considered here, because the defendant answered over, thereby waiving a demurrer or any motion in the nature of a demurrer. A like rule would apply to the demurrer proper.

[6] Going next to the record proper to which our right to review is limited by defendant's failure to abstract her record properly, we find a good petition, and a decree which responds to at least one count of the petition, if not to both. In such case we are forced to affirm the judgment.

Let the judgment be affirmed. All concur.

HEINTZ v. MOORE.

(Supreme Court of Missouri. Division No. 1.
Nov. 30, 1912.)

1. ACKNOWLEDGMENT (§ 5*) — CONTRACT OF SALE—RECORD.

Where a contract for the sale of land was not acknowledged by the grantor, though signed by her with the grantee who did acknowledge it, it was not entitled to record.

[Ed. Note.—For other cases, see Acknowledgment, Cent. Dig. §§ 22-45; Dec. Dig. § 5.*]

2. VENDOR AND PURCHASER (§ 231*)—CONSTRUCTIVE NOTICE—INSTRUMENT IMPROPERLY OF RECORD.

The actual record of an instrument affecting the title to real estate and not entitled to record does not constitute constructive notice to subsequent purchasers.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 513-539; Dec. Dig. § 231.*]

Appeal from Circuit Court, St. Louis County; John W. McElhinney, Judge.

Action by William Heintz against John Moore. From a judgment for plaintiff, defendant appeals. Affirmed.

Stevens & Braden, of Clayton, for appellant. Pearce & Davis, of St. Louis, for respondent.

GRAVES, P. J. Plaintiff by his petition seeks to have the court ascertain and determine the title to a small tract of land in St. Louis county, Mo. Petition is in approved form under old section 650. Plaintiff is the immediate grantee by law from Annie E. Hiett, who is treated throughout as the common source of title.

By answer the defendant admits that the plaintiff was in possession of the property, and that he claimed an interest therein. He further set up what he alleged to be a contract of sale between him and Mrs. Hiett. Plaintiff now claims that the contract pleaded by defendant is not the one offered in evi-

dence, and makes the point of a variance. This will meet with disposition in the opinion. Suffice it now to say that, whatever be the contract pleaded, the contract relied upon is in evidence, and, although rather long, had best be set out, inasmuch as its legal effect is strongly assailed by the plaintiff. The contract reads:

"Kirkwood, Mo., March 21, 1908.

"Received from John Moore the sum of one hundred dollars earnest money and part purchase money for a certain parcel of improved property, lying in the county of St. Louis, state of Missouri: That tract of ground on the N. E. corner Geyer and Big Bend roads, contains about 12 acres, more or less, on which premises is situated house No. ——— which property is this day sold to ——— for the total sum of nine thousand ——— dollars payable as follows: \$1500 cash, \$1500 on or before six months, \$1000 on or before 12 months, and subject to the deed of trust of \$5000 now on the property, with interest on deferred payments to be secured by first deed of trust on said premises. The title to said property to be perfect and to be conveyed by warranty deed free from liens and encumbrances, except taxes, both general and special for the year 1908, and thereafter, and the hereinbefore noted deed of trust which the undersigned purchaser agrees to pay. If the title be found imperfect and cannot be perfected with in a reasonable time, said purchaser is to be paid the cost of examining the title, not to exceed \$25.00 dollars, and earnest money to be refunded. The sale under this contract to be closed within 10 days from date on or before April 1st. and if not closed by that time, owing to the failure or neglect of the purchaser to comply with terms herein, the earnest money is to be forfeited to the seller; but for this cause the buyer shall not be released from the fulfillment of his part of this contract, if so determined by the seller. This contract is subject to the approval of the owner, and also subject to restrictions now on said property. Sale under this contract, when approved by owner, to be closed at the office of Benjamin F. Thomas, Kirkwood, Mo.

"Accepted under the above terms and conditions. John H. Moore.

"I hereby approve the above contract and agree to pay Benjamin F. Thomas a commission of 5%. Annie E. Hiett.

"This receipt to be returned to this office on closing of purchase.

"State of Missouri, County of St. Louis—ss.: On this, 2nd of April, 1908, before me personally appeared John Moore to me known to be the person described in and who executed the forgoing instrument and acknowledged that he executed the same as his free act and deed. In testimony whereof, I have hereunto set my hand and affixed by official seal

at my office in St. Louis county, the day and year first above written.

"My term expires May 2, 1909. J. G. Hawkens, Notary Public."

This contract was filed for record in the recorder's office of St. Louis county on March 3, 1908, and was duly recorded prior to the conveyance by Mrs. Hiett to the plaintiff. By oral proof it is made clearly to appear that Mrs. Hiett alone breached the contract, and that the defendant, Moore, did all that he could to comply with its terms. The cash payment was tendered. The deed of trust was prepared and tendered. In fact, it is not seriously contended that Moore did not do everything in his power to secure the deed from Mrs. Hiett under this writing, and that she refused. It should be further noted that the evidence fails to disclose that the plaintiff had actual knowledge of this contract at the time he took the deed. This succinctly states the issue involved. The learned trial judge in a written memorandum thus disposed of the case: "The contract offered in evidence is not an agreement by Mrs. Hiett to convey or sell to the defendant Moore. It is a receipt from Moore for money paid by himself on a sale of real estate; but it does not appear to whom the property is sold or by whom it is sold. According to the claim of the answer, defendant was a purchaser from Mrs. Hiett. The contract was recorded, after acknowledgment by the defendant Moore. It was never acknowledged by Mrs. Hiett, and the record of it was not constructive notice to any person claiming under her. There is no evidence of actual notice. For this reason, at least, the defendants have failed to show any title or interest. Finding and decrees for plaintiff, with costs."

From a judgment in accordance with this memoranda opinion the defendant appeals. Points made will be taken in this order.

1. It is urged in the briefs here that the instrument relied upon by defendant is totally defective in substance and form, and did not operate to give Moore any interest in the land. It is urged that it only purports to be a receipt from Moore to himself for \$100, and an agreement by him to convey the land described. It is also urged that the written instrument does not show an agreement upon the part of Mrs. Hiett to convey the land. To say the very least of it, the written instrument relied upon is very awkwardly worded, and whether it is such as to carry with it any interest or rights is extremely doubtful. In view of another question, we need not go into a discussion of the force and effect of this written instrument. We have set it out in full, with the acknowledgment thereto attached for another purpose, which we discuss next.

[1] 2. The next contention of the plaintiff is that, although it be conceded that the written instrument upon its face is a good contract between Mrs. Hiett and Mr. Moore for

the conveyance of the land in dispute, yet such contract was never acknowledged by Mrs. Hiett, and the mere spreading it upon record did not give notice to the plaintiff. This contention is so plainly well taken that we desist from a discussion of the real force and effect of the written instrument. It will be observed that the instrument divides itself into three parts: (1) That which precedes the signature of John H. Moore; (2) that portion between the signature of Moore and the signature of Mrs. Hiett; and (3) a short sentence following the signature of Mrs. Hiett. But, however these portions may be put together, and whatever may be its legal effect as between the parties, when they are put together, it is clear that the instrument is not acknowledged by Mrs. Hiett. If the instrument was intended to affect title to real estate, it must be acknowledged by the grantor or proposed grantor before it is entitled to record. This is not a case of defective acknowledgment, but a case of no acknowledgment at all, so far as the real grantor is concerned. As to Mrs. Hiett, the instrument was not entitled to record.

[2] As the instrument was not entitled to record as one affecting the title to real estate, the next question is, Does the fact that it was recorded change the situation as to notice to subsequent purchasers from Mrs. Hiett? Stated differently, does the actual record of an instrument not entitled to record make such recorded instrument constructive notice? Under the rulings in this state, we think not. In the later case of *Williams v. Butterfield*, 182 Mo. loc. cit. 184, 81 S. W. 616, we thus dispose of the point in hand: "There is but one vital proposition involved in this cause presented for our consideration. That is this: Was the record of the deed from Bohlicke and wife to Wolfenden, embracing the land in dispute, admissible in evidence in this cause for the purpose of fixing constructive notice upon plaintiff of the sale of the land prior to his (plaintiff's) purchase? The record of this deed, as offered in evidence, does not show any certificate of acknowledgment by Henry Bohlicke, the grantor in said deed. Under the statute, it must be conceded that this deed was not entitled to be recorded, by reason of the absence of such acknowledgment. Section 2418, R. S. 1889. It follows from this, if the general rule is applicable to this deed, that, in the absence of the certificate of acknowledgment required by the statute, it had no place upon the land records of Stoddard county, and, if improperly recorded, would not impart constructive notice to a subsequent purchaser in good faith for a valuable consideration. Sections 2419 and 2420, R. S. 1889; *Bishop v. Schneider*, 46 Mo. 472 [2 Am. Rep. 533]; *Terrell v. Andrew County*, 44 Mo. 309." In that case, as in this, the owner of the land and the purposed grantor in the written instrument had not acknowledged it. So we

say in the case at bar that, it appearing from the evidence that the plaintiff had no actual knowledge of this so-called contract, the record thereof gave him no notice, and his purchase in good faith cannot be disturbed.

The judgment nisi was for the right party, and it is affirmed. All concur.

CARTER v. SPRACKLIN et al.

(Supreme Court of Missouri, Division No. 1.
Nov. 30, 1912.)

1. BOUNDARIES (§ 36*)—SURVEYS—EVIDENCE.

Rev. St. 1909, § 11,301, providing that, with certain exceptions, no survey except those made by the county surveyor or his deputy shall be legal evidence, merely makes the official survey prima facie correct, and does not prevent the introduction in evidence of surveys made by private or other public surveyors, where their correctness has been first shown.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. §§ 160-162, 164, 166-176; Dec. Dig. § 36.*]

2. BOUNDARIES (§ 54*)—SURVEYS—EVIDENCE.

A survey is not admissible as an official survey where it appears on its face or from competent evidence that it was not made as the statute directs.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. §§ 263, 268-277; Dec. Dig. § 54.*]

3. BOUNDARIES (§ 40*) — EVIDENCE — JURY QUESTION.

Where, in ejectment, the evidence upon a disputed boundary contradicted the prima facie case made out by an official survey, the issue was for the jury.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. §§ 196-204; Dec. Dig. § 40.*]

4. BOUNDARIES (§ 54*) — INSTRUCTION — EVIDENCE.

Where the plaintiff introduced, on the issue of a disputed boundary, not only the official survey, but also evidence contradictory thereto, the court properly refused plaintiff's requested instruction that the survey made by the county surveyor was presumptively correct; the court being bound to instruct for plaintiff only upon the case as made out by all his evidence.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. §§ 263, 268-277; Dec. Dig. § 54.*]

Appeal from Circuit Court, Jasper County; Hugh Dabbs, Judge.

Ejectment by Harriet E. Carter against E. E. Spracklin and others. From judgment for defendants, plaintiff appeals. Affirmed.

This is a suit in ejectment, brought by the plaintiff against the defendants to recover the possession of a strip of ground three feet wide off of the south side of lot 71, in the original town of Webb City, Jasper county, Mo. Said lot 71 has a frontage of — feet on Webb street and a depth of — feet on Daugherty street; the exact dimensions of said lot not appearing, though I suppose it was quite a large tract of land. The latter street runs east and west, and the former north and south. A trial was had in the circuit court of that county, which resulted in a judgment in favor of

the defendants; and, after moving unsuccessfully for a new trial, the plaintiff duly appealed the cause to this court.

The "Webb estate," so designated in the record, is the common source of title. The plaintiff's deed, dated October 11, 1904, conveys to him a lot of ground described as commencing at a point on Webb street 50 feet north of the north line of Daugherty street, and running west 142 feet, thence north 66 feet, thence east 142 feet, thence south 66 feet to the point of beginning. The deed of defendants is dated March 22, 1888, and conveys to them by metes and bounds a lot of ground 50 feet front on Webb street by 142 feet on Daugherty street in the southeast corner of that part of lot 71, in original town of Webb City, lying north of Daugherty street. This controversy arises over the proper location of Daugherty street. In order to make out the plaintiff's case, he introduced two witnesses, namely: William Kohlman, the county surveyor of Jasper county, and W. E. Smith, the city engineer of Webb City. According to the testimony of the former, the defendants occupy said three feet of plaintiff's lot, and, according to the latter, they occupy only a narrow strip thereof, 7½ inches wide at one end and 4 inches at the other. The evidence for the defendants shows that at the time of the trial there was a fence standing between the houses of plaintiff and the defendants, and that it had been there for more than 20 years, and stood about 3 feet north of the defendants' north line; that defendants never claimed more than the 50 feet of ground described in their deed of March 22, 1888; that shortly after defendants purchased said 50 feet of ground they erected a building on it practically covering the entire lot. The south line of the building stands on the north line of Daugherty street and the east line thereof stands on the west line of Webb street.

Currey, Owen & Farris, of Webb City, for appellant. Frank L. Farlow, of Webb City, for respondents.

WOODSON, J. (after stating the facts as above). 1. The questions here presented by the record are propositions of law, and grow out of the action of the trial court in refusing to give two instructions asked by appellant. The first was a mandatory instruction directing the jury to find for the plaintiff, and the second declared that, under the law, a survey of the county surveyor was presumptively valid and correct. We will consider these two propositions in the inverse order as stated.

[1] The position of counsel for plaintiff is this: That under section 11,301, R. S. 1909, the survey introduced in evidence, made by Mr. Kohlman, the county surveyor of Jasper county, is presumptively correct, and must be accepted as such until it is, by

competent evidence, shown to be incorrect, and that (quote) "while the survey of W. E. Smith must be shown to be correct, and the survey itself of this nonofficial surveyor is not admissible as evidence, even if shown to be correct." Said section 11,301 of R. S. 1909 reads as follows: "What survey shall be legal evidence.—No survey or resurvey, hereafter made by any person, except that of the county surveyor or his deputy, shall be considered legal evidence in any court in this state, except such surveys as are made by the authority of the United States or by mutual consent of the parties." This section of the statute came before this court for construction in the case of *Hopper v. Hickman*, 145 Mo. 411, 46 S. W. 973, and it was there held, and properly so in our opinion, that this statute does not disqualify any surveyor, private or official, from testifying in relation to surveys made by him. Clearly the design of the Legislature in enacting that section was to make a survey made by a county surveyor *prima facie* evidence of its correctness without first establishing its correctness by parol or other competent evidence. There is nothing in the letter or spirit of said section which indicates that surveys made by private or other public surveyors shall not be introduced in evidence, where their correctness has first, by competent evidence, been shown to be such.

We are cited to the case of *Clark v. McAtee*, 227 Mo. 152, 127 S. W. 37, as announcing a contrary rule. The writer is perfectly familiar with that case, he having written the opinion therein; and we have no hesitancy whatever in saying that there is no conflict between that case and the case of *Hopper v. Hickman*, *supra*. The court in the *Clark-McAtee* Case simply held that a survey made by the county surveyor was *prima facie* correct, and needed no evidence in the first instance to establish its *prima facie* character.

[2] But, in order to be held an official survey, it must be made as the statute directs; and that where it appears from the face of the survey itself, or where it is shown by competent evidence, that it was not so made, it cannot be admitted in evidence as an official record; also, that the only authority for admitting such surveys in evidence as official records is the statutes which authorize them to be made, and which direct them to be recorded. Under this view of the law, the survey made by the county surveyor was properly admitted in evidence, and it made out a *prima facie* case, which, of course, could be overthrown or disproved by any competent evidence.

[3] But counsel for plaintiff did not rest his case upon the *prima facie* case made by the official survey introduced in evidence,

but went farther, if I correctly understand the record, and introduced W. E. Smith, the city engineer of Webb City, as a witness, who it seems also made a survey of the land in controversy, which was also introduced in evidence by plaintiff. As previously shown, according to the survey made by the county surveyor, the defendants were in possession of the entire three feet of ground claimed by the plaintiff, but, according to the testimony of Smith, the city engineer, and the survey made by him, defendants are in possession of only a narrow strip thereof, 7½ inches wide at one end and 4 inches at the other. By this evidence the plaintiff contradicted the *prima facie* case he made by the official survey introduced, or, at least, all of it except as to the narrow strip mentioned. In addition to the foregoing testimony introduced by plaintiff, the respondents introduced Samuel Bell, a former city engineer of said city, who it was shown was perfectly familiar with the premises and had located the sidewalks, curbs, and gutters on Daugherty and Webb streets. He testified in effect, among other things, that defendants were in the possession of no part of the plaintiff's ground. This evidence of the respondents, as well as a part of that introduced by the appellant, contradicted the *prima facie* case made by plaintiff, which, of course, presented a question of fact for the jury to determine. That being true, the court properly refused to give the mandatory instruction asked by appellant, telling the jury to find for him.

[4] 2. This brings us to the consideration of the action of the court in refusing the second instruction asked by the plaintiff. That instruction told the jury that the survey introduced made by the "county surveyor was presumptively valid and correct." As an abstract legal proposition, that instruction properly declared the law, but it was not error to refuse it in this case, for the reason that plaintiff did not rely upon that survey alone to make out his case, but he went further and introduced in evidence the testimony of W. E. Smith, and a survey made by him, both of which contradicted the *prima facie* case made by the official survey. After that had been done, it was the duty of the court to instruct the jury for plaintiff upon the case as made by all the evidence introduced by him, and not upon a portion of it. To have done so would have convicted the court of having selected out and commented upon certain portions of the evidence, and of having ignored the remainder. Clearly that would have been error. We are, therefore, of the opinion that the court properly refused said instruction.

Finding no error in the record, the judgment should be affirmed. It is so ordered. All concur.

MONTGOMERY v. GAHAGAN.(Supreme Court of Missouri, Division No. 1.
Nov. 30, 1912.)**1. JUDGMENT (§ 107*)—DISPOSAL OF ISSUES—NECESSITY.**

Where an answer contained a general denial, as well as allegations of facts on which defendants based a claim for affirmative relief, defendant's refusal to plead further, after a demurrer was sustained to the affirmative part, did not leave him in default so as to warrant judgment against him.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 198-200; Dec. Dig. § 107.*]

2. APPEAL AND ERROR (§ 499*)—REVIEW—RECORDS.

The question whether the issues raised by demurrer to part of an answer were concluded by an adverse ruling on motion to strike out cannot be raised on appeal, where the record does not show that it was brought to the attention of the lower court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2295-2299; Dec. Dig. § 499.*]

3. EJECTMENT (§ 144*)—RECOVERY FOR IMPROVEMENTS—LIEN.

A purchaser of land sued in ejectment by the vendor, on default in payment of installments of the contract price, cannot have the value of his improvements on the premises, made under a collateral contract with the vendor, charged as a lien on the land, but is limited to setting them off against the damages claimed by the vendor, since Rev. St. 1909, § 2401 et seq., giving the right to charge the improvements against the land, requires it shall be done in a separate proceeding, and is further limited to improvements made by one claiming ownership, and before notice of any adverse claim.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. § 482; Dec. Dig. § 144.*]

4. APPEAL AND ERROR (§ 1073*)—HARMLESS ERROR.

Where, in ejectment, a demurrer was sustained to part of the answer of defendant purchaser praying that his improvements be made a lien on the land, and, on refusal to plead further, a default judgment was rendered for plaintiff vendor, though there was also a general denial, the judgment could not be sustained on appeal, on the theory that, while defendant could set off the improvements against damages, defendant was not prejudiced, since only nominal damages were recovered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4240-4247; Dec. Dig. § 1073.*]

Appeal from Circuit Court, Greene County; James T. Neville, Judge.

Action in ejectment by Peter H. Montgomery against D. W. Gahagan. Judgment for plaintiff, and defendant appeals. Reversed.

This is an action in ejectment, instituted January 15, 1907, in the Newton county circuit court, to recover a piece of ground in the city of Seneca in that county, on which a flour mill was situated.

The defendant filed an answer, in which he denied specially that plaintiff was entitled to possession of the premises, and generally denied "each and every allegation contained in said petition, except what is hereinafter specially admitted." For further an-

swer it stated that the defendant was placed in possession of the premises under a contract executed by plaintiff to sell and convey the same to defendant, and set forth a true copy thereof. It is dated June 30, 1905, signed by the plaintiff and his wife as parties at the first part, who, by its terms, agreed that, if defendant, the party of the second part, should first make the payments and perform the covenants therein contained to be kept and performed by him, they would convey to him the premises in fee, clear of incumbrances, by warranty deed. The defendant was to pay the sum of \$3,000 in 12 semiannual payments, due, respectively, on the 1st days of January and July of each year, beginning January 1, 1906, the last being due July 1, 1911, without interest. It was further provided as follows: "And in case of the failure of said party of the second part to make either of the payments or perform any of the covenants on his part hereby made and entered into, this contract shall, at the option of the parties of the first part, be forfeited and determined, and the party of the second part shall forfeit all payments made by him on this contract, and such payments shall be retained by the said parties of the first part in full satisfaction and in full liquidation of all damages by them sustained and they shall have the right to re-enter and take possession of the premises aforesaid; and it is mutually agreed by and between the parties hereto that in construing this contract time shall be an essential." These payments were evidenced by promissory notes, payable as stated above. The answer then proceeded to state that the premises in suit consisted of lands on which was situated a small steam flouring mill in a crude, unfinished, and dilapidated condition, erected in 1901; that it was operated for a year or more and then abandoned for about two years, and, at the time of its purchase by defendant, had so deteriorated as to be almost valueless; that its abandonment by plaintiff was brought about by financial embarrassment due to the incapacity of the mill to earn a profit without large improvements and additions to its equipment, and plaintiff consented and agreed that the improvements must be made before it could be successfully operated; that by reason of these facts plaintiff sold to defendant and put him in possession of the mill on deferred payments, without interest, and that defendant would have to expend large sums of money in rebuilding and improvements and additions to said mill, and it was agreed that defendant would add a complete and finished corn-milling plant, a large platform wagon scales with dump and suitable shed over the same, with corn drag and wheat conveyors from said dump, and additional elevators in the mill; "that in consideration of the improvements and additions to be made on said

mill, and in consideration of the very large expenditure of money by the defendant, the plaintiff sold to defendant the said milling plant and the land as described, as aforesaid, without the payment of any sum of money in advance by defendant to plaintiff, it being agreed and understood that said improvements and additions were absolutely necessary to put the mill in a serviceable condition; that it was agreed and understood by and between the plaintiff and defendant that said improvements and additions to be made at the cost and expense of the defendant would amply secure the plaintiff for any default in the deferred payments of the notes of the defendant, as aforesaid; that it was agreed and understood by and between the plaintiff and defendant that until said mill was placed in a condition to earn a profit, by making the improvements and additions as aforesaid, it would be impossible for the defendant to pay off and discharge and extinguish his said notes or any of them; that the defendant did, on being placed in possession of the premises, as aforesaid, by plaintiff, diligently proceed at once, in good faith, to the building and completion of all the aforesaid improvements and additions, and many more, under the contract and agreement by and between the plaintiff and defendant, as aforesaid, at his own expense, and did, as rapidly as possible and practical under the circumstances, put the milling plant in perfect repair and good order for successful operation; that all of said improvements and additions were made with the full knowledge and consent and contract and agreement of the plaintiff."

It then set out an itemized account of the money so expended between the date when defendant took possession of the mill and November 2, 1905, amounting to \$1,822.98, and stated that defendant had paid cash on the notes, without giving dates therefor, amounting to \$175, and that the mill was worth \$2,500 more than at the time of the purchase, and that defendant went into possession and made the said improvements by the authority of the plaintiff, and did not hold adversely to plaintiff, but under and by authority from him, and that there were no other writings between them than the contract and notes mentioned. The answer asked judgment for the sum of \$1,997.90, the amount of the expenditure for improvements and cash paid on the notes, less any amount that might be found by the court to be due for rent, and that the sum be adjudged and declared a first lien on the real estate described in the petition, including the milling plant thereon, and that plaintiff be enjoined and restrained, "or that execution be stayed by order of record of this court until such time as the plaintiff shall have paid to the defendant the amount of his judgment and filed the receipt of the defendant therefor with the clerk of this court; that all of

defendant's notes described in the plaintiff's articles of agreement be canceled and for naught held and esteemed by the order and judgment of this court, and for such other and further relief as may be proper." The plaintiff then filed its motion to strike out "the following portion of defendant's answer, viz., beginning with the ninth line on the fourth page of defendant's answer, and including all the portion following, except the prayer, the same being that portion of defendant's answer that attempts to charge the plaintiff with the value of improvements," for the reason, among others, that it does not state facts sufficient to constitute a cause of action, or entitle the defendant to any relief. This motion was overruled by the court, and thereupon the plaintiff applied for, and the court granted, a change of venue, transferring the case to the Greene county circuit court, where the plaintiff filed a demurrer to the answer, which, omitting the title, is in words and figures as follows: "Now comes the plaintiff and demurs to the defendant's answer excepting the general denial, for the following reasons, viz.: (1) Said answer does not state facts sufficient to constitute any cause of action against plaintiff or any defense to plaintiff's action. (2) Upon the allegations of defendant's answer, the plaintiff is entitled to recovery." The demurrer was thereupon sustained by the court, and, the defendant refusing to plead further, the court entered a judgment by default against him and, proceeding to hear evidence, found all the issues for plaintiff, and assessed his damages at one cent and the value of the monthly rents and profits at \$20 per month, and entered judgment for the possession of the property, together with the damages and monthly rental.

James H. Pratt, of Neosho, A. D. Bennett, of Vinita, Okl., and A. J. Clarity, for appellant. M. E. Benton, Horace Ruark, and Barton J. Morrow, all of Neosho, for respondent.

BROWN, C. (after stating the facts as above). [1] 1. The sustaining of the demurrer so emasculated the answer that it contained nothing but a general denial. This constitutes a complete defense to the cause of action stated in the petition. It was therefore error for the court to enter default and proceed thereon to final judgment while it stood as a pleading in the case.

[2] The defendant, however, in the part of the answer held insufficient on demurrer, had pleaded a special defense inconsistent with the general denial, in that it set up that he was in possession of the premises under the plaintiff by virtue of a contract of purchase which had already become subject to forfeiture. In avoidance of this admission, he pleaded certain matters which he claims entitled him to rescind the contract and to have affirmative relief, and he now claims that as to these matters the demur-

rer was improperly sustained, and his real defense eliminated.

The first ground urged by defendant in support of this contention is that the same questions had been previously raised by motion to strike out substantially the same parts of the same answer, and that the overruling of this motion constituted a final adjudication of all the questions so raised. Ordinarily this result, by which black may be made white and the crooked straight by the dictum of the court, can only proceed from a final judgment. This seems to accord with both the letter and spirit of our own practice, in which all the decisions of the court made in course of a trial are, if questioned, required to be reviewed upon the motion for a new trial, so that the court may then have an opportunity of correcting and revising its decisions. The question, however, does not seem to have been made or preserved in this record, where there is nothing to show that it was brought to the attention of the court. The defendant might have waived it, and gone directly to the merits of the controversy. If he did not desire to do this, he could have made his motion to strike out the demurrer, or could have taken such other course upon the record as would apprise the court of his intention. Having failed to do so, he will not be permitted to raise the question in this court. We do not think that there is anything in this inconsistent with any expression of Judge Sherwood in *Baisley v. Baisley*, 113 Mo. 544, 550, 21 S. W. 29, 35 Am. St. Rep. 726.

[3] 2. The contract of purchase under which the defendant was in possession provided, as we have seen, that if he should fail to make any payments that it required it should, at the option of the vendor, be forfeited and determined, and the payments theretofore made upon it should be retained in full satisfaction of all damages sustained by him, and that he might re-enter and take possession of the premises. The exercise of this option would thus extinguish, not only the right to charge the unpaid purchase price upon the land, but also his right to damages up to the time of such forfeiture and re-entry therefor. The answer pleaded, in connection with this contract, that there was a contemporaneous oral agreement that the defendant should make certain improvements, which were necessary before the mill could be operated, which, it was agreed, would increase the security of the plaintiff for the deferred payments of the purchase price, and which were therefore intended for the benefit of the plaintiff as well as of the defendant, and that the defendant made these improvements at an expenditure of \$1,822.98, and thereby increased the value of the property to the extent of \$2,500. Having done this, he failed to make the payments as they became

due, and the plaintiff, by this suit, has exercised his election to forfeit the contract and re-enter the premises, and now asserts that he is entitled to not only the liquidated damages provided in the contract, amounting to \$175 paid him upon the purchase price, but also to have the improvements made in compliance with the oral agreement. This, he says, is so nominated in the obligation; while the defendant asserts that he has, in equity, the right to be reimbursed for the improvements and have the same charged upon the body of the property on which they were made. This difference in opinion is the foundation of the real question in the case. It was directly presented by the demurrer to that part of the answer stricken out by the court.

At the time the common law of England was brought to this country by our ancestors, the action of ejectment was an altogether fictitious proceeding, in which the damages were nominal only; and it remained so in those states in which the common law was adopted until changed by statute. The owner recovered his land without being required to pay for improvements, which were considered as annexed to the freehold and passing with recovery. Another remedy was given the plaintiff for his injury by being kept out of the premises in the way of an action of trespass for mesne profits. *Sedgwick on Damages* (9th Ed.) § 901. This action is a liberal and equitable one, which will allow every equitable kind of defense. Id. § 915, and note. Nothing is more reasonable than that the bona fide possessor of land should be reimbursed out of the rentals for valuable and permanent improvements made by him, in good faith, while in possession, with the consent and at the instance of the owner; and we find that the practice of permitting such compensation to be offset in actions for mesne profits has prevailed both in this country and in England for many years. For instance, in *Coulter's Case*, 3 Coke, 30, decided more than 300 years ago, it was said: "The disseisor shall recoup all the damages which he hath expended in amending the houses." And in *Viner's Abridgment*, title "Discount," case 3, it was said: "Damage of 40 shillings and no more was found by the assize, because the land sown and the houses well amended and so recouped the damages." Approaching nearer to our own time, it was said by Kent, J., in *Murray v. Gouverneur*, 2 Johns. Cas. (N. Y.) 438, 1 Am. Dec. 177: "As to the sum expended by the appellant for repairs, it may be left for liquidation in an action for the mesne profits, if the respondents should think proper to sue for the rents and profits. The action for mesne profits is a liberal and equitable action, and will allow of every kind of equitable defense." In our own state this right of recoupment was not considered broad enough to permit

the doing of justice in all cases, inasmuch as it afforded the occupant no relief, except out of the rents and profits, while it was thought that in those cases in which the occupants make improvements not only in good faith, believing themselves to have good title, but not having any notice of the title or claim asserted by the true owner, they should have a broader and more complete remedy. To meet this supposed want, the law was enacted which is now embodied in section 2401, and following, of the Revised Statutes of 1909. That this law was not intended to take away any remedy that had theretofore existed, but to afford a more complete remedy out of the body of the improved estate in those cases that come within its provisions, is settled by numerous adjudications in this state. *Mann v. Doerr*, 222 Mo. 1, 121 S. W. 86; *Dawkins v. Griffin*, 195 Mo. 430, 94 S. W. 525; *Tice v. Fleming*, 173 Mo. 49, 72 S. W. 689, 96 Am. St. Rep. 479; *Henderson v. Langley*, 76 Mo. 226; *Fenwick v. Gill*, 38 Mo. 510; *Dothage v. Stuart*, 85 Mo. 251.

In those jurisdictions where the recovery of rents and profits in ejectment is permitted, the same rule applies as in actions for mesne profits at common law. The improvements may be recouped against the damages recovered on account of rents and profits. It is recognized that this is just, because, in most cases, as in this, it is the improvements that earn the rental. In cases arising under the Missouri statute to which we have referred, a separate suit must be brought, according to the practice there prescribed, to charge the improvements against the land. The statute, however, takes away no right of this character that existed before the enactment. It excludes by its terms all actions between vendor and vendee and between landlord and tenant, because vendees and tenants have notice of the titles of their vendors and landlords. It is useless to speculate here as to what other relations, in which the common-law remedy was so allowed, may be included in or excluded from the terms of this statute; but one or the other of these remedies applies in all cases in which the right existed at common law.

[4] While the defendant is not entitled to the relief he asks in his answer, we think the facts stated constitute a good defense against the damages alleged in the petition. The plaintiff had, as was his right, exercised his election to forfeit the contract of sale, instead of proceeding to collect the purchase price by charging it upon the land, which would have permitted the defendant to reimburse himself for his improvements out of any surplus which might be left after satisfying that claim. This left no other course open to defendant than to seek, somewhere in the proceeding, compensation for his improvements, made not only with

the acquiescence of, but under an agreement with, the plaintiff. He filed an answer disclosing his rights, which was held bad on demurrer; and, notwithstanding his general denial was still left, a default was entered and immediately proceeded upon to final judgment. That this was in direct disregard of the statute cannot be questioned; but it is answered that as only nominal damages were assessed no substantial right of the defendant was violated. It is a sufficient answer to this to say that the plaintiff, in pursuit of his strict legal rights, must conform to the remedies the law has prescribed as conditions to its aid.

The judgment of the Greene county circuit court is accordingly reversed, and the cause remanded to be proceeded with in accordance with this opinion.

PER CURIAM. The foregoing opinion of BROWN, C., is adopted as the opinion of the court. All concur.

LANGSTAFF v. CITY OF WEBSTER GROVES.

(Supreme Court of Missouri, Division No. 1
Nov. 30, 1912.)

1. EXCEPTIONS, BILL OF (§ 56*)—FILING—RECORD.

The judge's statement, at the end of a paper purporting to be a bill of exceptions, that it was allowed, signed, sealed, "filed, and made a part of the record," does not prove that fact, but merely shows that it was signed in proper form and ready to file.

[Ed. Note.—For other cases, see Exceptions, Bill of, Cent. Dig. §§ 94-96; Dec. Dig. § 56.*]

2. APPEAL AND ERROR (§ 581*)—REVIEW—RECORD—BILL OF EXCEPTIONS.

Matters in the bill of exceptions will not be reviewed, unless it is shown in the abstract of the record proper that a bill of exceptions was actually filed, as well as signed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2575-2581, 2599; Dec. Dig. § 581.*]

3. APPEAL AND ERROR (§ 581*)—REVIEW—RECORD—MOTION FOR NEW TRIAL.

Matters required to be presented in a motion for a new trial will not be reviewed, unless it appears from the abstract of the record entry of the court that such motion was filed and passed on.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2575-2581, 2599; Dec. Dig. § 581.*]

Appeal from St. Louis Circuit Court; Matt G. Reynolds, Judge.

Action by Thomas Langstaff against the City of Webster Groves. Verdict for defendant, which appeals from an order granting a new trial. Affirmed.

S. D. Hodgdon, of Webster Groves, and L. A. Steber, of St. Louis, for appellant. R. H. Stevens, of Clayton, and Watts, Gentry & Lee, of St. Louis, for respondent.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

BROWN, C. This is a suit for \$20,000 damages for personal injuries alleged to have been suffered by the plaintiff from falling off a defective sidewalk in defendant city. It was instituted in the circuit court for the county of St. Louis, from which it was removed to the circuit court for the city of St. Louis, in which the transcript was filed February 7, 1908. The cause seems to have been tried at the June term, 1908, of that court. The trial resulted in a verdict for defendant, which was set aside upon motion for a new trial, upon the ground that the court had erred in giving improper instructions at defendant's request. The appeal is taken from the order sustaining the motion for a new trial, as is shown by the short transcript filed. The abstract of the record consists of the certified transcript of the proceedings in the circuit court for St. Louis county. It contains no entry whatever from the records of the circuit court for the city of St. Louis.

[1] Following the transcript is what purports to be a "bill of exceptions," beginning as follows: "Be it remembered that, on the 20th day of April, 1908, at the April term, the above-entitled cause came on for trial in division No. 4 of said court, before Hon. Matt G. Reynolds, Judge, and a jury, and the following proceedings were had therein, to wit." Then follows the evidence, the instructions of the court, the verdict, the motion for a new trial, and the statement that it was sustained, and time granted to file a bill of exceptions. It then closes as follows: "Inasmuch as the above matters and things do not appear of record, and in order that they may be preserved and made of record, and presented to the Supreme Court of Missouri for review, the defendant tenders this its bill of exceptions, and prays that the same may be allowed, signed, sealed, filed, and made a part of the record in this cause, which is accordingly done this 20th day of November, 1908, in the October term of said court. Matt G. Reynolds, Judge of the Circuit Court, City of St. Louis, State of Missouri, Division No. 4." The abstract contains nothing more. It will be seen that it does not appear from it that any order was entered upon the records of the circuit court for the city of St. Louis during the progress of the case. If the statement, contained in the paper entitled "Bill of Exceptions," that a motion for a new trial was filed and overruled, would otherwise raise a sufficient implication of those facts, we are still confronted with the difficulty that, although the judge's statement at the end of the bill recites that it was allowed, signed, sealed, *filed*, and made a part of the record in term time, this has no tendency to prove that fact, but merely shows that it was signed in proper form and ready to file in the court whenever the appellant should think proper to do so.

[2, 3] Under the repeated decisions of this court that matters of exception will not be reviewed here unless it is shown in the abstract of the record proper that a bill of exceptions was actually filed, as well as signed, and that matters required to be presented in a motion for a new trial will not be reviewed unless it appears from the abstract of the record entry of the court that such motion was filed and passed on, the only question involved in this appeal is not so presented that we can examine and determine it. *Noble v. Brinson*, 231 Mo. 640, 132 S. W. 1068; *Wallace v. Libby*, 231 Mo. 341, 132 S. W. 665, and cases cited. It is seldom that our attention has been directed to a more flagrant disregard of this rule, which has been enforced with such uniformity that there can no longer be any reasonable excuse for its violation.

It follows that the order and judgment of the circuit court granting a new trial must be affirmed.

PER CURIAM. The foregoing opinion of **BROWN, C.**, is adopted as the opinion of the court. All concur.

STATE ex rel. McDERMOTT REALTY CO.
et al. v. **McELHINNEY**, Judge.

(Supreme Court of Missouri. Nov. 26, 1912.)

1. PRIVATE ROADS (§ 2*)—PROCEEDINGS FOR ESTABLISHMENT—PETITION.

Under Rev. St. § 10,447, providing that if any inhabitant shall present a petition setting forth that he is the owner of land and that no public road passes through or touches it, and asking for the establishment of a private road at some convenient point, the court shall appoint commissioners, it is not necessary that the petition aver that the petitioner is an inhabitant of the state, although proof of that fact is jurisdictional.

[Ed. Note.—For other cases, see *Private Roads*, Cent. Dig. §§ 3-21; Dec. Dig. § 2.*]

2. PRIVATE ROADS (§ 2*)—PROCEEDINGS FOR ESTABLISHMENT—APPEAL TO THE CIRCUIT COURT—PROOF OF JURISDICTIONAL FACTS.

In view of Rev. St. 1909, § 4091, providing that appeals from the county courts shall be determined in the manner governing appeals from a justice's court, and that they shall be heard *de novo* in the circuit court, and as an appeal in a proceeding to establish a private road is not governed by section 10,440, which controls appeals in proceedings to establish public roads, but by section 3956, providing that the circuit court shall have jurisdiction of all appeals from the county court unless otherwise provided for, the record of the proceeding to establish a private road, begun in a county court, need not, to confer jurisdiction on the circuit court to hear the appeal, show that the petitioner was a citizen of the state.

[Ed. Note.—For other cases, see *Private Roads*, Cent. Dig. §§ 3-21; Dec. Dig. § 2.*]

3. MANDAMUS (§ 31*)—PROCEEDING WITH SUIT.

As it is not a function of a writ of mandamus to direct the course of judicial action, but the writ may issue to compel a judicial officer to proceed with the cause, mandamus may issue to a circuit court judge to proceed with a cause

to establish a private road, though it is improper to direct the appointment of commissioners or in any way govern his action.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. §§ 74, 75; Dec. Dig. § 31.*]

In Banc. Original application for mandamus by the State, on the relation of the McDermott Realty Company and another, against John M. McElhinney, as Judge of the Circuit Court of St. Louis County. Peremptory writ issued.

John C. McAtee, of Clayton, for relators. Boyle & Priest, of St. Louis, and J. O. Kiskaddon, A. E. L. Gardner, and R. H. Stevens, all of Clayton, for respondent.

KENNISH, J. This is an original proceeding in mandamus, the purpose of which is to obtain a writ from this court, commanding the respondent, as judge of the circuit court of St. Louis county, to assume jurisdiction of a proceeding pending in his said court on appeal from the county court of said county, in which relators are seeking to establish a private road, and also commanding him to appoint commissioners to lay out said road and assess damages therefor. Upon the filing of the petition an alternative writ was issued, and in due time respondent made return thereto. Relators filed a motion for judgment on the pleadings, and the cause has been submitted for decision on the issues of law thus made.

The substance of the allegations of relators' petition, briefly stated, is as follows: On August 22, 1910, they filed in the county court of St. Louis county a petition for a private road. That petition alleged that relator McDermott Realty Company, a domestic corporation, was the owner, and that relator John W. Bellairs was the lessee, of a tract of land therein described, located in said county, and that no public road passed through or touched said tract of land, and prayed that a private road be opened from said tract, through and over the lands of the United Railways Company and others, to Marine avenue, a public road in said county. Upon a hearing in the county court the petition was denied and petitioners appealed to the circuit court. The respondent, as judge of the circuit court, heard the cause on appeal, made a finding in favor of petitioners, adjudged that the petition should be granted, and remanded the cause to the county court for further proceedings therein. After the cause was so remanded, the United Railways Company instituted a suit in this court to prohibit the judges of the county court from taking further cognizance of the cause. This court held in that suit that the county court did not have jurisdiction of the proceeding, for the reason that the appeal to the circuit court gave the latter court exclusive jurisdiction, on a trial de novo, to take all action necessary to a complete determination

and disposition of the proceeding. See *State ex rel. v. Wiethaupt et al.*, 238 Mo. 155, 142 S. W. 823. The United Railways Company also prosecuted an appeal to this court from the judgment of the circuit court remanding the cause to the county court. On motion of appellees (relators herein), that appeal was dismissed because no final judgment had been entered in the circuit court and the appeal was therefore premature. The appellant filed a motion to set aside the order dismissing the appeal, and that motion was overruled by this court. See *McDermott Realty Co. v. United Rys. Co.*, 240 Mo. 146, 144 S. W. 103. After this court had granted the writ of prohibition against the county court and had dismissed the appeal of the United Railways Company, respondent made and entered of record an order vacating so much of the former judgment of the circuit court as purported to remand the proceeding to the county court, and thereupon appointed commissioners to mark out the road and assess the damages. The commissioners laid out the road, assessed damages, and made their report to the court, to which report the United Railways Company filed exceptions. Respondent sustained the exceptions and set aside the report, on the ground that the proceedings of said commissioners were irregular and not according to law. The petitioners thereupon filed a motion to again refer the matter to the same commissioners or to appoint new commissioners to lay out the road and assess the damages. This motion was overruled, respondent giving as a reason for such ruling that the court was without jurisdiction to proceed in the case. No further steps were taken, and the cause thus remained on the docket when the alternative writ herein was issued. The prayer of the petition is that a writ of mandamus be issued, commanding respondent to again assume jurisdiction of the cause and make an order appointing new commissioners to lay out the road and assess damages or refer the matter to the former commissioners for the performance of such duties.

After setting out the history of the litigation substantially as stated in the petition, respondent alleges in the return that the term of the circuit court at which it was adjudged by him that he was without jurisdiction to proceed further has long since adjourned; that said judgment stands in full force and effect and no appeal has ever been taken therefrom. It is also alleged in the return that: "It does not appear by or in the petition of said relators for a private road, or in any of the records or proceedings of the said county court in said cause, that the relators and petitioners were inhabitants, or that either of them was an inhabitant, of this state, at the time of presenting said petition to said county court, or at any other time."

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep't Indexes

Relators contend: First, that respondent, as judge of the circuit court of St. Louis county, has jurisdiction to hear and determine the cause; and, second, that they are entitled to relief by the peremptory writ of mandamus of this court. Both of these contentions are controverted by respondent.

[1] I. In overruling the motion for the appointment of new commissioners, the court made and entered of record the following order: "Ordered by the court, after due and full consideration of the motion heretofore filed to appoint other commissioners, that the said motion be and the same is hereby denied upon the ground that the petition filed herein does not state, and the record of the county court does not show, that the petitioners are inhabitants of the state, and this court is therefore without jurisdiction to proceed further." We are of opinion that the circuit court was not without jurisdiction, and for the reasons following:

It is provided by section 10,447, Revised Statutes 1909, that: "If any inhabitant of this state shall present a petition to the county court of the proper county, setting forth that he or she is the owner of a tract or lot of land in such county, or in an adjoining county, and that no public road passes through or touches it, and asking for the establishment of a private road from his or her premises, to connect with some public road of the county in which the proceedings are had, at some convenient point, and shall describe the place where said road is desired, and the width desired, the court shall appoint three disinterested commissioners to view the premises and to mark out the road, and to assess the damages to the owner or owners of the land through which it will pass."

It will be observed that, although the statute expressly designates what facts shall be set forth in the petition, it does not require that it shall thus appear that the petitioner is an inhabitant of this state. While the right to a private road is conferred only upon "any inhabitant of this state," and therefore the record should show that the petitioner is such an inhabitant, it is not essential that such fact should appear in the petition. *Snoddy v. County of Pettis*, 45 Mo., loc. cit. 363; *Fisher v. Davis*, 27 Mo. App., loc. cit. 325. In the *Snoddy* Case, supra, this court said: "It is claimed that these proceedings were erroneous: First, because the petition does not show that twelve of its signers were householders of the township, etc. The statute is express that it must be signed by that number of householders, etc., three of whom shall be of the immediate neighborhood of the road. But it does not say that they shall be so described in the petition; and, if they were so described, it would have been no evidence of the fact." And in the case of *Fisher v. Davis*, supra, discussing the question of the sufficiency of a petition for a

private road, the court said: "We can find no warrant for the assumption that the qualification of the petitioners must be recited in the body of the petition. That is a matter of evidence to be determined by the court, on the hearing of the petition."

[2] The statutory requirement as to the inhabitancy of the petitioners not being alleged in the petition, was it essential to the jurisdiction of the circuit court that it should have appeared in the record of the county court? We think not. The statutory provisions applicable to an appeal from a judgment of the county court, in a case for the establishment of a public road, are radically different from those governing an appeal in a case for the establishment of a private road, and consequently decisions as to the effect of an appeal under one proceeding are correspondingly inapplicable to a case under the other. In a public road case no appeal is allowed unless the petition is sustained in the county court, and even then the entire cause is not removed to the appellate court, nor does the appeal operate as a supersedeas of the judgment of the county court. Section 10,440, R. S. 1909; *State ex rel. v. Wlethaupt et al.*, 238 Mo. 155, 142 S. W. 323. In such case it may well be said that such jurisdictional facts should appear of record in the county court. On the other hand, either party is entitled to an appeal in a private road case, from any judgment or order of the county court not expressly prohibited by law (section 3956, R. S. 1909; *Colville v. Judy*, 73 Mo. 651; *State ex rel. v. Wlethaupt et al.*, supra), and the effect of such an appeal (section 4091, R. S. 1909) is that "the appellate court shall thereupon be possessed of such cause, and shall proceed to hear and determine the same anew, and in the same manner as if such cause had originated in such appellate court, without regarding any error, defect or informality in the proceedings of the county court." A consideration of these several provisions makes it apparent that in a private road case the county court, by its judgment, might cut off the proceedings in that court before the petitioner reached the stage of making proof of the jurisdictional facts, or might, after hearing the evidence, make an adverse finding as to such facts. And it would be a most unreasonable construction of the law to hold that, although an appeal from such judgment would remove the case to the circuit court for trial de novo, yet, because proof of certain jurisdictional facts and a finding accordingly were not shown by the record of the lower court, the appellate court was without jurisdiction of the cause. The statute (section 4091, R. S. 1909), in providing that the appellate court shall proceed to hear and determine the case "in the same manner as if such cause had originated in such appellate court," was evidently intended to prevent such an unreasonable result. In appeals from inferior

courts, where provision for an unrestricted trial de novo is made, it is well-recognized law that the judgment appealed from is vacated, and any finding of fact in the lower court, although of record, does not dispense with proof of such fact on appeal. The case on appeal stands for trial anew, and the appellant has the right, and it is incumbent on him, to make proof of every material fact necessary to entitle him to judgment. Nor is it material at what stage of the proceedings such proof be made, for if made at any stage, and a finding to that effect is shown, that is all that is necessary. In the case of *Chandler v. Reading*, 129 Mo. App., loc. cit. 70, 107 S. W. 1041, discussing this subject, the court said: "As jurisdiction attached to hear and determine the cause by the filing of the petition and the service of notice on defendant, we think it was immaterial at what stage of the proceedings the court found the road proposed was a road of necessity, or that petitioner was an inhabitant of Pike county. It is enough to know that the court found these facts affirmatively at some stage of the proceedings; they were found and are recited in its final judgment; this is sufficient."

For the foregoing reasons we have concluded it was not essential to the jurisdiction of the circuit court that it should have appeared either in the petition or in the record of the county court that the petitioners were inhabitants of this state, and further that the circuit court was possessed of complete jurisdiction to proceed to hear and determine the cause.

[3] II. The question remains: Are the relators entitled to a peremptory writ as prayed for?

We have held that the circuit court was possessed of jurisdiction, and as respondent refused to appoint new commissioners and did not proceed with the cause, and as no final judgment from which an appeal would lie was entered, relators are entitled to relief. *State ex rel. Kansas City v. Field*, 107 Mo., loc. cit. 450, 17 S. W. 896. The alternative writ commanded that the respondent "assume jurisdiction of the cause of petitioners in their application for a private roadway of necessity and make an order appointing new commissioners, with like powers and duties as the former commissioners, or to order the former commissioners to again proceed with the duties enjoined upon them in their order of appointment, or show cause," etc. It is not the function of a writ of mandamus to direct the course of judicial action in a given cause, but the writ may issue to compel a respondent, clothed with judicial power, to proceed with the cause. The alternative writ commanded action in excess of that authorized in this proceeding, and therefore a peremptory writ should be issued, commanding respondent, as judge of the circuit court of St. Louis county, to assume jurisdiction of

the cause and to proceed in the exercise thereof to final judgment.

It is so ordered. All concur, except WOODSON, J., not sitting.

LACLEDE-CHRISTY CLAY PRODUCTS CO. v. CITY OF ST. LOUIS et al.

(Supreme Court of Missouri, Division No. 2
Nov. 13, 1912. Rehearing Denied Dec.
10, 1912.)

1. MUNICIPAL CORPORATIONS (§ 654*) — STREETS—EVIDENCE OF USE—INJUNCTION— REMOVAL OF OBSTRUCTIONS.

Evidence, in an action to enjoin the removal of obstructions from a street, held to show that from 1862 to 1890 the street was a public highway which was fenced and had a well-defined track over which the public traveled, though in bad weather it was almost or entirely impassable for loaded wagons.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1428; Dec. Dig. § 654.*]

2. HIGHWAYS (§ 28*)—ESTABLISHMENT—SUF- FICIENCY OF PETITION.

An order of the county court establishing a road was void where the petition was signed only by 8 persons instead of 12, as required by law.

[Ed. Note.—For other cases, see *Highways*, Cent. Dig. §§ 40-46; Dec. Dig. § 28.*]

3. MUNICIPAL CORPORATIONS (§ 654*) — STREETS—ESTABLISHMENT—EVIDENCE.

In an action to enjoin the removal of obstructions from a street, a void order made by the county several years before and establishing a public road, now such street, was material to show demand for the road at that time, the county court's opinion thereon, and that the route was practical.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1428; Dec. Dig. § 654.*]

4. HIGHWAYS (§ 6*)—ESTABLISHMENT BY USE.

The use of a road for 10 years, with the acquiescence of the owner, makes it a valid road.

[Ed. Note.—For other cases, see *Highways*, Cent. Dig. §§ 8, 9; Dec. Dig. § 6.*]

5. MUNICIPAL CORPORATIONS (§ 647*) — STREETS—TITLE.

Under St. Louis Scheme of Separation, § 10, providing that the interest of the county in public roads should vest in the city, title to a road established by use vested in the city.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1420; Dec. Dig. § 647.*]

6. MUNICIPAL CORPORATIONS (§ 657*) — STREETS—ABANDONMENT BY NONUSE.

Rev. St. 1909, § 10,446, providing that non-user by the public for 10 years continuously of any public road shall be an abandonment of the same, does not apply to city streets.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 722, 844, 1429, 1436; Dec. Dig. § 657.*]

7. MUNICIPAL CORPORATIONS (§ 657*) — STREETS—ABANDONMENT.

The right of city and public to the use of a street was not lost by abandonment or adverse possession, though the street was in the possession of individuals for more than 10 years, and though the street commissioner declared it not a street, and the city by ordinance

condemned a right of way for the purpose of laying sewers and water pipes.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 722, 844, 1429, 1496; Dec. Dig. § 867.*]

Appeal from St. Louis Circuit Court; Moses N. Sale, Judge.

Action by the Laclede-Christy Clay Products Company against the City of St. Louis and others. From a decree for plaintiff, defendants appeal. Reversed and remanded, with directions.

This case involves the question as to whether Sulphur avenue, running south from Manchester avenue to Wilson avenue in the city of St. Louis, a distance of about 1,800 feet, is a valid street. The plaintiff, about two years before the trial, constructed a building known as the shipping shed, extending from the west to a point 10 feet within the alleged street. It also built a brick kiln 38 feet in diameter on the street. The city was proceeding to remove those structures as obstructions to the street when the suit was begun to enjoin such action on the part of the city. The decree was for the plaintiff, and the injunction was made perpetual. The city has appealed.

The river Des Peres' crosses the alleged street about 700 feet south of Manchester avenue. Appellant claims that Sulphur avenue has been traveled as a public highway since 1862 until within the last few years, while the respondent claims that it was never a defined and recognized line of public travel, but that such travel as there was on or near that portion south of the river was the random and irregular travel such as occurs ad libitum over open land, and not confined to a definite track; and that the travel north of the river was of the same character except in dry weather.

Our attention is called to the language used by the learned trial judge during the trial, as follows: "I am very much impressed with what evidence I have heard so far that the use that was made of that road ought not to be dignified by calling it a user. There never was any use of that road any more than there was of any open land in the county over which people might drive; there never was any road there, and never was any public work done on it, and absolutely the only thing from the testimony that would lead anybody to suppose that there was a road there was the fact that there was a bridge across the river Des Peres." Owing to that claim made by the plaintiff and the above language of the trial court, we will state at some length what are the conceded facts or facts established by the evidence for the plaintiff.

On July 24, 1862, the territory through which the street runs was outside the city and in St. Louis county. The county court of that county on that date made an order establishing the road under the name of

Cheltenham avenue, now the street in controversy, 30 feet wide on the line between lots 12 and 13 in Graham's subdivision of the Sulphur Springs tract. Lot 13 is on the east and lot 12 on the west. That order was void by reason of the fact that the petition on which it was based was signed by only 8 persons instead of 12 as the law required, and it was void for other reasons not necessary to mention. In 1865 Samuel Hambleton and James Green purchased lot 13 from Thomas Allen. There were at that time several railroad tracks crossing the property near the north end, and other tracks have been built since. Mr. Green, who is the president of the plaintiff company and has been in business on that land ever since 1865, testified that he knew the land since about two years before his purchase in 1865, and that there was then "a little bit of a country road over there," and that it was fenced on both sides from Manchester avenue to Wilson avenue with good fences—plank fences—except that the part on the east side north of the river was a hedge fence. About the time the road was opened, a bridge was built by the county across the river Des Peres. The following instrument was read in evidence: "Cheltenham, Mo., May 20, 1866. To the Hon. John H. Long, St. Louis, Mo.—We, the undersigned citizens of Cheltenham, do petition the honorable county court of St. Louis county, Mo., to widen the space between the bridge and the fence of the new road at Cheltenham so that the stock can have easy access to the water"—which was signed by Charles D. Devlin and six others.

The following was also in evidence: "St. Louis, June 25th, 1866. To the Honorable County Court of St. Louis County—Gentlemen: The undersigned petitioners, having been notified to remove their fence from the stone buttments of the bridge across river Des Peres on county road at Cheltenham, Cheltenham avenue, would most respectfully beg leave to state if they should be required by your honorable body to remove the fence it would be almost impossible for them to protect their property from trespass of their neighbors' cattle. They would have to erect flood gates, which, in our opinion, would wash away at every freshet of the river, which rises and falls very rapidly, and a very large quantity of drift floats down the river at every heavy rain, and consequently would carry away any gate we could possibly construct; and, we would further state the removing of our fence would not benefit any person in the neighborhood, and the majority of the petitioners who ask for the removal of the fence are not property holders, and as we believe the petition was gotten up for the express benefit of Mr. Charles Devlin, and your petitioners would most respectfully ask your honorable body to allow our fences to remain as it now

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

is. If granted their request, they will ever pray, etc. [Signed] Samuel Hambleton. James Green. Charles M. Field."

Also this report: "Office Genl. Road Supt., Sept. 3, 1866. To the Hon. County Court of St. Louis County—Gentlemen: The petition of Charles Devlin and others at Cheltenham, St. Louis county, for widening Cheltenham avenue, at the crossing of the river Des Peres so that the stock can have easy access to the water has been referred to me, Samuel Hambleton, James Green and Chas. M. Field, having joined their fences and the wing walls of the bridge across the said river together, have been notified to remove their fences from the property of the county, whereupon the said Samuel Hambleton, James Green and Chas. M. Field have filed their petition for allowing their fences to remain as they are, which having also been referred to me by your order, I have examined the place of complaint, and beg leave to report as follows: Cheltenham avenue is 30 feet wide, and the bridge is in the middle of the road; the bridge and wing walls occupy 26.4 feet in width, so that 1.9 feet space will be left between the wing walls and the fences to give the stock access to the water in case the fences should be removed; this narrow space is, in my opinion, insufficient for stock to strain itself through the narrow space into the said river. No stock of any kind can go back easy, because the river bank is too steep and the space between the wing walls too narrow. If Cheltenham avenue would be 40 feet wide I should recommend the opening of the said river, but as the width is only 30 feet and the stock cannot get an easy access to the water, I respectfully recommend to allow the fences to remain as they are. Respectfully, your obedient servant, John Alt, Genl. Road Superintendent."

Also the following: "St. Louis, January, 23rd, 1875. To the Hon. County Court of St. Louis County—Gentlemen: We, the undersigned citizens and property owners of Central township, petition your honorable body to grant your disposition regarding the grading of Cheltenham avenue from the Old Manchester road to the New Manchester road"—which was signed by the Laclede Fire Brick Company, by James Green, president, and by 45 others.

And this report:

"County Engineer's Office, February 22, 1875. Hon. County Court, St. Louis County—Gentlemen: I beg leave to report the following upon this petition referred to me, of Charles B. Gratiot et al., for the grading of Cheltenham avenue. The avenue has a width of only 30 feet, and is about a mile in length connecting the Market street road at Cheltenham, with the Old Manchester road, near the Watson road. It passes over very rough and steep ground, and to excavate it, even to very steep grades will require quite a large amount of work. A new bridge also will have to be built over the river Des

Peres, as the present one will not be adequate if the avenue is to be improved. The following is an estimate of the approximate cost of improving said avenue, as called for in the petition, viz:

| | |
|---|------------------|
| Excavation, 14,000 cu. yds. at 20 cts. | \$2,800 00 |
| Bridge & culvert masonry 300 perches at \$5 | 1,500 00 |
| 56 lineal feet of new superstructure, at \$12 | 672 00 |
| | <hr/> \$4,972 00 |

"As this road is under the control of the general road superintendent, I am unable to say whether this amount can be spared at the present time from his appropriation to be applied to the improvement petitioned for. Respectfully, yours obediently, John G. Kelly, County Engineer."

Also the following: "Office General Road Superintendent. St. Louis, April 19, 1875. To the Hon. County Court—Gentlemen: Respecting the inclosed petition of Charles B. Gratiot et al., for the grading of Cheltenham avenue, I have the honor to report as follows: This avenue runs from the Manchester road at Cheltenham station to the Old Manchester road, near its intersection with the Watson road, and is about one mile in length. If properly graded it would no doubt become an important thoroughfare, but at present it is nearly impassable for loaded teams. The proposed improvement, according to the estimate of the county engineer, would cost in round figures the sum of \$5,000.00 dollars, which estimate is based upon a maximum grade of 7.5 feet in 100 feet, and a clear width of 24 feet, which still would leave the road in an unsatisfactory condition because the road being only 30 feet wide, the embankments would have to be made partly on private property, and the sides of the excavations would have to be made nearly perpendicular, which is very objectionable in such narrow cuts. I cannot recommend this work at the present time; first, because there are not sufficient funds credited to my department for the present year; and, secondly, because the road is only 30 feet in width, and the proposed work cannot be done properly unless the road is widened to at least 60 feet. Respectfully, Aug. Elbring, Genl. Road Superintendent."

In 1869 Hambleton and Green incorporated their business under a charter running 20 years. The corporate name was the Laclede Fire Brick Manufacturing Company, and in 1889 its charter was renewed under the same name, which has since been changed to its present name. In 1882 the plaintiff acquired that part of lot 12 lying south of the river under two different deeds; each conveying an undivided half, and both expressed to be "subject to the public road lying between lots 12 and 13." In 1889 the old expiring corporation made to the new one a deed to its property in lots 12 and 13; the description of the land in lot 12 being followed by the words, "Containing 11.77 acres,

including one-half of Sulphur avenue, and 11.26 acres excluding said avenue." In 1876, by the "scheme and charter," the territory which includes Surphur avenue was taken inside the city of St. Louis. In 1882, by ordinance, the name of the street was changed from Cheltenham avenue to Sulphur avenue. On February 14, 1889, the city by ordinance provided for replacing the old bridge with a new one of iron and appropriating \$1,000 for that purpose. The new bridge was thereupon constructed.

Mr. Davis, a member of the St. Louis bar, testified for plaintiff: "Originally when you looked south from Manchester road—Manchester avenue now—on the right hand was called the Sulphur Spring Cottage. I think a man by the name of Fields lived there, and I think he had a boy about my age that used to be there quite often, and afterwards Jack Howard and somebody else had a road-house there and a picket fence on the outside and hedge fence on the inside; that is, going down to the creek. On the left-hand side there was, I believe, an osage orange hedge fence. Where the office of the Laclede Fire Brick Company now is, in the corner of the place, was a flower bed and an asparagus bed, and so forth, put there by the Icarians. As you went south to the bridge, it is flat and level ground, and, as you cross the bridge, there is a little depression. From there on up the hill, there was originally what you might call a country road. There were wagon tracks there, fenced on both sides, and that condition existed until it slid in. It slid north and slid east, and then the rain actually made gutters in it, and it was an utter impossibility to go up and down there. Q. You are describing up and down from the bridge, up to what is now Wilson avenue? A. Wilson avenue is over in the next hollow. It then became impassable. I tried to drive over it myself and couldn't. Q. How long would you say that it was that you tried to drive over it? A. A good many years ago. It is more than 20, and possibly 25. It may be 30. I can recollect well the occurrence of trying to go up there with a wagon that had side springs, the only one my father had, and the gutters would let the horse down so low that the buckler would come up over the top of his back. Q. And under those conditions you couldn't go up the hill? A. I could go over it horseback; I have ridden it that way. Q. On the same theory, you could go over a mountain? A. Yes, sir; it slid in and gutters washed in there."

Mr. Green further testified for the plaintiff as follows: "Q. Now, Mr. Green, the fact is, is it not, that this whole land here has, so to speak, caved in here (indicating in plat) from the brick kiln up to Wilson avenue? A. No, it is caved in about halfway up to Wilson avenue. Q. Do you know how that happened? To what was that due? A. When we were digging out that cliff alongside, right

straight through there, it would slide in most every day. Q. When did that begin to slide in, or cave in? A. Oh, 15 or 20 years ago. It used to come pretty near down to the river. Q. What is that? A. The slide of that used to come pretty near into the river. Q. You mean when the land slid, the earth used to come almost down to the river Des Peres? A. Yes, sir; when we built No. 2, as the rain came down. Mr. Charles: When you built what? A. Factory No. 2. Mr. Swarts (resuming examination): Q. Some of that land that was cut, you mean, from the slide there, came down and slid? A. Yes, down onto the second story of the building." The evidence shows that factory No. 2 was constructed at the foot of the hill, about 20 years before the trial, and that near the same time excavations were made along the base of the hill for railroad switch tracks, and also for the factory, and that, by reason of those excavations, the land began to slide toward the river and eastward in and along Sulphur avenue. At some time thereafter the road became impassable and ceased to be used.

The following letters were put in evidence: "St. Louis, September 27, 1902. Charles Varrelmann, Esq., Street Commissioner, City Hall, City—Dear Sir: We wish to call your attention to the bridge over the river Des Peres, on Sulphur avenue. The roadway is full of holes, and if something is not done soon the city is liable to have a damage suit on its hands, as a horse would be very apt to break his leg if he went through. We simply thought we would call your attention to this matter. Yours very respectfully, Laclede Fire Brick Company, George R. Blackford, Secretary." "City of St. Louis. Street Department, Commissioner's Office. Chas. Varrelmann, Commissioner. W. O. Hemenway, Asst. Commissioner. Julius G. D. Bischoff, Secretary. St. Louis, Mo., Sept. 30, 1902. Geo. R. Blackford, Secretary Laclede Fire Brick Co., Manchester & Sulphur Avenues—Dear Sir: Replying to your letter of the 27th inst., relative to the condition of the roadway of the bridge over river Des Peres on Sulphur avenue, I would respectfully advise that the same was referred to Mr. Gayler, bridge engineer for the city, who reports that said avenue, not being a public highway, the city is not liable for the maintenance of said bridge. In view of the above report, I feel that I can take no action in the matter. Respectfully, Chas. Varrelmann, Street Commissioner." Also an ordinance of the city as follows:

"21,914.

"An ordinance to condemn a right of way for sewers and water pipes over a part of proposed Sulphur avenue between Wilson avenue and Manchester avenue.

"Be it ordained by the Municipal Assembly of the city of St. Louis, as follows:

"Section 1. For the purpose of permitting

the construction or laying, repairs and perpetual maintenance of sewers and water pipes, a certain strip of land thirty feet in width shall be condemned for the uses above mentioned. The center line of said strip of land to be coincident with the dividing line between lots 12 and 13 of 'D. W. Graham's subdivision of Sulphur Spring tract,' said center line also being coincident with the center line of proposed Sulphur avenue as laid out in said subdivision.

"Sec. 2. The city counselor is hereby authorized and instructed to cause said strip of land to be condemned for the purposes hereinbefore mentioned, according to law.

"Approved March 30th, 1905."

That ordinance has never been repealed. The evidence shows that, from about the time that territory was taken inside the city, the bridge over the river Des Peres was repaired by the city every year or two until about 1900. Some of the evidence for the plaintiff tended to support its claim that there was never a well-defined passable road from the river south to Wilson avenue, while the evidence for the defendant tended to show the constant use of Sulphur avenue by the public over its whole length. All the evidence, however, showed that the hill, beginning about 300 feet south of the river, was steep, and at muddy seasons almost, if not entirely, impassable for loaded wagons.

Chas. W. Bates, Benj. H. Charles, Lambert E. Walther, and T. P. Young, all of St. Louis, for appellants. Lyon & Swarts, of St. Louis, for respondent.

ROY, C. (after stating the facts as above).

[1] 1. On the question of fact, we have no hesitation in holding that, from 1862 until about 1890, the street in question was a public highway, with fences on both sides thereof, and with a well-defined track over which the public traveled. It was at times in muddy weather a very bad road, almost or entirely impassable for loaded wagons, but it was nevertheless a public highway and so considered by everybody concerned, including this plaintiff.

[2, 3] The order of the county court opening the road was void. However, we can consider it to the extent of concluding that there was a demand at that time for a road there, and the county court was of the opinion that there was sufficient demand to justify opening it, and that the route was a practical one. In 1866 Mr. Green, who has always been a strong force in the business of the plaintiff, signed the communication to the county court recognizing the road and showing that the fences were there on both sides of the road. Mr. Green stated that, two years before he and Hambleton bought, there was a road there with good fences on both sides of it. In 1875 the plaintiff and 45 others petitioned the county court in re-

gard to grading the road. In 1882 the plaintiff acquired the land west of the road and south of the river by deeds, which stated that they were subject to the road. In 1889 the plaintiff, in the character of the first corporation whose charter was expiring, made a deed to itself as a new corporation, showing by the language of that deed the existence of the street. In 1889 the city replaced the old bridge with a new one, and repaired it until about 1900; and even as late as 1902 the plaintiff in its letter to the street commissioner recognized the existence of Sulphur avenue and wanted the city to repair the bridge. When that road was taken into the city under the scheme and charter in 1876, it was a well-defined public road, fenced on both sides, on which there was a bridge over the river, and it had been traveled as such by the public for more than 10 years, and such use had been acquiesced in by the owners of the land over which it passed.

[4] The use of a road for 10 years with the acquiescence of the owner makes it a valid road. *State v. Wells*, 70 Mo. 635; *State v. Walters*, 69 Mo. 463; *Milling Co. v. Riley*, 133 Mo. 574, 34 S. W. 835; *Bauman v. Boeckeler*, 119 Mo. loc. cit. 200, 24 S. W. 207. Section 10,446 of the Revised Statutes, prescribing how a road may be acquired by user, had no application to this street at the time it was taken into the city, as that statute was not enacted until 1879.

[5] When taken into the city, the road became a city street, as provided by section 10 of the scheme of separation, which provided that the interest of St. Louis county in all public roads and highways should vest in the city of St. Louis. Independent of such a provision, it would seem that such would be the result of taking a public road into a city. It was so treated in *Wright v. City of Doniphan*, 169 Mo. 601, loc. cit. 606, 70 S. W. 146.

[6] It is contended that section 10,446 of the statute above quoted applies to city streets, and that an abandonment for 10 years destroys the right of the public to use the street. It is not clear in this case that there was such a nonuse for 10 years; yet, even if such were the case, we hold that the statute does not apply. It does not purport to do so. It is a special statute of limitations applicable to public roads outside of incorporated cities.

[7] There is a long line of cases in this state based upon the doctrine that the right of a city and the public to the use of a street cannot be lost by abandonment or adverse possession. *St. Louis v. Railroad*, 114 Mo. 13, 21 S. W. 202; *Williams v. St. Louis*, 120 Mo. 403, 25 S. W. 561; *Wright v. City of Doniphan*, supra. The application of that section of the statute to city streets was not discussed in those cases, and for a good reason. It was not supposed to have any

reference to city streets. The wisdom of section 1886, R. S. 1909, providing that the statute of limitations shall not apply to "lands given, granted, sequestered or appropriated to public use" has been so thoroughly justified by experience, and so often approved by this court, that it is now too late to assail it. There are greater reasons why city streets should not be subject to destruction by nonuse or adverse possession than can be found applicable to any other kind of property. No other kind of public property is subject to more persistent and insidious attacks or is less diligently guarded against seizure. The city was not estopped by the act of the street commissioner when he declared that Sulphur avenue was not a street, nor by the ordinance condemning the right of way for the purpose of laying sewers and water pipes, nor by any other act or omission of the city officers shown in evidence.

The judgment is reversed, and the cause remanded, with directions to enter a decree dissolving the injunction and dismissing the plaintiff's bill, and for such other proceedings as may be in accordance with the law.

BLAIR, C., concurs.

PER CURIAM. The foregoing opinion is adopted as the opinion of the court.

WRIGHT v. GROOM et al.

(Supreme Court of Missouri, Division No. 1.
Nov. 30, 1912.)

PLEADING (§ 236*)—AMENDMENTS—DISCRETION—LAND DESCRIPTIONS.

Rev. St. 1909, § 1848, relating to amendments, is in aid and declarative of the common-law rule that amendments were peculiarly within the sound discretion of and favored by the courts; hence, where, in ejectment, the court ordered a survey which survey differed from a prior survey, throwing the land into a different section, a refusal to allow plaintiff to amend the description in his petition would have been gross error, he claiming by limitations.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 601, 605; Dec. Dig. § 236.*]

Appeal from Circuit Court, Shannon County; W. N. Evans, Judge.

Action by Armada J. Wright against Arch Groom and another. Judgment for plaintiff, and defendants appeal. Affirmed.

A. H. Livingston, of Westplains, for appellants. Swain & Sizemore, of Eminence, Shuck & Cunningham, of Eminence, and L. O. Neider, of Mansfield, for respondent.

LAMM, J. Ejectment in the Shannon circuit court. Defendants (claiming a departure) challenge an amended petition by motion to strike out. Unsuccessful, they refuse to appear further, stand on their motion, suffer judgment, duly except, and appeal.

The departure is said to arise in an amendment changing the description of the land. Monthly rents and profits, damages, date of ouster, and parties are the same in both petitions. The change in description appears in the following excerpts, one from the first and the other from the last petition:

Original Petition.

"Beginning at the southeast corner of section 15 in township 27, range 6 west, running thence north four rods; thence west eighty rods; thence south four rods; thence east to the place of beginning, containing two acres, more or less; the same being a part of the southeast quarter of section 15, in township 27 north, range 6 west."

Amended Petition.

"Beginning at the northeast corner of section twenty-two, in township twenty-seven north, range six west, running thence south one hundred feet, thence west eighty rods, thence north ninety-two feet, thence east eighty rods to the place of beginning, containing three acres more or less, the same being a part of the northeast quarter of section twenty-two, in township twenty-seven north, range six west."

Comparison shows that the township and range are the same, and, since section 22 always lies adjoining and south of section 15 in the same township and range, it follows that the northeast corner of 22 coincides with the southeast corner of 15; therefore, though the verbiage differs, the point of beginning in each description is the same. It will be observed, further, that the east and west distances, 80 rods, are the same; hence (since the beginning point is the same) the north line of the second description in point of fact coincides with the south line of the first description. Moreover, it is apparent that the description in the amended petition is of land lying immediately south of that described in the first, the amendment covering a trifle more land.

An additional abstract of the record proper furnished by respondent shows that at appellants' instance and request, after issue joined on the first petition (and before the filing of the amended petition), the court ordered a survey of the tract in dispute, and to that end continued the cause. As a sensible convenience in determining disputed land titles, such request and order are within a statutory power (R. S. 1909, § 11,299; Id. § 11,305); and, as the court ordered the survey to be made by the county surveyor, presumably the order was made under section 11,299. Out of excess of abundant caution the order was directed to a board of three, to wit, the surveyors of Dent, Oregon, and Shannon counties. This excess of caution did not vitiate the order; for the maxim is: Abundant caution injures no man. Two of them (the surveyors of Oregon and Shannon) served; and the record shows they made return to the order, filing a plat of their survey, which plat is submitted to us. This plat shows that the trouble in description had its root in where the true line of division between said sections 15 and 22

actually lay, and was marked on the earth's surface. It seems that by a former survey that line was located so far south of where the county surveyors, acting under the order of the court, located it, that a description of the disputed tract at the time the suit was brought put it on the south side of the southeast quarter of the southeast quarter of section 15, as the original petition did; whereas, the survey ordered by the court shoved the division line between those two sections to the north several rods. The record also shows that, after the survey and plat thereof was filed, plaintiff filed her amended petition, and thereby accepted the last survey and described the land in dispute accordingly. It is allowable to say that presumably plaintiff relied on the old survey in drawing her original petition, and on the new in drawing her amended petition. The judgment shows that plaintiff's title was by limitation; and, while the area of the second description a little exceeds the area of the first, there is nothing to show that the actual land on the earth's surface, actually in defendants' possession and actually claimed by plaintiff, was any other or separate tract than that intended to be sued for in both descriptions. In other words, the actual land, the real thing, the subject-matter of the suit (apart from the mere arbitrary and conventional description of it), was the same under each petition. So the ouster complained of was the same, and for aught appearing here the muniments of title would be the same. Certainly the parol evidence of title by limitation would naturally be the same under both petitions.

Under such circumstances, we are of opinion the motion to strike out was well ruled.

This, because:

(a) At common law the power of amendment (subject to limits not pertinent here) was considered an essential incident of the exercise of all judicial power. 1 Ency. of Pl. and Pr. p. 508. Therefore, even at common law, amendments were peculiarly within the sound (that is, judicial) discretion of the court. *Chouteau v. Hewitt*, 10 Mo. loc. cit. 134. Speaking generally, at common law the amendment of pleadings was regarded as a matter so exclusively addressed to the discretion of the trial court that its allowance or refusal could not be reviewed upon error. 1 Ency. of Pl. & Pr. p. 524. Broadly, the statute on amendments, applicable here, is in aid and declarative of the common law. Vide *Chouteau Case*, supra. Accordingly, it has always been construed most liberally to further its benign purpose. Amendments are favored by courts. *House v. Duncan*, 50 Mo. 453. They avoid delay in joining issue on the true merits of a cause, and tend to bring litigated controversies to an end. Under the statute on amendments, the trial court's discretion is not immune from review on appeal, but it will not be interfered with unless palpably abused by

grafting a separate and independent suit on the stem of the original proceeding. *Joyce v. Growney*, 154 Mo. loc. cit. 263, 55 S. W. 466. Speaking to the right to amend, this court through Bliss, J. (*Allen v. Ranson*, 44 Mo. loc. cit. 267, 100 Am. Dec. 282), said: "This is necessarily so much a matter of discretion in the court trying the case that we must presume that discretion was soundly exercised unless the contrary is shown by a full exhibit." That statute reads (section 1848, R. S. 1909): "The court may, at any time before final judgment, in furtherance of justice, and on such terms as may be proper, amend any record, pleading, process, entry, return or other proceedings, by adding or striking out the name of any party, or by correcting a mistake in the name of a party, or a mistake in any other respect, or by inserting other allegations material to the case, or, when the amendment does not change substantially the claim or defense, by conforming the pleading or proceeding to the facts proved." Attending to that statute, not only do the cases cited show it, but our reports abound in nearly every volume with cases showing a most liberal trend in reviewing the discretion of trial courts in the matter of allowing amendments before judgment in furtherance of justice on such terms as the circumstances of each case bespeak. The case at bar must be ruled in the light of that statute, and of the foregoing decisions, and not otherwise.

(b) Coming closer to the point, the single question involved on this appeal, to wit, the power of the trial court in the exercise of a judicial discretion to permit the amendment of a land description in an ejectment suit and kindred cases, is far from new to appellate courts. Such amendments, on substantially equivalent statutes, have been allowed in other jurisdictions. For example, in *Gilman v. Cate*, 56 N. H. 160, an action of trespass qu. cl. fr., such amendment, correcting a misdescription of the locus in quo, was allowed. *Helbron v. Heinlen*, 72 Cal. 376, 14 Pac. 24, was ejectment. In that case the complaint originally described the land as in range 20. Presently plaintiffs were permitted to amend by striking out "20" and inserting "19," and it was held well enough as against the contention that the amendment substituted a new and different cause of action. *Cooper v. Granberry*, 33 Miss. 117, was ejectment. In describing the land in controversy the complaint put it in the "northwest" quarter of a given section when in truth and fact it was in the "northeast" quarter. An amendment was permitted correcting this mistake. Error being assigned on that ruling, the court on appeal observed: "The object of the suit was to recover a particular tract of land, and it would have been simply useless litigation, after the error was confessed, if the amendment had not been permitted. The object of the amendment was to bring before the court the true subject of

litigation, and not to go through the forms of a trial in regard to a subject, about which there was no controversy between the parties." *Leeds v. Lockwood*, 84 Penn. 70, was ejectment. There a misdescription of the land was amended by filing a new description and it was held that, saving to defendants the right of a defense, if any, on the ground of limitations, they had no right to object to the amendment merely because of the substitution of a new tract of land. In this connection we refer to a case (*Bricken v. Cross*, 163 Mo. 449, 64 S. W. 99) where, under the particular facts disclosed by the record, the statute of limitation was allowed as a defense in ejectment where a new tract of land was introduced by amendment. But that point is not involved here, and we need not review the learning on it. Whether the statute of limitation would or would not be eked out and tolled (*Walker v. R. R.*, 193 Mo. loc. cit. 474, 92 S. W. 83, et seq.) in case of an amendment correcting a mere clerical error in a land description or a mere palpable mistake therein is not here for decision at this time. And in cases involving titles in this jurisdiction the same liberal doctrine in interpreting our own statute on amendments obtains, thus: *Sage v. Tucker*, 51 Mo. App. 337, was an action for penal damages for tearing down the fences and gates on the land of Mrs. Sage. Commenced in a justice court, it was sent to the circuit court on defendant's affidavit putting title in issue. In the circuit court an amendment was permitted giving a different description of the locus in quo. The assignment of error in that behalf was overruled on the authority of *Callaghan v. McMahan*, 33 Mo. 111. *Callaghan v. McMahan*, supra, was a suit in two counts, one in equity for land under a resulting trust, the other a claim for money had and received and not expended in the entry of the land. After the evidence was in, plaintiff was permitted to amend by describing a different tract of land, and thereby correcting a misdescription in the petition. Referring to the statute quoted, supra, in disallowing the assignment of error, this court observed: "This section is broad enough to embrace the amendment made. It was a mere misdescription of the land which seems not to have been noticed by either of the parties upon the trial, and the object of the amendment was to make the petition conform to the facts proved. It does not appear that the defendant was taken by surprise, or in any wise prejudiced." The *McMahan* Case was followed in the late case of *Blanchard v. Dorman*, 236 Mo. loc. cit. 443, 139 S. W. 395. That was a partition suit begun in the circuit court of Henry and transferred to the circuit court of Cass. In the latter such steps were taken as amounted to an amendment in the description of the land. It was held that, if the court had not permitted the amendment, it would have been

error. In deciding the point it was aptly pointed out by Brown, C., that "one of the most common grounds for amendment to a pleading is to correct a mistake in the description of the subject-matter of the litigation, and such mistakes occur nowhere more frequently than in the technical description of lands." *Waverly Timber Co. v. Cooperage Co.*, 112 Mo. 383, 20 S. W. 566, was a suit for damages for a wrongful entry and cutting timber and staves, etc., on plaintiff's land in Tennessee, and converting same to defendant's use. The original complaint described the land specifically as "north" of Turkey creek, etc. Depositions were on file showing the land was "south" of Turkey creek. Plaintiff offering to amend was refused permission, and that ruling we held error.

Doubtless other cases in point could be found if there was any call to take time for a more extended research. The above must suffice. We have examined the cases cited by appellants, and there is nothing in them, when carefully analyzed and discriminatingly applied, militating against the exercise of a wise discretion in correcting land descriptions in pleadings on such statutory terms imposed as may be just. The facts of the instant case, heretofore set forth, are more persuasive in favor of the exercise of a wise discretion in allowing an amendment below than in many of the cases referred to; for here the trial court, in informing himself on the right to amend and leading up to the exercise of a discretion, could take judicial notice of the entries in the same case. By that token he knew he had ordered a survey at the instance of defendants, knew it had been made, and that the dispute was over a boundary line, that plaintiff claimed by limitation, and that the offered amendment related to the identical land embraced in the old petition, but which by a new survey had now a new description. It would have been gross error to have refused the right to amend under the facts before him. There are provisions of our statutes providing for continuances and for other terms, in the form of costs, in cases of amendment, but here defendants, asking no terms, stood stoutly and unwisely on their motion, raising a mere improvident and barren point. They put all their eggs in that one basket. The basket fell. Their eggs broke and rightly so; for there is no showing made disclosing an abuse of discretion nisi in allowing the amendment. Fortunately for defendants, if they actually have title and the right to possession, it may be the courts are still open to them in another action in ejectment, if, after suffering ouster in this suit, they wish to put the issue to the touch, but that question is beside this case and may not be passed on now.

The judgment is affirmed. All concur.

LOCKE v. BOWMAN.

(St. Louis Court of Appeals. Missouri. Nov. 12, 1912.)

1. INSURANCE (§ 219*)—LIFE INSURANCE—ASSIGNMENT OF POLICY—RIGHTS OF ASSIGNEE.

Where a person who received an assignment of a life insurance policy from one to whom it had been assigned had no greater right in the policy than that which he derived from his assignor, he acquired only such rights therein as were held by such assignor.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 488, 489, 494-496; Dec. Dig. § 219.*]

2. INSURANCE (§ 122*)—ASSIGNMENT OF POLICY—VALIDITY—ASSIGNMENT OF CREDITOR.

An assignment of an insurance policy made to one who has no interest in the life of the insured is prima facie void, unless he is a creditor, when it may be valid only to the amount of the advances made.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 166, 167; Dec. Dig. § 122.*]

3. INSURANCE (§ 212*)—ASSIGNMENT OF POLICY—VALIDITY—ACTIONS TO SET ASIDE—BURDEN OF PROOF.

Where in an action to have an assignment of a life insurance policy made by an assignee of the insured set aside, and the policy surrendered to the insured, a showing by the pleadings of an assignment prima facie void places on the defendant who asserts its validity the onus of showing such facts as will render it valid and binding.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 481, 482; Dec. Dig. § 212.*]

4. EQUITY (§ 346*)—ESTOPPEL (§ 116*)—BURDEN OF PROOF.

One setting up estoppel or laches has the burden of making out the facts upon which they rest.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 725, 726; Dec. Dig. § 346.* Estoppel, Cent. Dig. § 306; Dec. Dig. § 116.*]

5. INSURANCE (§ 219*)—ASSIGNMENT OF POLICY—RIGHT OF ASSIGNOR TO SET UP TITLE.

An assignor of a policy of life insurance is not estopped to set up his title as against the assignee, contrary to the ordinary rule regarding the right of a pledgor of personalty to set up his title against the pledgee.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 488, 489, 494-496; Dec. Dig. § 219.*]

6. EQUITY (§ 69*)—LACHES—DEATH OF PERSON ACQUAINTED WITH DETAILS.

Though, in a proceeding in equity to redeem a policy of life insurance in the hands of an assignee, the complaint disclosed that the action was brought after the death of a person to whom the policy was originally assigned, and who, in turn, assigned it to the defendant, there is no such showing of laches as will bar the suit where it is not shown that the defendant was injured by the delay, or that the plaintiff had knowledge of his rights and opportunity to establish them before the first assignee died, or for any considerable time before the bringing of suit.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 197-199; Dec. Dig. § 69.*]

7. INSURANCE (§ 222*)—ASSIGNMENT OF POLICY—RIGHT TO REDEEM—NECESSITY OF TENDER BEFORE SUIT.

In an equitable proceeding to redeem a policy of life insurance assigned absolutely, allegations and proof of a tender before suit of

the amount of the debt necessary to be paid in order to redeem the policy is not necessary.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 492; Dec. Dig. § 222.*]

8. APPEAL AND ERROR (§ 889*)—AMENDMENT OF PLEADINGS—EFFECT OF TRIAL COURT'S ORDER.

Where a trial court ordered a reply to be amended to meet an objection thereto, it will be regarded on appeal as having been made, whether the verbal changes were made or not.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3621, 3622; Dec. Dig. § 889.*]

Appeal from St. Louis Circuit Court; George H. Shields, Judge.

Action by George W. Locke against Joel W. Bowman. From an order granting a new trial after a dismissal, defendant appeals. Affirmed and remanded.

In equity. When this cause came on for hearing in the circuit court, the question was raised as to whether under the pleadings the plaintiff or the defendant had the burden of proof. The trial court decided that plaintiff must assume that burden, whereupon, the plaintiff declining to offer any evidence, the court rendered judgment dismissing his bill. Afterwards, because it considered that it had erred in ruling that plaintiff had the burden of proof, the court granted a new trial on plaintiff's motion, and the defendant has appealed.

The sole question presented on this appeal is whether the plaintiff or the defendant had the burden of proof under the pleadings. The petition alleges, in substance, that the plaintiff procured from an insurance company a paid-up life insurance policy for \$5,532 on his own life payable to Fannie G. Locke, his wife, if living at his death, and, if not living at his death, to the executors, administrators, or assigns of plaintiff; that thereafter, on September 14, 1905, plaintiff and his said wife assigned the policy to E. M. Schwarzkopf in consideration of the latter paying \$250 which the plaintiff owed the St. Louis Trust Company; that said assignment, although on its face an absolute assignment, was, in fact, executed as security to Schwarzkopf for the repayment to him of said \$250; that Schwarzkopf died in June, 1907, and at the date of his death plaintiff was indebted to him in the sum of \$250 advanced as aforesaid, together with interest thereon from September 14, 1905, such advance being secured by the aforesaid pledge of the policy; that prior to the date of his death Schwarzkopf pledged the policy with defendant Bowman as security for advances made by said Bowman to Schwarzkopf in a sum far in excess of the amount of plaintiff's indebtedness to Schwarzkopf, and thereafter, Schwarzkopf making default in the amount owing to Bowman, the latter caused the policy to be sold to satisfy Schwarzkopf's indebtedness to him and at said sale purchased the policy himself and

is now in possession, claiming to be the owner thereof; that Fannie G. Locke is dead. Plaintiff further avers his readiness and willingness to pay to either defendant the said sum of \$250, together with interest thereon, and to do all things which, in equity, he should do to protect the interests of the defendants. The prayer of the petition is that "the court adjudge and decree that the said policy is now held by the said Bowman only as security for the payment of the said sum of \$250, with interest due thereon from September 14, 1905, and upon payment by the said plaintiff to said Bowman of said amount the court order and direct the said Bowman to surrender to plaintiff the said policy herein described. And plaintiff prays for such other and further judgments, orders, and decrees as may be necessary to fully protect his interests and the rights and interests of the defendants." The defendant executrix does not appear to have answered or appeared, though duly summoned. Defendant Bowman answered, admitting the transaction as alleged, except that he avers that the consideration for the assignment to Schwarzkopf in addition to the payment by Schwarzkopf of \$250 to the trust company "was for premiums paid on the policy by Schwarzkopf and other valuable consideration." He denies that the assignment to Schwarzkopf was executed as a mere assignment to secure the repayment of the \$250, and avers that it was in fact "an unconditional and an absolute sale and assignment of said policy in writing for a valuable consideration." He pleads that, the assignment being absolute on its face, plaintiff is estopped from denying that it was so in fact. He alleges that the amount of the loan for which Schwarzkopf pledged the policy to him was \$2,000, which was evidenced by a note; that the sale by defendant Bowman at which he bought the policy in was made in accordance with the terms of the pledge, etc.; and that by said sale he became the absolute legal and beneficial owner of the property. Defendant also states facts relied upon by him as creating an estoppel, and constituting laches, sufficient to bar plaintiff from relief. Defendant further pleads that he made the loan to Schwarzkopf in good faith, relying on the assignment of the policy to Schwarzkopf as an absolute one, and without knowledge or notice of plaintiff's claim or alleged equities. The reply was a general denial of "each and every allegation of new matter" in the answer contained. When the case was called for trial and the pleadings were read, the trial judge asked if the reply contained the word "new." Being answered in the affirmative, he said: "You better strike it out. The Supreme Court has held that the court and the other party are not bound to plow through the pleadings to find out what is new matter and what is not. Just let it be

a general denial of the allegations of the answer."

Hall & Dame, of St. Louis, for appellant J. D. Johnson and Loomis C. Johnson, both of St. Louis, for respondent.

CAULFIELD, J. [1] It is clear that, considering the state of the pleadings, the trial court erred in holding that the burden of proof lay with the plaintiff, and not the defendant, and did not err in granting plaintiff a new trial on that account. On the admitted facts defendant has no right except such as he derived through Schwarzkopf, who, in turn, was a mere assignee of the policy. He acquired no greater right in the policy than Schwarzkopf had. *Heusner v. Mutual Life Ins. Co.*, 47 Mo. App. 336, 345.

[2] The assignment to Schwarzkopf, being made to one having no interest in the life of the insured, was *prima facie* void, and, if he was a creditor, it could be valid only to the amount of his advances. *Deal v. Hainley*, 135 Mo. App. 507, 116 S. W. 1; *Jenkins v. Morrow*, 131 Mo. App. 288, 109 S. W. 1061; *Mut. Life Ins. Co. v. Richards*, 99 Mo. App. 88, 72 S. W. 487; *Singleton v. Insurance Co.*, 66 Mo. 63, 27 Am. Rep. 321; *Warnock v. Davis*, 104 U. S. 775, 26 L. Ed. 924; *Heusner v. Mut. Life Ins. Co.*, *supra*.

[3] Being *prima facie* void, the onus was on the one asserting its validity to show such facts as rendered it valid and binding. *Singleton v. St. Louis Mut. Ins. Co.*, 66 Mo. 63, 75, 27 Am. Rep. 321; *Ryan v. Metropolitan Life Ins. Co.*, 117 Mo. App. 688, 93 S. W. 347. The plaintiff admitted its validity to the amount of \$250 and interest, and to that extent defendant might have enforced his right without offering evidence. He could not, however, rest his claim for a larger amount upon that admission, but must show that Schwarzkopf advanced the larger amount claimed. As the case stood on the pleadings, with both parties declining to offer evidence, the plaintiff would have been entitled to a decree as specifically prayed for in his petition.

[4] As to estoppel and laches, the onus is on the party setting them up to make out the facts on which they rest. The petition does not disclose such facts.

[5] It does disclose that plaintiff delivered the policy to Schwarzkopf, together with an assignment which is absolute in form and that Schwarzkopf pledged it to defendant, but the rule that the owner of personalty will be estopped from setting up his title as against a pledge of it when he has clothed the pledgor with evidence of ownership of it has been held to have no application to a life insurance policy. *Heusner v. Insurance Co.*, *supra*.

[6] Neither does it appear on the face of the petition that plaintiff has been guilty of such laches as to bar his right to relief in

equity, or to put him to an explanation of his delay in bringing suit. It is true that plaintiff alleges that Schwarzkopf died in June, 1907, having theretofore pledged the policy with defendant Bowman for a larger sum, etc., but that is not sufficient. There must be something more than mere delay or death of a participant before the relief asked should be refused. It must appear that the other party was injured by the delay, and that plaintiff had had knowledge of his rights being infringed and opportunity to establish them. *St. Louis Safe Deposit & Savings Bank v. Kennett's Estate*, 101 Mo. App. 370, 74 S. W. 474. The cases which hold that equity views with disfavor a suit that is brought after the death of a party acquainted with the "whole business" proceed on the theory that the plaintiff had knowledge of the infringement upon his rights and ample opportunity to establish them before the party died. *Lenox v. Harrison*, 88 Mo. 491; *Burdett v. May*, 100 Mo. 13, 12 S. W. 1056; *State ex rel. v. West*, 68 Mo. 229; *Dexter v. Macdonald*, 196 Mo. 373, 95 S. W. 359. The petition in this case does not disclose that defendant was injured by the delay or that plaintiff had knowledge of his rights and opportunity to establish them before Schwarzkopf died, or, indeed, for any considerable time before bringing this suit.

[7] It was unnecessary for plaintiff to allege and prove a tender before suit of the amount of the debt necessary to be paid in order to redeem the policy; this being a proceeding in equity to redeem. *Haydon v. Railroad*, 222 Mo. 126, 121 S. W. 15.

[8] Defendant's counsel contend that, as the reply denied the "new matter" of defendant's answer, it is insufficient, and therefore the averments in the answer must stand as admitted. The contention will be ruled against the defendant. The trial court having ordered the reply to be amended so as to meet that objection, it is to be regarded here as having been made, and it is immaterial whether the verbal changes were made or not. *Underwood v. Bishop*, 67 Mo. 374; *Shantz v. Shriner*, 150 S. W. 727 (decided October 8, 1912).

The judgment is affirmed and the cause remanded.

REYNOLDS, P. J., and NORTONI, J., concur.

MATTHEWS v. EBY.

(St. Louis Court of Appeals. Missouri. Nov. 12, 1912.)

1. ATTACHMENT (§ 32*)—DEBT FRAUDULENTLY CONTRACTED—REPRESENTATIONS.

From one's statement just after the price to be paid by him for mules was agreed on, and just before they were turned over to him, "I haven't got my checkbook here, and I can't pay you now, but I will send you a check when

I get home," an implied affirmation that nothing stood between immediate payment but absence of his checkbook, that the money was in bank, and that it was a mere matter of getting to the checkbook, in order that payment might be made, if not inevitable, is permissible, making the debt one fraudulently contracted, as regards right to attach therefor; he not having had the money in bank.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 81-87; Dec. Dig. § 32.*]

2. ATTACHMENT (§ 233*)—FRAUDULENT ATTACHMENT—JURISDICTION.

Where one desiring to prevent removal from the county of property of his debtor temporarily there, having a single cause of action for a sum too great for the jurisdiction of a justice, split it and had the property seized on two attachments issued by a justice, and then, in the absence of the debtor, dismissed them and seized the property on attachment in a suit in the circuit, the latter attachment, obtained by means of the other fraudulent attachments, gives no jurisdiction.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 795, 798; Dec. Dig. § 233.*]

3. APPEAL AND ERROR (§ 352*)—REVIEW—THEORY BELOW.

The denial of a motion to dismiss will be reviewed, on the theory that the motion was a proper mode of raising the question of jurisdiction; both parties and the trial court having proceeded on that theory, and no question in that regard being raised on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3402; Dec. Dig. § 352.*]

Appeal from Circuit Court, Scott County; Henry C. Riley, Judge.

Action by R. C. Matthews against Bert Eby. Judgment for plaintiff; defendant appeals. Reversed and remanded, with directions.

Marshall Arnold, of Benton, and Brown & Gallivan, of New Madrid, for appellant. Joe Moore, of Sikeston, for respondent.

CAULFIELD, J. The appeal in this case was prosecuted to this court, but was thereafter transferred by it to the Springfield Court of Appeals, under the provisions of the act of the Legislature, approved June 12, 1909. See *Laws of Missouri*, 1909, p. 396. See, also, section 3939, R. S. 1909. In due time the cause was disposed of by the Springfield Court of Appeals through an opinion prepared by Judge Nixon of that court, as will appear by reference to *Mathews v. Eby*, 149 Mo. App. 157, 129 S. W. 1016. Subsequently the Supreme Court declared the said legislative act, which purported to authorize the transfer of cases from this court to the Springfield Court, to be unconstitutional. The cause was thereafter transferred by the Springfield Court of Appeals to this court, on the theory that the jurisdiction of the appeal continued to reside here, and the proceedings had in the Springfield Court with reference thereto were *coram non judice*.

The case has been argued and submitted here and duly considered. Upon reading the record, we are satisfied with and adopt, so far as it relates to the question whether the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

debt sued for was fraudulently contracted, the statement of facts set forth in the opinion of the Springfield Court of Appeals, above referred to, as follows: "This was an action brought in the circuit court of Scott county on an account in the sum of \$375, and a writ of attachment was sued out in aid thereof; the ground for attachment being that the debt sued for was fraudulently contracted. This writ was levied on three mules, the subjects of this controversy. The defendant filed a plea in abatement, which, among other things, denied that the debt sued for was fraudulently contracted. The verdict of the jury sustained the attachment. The defendant then answered; but upon plaintiff's motion a part of the answer was stricken out, and, defendant declining to plead further, judgment was rendered for plaintiff for the amount sued for. Defendant has appealed, and insists that the attachment should not have been sustained, because the evidence does not show that the debt sued for was fraudulently contracted."

This litigation had its inception in the sale of three mules. The evidence shows: That plaintiff was a dealer in mules, maintaining a mule barn in Sikeston, Scott county, Mo. That about the 1st of April, 1908, defendant appeared at plaintiff's mule barn, and, after having examined several mules, had two hitched to a wagon and tried them, and said he would take them, together with another mule he had examined. The two mules were priced at \$190 each, and the separate mule at \$175, making a total of \$555; but plaintiff told defendant he would sell the three for \$550. There is a direct conflict in the evidence as to what then occurred. Plaintiff testified that defendant went uptown, and then came back and caught the mules, and said: "I haven't got my checkbook here, and I can't pay you for this now, but I will send you a check when I get home." Plaintiff says he went uptown and asked a man who was well acquainted in that country what he thought about letting the mules go on that kind of a promise, and that he was told it would be perfectly safe. That plaintiff then told defendant he could take them, but to send the check at once. That he waited about two weeks and then wrote to defendant. Not receiving a reply, he wrote again, but to no avail. Plaintiff says that after about five weeks he sent Alfred Emery to the defendant; that the defendant sent back \$100, with a promise to pay the balance at once; that after waiting about a week longer he wrote again, and then defendant came from his home in New Madrid county to Sikeston and wanted to turn back the two mules which had been priced at \$190 each, but plaintiff refused to take them and told defendant to get the matter settled up by the following Monday; that defendant returned on Monday and left the two mules at plaintiff's mule barn in plaintiff's absence. They

met later, however, and had some words, defendant saying one of the mules was not worth \$1.50. Plaintiff then offered him \$150 for the mule, but defendant would not take less than \$165, which plaintiff refused to give, because the mule had become lame, and both of them had deteriorated in value. Defendant then paid him \$75 more, leaving a balance due of \$375, and plaintiff prepared a note for that amount and gave it to the defendant, with directions to get it signed by certain named persons, so that he would have something to show for the sale. Plaintiff states that he then saw defendant "acting peculiar," and that defendant slipped back and got the bridle he had had on one of the two mules which he had brought to the barn and wrapped it up in his rain coat, walked around "back there" a while, and then went out; that plaintiff was then convinced that defendant was trying to beat him by leaving the mules there anyhow; that he went out and found that defendant had also brought the third mule to town, and he at once started attachment proceedings and secured possession of the three mules. Defendant's testimony was that he did not agree to send a check at once, but that he was to take the mules home and pay at a future date, when his brother had secured some money on a loan; that nothing was said about a check; that the mules were warranted, and that if they were not "all right" defendant could return them. Defendant's own evidence shows that he had no money in the bank, but was relying upon his brother to make a loan and obtain the money.

[1] Our learned Brethren of the Springfield Court of Appeals treated the case, upon the foregoing facts, as if there was nothing more by way of fraud than the defendant's promise to send plaintiff a check on his arrival home, and concluded that such mere promise was not such a false representation as to constitute a fraud, though it was unperformed, citing *Bullock v. Wooldridge*, 42 Mo. App. 356; *Stocking v. Howard*, 73 Mo. 25. We cannot agree that the case should be so treated. In order for a debt to be fraudulently contracted on his part, "the debtor must have been guilty of some material deceptive act, word, or concealment, done or suffered by him with the intent to induce the opposite party to consent to the debt. The opposite party must have relied upon such false acts or manifestations of the debtor, and yielded his consent to the contract on the faith thereof." *Finlay v. Bryson*, 84 Mo. 664. It is clear from this definition or rule that the false representation need not be express, but may be by conduct as well as by words; and such is the law. "If one intentionally acts in such a manner as to reasonably lead another to believe in the existence of facts which do not exist, and to act on such belief to his prejudice, it

is as much a fraud as if he made a positive statement as to the existence of such facts." 14 Am. & Eng. Enc. of Law (2d Ed.) p. 80. Thus the drawing of a check upon a bank in which the drawer has no funds, and uttering it, is a fraud. It amounts to a false affirmation that the money is there to meet it. *Peterson v. Union Nat. Bank*, 52 Pa. 206, 91 Am. Dec. 146. Now, in the case at bar, the purchaser (defendant) did not actually draw the check, but he used the words which were equivalent as an affirmation. He said: "I haven't got my checkbook here, and I can't pay you now, but I will send you a check when I get home." Who can doubt that this language implied that the money was in bank to meet the check as soon as it was given? It amounted to a statement that nothing stood between the parties and immediate payment but the absence of defendant's checkbook; that the money was in bank, and it was a mere matter of getting to the checkbook, in order that payment might be made. If such implication was not inevitable, it was at least permissible, and was a matter for the jury. That such implied affirmation was false is clearly shown, and, of course, defendant must have known it was false. It related to a material fact; for if the money had been in bank payment could have been made as soon as the defendant could reach his checkbook, while if the contrary was true the payment, or at least the time thereof, was dependent upon the ability of defendant's brother to make a loan, which was a very uncertain matter. That plaintiff relied upon such affirmation may be inferred; for it concerns a fact of which defendant had, or was supposed to have, knowledge, while the plaintiff had no such knowledge, and no ready means of acquiring it. That the false impression was given by defendant with intent to induce plaintiff to consent to the debt, and that plaintiff yielded his consent on the faith thereof, may be inferred; for the language which created it was part of the negotiation for the sale of the mules, and was followed immediately by the mules being turned over to the defendant. We are satisfied that there was sufficient evidence on which to base a finding that the debt was fraudulently contracted.

[2] But the point is made that the judgment should be reversed by reason of the action of the circuit court in overruling defendant's motion to dismiss the cause for want of jurisdiction. The cause was instituted in the circuit court of Scott county, and the jurisdiction depends upon the validity of the attachment, because the defendant resided in another county, and was not served with summons in Scott county, where the plaintiff resided. Section 1751, R. S. 1909; *Brckett v. Brckett*, 61 Mo. 221. The objection raised by the motion to dismiss is

aimed at the means by which the court acquired jurisdiction through the execution of its attachment process.

The following facts were disclosed at the hearing upon the motion: On May 4, 1908, defendant resided and had the three mules in New Madrid county. The plaintiff resided and had his mule barn at Sikeston, in Scott county. On that day the defendant came from New Madrid county to Sikeston, in Scott county, bringing with him the three mules. One, a bay mule, he drove, in his buggy, and the other two, the gray mules, he led. Arrived in Sikeston, he tied the bay mule at the usual hitching place and took the two gray mules to plaintiff's mule barn, where he insisted on plaintiff taking them back as unsound. He testified that plaintiff did take them back and received a payment, which finished paying for the bay mule. According to plaintiff's version, however, he refused to consent to any such arrangement and repudiated defendant's suggestion that the amount paid (\$175) paid for one mule, and insisted that that sum was to be credited on the three mules; that the transaction had been a sale of three mules for \$550 which could not be divided. Plaintiff told defendant to take the mules out of his barn and take them home. But afterwards the plaintiff testified he judged from the defendant's actions that he was going to try to get out of town with the bay mule, leaving the gray mules on plaintiff's hands. He determined to stop this and keep the bay mule in Scott county by means of a writ of attachment from the justice of the peace; but, as the sum demanded by him (\$375) exceeded the amount of the justice's jurisdiction, he split his cause of action into two parts and sued out two writs before the justice for the two parts. Under the first writ, which was issued that day, May 4, 1908, he succeeded in having the bay mule seized and held by the constable before the defendant had a chance to get it, and in spite of the defendant's attempt to do so. The constable and plaintiff then took the bay mule and put it with the two gray mules in the plaintiff's barn. Under the second writ, which was sued out the next day, May 5, 1908, the plaintiff had the two gray mules levied upon. All the mules continued to be kept in plaintiff's barn. On his cross-examination plaintiff frankly admitted that he divided his cause of action because he wanted to keep defendant from getting out of town with the mule, and so as to get the matter into the justice court. The two attachment suits before the justice were set down for hearing on the 14th day of May, at which time the defendant was present; but the causes were continued on account of the sickness of the plaintiff. Thereafter, and while the defendant was out of the county and the mules were still in plaintiff's barn, held under the

attachment, the plaintiff, without defendant's knowledge, dismissed both suits before the justice and immediately sued out the writ of attachment in the case at bar and caused the mules to be levied upon thereunder. He stated, on cross-examination, that he had had this attachment sued out right away after dismissing the others, so that he could hold the mules, as he was afraid "they would beat me out of them."

What is the effect of plaintiff's conduct, as above disclosed, upon this proceeding? The law is that an attachment levy effected by unlawful or fraudulent means is illegal and void, and confers no jurisdiction. *Rosencranz v. Swofford Bros. Dry Goods Co.*, 175 Mo. 513, 75 S. W. 445, 97 Am. St. Rep. 609; *Drake on Attachment* (6th Ed.) § 193. This is upon the principle that courts will not lend their assistance to effectuate fraudulent or unlawful practices of suitors (*Holker v. Hennessey*, 141 Mo. 527, loc. cit. 536, 42 S. W. 1090, 39 L. R. A. 165, 64 Am. St. Rep. 524); or, as otherwise stated, no one should be permitted to take advantage of his own wrong, and no lawful thing can stand on an unlawful foundation. *Rood on Attachment*, § 186, citing *Holker v. Hennessey*, supra. So, where one came into possession of goods of another in one state fraudulently or as a trespasser, and took them into another state without the consent of the owner, in order that a writ of attachment in that state could be levied upon them, it was held that the levy conferred no jurisdiction, and was void. *Rosencranz v. Swofford Bros. Dry Goods Co.*, supra; *Powell v. McKee*, 4 La. Ann. 108. A like ruling was made where a slave was decoyed into the jurisdiction of the court and there attached. *Timmons v. Garrison*, 4 Humph. (Tenn.) 148. So it was held that if the levy be made by means of a trespass it is vitiated. *Bailey v. Wright*, 39 Mich. 96. Likewise, where the sheriff in one county seized the property, pretending that he seized it by virtue of a writ of attachment, and carried it back to his own county, where he made a formal levy under a writ in his possession, the levy was held to be void. *Pomroy v. Parmlee*, 9 Iowa, 140, 74 Am. Dec. 328. In some instances the fraudulent contrivance for obtaining possession of defendant's property involves an abuse of legal process. As in the case of *Gilbert v. Hollinger*, 14 La. Ann. 441, where, by means of a writ of attachment issued by the United States Circuit Court on a false affidavit that the defendant was a citizen of the state, goods were brought into the territorial jurisdiction of the state court and there attached under the state court writ, on the ground that the defendant was a non-resident of the state. The case of *Byler v. Jones*, 79 Mo. 261, illustrates the same principle, though it does not involve a seizure of property. It was there held that the crim-

inal process of the state cannot be used to take a person from one county to another, for the purpose of having him served with civil process in the latter county; and that courts of the county into which he was so brought could acquire no rightful jurisdiction over his person in any civil proceeding by means of such a contrivance and wrong. There are many other cases, but the foregoing are sufficient to illustrate the principle involved.

Now, in the case at bar, in order to detain the property in Scott county, in order that it might be subjected to attachment process therein, the plaintiff used the writs of attachment issued by the justice of the peace. The justice had no jurisdiction, as plaintiff knew, to issue a writ to secure the sum demanded by him, so, in order to accomplish his purpose, regardless of the law, plaintiff conferred upon the justice a fictitious appearance of jurisdiction by splitting his cause of action and bringing two suits. This was an unlawful practice—a proceeding which the law never tolerates. *Robbins v. Conley*, 47 Mo. App. 502; note to *Reynolds v. Jones*, 44 Cent. Law J. 306; *Wagner v. Jacoby*, 26 Mo. 532; *Laine v. Francis*, 15 Mo. App. 107. It was a fraud in law. Yet by this means fraudulent and unlawful attachment writs were procured, the property taken into custody and held until the defendant had left the county and was off his guard, when plaintiff dismissed the justice suits, and, fearful of losing the unlawful advantage he had gained thereby, hurriedly sued out this writ and caused the property to be seized thereunder before defendant had a chance to be advised. It is clear that this proceeding is but an attempt to reap the fruits of the unlawful practice by which it was made possible; and to permit plaintiff to prevail herein would be but to lend our assistance to effectuate such unlawful practice. Under the law it is our duty to refuse to do so, as it was the duty of the trial court. Jurisdiction cannot be unlawfully acquired as in this case.

[3] We may add here that we have proceeded on the theory, without deciding, that the motion to dismiss was a proper mode of presenting the question of jurisdiction. We have done this, because both the parties, as well as the trial court, proceeded on that theory, and no question in that regard is raised here. That the trial court did not overrule the motion because it was an improper mode of raising the question of jurisdiction is made clear by the record, which discloses that the court struck out, on plaintiff's motion, a like plea to the jurisdiction from defendant's plea in abatement of the attachment, and from defendant's answer to the merits; the defendant duly excepting.

For the reasons above stated, the judgment is reversed and the cause remanded,

with directions to the circuit court to set aside its order sustaining the attachment and enter an order dismissing the cause.

REYNOLDS, P. J., and NORTON, J., concur.

GAMBREL v. HINES et al.

(Kansas City Court of Appeals. Missouri. Nov. 25, 1912.)

1. FRAUDULENT CONVEYANCES (§ 135*)—SALE—CHANGE OF POSSESSION.

Where a bill of sale given by a debtor to two creditors in payment of his debts was not recorded, and the property was not pointed out or taken into their possession, and where both were present at an auction sale at which the property was sold to others and one of them acted as auctioneer, the sale to them was void as to a judgment creditor who levied upon the proceeds of the auction sale, under Rev. St. 1909, § 2887, avoiding as to creditors a sale of chattels not accompanied by a change of possession.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. § 427; Dec. Dig. § 135.*]

2. FRAUDULENT CONVEYANCES (§ 115*)—PREFERENCE.

A debtor may transfer his property in payment of his debts, though he thereby gives certain creditors a preference over a judgment creditor.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. §§ 370, 375-377; Dec. Dig. § 115.*]

Appeal from Circuit Court, Holt County; Francis H. Trimble, Judge.

Action by Felix Gambrel against Thomas H. Hines, in which Joseph G. Wilson and another interpleaded. From judgment for interpleaders, plaintiff appeals. Reversed and remanded.

H. B. Williams, of Craig, and W. E. Stubbs, of Mound City, for appellant. John W. Stokes, of Craig, and J. B. Dearmont, of Mound City, for respondent.

BROADDUS, P. J. Garnishment and interpleas. On the 15th day of January, 1907, Gambrel obtained a judgment in the circuit court of Holt county against Thomas Hines for \$56.08 and costs, the costs amounting to \$125.95, making the total judgment \$182.03. One or more executions were issued upon the judgment and returned nulla bona. The execution which has reference to the subject of this controversy was issued on the 16th day of January, 1909.

[1] A short time prior to the issuing of this execution, Hines, the execution debtor, advertised certain personal property to be sold at the farm, upon which he was residing, at public sale, on the 19th day of January, 1909, in which advertisement he stated that he intended to remove from the state. On the day of sale, the sheriff of the county went to the farm mentioned to levy upon the

personal property so advertised for sale as the property of Hines. It seems that there was to be other personal property than that of Hines also to be sold at that time. Upon arriving at the farm, the sheriff made his business known to Hines, whereupon Hines, to prevent injurious effect upon the sale, agreed with the sheriff that, if the sheriff would not seize the property under the execution, he (Hines) would leave in the hands of Fred Burnett, who was the clerk of the sale, enough of the proceeds derived from the sale of said property to satisfy the execution in the hands of the sheriff, and that the sheriff could seize said proceeds in lieu of, and as for the property itself. Whereupon Hines, the sheriff, and Burnett inspected the property, and Hines pointed out to Burnett the property from the sale of which the proceeds were derived, which said proceeds were seized by the sheriff under the execution in his hands, and which are the subject of this litigation. In the morning of the day of sale Hines executed a bill of sale of the property mentioned to Joseph G. Wilson, his father-in-law, and J. P. Hines, his brother; the consideration being an existing indebtedness. Plaintiff had no notice of this bill of sale previous to the seizure of the property. The funds having been garnished in his hands, Burnett asked leave to deposit them with the court, and for an order for claimants to interplead for the funds. Wilson and J. P. Hines filed their interpleas, and, issue being made, the cause was heard by the court sitting as a jury. The bill of sale was not recorded, nor was the property mentioned in the bill of sale pointed out to interpleaders at the time of the execution of said instrument, and no physical possession was taken by them. Both interpleaders were present, and Wilson was the auctioneer who cried the sale. They were not parties to the agreement made between the sheriff and the debtor, Hines, that the property should be sold and the proceeds held by Burnett, subject to seizure by the sheriff, as stated, and also to be held subject to garnishment. At the close of the evidence the plaintiff offered a demurrer to interpleaders' evidence, which the court overruled. The plaintiff then asked the court to declare the law in the following language: "The court, sitting as a jury, declares the law to be that although he may believe from the evidence in the case that interpleaders, Joseph G. Wilson and J. P. Hines, did in good faith purchase from Thomas Hines the property mentioned in evidence, yet, if you further believe and find from the evidence that said property so purchased had never been actually delivered unto said purchasers prior to the levying of the execution mentioned in evidence, then and in that event such sale, if any, is void as to plaintiff, Felix Gambrel, and your

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

verdict should be against the interpleaders and for plaintiff." The court refused the declaration, and rendered judgment in favor of the interpleaders, and plaintiff appealed.

The contention of plaintiff is that the sale of personal property to interpleaders was void as to creditors. Section 2887, R. S. 1909, provides that: "Every sale made by a vendor of goods and chattels in his possession or under his control, unless the same be accompanied by delivery in a reasonable time, regard being had to the situation of the property, and be followed by an actual and continual change of possession of the things sold, shall be held to be fraudulent and void, as against the creditors of the vendor, or subsequent purchasers in good faith," etc. This section was construed by this court, wherein it is held that in the case of a sale of goods there must be an actual delivery—"a substantial change of possession." *Harmon v. Morris*, 28 Mo. App. 326. "A mere-symbolical delivery of personal property, without any outward or visible change of possession within a reasonable time, such as the nature and situation of the property admit of, will not constitute such a change of possession as the statute requires as against creditors of the vendor, especially when the vendor continues to sustain the same relation to the property in respect to its possession as before the sale." *Dyer v. Balsley*, 40 Mo. App. 559. And so it is held in *State ex rel. v. Hall*, 45 Mo. App. 299, and many other cases since determined.

There was no attempt made by interpleaders to take possession of the property in question. On the contrary, the property was suffered to remain in the debtor's possession after the sale in question, and was allowed, without objection or protest by vendees, to be sold by the auctioneer at public sale; *Wilson*, one of the interpleaders, being the auctioneer. It is true that as to the corn and household property perhaps interpleaders did not have sufficient time to remove the same from the farm. But, as to the other property, it was subject to the immediate control of interpleaders had they seen fit to take it into their possession. However, the evidence discloses that they did not intend to take possession of any part of the property at any time, but left it in the debtor's possession for the purpose of having it sold as his property.

[2] It is insisted that the debtor has a right to prefer interpleaders, who were his creditors. This is true, but that fact does not place them in any better position than that of purchasers, as the same rule would apply in both instances.

The question is not one of fraudulent intent, but fraud as a matter of law. The plaintiff's demurrer should have been sustained.

Reversed and remanded. All concur.

SCIENTIFIC AMERICAN CLUB v. HORCHITZ et al.

(St. Louis Court of Appeals. Missouri. Nov. 12, 1912. Rehearing Denied Dec. 3, 1912.)

1. COURTS (§ 488*)—JURISDICTION—QUESTIONS IN CONTROVERSY.

Where the Supreme Court transfers a case appealed to it to the Court of Appeals, constitutional questions sought to be raised are eliminated.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 1316-1323; Dec. Dig. § 488.*]

2. JUDGMENT (§ 713*)—CONCLUSIVENESS—QUESTIONS CONCLUDED.

A judgment of a court having jurisdiction of the parties and subject-matter is conclusive on the parties as to all matters in issue, or which could have been brought up in the trial of the cause; and a judgment for a foreign corporation is conclusive on its right to maintain the action.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1063, 1066, 1099, 1234-1237, 1239, 1241, 1247; Dec. Dig. § 713.*]

3. JUSTICES OF THE PEACE (§ 191*)—JUDGMENT ON APPEAL—CONCLUSIVENESS—PARTIES CONCLUDED.

A surety on an appeal bond, on appeal from a judgment of a justice is in privity with the judgment debtor; and the judgment is binding on both.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 735-750; Dec. Dig. § 191.*]

4. EXECUTION (§ 163*)—FOREIGN CORPORATIONS—RIGHT TO EXECUTION ON JUDGMENT—ATTACK.

That a foreign corporation is not authorized to do business in the state is an affirmative defense to an action brought by it; and the mere filing of an ex parte affidavit, not brought to the attention of the court, in support of a motion to quash an execution on a judgment in favor of the foreign corporation, on the ground that it has not complied with the statute, does not establish the truth of the facts, and is not a sufficient attack on the right to execution, though it be assumed that the execution defendant may attack the execution for such reason.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 473-483; Dec. Dig. § 163.*]

Appeal from St. Louis Circuit Court; Daniel G. Taylor, Judge.

Action by the Scientific American Club against Louis Horchitz and another. From a judgment for plaintiff, defendants appeal. Affirmed.

See, also, 128 Mo. App. 575, 106 S. W. 1117.

Frank K. Ryan, of St. Louis, for appellants. Bishop & Cobbs, of St. Louis, for respondent.

REYNOLDS, P. J. Plaintiff commenced its action before a justice of the peace to recover a debt claimed to be due it by the defendant Horchitz. On trial before the justice there was a verdict and judgment for plaintiff. Seven days after the judgment was rendered, defendant appealed to the circuit court, giving an appeal bond with appellant Levin as surety. No notice of the appeal having been served on plaintiff, and

after the lapse of several terms of the circuit court, plaintiff filed its motion to affirm the judgment of the justice for failure to give notice of the appeal. At the same term defendant Horchitz filed a motion to dismiss the appeal for the reason that plaintiff was a foreign corporation, organized under the laws of the state of New York and that at the times mentioned in the petition or statement in the case it was not authorized to do business in this state by its failure to comply with the provisions of what is now section 3039, R. S. 1909, and under what is now section 3040, it could not maintain any action or suit. This motion was stricken from the files by the circuit court and the motion to affirm the judgment of the justice sustained, the judgment being rendered in the circuit court in favor of respondent, plaintiff below, and against Horchitz, the defendant in the case, and Levin his surety on his appeal bond. Whereupon defendant Horchitz appealed to this court, where the judgment of the circuit court was affirmed. See *Scientific American Club v. Horchitz*, 128 Mo. App. 575, 106 S. W. 1117. Execution thereupon issued out of the office of the clerk of the circuit court against Horchitz and Levin, who thereupon filed their motion to quash the execution, alleging the same grounds as set out in the former motion, that is failure of plaintiff to comply with the provisions of section 3039, supra, and upon the further ground that the summary judgment against defendant Levin, surety on the appeal bond, and issue of execution thereon deprived him of his property without due process of law, in violation of the provisions of the Constitution of this state and of that of the United States, "and deprived him of that right and justice and the administration thereof guaranteed by section 10, art. 2, of the Constitution of Missouri." This motion was sworn to by defendant Horchitz, who filed an affidavit to the effect that he was well acquainted with the ownership and management of plaintiff and its method of doing business and that he knew that plaintiff had not obtained a license to do business in this state, having made an examination in the office of the Secretary of State; that he had also received a letter from the Secretary of State, attached to the affidavit, to the effect that the Secretary of State was unable to locate any foreign corporation licensed in this state under the name of Scientific American Club. Beyond filing this affidavit it does not appear that anything else was done concerning the motion to quash the execution. It does not appear that any evidence was offered in support of the motion, it not even appearing that this affidavit was ever presented to or called to the attention of the trial judge. The court overruled the motion to quash the execution, defendants excepting. Praying an appeal to the Supreme Court of this state and filing bond, defendants duly perfected their appeal to

that court. The Supreme Court transferred the cause to this court on the ground that the amount involved did not exceed the sum of \$7,500 and that the Supreme Court had no jurisdiction of the cause on appeal.

[1] It follows from this that the constitutional questions sought to be raised are out of the case, the only matter remaining for our consideration being the action of the circuit court in overruling the motion to quash the execution.

Learned counsel for appellants contend that suing out the execution is a new and distinct suit or action and that defendants are at liberty to attack that execution on the ground that the plaintiff corporation was not and is not authorized to do business in this state and cannot maintain any action or suit in this state.

[2-4] Without going into an examination of the authorities cited by counsel or an elaborate discussion of the proposition, it is sufficient to say that the judgment in the case which was originally entered, was rendered by a court having jurisdiction over the parties and the subject-matter, and is conclusive on the parties to it as to all matters which were in issue or which could have been brought up in the trial of the cause. Whether the right of plaintiff to maintain the action was or was not there in issue or tried, it was an issue which could have been there tried and, "the plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time." 2 Taylor on Evidence (8th Ed.) p. 1454, § 1702, cited and quoted approvingly by our Supreme Court in *Chouteau v. Gibson*, 76 Mo. 38, loc. cit. 46. Defendant Levin, as surety on the appeal bond, is in privity with the defendant Horchitz and that judgment is binding on both of them. Taylor on Evidence, Id. § 1684. If however, we are to go behind the judgment of the justice and enter upon an attack on the execution, it is clear that defendants have not produced any proof tending to sustain that attack. It is a well-settled rule in our state that the fact that plaintiff is a foreign corporation, raises no presumption that it is not authorized to do business in this state. That is an affirmative defense to the action which must be made and sustained. See *American Ins. Co. v. Smith*, 73 Mo. 368; *Parlin & Orendorff Co. v. Boatman*, 84 Mo. App. 67; *State to use v. Hudson*, 86 Mo. App. 501; *Scientific American Club v. Horchitz*, supra. The mere filing of an ex parte affidavit, without any showing that it was ever presented to or considered by the court, is very far from such an attack, very far from establishing the truth of the matter set up in that affida-

vit. So that even granting for the sake of the argument that defendants were at liberty to attack this execution for the reasons stated in the motion to quash, they have entirely failed, by any affirmative testimony, to establish the averments of their motion.

The judgment of the circuit court is affirmed. NORTON and CAULFIELD, JJ., concur.

HARTWIG et al. v. SECURITY MUT. LIFE INS. CO.

(Kansas City Court of Appeals. Missouri. Nov. 25, 1912.)

1. JUDGMENT (§ 585*)—RES JUDICATA—QUESTIONS CONCLUDED.

A judgment denying relief to insured in a life policy suing for the premiums paid, on the theory that a forfeiture of the policy by insurer for nonpayment of premiums at maturity was wrongful, is not res judicata in a subsequent action by insured's widow and children for the amount of the policy, on the theory that Rev. St. 1889, § 5886, in force at the time, extended the insurance beyond the date of insured's death, notwithstanding nonpayment of premiums, in the absence of a showing that the former judgment adjudged that the policy did not come within the statute of extended insurance.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1062–1064, 1067, 1073, 1084, 1085, 1092–1095, 1132; Dec. Dig. § 585.*]

2. JUDGMENT (§ 713*)—CONCLUSIVENESS—QUESTIONS CONCLUDED.

A judgment bars a subsequent action between the same parties on the same cause of action as to all matters which might have been litigated in the prior action, whether in fact litigated or not; but where the subsequent action is for a different cause of action the judgment only concludes the parties as to the points actually determined.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1063, 1066, 1099, 1234–1237, 1239, 1241, 1247; Dec. Dig. § 713.*]

3. ELECTION OF REMEDIES (§ 11*)—ACTS CONSTITUTING.

An election of remedies presupposes the existence of more than one remedy at the time the election is made; and, where one believes he has a remedy when he has not, the rule of election of remedies does not apply, for there is a difference between an election of remedies and a mistake of remedies.

[Ed. Note.—For other cases, see Election of Remedies, Cent. Dig. § 8; Dec. Dig. § 11.*]

4. ELECTION OF REMEDIES (§ 9*)—ACTS CONSTITUTING.

An unsuccessful action by insured in a life policy for the premiums paid, on the ground of the insurer's wrongful forfeiture of the policy, does not bar, on the theory of election of remedies, an action by his widow and children for the amount of the policy.

[Ed. Note.—For other cases, see Election of Remedies, Cent. Dig. § 6; Dec. Dig. § 9.*]

Appeal from Circuit Court, Chariton County; Fred Lamb, Judge.

Action by Elizabeth Hartwig and others against the Security Mutual Life Insurance Company. From a judgment for plaintiffs, defendant appeals. Affirmed.

Sparrow, Page & Rea, of Kansas City, and H. D. Hinman, for appellant. Busby Bros. & Withers, of Carrollton, for respondents.

ELLISON, J. Plaintiffs are the widow and children of John Hartwig, and they instituted this action on a policy of life insurance issued on the 21st of August, 1891, on the life of Hartwig, who died in September, 1910. He was to pay premiums semiannually, and he did so up to and including that for the first half of the year 1906. He failed on the last half of that year, due in August, and the defendant for that reason thereafter declared his policy forfeited and of no further force. He felt that the forfeiture was wrongful; for he insisted there was a custom under which defendant had permitted him, at past times, to pay premiums a few days after they were due, and by such conduct had led him to believe that no serious result would follow the delay in the instance referred to. On the idea that the custom allowed him to delay payment, he based his contention that the policy had been wrongfully forfeited, and, realizing that by the forfeiture his insurance was cut off, and yet defendant had retained the premiums which he had been paying for about 15 years, he shortly thereafter brought his action against defendant for damages, being the premiums and interest on each from the time it was paid. He was defeated at the trial, and did not appeal. After Hartwig's death in September, 1910, the present action was begun, as already stated. There was a judgment for plaintiffs in the trial court, and defendant has brought the case here.

The theory upon which the action was instituted is based on the statute (section 5886, R. S. 1889), which provides that a life insurance policy shall not be forfeited after the payment of two annual premiums, but its net value shall be computed on the American mortality tables and the amount, less any note or other debt owing to the insurance company on account of premiums, shall be taken as a net single premium for temporary or extended insurance for a length of time to be ascertained by calculation on the mortality tables. Such calculation, considering Hartwig's age, extended his policy to a date beyond the time he lived. In other words, the policy, by force of the statute, was in force at the date of his death.

Defendant presents four defenses: First, that the policy, by its own terms, was forfeited absolutely by defaulting in the premium; second, that the suit for damages which Hartwig instituted, with the judgment in defendant's favor, became res adjudicata and barred the present action; third, that by the institution of that action Hartwig made an election of his remedy, and he cannot now try another; fourth, that he abandoned his contract.

[1,2] The second and third are all that require serious attention. *Res adjudicata*, in general terms, means the thing has been once adjudicated. The action here interposed as a former adjudication was based upon an alleged wrongful forfeiture of a life insurance policy, whereby the insured was damaged in the amount of the premiums he had paid, with interest thereon; while this action is by the widow and children of the plaintiff in that case, and has for its object a recovery of the amount of the policy. In the former case the cause stated was to recover premiums and nothing on the policy, and the issue was whether defendant had not waived a payment of premium, and therefore illegally forfeited the policy. This case seeks to recover the whole amount of the policy, and no premiums, and the right to so recover was not necessarily involved in the former action. This case depends upon the policy being kept alive by the statute of extended insurance. The two causes of action are in no sense the same. "When the very cause of action once decided is again brought forward in a subsequent suit between the parties, the judgment in the first action is conclusive, and constitutes a perfect bar to the prosecution of the second, as to all matters which might have been litigated therein, whether in point of fact they were or not; for no one ought to be twice vexed about the same dispute or claim. * * * But the judgment in the first case enjoys no such prerogative if the second action is for a *different* cause of action from that contested in the first one. This is the distinction to be always seized as vital to the right determination of pleas of *res judicata*; and it will clear up a great deal of the confusion in the multitudinous decisions on the subject. In the second class of cases the judgment only concludes the parties as to points actually determined—that is, as to issues tendered or joined by the pleadings and decided—not those which might properly have been, but were not; for the rights of parties ought not to be construed away." *Barkhoefer v. Barkhoefer*, 93 Mo. App. 373, 67 S. W. 674; *Dickey v. Helm*, 48 Mo. App. 114. A part of the record in the former case was introduced in evidence in this; but it does not prove, nor tend to prove, that this policy did or did not come within the statute of extended insurance. A plausible argument was made by defendant to show that the issue here was found in the other case. But "it is not enough that it may be argumentatively inferred from the judgment that the point was involved in the former case." *Dickey v. Helm*, *supra*. The rule does not extend to points incidentally or collaterally considered. *Ridgley v. Stillwell*, 27 Mo. 128.

[3] It is next insisted that plaintiffs' present action is barred by the former action, under the rule as to election of remedies. It is said that Hartwig concluded to con-

sider the policy canceled by defendant's wrongful conduct, and elected to sue for the premiums he had paid. There are several reasons why the rule cannot be allowed application in this case. An election or choice necessarily presupposes two or more things out of which a choice is to be made. There must, therefore, be more than one remedy existing at the time the choice is said to have been made. Therefore, if one believes he has a remedy when he has not, the rule does not apply; "for there is a difference between an election of remedies and a mistake of remedies." *McLaughlin v. Austin*, 104 Mich. 489, 62 N. W. 719.

If there be not two remedies in fact, there cannot be a binding choice made. The following authorities justify these statements of the law: *Johnson-Brinkman Co. v. Railway Co.*, 126 Mo. 344, 28 S. W. 870, 26 L. R. A. 840, 47 Am. St. Rep. 675; *Henry v. Herrington*, 193 N. Y. 218, 86 N. E. 29, 20 L. R. A. (N. S.) 249; *Sullivan v. Ross' Estate*, 113 Mich. 311, 318, 71 N. W. 634, 78 N. W. 309; *Metcalf v. Williams*, 144 Mass. 452, 11 N. E. 700; *Snow v. Alley*, 156 Mass. 193, 30 N. E. 691; *Fuller-Warren Co. v. Harter*, 110 Wis. 80, 85 N. W. 698, 53 L. R. A. 603, 84 Am. St. Rep. 867; *Clark v. Heath*, 101 Me. 530, 64 Atl. 918, 8 L. R. A. (N. S.) 144; *Bank v. Danckmeyer*, 70 Mo. App. 168; *Hill v. Combs*, 92 Mo. App. 242; 7 Ency. Plead. & Prac. 361; 15 Cyc. 252; 24 Amer. & Eng. Ency. (2d Ed.) 816.

[4] It is manifest that Hartwig did not have two remedies in point of fact. We may concede that he supposed he had, when he instituted the action for damages. But he was in error in thinking he had that right. The record shows he lost. Defendant defeated him in his effort to get back the premiums, and now, if it defeats the policy also, it will have gained, through the law, an unconscionable victory. The fact that a party wrongly supposes he has two rights and chooses the one to which he is not entitled "is not enough to prevent his exercising the other, if he is entitled to that. There would be no sense or principle in such a rule." *Snow v. Alley*, *supra*. "The plaintiff's previous action was fruitless, because she had no right to maintain it upon her own showing; but that did not preclude her from subsequently bringing an action in which she asserted a right which she possessed. She had made no election, for there was no choice of remedies against the defendant, and in suing him with others, as for a conspiracy, she mistook, or misconceived, her remedy and was dismissed; but she did not forfeit her legal right to bring this action to recover from the defendant what he owed her. Any step or action taken by her, which was fruitless because proceeding upon a misconception of the rights which the law gave her, left her unaffected as to any legal remedy which she did possess." *Henry v. Herrington*, 193 N. Y. 218, 86 N. E. 29, 20 L. R. A. (N. S.) 249.

In *Capp v. Insurance Co.*, 117 Mo. App. 532, 94 S. W. 734, there was no refusal of premium by the insurance company; none was offered. The insured, after having paid a number of premiums, tired of the contract and quit paying, and the company undertook to forfeit the policy, when, in fact, under the statute, it was nonforfeitable, since he was entitled to extended or paid-up insurance, based on the value of his policy when he ceased to pay. He brought his action, basing it upon the statute for extended insurance, of the benefit of which statute, he alleged, defendant had deprived him by the forfeiture. We decided that the statute for extended insurance was a part of the contract, and that therefore there had not been and could not be a forfeiture, and that the policy was still a subsisting contract for the statutory extended time; and therefore no damages had accrued to him. While the point here involved was not discussed, it was assumed that Capp's unsuccessful action for damages would not bar an action on the policy, if he died within the extended time. It was not decided in the Capp Case that, where one wishing to continue his insurance tenders his proper premium, and the insurance company wrongfully refuses to receive it, he cannot treat the contract as at an end and sue for all premiums which he had theretofore paid. We did not consider that proposition; and, though we have been cited to *Smith v. Insurance Co.*, 173 Mo. 329, 72 S. W. 935, as holding that an insured cannot waive his statutory right to extended insurance, except as provided by the statute, and to *Bishop v. Insurance Co.*, 85 Mo. App. 302, as, in effect, deciding that he could, we do not believe that question to be involved in this case. It is true Hartwig brought the former action for damages on the ground that his policy had been wrongfully forfeited; yet it was shown by the result that he had mistaken his remedy, and we have already seen such mistake will not bar the present action.

The further ground is claimed that Hartwig abandoned the policy. We do not see any evidence in the record of an intention to abandon. It was not pleaded, and was not submitted as an issue.

Other suggestions against the judgment have been noted, but we have not found anything to justify a reversal; and it is therefore affirmed. All concur.

**GRANITE BITUMINOUS PAVING CO. v.
PARKVIEW REALTY & IMPROVE-
MENT CO. et al.**

(St. Louis Court of Appeals, Missouri, Dec. 8, 1912.)

1. MUNICIPAL CORPORATIONS (§ 519*)—SPECIAL ASSESSMENTS—PRIOR INCUMBRANCES.

Special taxes assessed against specific property for street improvements are a lien on

the property superior to all other incumbrances thereon.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1220-1227; Dec. Dig. § 519.*]

2. MUNICIPAL CORPORATIONS (§ 525*)—SPECIAL TAX BILLS—ENFORCEMENT.

A suit to enforce special tax bills is in the nature of a proceeding in rem, and compulsory payment of the judgment can only be made by a sale of the assessed property.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1240, 1241; Dec. Dig. § 525.*]

3. MUNICIPAL CORPORATIONS (§ 565*)—SPECIAL TAX BILLS—ENFORCEMENT—PARTIES.

Beneficiaries of prior incumbrances on land subject to a lien for special taxes are not necessary, but proper, parties in a suit to enforce the bills.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1274; Dec. Dig. § 565.*]

4. COURTS (§ 93*)—CONTROLLING DECISIONS—STARE DECISIS.

A decision of the Supreme Court that the lien of special tax bills is superior to prior incumbrances is a rule of property binding on all courts in proceedings involving the same question.

[Ed. Note.—For other cases, see *Courts*, Cent. Dig. §§ 336-339; Dec. Dig. § 93.*]

5. MUNICIPAL CORPORATIONS (§ 565*)—SPECIAL TAX BILLS—ENFORCEMENT—PARTIES.

The owner against whom a special tax bill has been issued, and who was the legal owner at the time the lien of the tax bill attached, is the only necessary party defendant in a suit for the enforcement of the lien.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1274; Dec. Dig. § 565.*]

6. STATUTES (§ 184*)—CONSTRUCTION.

Where two constructions of a statute are equally permissible, the one which will best carry out the object of the statute will be adopted.

[Ed. Note.—For other cases, see *Statutes*, Cent. Dig. § 262; Dec. Dig. § 184.*]

7. MUNICIPAL CORPORATIONS (§ 565*)—SPECIAL TAX BILLS—"OWNER."

The word "owner" in the St. Louis city charter, providing for special taxes for street improvements, against the property benefited, and providing that tax bills shall be a lien on the property charged therewith, and that suits for the enforcement thereof shall be brought against the owner of the land, is used in its restricted sense, and means the "legal owner," though the term in its wider sense may include any person beneficially interested in the property.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1274; Dec. Dig. § 565.*]

For other definitions, see *Words and Phrases*, vol. 6, pp. 5134-5151; vol. 8, p. 7744.]

8. INTEREST (§ 38*)—LEGAL INTEREST—JUDGMENT.

Under Rev. St. 1909, §§ 7179, 7181, fixing 6 per cent. as the legal rate of interest, and declaring that judgments shall bear 6 per cent., and that judgments on contracts bearing more than 6 per cent. shall bear the same interest as fixed by the contracts, a judgment enforcing a special tax bill draws interest at the rate of 6 per cent., though the charter of the city au-

thorizing the issuance of the bills provides for 8 per cent. interest in case of default.

[Ed. Note.—For other cases, see Interest, Cent. Dig. §§ 79-82; Dec. Dig. § 38.*]

9. APPEAL AND ERROR (§ 301*)—QUESTIONS REVIEWABLE—ERROR APPARENT ON THE RECORD.

The error in a judgment enforcing a special tax bill which provides for interest at 8 per cent. per annum from date of judgment until paid, while the judgment draws only 6 per cent., appears on the face of the record, and the court on appeal must review it, though the motion for new trial does not complain of it.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1743, 1753-1755; Dec. Dig. § 301.*]

Norton, J., dissenting.

Appeal from St. Louis Circuit Court; Eugene McQuillan, Judge.

Action by the Granite Bituminous Paving Company against the Parkview Realty & Improvement Company and others. From a judgment for plaintiff, defendants appeal. Affirmed, and cause certified to the Supreme Court for final determination.

Bland & Cave and Carter, Collins & Jones, all of St. Louis, for appellants. Sturdevant & Sturdevant, of St. Louis, for respondent.

ROMBAUER, Special Judge. This is a suit on a special tax bill issued in pursuance of the charter provisions of the city of St. Louis relating to street improvements. The suit was tried by the circuit court without the intervention of a jury, and resulted in a judgment for plaintiff in the sum of \$1,615.25, with interest at the rate of 8 per centum per annum from date, charging the lot against which said tax bill was issued, with the amount of the judgment, interest, and costs, and ordering the sheriff of the city of St. Louis to sell the same to satisfy the amount thus found to be due. From this judgment all the defendants appealed, assigning for error that the judgment is against the law and the evidence, was excessive as far as the interest was concerned, and was erroneous, because the tax bill was barred by limitation, as far as all defendants were concerned save the Parkview Realty & Improvement Company, who had ceased to be an owner, its title having been divested prior to the trial of the case by foreclosure proceedings. The appeal was heard at the last term of this court, and resulted in a reversal of the judgment. Upon a motion for rehearing filed by respondent some doubts were entertained by the court as to the correctness of that ruling, and, in view of the grave importance of the question to the municipality as well as to individual owners of real property within the city, full argument on the motion for rehearing was ordered at the present term. One of the judges being disqualified to sit, the undersigned was with the consent of all parties appointed special judge.

In order to pass intelligently upon the

contention of the defendants that the judgment is erroneous for reasons hereinabove stated, it is necessary to set out certain provisions of the charter of the city of St. Louis relating to street improvement. Section 14 of article 6 levies the tax against the property benefited. Section 24 directs the issuance of the tax bill, but does not require that any one be named therein as owner. Section 25 provides that the tax bills shall be a lien on the property charged therewith, but does not impose any personal liability on the owner. This section further provides that suit for the enforcement of the tax bills shall be brought in the name of the contractor against the owners of the land, and that such tax bills shall be barred by limitation after two years from their maturity, unless proceedings in law shall have been commenced to collect the same within two years from their maturity.

[1] It was a mooted question in this state at one time whether special taxes assessed against specified property for street improvements stood as to their superior lien over prior incumbrances upon the same footing as general taxes assessed by the state. This question has since the trial of the cause in the lower court been set at rest by the opinion of the Supreme Court in the case of the Morey Engineering & Construction Company v. St. Louis Artificial Ice Rink Co. (Sup.) 146 S. W. 1142, which decides that question in the affirmative.

[2, 3] The further question, however, which is the vital question in this case, namely, whether prior incumbrancers of the property charged with the special tax lien, are necessary parties to a suit brought by the contractor against the owner, not only for the purpose of subordinating their lien to the superior lien of the special tax bill, but also for the purpose of keeping alive the lien of the special tax bill for more than two years after its maturity, is a question which has not been decided by that case, and is one which must be determined by the rules of law defining the respective rights of the holders of senior and junior incumbrances in proceedings brought to foreclose the senior lien. The Supreme Court in the Morey Engineering Case, supra, quoting from Barber v. St. Joseph, 183 Mo. 451, 82 S. W. 64, holds that "proceedings to enforce special tax bills are in the nature of proceedings in rem, and compulsory payment of the judgment can only be made by a sale of the assessed property"; and, quoting from the case of Keating v. Craig, 73 Mo. 507, further holds that the lien of a special tax bill like the lien of general taxes is superior to any incumbrance, with which the owner may charge the land. If this be so, beneficiaries of prior incumbrances upon the land hold the same right against the lien of a special tax bill as the junior mortgagee holds against the prior mortgagee. The former is

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

a proper party to any proceeding to enforce the superior lien by foreclosure, but he is not a necessary party. If not made a party, he is not confined to his right to redeem, but may attack the validity of the prior incumbrance in any subsequent proceeding because he had no day in court. To use a terse definition of his rights, his right of entry is gone, but his right of action remains. His right to redeem before foreclosure sale remains intact, even if he is made a party to the foreclosure proceedings.

Having thus stated the general rules of law applicable to a case stated, we shall apply them to the uncontroverted facts in this case. The special tax bill sued upon was issued to the plaintiff July 1, 1905. At that time there were the following recorded liens by deed on the property: One dated April 30, 1901, in favor of Isaac H. Orr, trustee, to secure certain notes. One dated July 1, 1902, to the Lincoln Trust Company to secure certain bonds, and one dated August 1, 1902, to the Lincoln Trust Company to secure certain other bonds. The Parkview Realty & Improvement Company was the legal owner of the property when these two last mortgages were made and recorded, and was also the legal owner of the property when the tax bill in question was issued. On July 19, 1905, notice of the issue of this tax bill was served on the Parkview Realty & Improvement Company, and on June 28, 1907, and within two years from the maturity of said tax bill, suit was brought against the Parkview Realty & Improvement Company, Isaac H. Orr, trustee in the mortgage of April 30, 1901, and the Lincoln Trust Company, trustee, in the two mortgages of July 1 and August 1, 1902. None of the beneficiaries in these mortgages were made parties defendant. These mortgages are not set out in the abstract of the evidence of the appellant, nor does it appear that they were ever offered in evidence. The plaintiff's amended petition, however, on which the cause was tried, stated that the mortgage of July 1, 1902, of the Parkview Realty & Improvement Company to the Lincoln Trust Company, as trustee for bondholders secured 5,000 bonds, and the mortgage of August 1, 1902, between the same parties secured 2,000 bonds, and that the Nina Realty Company became the purchaser of the property charged with the plaintiff's lien on the foreclosure sale of these mortgages, subsequent to the issue to plaintiff of the tax bill in question. While these allegations are denied by the defendants' answers, they are admitted to be true in the briefs of counsel, and we have taken them to be true, otherwise we cannot see how the defendants could have any standing in this court. All the defendants except the Parkview Realty & Improvement Company in their separate answers set up the fact that the tax bill, owing to the two years limitation of the lien contained in sec-

tion 25 of the charter of the city of St. Louis, hereinabove set out, has become invalid. During the pendency of the suit, the Nina Realty Company became purchaser of the property, under foreclosure of the mortgages to the Lincoln Trust Company, and it was made a party defendant to the suit by amended petition on November 20, 1908, when more than two years had elapsed from and after the maturity of the tax bill. We may state at the outset that it is next to impossible to reconcile the various conflicting decisions of the appellate courts in this state on the question whether in proceedings for enforcement of special tax bills incumbrancers prior in time and record are necessary parties to enforce the bill against the property.

[4] Prior to the decision in the Morey Engineering & Construction Company Case, supra, the same conflict existed on the question as to whether the lien of a mortgage prior in time and record to the issue of a special tax bill constituted a superior or inferior lien on the property to the lien of a tax bill. When that case decided that the lien of the tax bill was superior, it necessarily decided, by analogy to the rights of other prior and subsequent lienors, that the incumbrancer whose lien was subordinate was not a necessary party to the proceeding. This decision establishes a rule of property which on well-settled principles is binding on all courts of the state in proceedings involving the same question.

[5] It logically follows from the foregoing that, under the recent decision of the Supreme Court, the owner against whom the bill has been issued, and who was the legal owner at the time the lien of the tax bill attached, is the only necessary party defendant in proceedings for the enforcement of its lien, and, if the suit is instituted against him within two years after maturity of the bill, it is sufficient to preserve the lien of the bill, although parties beneficially interested in liens on the property prior in time, or becoming owners by the foreclosure of such liens, may never be made parties defendant.

[6, 7] There is another consideration equally potent which leads to the same conclusion. It is a maxim of judicial procedure that, where two conclusions are equally admissible in construing a law, the one should be adopted by the court which will best carry out the object which the lawgivers sought to reach. The term "owner" in its restricted sense means the legal owner, and in its wider sense any person beneficially interested in the property. The city charter in providing for the pay of the contractor in special tax bills must have used the term owner in its more restricted sense, since otherwise the lien of the special tax bill in preference to existing liens created by deed would have become practically unenforceable, and furnish the contractor no security whatever. Of this the facts disclosed by the record in this case fur-

nish the fairest illustration. The two trust deeds held by the Lincoln Trust Company, as above seen, secured 7,000 bonds. Nothing to the contrary appearing in the record, we must assume that these bonds, as all other bonds of a similar character, were negotiable by delivery, and may have been negotiated to seven thousand different persons, each of whom under the rule well established in this state would have become a pro tanto beneficial owner in the property charged by the tax lien, and under the defendants' contention of the proper construction of the law a necessary party defendant to the foreclosure of plaintiff's tax lien. Yet the plaintiff could not have ascertained by the greatest diligence the name of such parties, since the law requires no registry of these transfers. On the other hand, the contractor's claim is based upon records accessible to all interested in the property from its inception to the date of the issue of the tax bill. The work performed by him is bound to be performed in the immediate vicinity of the property to be charged with the tax lien, and there is nothing to prevent those beneficially interested from informing themselves of its character and extent.

The law puts the onus on the contractor to ascertain who is the legal owner of the property benefited when the tax bill against it is issued, and who hence is a necessary party to a suit for its enforcement against the property. *Prima facie* the owner of record is the legal owner, unless the contractor is aware of an unrecorded conveyance changing the ownership. *Vance v. Corrigan*, 78 Mo. 94. The exception to this rule is ownership by descent, because the contractor can always ascertain by reasonable inquiry whether the apparent record owner is living or dead, and, if dead, who his heirs are. The case of *Jaicks v. Sullivan*, 128 Mo. loc. cit. 186, 30 S. W. 890, furnishes an apt illustration. In that case *Richard L. Sullivan* was sued as owner four years after his death. The plaintiff sought to amend his petition by bringing in his widow and heirs after the two-year limitation had barred the tax bill. The Supreme Court held that the lien of the tax bill had expired because the suit against a dead man could not be considered the institution of a suit against the owner on any principle.

The point has been made upon the argument that the tax bill is under the charter *prima facie* evidence only against the owner, and hence, if the other defendants other than the *Parkview Realty Company* were not owners within the purview of the charter provisions, no judgment could be rendered affecting their interests upon the evidence of the tax bill alone. That objection is not sustained by the record which shows that the plaintiff offered in evidence the ordinance and contract under which the work was done, and proved by its general manager

that the plaintiff had performed the work called for by the contract.

The foregoing considerations lead to the conclusion that the judgment of the court was correct, and should be affirmed, unless, the defendants' contention that it is excessive in interest is born out of the record proper. An argument was pressed upon us that the judgment is excessive, as far as part of the interest is concerned. It suffices to say in disposing of this objection that the judgment is not challenged on that ground by the motion for new trial.

[8, 9] Section 7179 of the Revised Statutes provides that creditors shall receive interest at the rate of 6 per cent. per annum when no other rate is agreed upon for all moneys after they become due and demand of payment is made. Section 7181 provides that all judgments for money shall bear 6 per cent. interest per annum until satisfaction be made by payment, and that judgments upon contracts, bearing more than 6 per cent. interest, shall bear the same interest as borne by such contracts. The 8 per cent. interest which the charter provides if default be made in the payment of a tax bill is penal interest, and not one provided by contract, hence the judgment in this case, as far as it recites that the judgment rendered shall bear 8 per cent. interest, is excessive to that extent. This error appears by the record entry of the judgment, and we are bound to take cognizance of it, although the defendants' motion for new trial does not complain of it, because the judgment to that extent is a judgment against the law.

It is therefore ordered that the motion for rehearing be sustained, and that so much of the judgment entry as contains the words, "with interest at the rate of 8 per cent. per annum from the date of the judgment until paid," be stricken from the record, and that the judgment as thus amended be affirmed, and that the cause be remanded to the trial court to enter up judgment in conformity with this opinion.

REYNOLDS, P. J., concurs. CAULFIELD, J., not sitting. NORTONI, J., dissents in a separate opinion, and asks that the case be certified to the Supreme Court, deeming the majority opinion in conflict, with decisions of the Supreme Court and the Kansas City Court of Appeals referred to in his opinion.

It is accordingly ordered by the court that this case be certified to the Supreme Court.

NORTONI, J. (dissenting). This is a suit on a special tax bill issued in accordance with the charter provisions of the city of St. Louis in compensation for street improvement. Plaintiff prevailed in the suit, and the court gave judgment establishing the lien of the tax bill against the lot of defendant *Nina Realty Company* in the amount of \$1,600.23 and interest thereon.

There are several defendants and all of

them appeal from this judgment, but the Nina Realty Company alone, as owner of the lot on which the lien is enforced, is the substantial party in interest. The other defendants are prior owners of the property and trustees in certain deeds of trust thereon, and it will be unnecessary to set them forth here, as they are without any beneficial interest in the property and the judgment is in no sense a personal one against them. At the time the judgment was entered, the lot on which the lien of the tax bill is sought to be established was owned by defendant Nina Realty Company, who succeeded to the title of the Parkview Realty & Improvement Company by virtue of the foreclosure of certain deeds of trust thereon under which the Nina Realty Company purchased. The lot of ground involved is parcel of city block No. 3878, fronting 405.17 feet on Union boulevard in the city of St. Louis. Plaintiff contractor reconstructed Union boulevard adjacent thereto in accordance with an ordinance of and under a contract with the city of St. Louis to that end. At the time of the improvement and the issue of the tax bill therefor, the lot was owned by the Parkview Realty & Improvement Company, a corporation, subject, however, to two deeds of trust then outstanding thereon. The first of these deeds of trust was executed on July 1, 1902, by the Parkview Realty & Improvement Company, owner, to the Lincoln Trust Company, trustee, to secure certain bonds. The second of such deeds of trust was executed on August 1, 1902, to the Lincoln Trust Company, trustee, to secure certain other bonds, and both of such deeds were duly recorded about the time of their execution. While these deeds of trust were in force and the indebtedness evinced by the bonds therein described was subsisting and unpaid, the city provided by ordinance for the reconstruction of Union boulevard. This ordinance appears to have been passed in February, 1903, and the contract for such reconstruction work was duly let thereunder to plaintiff. Plaintiff performed the work in accordance with the ordinance and contract, and on July 1, 1905, the tax bill sued on was issued to him therefor. Thereafter, on July 19, 1905, notice of the issuance of the tax bill was duly served by the city marshal on the defendant, Parkview Realty & Improvement Company, owner of the fee, but on no other defendant. As originally issued, the tax bill was payable in installments, but upon the failure of the owner of the property to pay the first installment when due, plaintiff exercised its option under the city charter, and declared all installments thereof due and payable. Under the provision of the charter, the first installment of the tax bill became due 30 days after notice thereof was served on the owner—that is, on August 19, 1905—and subsequent installments became due immediately likewise because of the owner's failure to pay the first installment. Thereafter, on June

20, 1907, and within two years from the maturity of the tax bill, August 19, 1905, plaintiff instituted this suit to the end of establishing and enforcing the lien thereof against defendant Parkview Realty & Improvement Company, owner, and the trustee in the two deeds of trust, but omitted to make the beneficiaries in such deeds of trust parties thereto. Subsequently, and after the expiration of more than two years from the maturity of the tax bill, the property was sold at trustee's sale under the two deeds of trust above mentioned, and the Nina Realty Company became the purchaser thereof. Such sales under the two deeds of trust were had on November 2, 1908, and it was on that day the Nina Realty Company succeeded to the title of the prior owner, Parkview Realty & Improvement Company, through its purchase at the trustee's sale. The Nina Realty Company, having thus become owner of the fee during the pendency of the suit, was made a party defendant thereto on November 20, 1908. By filing an amended petition on that date plaintiff set forth the trustee's sales and the fact that the Nina Realty Company had purchased the lot thereunder, made that company a defendant, and prayed that its interests as owner of the property should be subject to the lien of the tax bill in suit.

Among other things, section 25, art. 3, of the city charter, provides the lien of any tax bill that is not entered satisfied within two years after its maturity, unless proceedings in law shall have been commenced to collect the same within that time and shall still be pending, shall be destroyed and of no effect against the land charged therewith. In view of this provision of the charter, the defendant Nina Realty Company interposed its answer to the effect that the lien of the tax bill had expired and was unenforceable against its interests in the property for the reason that no suit had been instituted thereon within two years after the maturity of the bill against the beneficiaries in the deed of trust under which it purchased. Though the Parkview Realty & Improvement Company, owner at the time, was sued within the two-year period, the case concedes that the beneficiaries in the two deeds of trust under which defendant Nina Realty Company purchased were not made parties thereto at any time. Indeed, the first move made toward bringing the interests of the beneficiaries before the court was the amended petition filed on November 20, 1908, adding the Nina Realty Company, who succeeded to their rights as a defendant, and this was long after the expiration of the two-year period prescribed in the charter, for that period commenced to run when the tax bill matured on August 19, 1905, and terminated August 19, 1907. Notwithstanding all of this, the court gave judgment for plaintiff, establishing and enforcing the lien of the tax bill against the lot of ground described and the interests of both the Parkview Realty & Im-

provement Company and the Nina Realty Company therein, as though it were unnecessary to include the beneficiaries in the deeds of trust in a suit for the enforcement of the tax bill within the two-year period prescribed to charge them or their successors as owners of the property with the consequences of the lien.

Obviously error lies in this judgment, for it involves and affirms the idea that one's rights may be concluded as though a valid claim existed against him or his property without having his day in court until long after such claim had become extinguished of its own force. By section 25, art. 6, of the charter, it is provided the tax bill shall become a lien upon the property charged therein, and may be collected of the owner of the land and in the name of and by the contractor as any other claim in any court of competent jurisdiction. From this it appears that the lien is to be enforced against the land in the name of the owner thereof, and by subsequent provision of the same section the lien of the tax bill, it is declared, "shall be destroyed and of no effect against the land charged therewith," unless proceedings shall have been commenced to collect the same within two years from the maturity of the bill and still be pending. Therefore, the proceedings must be commenced on the tax bill and against the owner of the land within such two-year period in order to preserve and establish the lien, for otherwise it is destroyed and extinguished perforce of the very words that gave it life. The authorities are abundant and of one accord, to the effect that the suit must be instituted against the owner within the two-year period prescribed, as will appear by reference to the following cases: The case of Eyer mann v. Scollay, 16 Mo. App. 498, declares and affirms the rule under the St. Louis charter. And the following are to the same effect with respect to the charter of Kansas City: Smith v. Barrett, 41 Mo. App. 460; Jaicks v. Sullivan, 128 Mo. 177, 30 S. W. 890; Smith v. Boese, 39 Mo. App. 15; Forrey v. Holmes, 65 Mo. App. 114; Parker-Washington v. Kemper, 143 Mo. App. 244, 128 S. W. 271. For rulings to the same effect under the St. Joseph Charter, see St. Joseph v. Baker, 86 Mo. App. 310; St. Joseph v. Baker, 113 Mo. App. 691, 88 S. W. 1122. The doctrine declared by all of the cases is that the two-year period prescribed after which the lien is to terminate is not a mere statute of repose to bar actions but is rather a limit to the existence of the lien, and therefore, unless the suit is instituted against the owner within that time, such lien expires, and it may not be revived and enforced against the interests of the owner in the land. Smith v. Barrett, 41 Mo. App. 460. But it is said, though such be true, the present suit was instituted against the Parkview Realty & Improvement Company, owner, within the two-year period,

and that will suffice to establish the lien against the derivative title of the Nina Realty Company, though the beneficiaries in the deeds of trust were not made parties; for, it is said, such beneficiaries possess nothing more as against this plaintiff lienor than the right to redeem therefrom. There can be no doubt that the lien of a subsequent special tax bill duly established prevails over the lien of a prior mortgage or deed of trust, and becomes senior thereto. Such is the effect of the recent decision of the Supreme Court in Morey Engineering, etc., Co. v. St. Louis Artificial Ice, etc., Co. (Sup.) 146 S. W. 1142. This is undoubtedly the rule where both the owner of the land and the beneficiaries in the mortgage are made parties to the suit prior to the expiration of the lien, for in the case last above cited all parties in interest were before the court. See, also, to the same effect Keating v. Craig, 73 Mo. 507, where both the owner and the mortgage were parties to the suit to enforce the lien of the tax bill. But though it be the rule that the lien of the subsequent tax bill becomes senior to the lien of the prior mortgage, which is remitted to the position of the junior lienor when all parties in interest are before the court, it is the rule, too, that the rights of the beneficiaries in the mortgage are not concluded by the judgment, unless they are made parties to the suit. For a judgment to this effect on a tax bill, see Forrey v. Holmes, 65 Mo. App. 114. As to such beneficiaries who have been omitted from the suit to foreclose the state's lien for taxes, the Supreme Court has, in a number of cases, affirmed that, though title passed by the execution sale, their right to redeem was still available, as will appear by reference to Stafford v. Fizer, 82 Mo. 393; Gitchell v. Kreidler, 84 Mo. 472; Corrigan v. Bell, 73 Mo. 53; Allen v. McCabe, 93 Mo. 138, 6 S. W. 62. Considering the thought reflected throughout all of these authorities, it is obvious that the beneficiary in the deed of trust or mortgage is required to be made a party to the suit, for the reason that he is an owner within the sense of that term as employed in the charter provision and as employed in the statute with respect to general taxes levied in behalf of the state. Some of the cases put the rule expressly on the ground that the beneficiary is an owner. See Stafford v. Fizer, 82 Mo. 393; Gitchell v. Kreidler, 84 Mo. 472. Furthermore, the Supreme Court, in the recent case of Morey Engineering, etc., Co. v. St. Louis Artificial Ice, etc., Co. (Sup.) 146 S. W. 1142, in construing the St. Louis charter, declared the beneficiary in the deed of trust an owner within the sense of that term, to the end of raising the lien of the tax bill from the position of the junior, where it otherwise lay, to that of senior lien over a mortgage prior thereto in point of time. To the end of evincing that the

charter contemplated the lien of the tax bill should prevail over the rights of a prior mortgage, the Supreme Court quoted from section 25 of the charter as follows: "Said tax bills shall be and become a lien upon the property charged therewith, and may be collected of the owner of the land and in the name of and by the contractor as any other claim in any court of competent jurisdiction." Touching the words thus quoted, the court says: "Construed in the light of the case last cited, this means that the tax is a lien upon the property, to be enforced by a proceeding in rem against the property. And, as ruled above, the word 'owner' includes incumbrancers." If, then, the beneficiary in the deed of trust is to be regarded as an owner of the property for the purpose of postponing the lien of his prior mortgage to the lien of the subsequent tax bill, it would seem that he should be regarded as an owner in whose favor the requirement to institute suit within the two-year period in order to preserve the lien obtained. On a like question the Kansas City Court of Appeals, under the charter of that city, declared that, unless the beneficiary in the mortgage was made a party to the suit within the two-year period, the lien as to his interests amounted to naught, or, in other words, had expired. See *Forray v. Holmes*, 65 Mo. App. 114.

But it is argued that the junior lienor is never a necessary party to a proceeding for the enforcement of the senior lien, and that a valid judgment may be had against the res enforcing the lien, though the junior lienor is not a party, but subject, however, to his right to redeem. The argument is obviously sound in those cases where the lien is a continuing one, and so comprehensive by the terms of the statutes as to include all interests in the land in whosoever name it may be. The cases of *Stafford v. Fizer*, 82 Mo. 393, *Gitchell v. Kreidler*, 84 Mo. 472, *Allen v. McCabe*, 93 Mo. 138, 6 S. W. 62, and numerous other authorities declare the rule where the lien of the state for taxes has been enforced. In the argument advancing this proposition, it is said the junior lienor, the holder of the mortgage here, at best has a lien only on the equity of redemption or a right to redeem from the prior lien of the tax bill, and that this continues and may be availed of to the very day of sale under the tax judgment; that, though defendant Nina Realty Company was not made a party until after the two years had expired and the beneficiaries in the mortgages to whose rights it succeeded were never made parties at all, its right to redeem is still open, and this defendant has been given its day in court with respect thereto, for it may redeem even after the judgment is affirmed and at any time before the property is sold in execution thereunder. Obviously this argument assumes a subsisting lien against the interests of the

Nina Realty Company from which a redemption may be made. If the lien continued to exist as in the tax cases and obtained upon the realty without regard to the ownership, the argument would be persuasive, indeed. But here the lien of the tax bill expired before it was ever asserted, as the charter requires, against the beneficiaries in the mortgages or the Nina Realty Company, which succeeded to their rights, and, furthermore, the lien of the tax bill does not obtain against the land without regard to the ownership. The general taxes in favor of the state are declared by section 11385, R. S. 1909, to obtain against the land "no matter who is the owner nor in whose name it was assessed." And the lien with respect to such taxes obtains accordingly there; that is, on every interest in the land. It is true that the owner of the land must be made a party to the tax suit for the purpose of enforcing the lien of the state, to the end of conferring the jurisdiction over the res, but the tax itself is affixed against the land as a matter of law without regard to the owner thereof. Such is not true as to a tax bill representing special assessments as for benefits because of improvements made, for, unless the improvements are made, no tax can obtain, and that such improvements were made is a fact to be proved as a basis for the lien. Special tax bills become a lien upon the property, and may be collected of the owner of the land, it is true, but to this end proof is required against the interest of the owner as a condition precedent to affixing the lien upon his interest in the land. This proof, according to section 25 of the charter, may be made by the tax bill itself, which is sufficient prima facie evidence "of the liability of the person therein named as the owner of the land charged with such bill to pay the same." The tax bill here involved names the Parkview Realty & Improvement Company as the owner of the land, and in no way refers to the beneficiaries in the mortgages. Obviously, then, the bill itself is sufficient to evince the right of a lien against only the Parkview Realty & Improvement Company. In the sense of the charter, as before pointed out, the beneficiaries in the mortgages are regarded as owners of the property too, and it is essential when others appear to be owners than those named in the tax bill that proof aliunde the bill shall be made in order to affect the rights of such owners not named therein. See *Farrell v. Rammelkamp*, 64 Mo. App. 425; *McCormick v. Clopton*, 150 Mo. App. 129, 130 S. W. 122. That the tax bill is not prima facie evidence of the right to the lien against a mortgagee not named therein has been expressly decided, as will appear by reference to *Kansas City to the use, etc., v. American Surety Co.*, 71 Mo. App. 315. Obviously the charter intends that every person interested as owner in the property sought to be subject to the lien of the tax bill

shall have a right to defend against the assertion of such lien, and most assuredly the assertion of the lien should be made while the right to it continues to exist and not after it dies, for then defense would be unnecessary. From these considerations alone, it would seem that the rule which prevails as to the right of the junior incumbrancer to redeem from the general tax lien, and, except for that, a judgment to which he is not a party concludes him, is without force here, for, unless this lien is established by evidence aliunde the tax bill, no lien whatever obtains against the rights of such owner as the Nina Realty Company; whereas, in the case of the lien for general taxes, it comprehends the whole estate and every interest in the land, without regard to matter of ownership whatever, and obtains against both prior and subsequent incumbrancer at all hazards. In the case of the special tax bill, the lien obtains against the owners and their interests in the land only by virtue of its being established against their interest in the land by proof and not because it comprehends such interests whether or no as a matter of law. Unless the lien is asserted within the two-year period and subsequently established, there is naught from which redemption should be made.

It seems to me the opinion of the court in this case overlooks the fact that there is no lien here until established, and treats the matter as though there were a subsisting lien as in the case of general taxes or in the case of a mortgage, both of which liens obtain without any proof whatever. In this cause, instead of there being a lien upon the land, there exists only a right to establish a lien which attaches provided competent proof is made against the owner within two years. If the mortgagee is an owner, as declared in *Morey Engineering & Construction Co. v. St. Louis Artificial Ice Rink Co.* (Sup.) 146 S. W. 1142, then such mortgagee should be sued within the two years limitation prescribed by the charter in favor of an owner. For the reasons given above, I respectfully dissent. I deem the judgment of the court to be in conflict with that of the Supreme Court in the case last cited, in that it denies to the mortgagee the right of an owner to be sued within two years, as prescribed by the charter. Furthermore, the judgment of the court in this case is in conflict with the judgment of the Kansas City Court of Appeals in the case of *Forrey v. Holmes et al.*, 85 Mo. App. 114, which is directly in point, to the effect that, unless the mortgagee is sued within two years, the right to establish a lien against his interests expires.

Because I deem the judgment to be in conflict with that given in the two cases last above cited, I request that the cause be certified to the Supreme Court for final determination.

GRANITE BITUMINOUS PAVING CO. v. PARKVIEW REALTY & IMPROVEMENT CO. et al.

(St. Louis Court of Appeals. Missouri. Dec. 3, 1912.)

1. MUNICIPAL CORPORATIONS (§ 564*)—ENFORCEMENT OF SPECIAL TAX BILLS—LIMITATIONS.

Under St. Louis City Charter, art. 6, § 25, providing for the maturity of special tax bills 30 days after service of notice on the owner, an action to enforce a tax bill brought within two years after maturity of the bill by service of notice against the owner, wherein the purchaser at a mortgage foreclosure sale is made a party defendant, is not barred by limitations.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1273; Dec. Dig. § 564.*]

2. APPEAL AND ERROR (§ 195*)—QUESTIONS REVIEWABLE—QUESTIONS NOT RAISED IN TRIAL COURT.

Where, in a suit to enforce a special tax bill, no question was raised as to the validity of the amendment of the bill so as to name one as owner, and no objection was made to the admission of the amended tax bill as evidence, the question of the validity of the amendment was immaterial.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 1149; Dec. Dig. § 195.*]

Appeal from St. Louis Circuit Court; Eugene McQuillan, Judge.

Action by the Granite Bituminous Paving Company against the Parkview Realty & Improvement Company and others. From a judgment for plaintiff, defendants appeal. Affirmed.

Bland & Cave and Carter, Collins & Jones, all of St. Louis, for appellants. Sturdevant & Sturdevant, of St. Louis, for respondent.

ROMBAUER, Special Judge. The record in this cause is identical with the record in cause 12,563, 151 S. W. 479, in which an opinion has been filed to-day, except in three respects, namely: First. That the amount of the special tax bill sued upon was only for \$160.81. Second. That the tax bill as originally issued was subsequently amended by the comptroller, so as to insert the name of the Parkview Realty Company as owner; the bill originally issued being one against the United Railways Company alone. Third. Notice and demand of payment was served on the Parkview Realty & Improvement Company named as owner in the special tax bill on February 28, 1907, and not before.

[1] Section 25 of article 6 of the charter of the city of St. Louis provides the conditions under which a special tax bill matures. The maturity of any installment of the bill, or of the entire bill as may be, is 30 days after notice is served on the owner; hence the special tax bill sued upon in this case matured as against the Parkview Realty Company on March 30, 1907. The Nina Realty Company, which is the successor in title of the Parkview Realty & Improvement

Company as well as of all the beneficiaries of the two mortgages of the Parkview Realty Company to the Lincoln Trust Company, was made a party defendant in the case on March 28, 1907, and within two years after the tax bill matured against the Parkview Realty Company and those claiming under it. Since it cannot be claimed on any rational theory that the beneficiaries in a deed of trust or mortgage are necessary parties defendant to a suit for its enforcement, after its foreclosure, and when the legal and beneficial title alike have vested in the purchaser at foreclosure sale, and since the purchaser, namely, the Nina Realty Company, was made a party defendant, within two years after the maturity of the bill, the question of limitation does not arise in this case.

[2] That the special tax bill was amended so as to name the Parkview Realty & Improvement Company as owner is, of course, immaterial, since no question is raised as to the validity of the amendment, and no objection was made by defendant to the admission of the amended tax bill as evidence. The same error appears by the record in making the judgment bear 8 per cent. interest from date of its rendition as in case 12,563.

It is therefore ordered that the motion for rehearing be sustained, and that so much of the judgment entry as contains the words "with interest at the rate of 8 per cent. per annum from the date of the judgment until paid" be stricken from the record, and that the judgment as thus amended be affirmed, and that the cause be remanded to the trial court to proceed in conformity with this opinion.

REYNOLDS, P. J., and NORTONI, J., concur. CAULFIELD, J., not sitting.

GRANITE BITUMINOUS PAVING CO. v. PARKVIEW REALTY & IMPROVEMENT CO. et al.

(St. Louis Court of Appeals. Missouri. Dec. 8, 1912.)

Appeal from St. Louis Circuit Court; Eugene McQuillan, Judge.

Action by the Granite Bituminous Paving Company against the Parkview Realty & Improvement Company and others. From a judgment for plaintiff, defendants appeal. Affirmed, and cause certified to the Supreme Court for final determination.

Bland & Cave and Carter, Collins & Jones, all of St. Louis, for appellants. Sturdevant & Sturdevant and Charles W. Bates, all of St. Louis, for respondent.

ROMBAUER, Special Judge. The record in this cause is identical with the one in

12,563, except the amount sued for, and the property sought to be charged with the lien of the special tax bill.

It is therefore ordered that the motion for rehearing be sustained, that the record entry of the judgment be amended, as is ordered to be done in cause 12,563 (151 S. W. 479), and as thus amended be affirmed, and that the cause be remanded to the trial court for further proceedings. In this disposition of the case REYNOLDS, P. J., concurs. CAULFIELD, J., not sitting. NORTONI, J., dissents for the reason stated in his dissenting opinion in cause No. 12,563.

The cause is therefore certified to the Supreme Court for final determination.

NORTONI, J. (dissenting). As the judgment of the court in this case involves the identical question and determines it in the same way as that involved in the case of Granite Bituminous Paving Company v. Parkview Realty & Improvement Company et al. (No. 12,563) 151 S. W. 479, between the same parties and decided to-day, I respectfully dissent therefrom for the reasons given in the dissenting opinion filed in the case last mentioned. I deem the judgment of the court in this case to be in conflict with the judgment of the Kansas City Court of Appeals in the case of Forrey v. Holmes, 65 Mo. App. 114, and also with the judgment of the Supreme Court in the case of Morey Engineering & Construction Co. v. St. Louis Artificial Ice Rink Co. (Sup.) 146 S. W. 1142, and therefore request that the cause be certified to the Supreme Court for final determination as provided in the Constitution.

GRANITE BITUMINOUS PAVING CO. v. PARKVIEW REALTY & IMPROVEMENT CO. et al.

(St. Louis Court of Appeals. Missouri. Dec. 8, 1912.)

1. MUNICIPAL CORPORATIONS (§ 567*)—ENFORCEMENT OF SPECIAL TAX BILLS—PLEADINGS—BURDEN OF PROOF.

An answer in a suit to enforce a special tax bill which alleges that in making the assessment a tract of land not subdivided was arbitrarily divided into lots and separate tax bills issued against it, one of which was sought to be enforced, etc., alleges new matter which defendant has the burden of establishing by legal evidence to defeat a recovery.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1276-1281; Dec. Dig. § 567.*]

2. MUNICIPAL CORPORATIONS (§ 485*)—PUBLIC IMPROVEMENTS—SPECIAL TAX BILLS—VALIDITY.

Under the St. Louis city charter, making special tax bills prima facie evidence of a proper assessment, a special tax bill was properly adjudged valid as against the claim that in making the assessment a tract of land not subdivided was arbitrarily divided into two lots,

and that two distinct tax bills were issued against it.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1140-1144; Dec. Dig. § 485.*]

Norton, J., dissenting.

Appeal from St. Louis Circuit Court; Eugene McQuillan, Judge.

Action by the Granite Bituminous Paving Company against the Parkview Realty & Improvement Company and others. From a judgment for plaintiff, defendants appeal. Affirmed and cause certified to the Supreme Court for final determination.

Bland & Cave and Carter, Collins & Jones, all of St. Louis, for appellants. Sturdevant & Sturdevant, of St. Louis, for respondent.

ROMBAUER, Special Judge. The record in this case is substantially the same as the record in cause No. 12,563, 151 S. W. 479, except touching certain matters hereinafter stated. The tax bill was issued against the Parkview Realty & Improvement Company; the assessment amounting to \$1,015.16. The appellants, however, assign an additional error to those assigned in cause No. 12,563. Their answers state, among other things: "That said tract of land is used by this defendant as one lot, is fenced as one lot, tract, or parcel of ground, and has not been in any way subdivided either in fact or as shown by any recorded plats of additions or subdivisions to the city of St. Louis, and constitutes but one lot within the meaning of section 14 of article 6 of the charter of the city of St. Louis; that the assessment district for the improvement of Union avenue, for which the tax bill sued on was issued, extended at this point 1,535 feet west of Union avenue, and included the said tract of land for that distance west of Union avenue, and that, under the provisions of section 14 of article 6 of the charter of the city of St. Louis, all that portion of said tract of land lying and being within the said assessment district should have been assessed as one lot in the proportion that its area bore to the area of the entire district, and one tax bill only should have been issued against the whole of such portion of said tract for such assessment, but that, in fact, in making said assessment, the portion of said tract of ground within the assessment district was arbitrarily and in violation and in contravention of the provisions of said section 14 of article 6, divided into two lots, one including said tract for 1,140 feet west of Union avenue, and the other including the remainder of said tract within said district, and was assessed as two lots and two separate and distinct tax bills issued against it and two suits brought against this defendant on said two tax bills; that tax bill No. 3,655, the bill here sued on, is one of the said two improperly issued tax bills, and tax bill No. 3,648 on which a similar suit is now pending in division No. 8,

being cause No. 46,627 in said division, is the other, and that for the reasons aforesaid said tax bill No. 3,655 here sued on is void."

[1] This new matter in the answer was denied by plaintiff's reply, and put the onus of establishing it by evidence upon the defendants, but the defendants offered no legal evidence to substantiate it. Special tax bill No. 3,648 referred to in defendant's answer was not offered in evidence by defendants, nor were the files in cause No. 46,627, referred to in defendant's answer, offered in evidence. The only testimony bearing on that subject is the testimony of Joseph Pasquier, an employé in the street department of the city of St. Louis, who testified on his cross-examination, and being recalled by the defendants, that two tax bills were issued against the property of the Parkview Realty & Improvement Company, one for a frontage of 1,140 feet, and the other for a frontage of 395 feet, that these two parcels were at that time divided by the proposed center line of Belt avenue (since opened), and were in different blocks of the city of St. Louis as established by the street department.

[2] Since the charter makes the special tax bill prima facie evidence of a proper assessment we cannot put the trial court into error for upholding its validity against defendants' contention that one tax bill only should have been issued covering the entire frontage of 1,535 feet. The record also fails to show any objection on the part of defendants to the introduction of the special tax bill in evidence, because the objection contained at the bottom of page 26 of appellants' abstract is confined to the irrelevancy of certain deeds as evidence. We have gone thus fully into this matter, since in the foregoing discussion of the subject, and the conclusion arrived at, all the members of the court agree. The same error appears by the record in making the judgment bear 8 per cent. interest until paid as in case 12,563.

It is therefore ordered that the motion for rehearing be sustained, and that so much of the judgment entry as contains the words, "with interest thereon at the rate of 8 per centum per annum from the date of this judgment until paid," be stricken from the record, and that the judgment as thus amended be affirmed, and that the cause be remanded to the trial court to proceed in conformity with this opinion. REYNOLDS, P. J., concurs. NORTON, J., concurs, in those parts of the opinion, which uphold the validity of the tax bill when issued, but holds the same is barred by limitation. CAULFIELD, J., not sitting.

In conformity with the order made in cause No. 12,563, the cause is certified to the Supreme Court for final determination.

NORTON, J. (dissenting). As the judgment of the court in this case involves the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

identical question and determines it in the same way as that involved in the case of *Granite Bituminous Paving Company v. Parkview Realty & Improvement Company et al.* (No. 12,663) 151 S. W. 479, between the same parties and decided today, I respectfully dissent from the conclusion on that question alone for the reasons given in the dissenting opinion filed in the case last mentioned. I deem the judgment of the court in this case to be in conflict with the judgment of the Kansas City Court of Appeals in the case of *Forrey v. Holmes et al.*, 65 Mo. App. 114, and also with the judgment of the Supreme Court in the case of *Morey Engineering & Construction Co. v. St. Louis Artificial Ice Rink Co.* (Sup.) 146 S. W. 1142, and therefore request that the cause be certified to the Supreme Court for final determination as provided in the Constitution.

MADDEN v. MISSOURI PAC. RY. CO.

(Kansas City Court of Appeals. Missouri, Nov. 25, 1912. Certified to Supreme Court, Nov. 25, 1912.)

1. MASTER AND SERVANT (§ 197*)—FELLOW SERVANTS—WHO ARE.

A machinist's helper in railroad shops and a machinist acting as foreman are fellow servants while engaged together in moving a brakebeam from the blacksmith shop to the roundhouse, there to be unloaded and placed under a locomotive.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 489, 490; Dec. Dig. § 197.*]

2. MASTER AND SERVANT (§ 180*) — FELLOW SERVANTS—LIABILITY OF MASTER.

The common-law rule that the negligence of a servant causing injury to a fellow servant may not be imputed to the master, and the risk of such injury is assumed by the injured servant, has been abrogated by statute, so far as railroad companies are concerned.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 359-361, 363-368; Dec. Dig. § 180.*]

3. MASTER AND SERVANT (§ 180*)—INJURY TO SERVANT—NEGLIGENCE OF FELLOW SERVANT—STATUTORY PROVISIONS.

Employees in railroad shops engaged in moving a brakebeam from the blacksmith shop to the roundhouse, to be there unloaded and placed under a locomotive, are within the fellow servant statute of Kansas (Gen. St. Kan. 1909, § 6999), making every railroad company liable for damages to any employee in consequence of the negligence of any other employee.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 359-361, 363-368; Dec. Dig. § 180.*]

4. MASTER AND SERVANT (§ 279*)—INJURY TO SERVANT — NEGLIGENCE OF FELLOW SERVANT.

In an action for injuries to a servant while assisting a fellow servant in removing a brakebeam from the blacksmith shop in railroad shops to the roundhouse, evidence held to support a finding of negligence of the fellow servant.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 973-975, 978-980; Dec. Dig. § 279.*]

5. MASTER AND SERVANT (§ 216*)—INJURY TO SERVANT—ASSUMPTION OF RISK.

Under the rule in force in Missouri that a servant does not assume risks created by the master's negligence, or under the rule in Kansas that a servant who, with full knowledge of the danger of the risk, continues in the service assumes the risk, though caused by the master's negligence, an employee in railroad shops assisting a coemployee in moving a brakebeam from the blacksmith shop to the roundhouse does not assume the risk of the coemployee's negligence in doing his part of the work.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 567-573; Dec. Dig. § 216.*]

6. PLEADING (§ 433*)—INJURY TO SERVANT—PETITION—SUFFICIENCY.

A petition, in an action for injuries occurring in Kansas to an employee in railroad shops, which alleges that plaintiff was a machinist's helper and worked under a machinist, who was a foreman, and that the injury was caused by his negligence in lifting a brakebeam and suddenly dropping it while plaintiff was in a place of danger, does not state a common-law cause of action, but states a cause of action under the fellow servant act (Rev. St. 1909, § 5434), and under Gen. St. Kan. 1909, § 6999, making every railroad company liable for damages done to any employee by the negligence of any other employee, and supports a recovery as against the objection raised after verdict, based on the failure to plead the statute of Kansas.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. §§ 1451-1477; Dec. Dig. § 433.*]

7. PLEADING (§ 395*)—ISSUES, PROOF, AND VARIANCE.

A plaintiff cannot plead one cause of action and recover on another.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. §§ 1333-1335; Dec. Dig. § 395.*]

8. EVIDENCE (§ 80*) — STATUTES (§ 281*) — STATUTES OF SISTER STATES.

One relying on the law of a sister state for his cause of action must allege in his pleading what the statute is, and his failure to do so subjects his petition to attack by demurrer; but where the petition states a good cause of action under the statutory law of Missouri, and defendant, failing to demur, files answer and invites judgment on the facts as pleaded, the presumption will arise that the law of the sister state is similar to the law of Missouri; and the petition, thus aided, is good after verdict.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 101; Dec. Dig. § 80;* *Statutes*, Cent. Dig. §§ 380, 381; Dec. Dig. § 281.*]

9. EVIDENCE (§ 80*)—LAW OF SISTER STATE—COMMON LAW—PRESUMPTIONS.

The court cannot presume that the common law is in force in Kansas; but, in the absence of any showing to the contrary, it will presume that the statutory law of Kansas is like the statutory law of Missouri.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 101; Dec. Dig. § 80.*]

10. MASTER AND SERVANT (§ 252*)—INJURY TO SERVANT—STATUTORY LIABILITY.

An action under Gen. St. Kan. 1909, § 6999, making every railroad company liable for damages to any employee caused by any negligence of other employees, provided notice of the injury has been given, unless an action is commenced within eight months, brought within eight months after the injury complained of, is maintainable without the statutory notice.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 806; Dec. Dig. § 252.*]

11. APPEAL AND ERROR (§ 216*) — INSTRUCTIONS—NONDIRECTION.

The defect in an instruction on the measure of damages, arising from the omission to give the legal elements on which the jury must base a verdict, is but a nondirection and not a misdirection; and defendant, failing to request an instruction, on the subject may not complain.

[Ed. Note.—For other cases, see *Appeal and Error*, Dec. Dig. § 216.*]

12. DAMAGES (§ 216*)—PERSONAL INJURIES—INSTRUCTIONS.

An instruction, in an action for personal injuries, on the measure of damages is not erroneous because it states the maximum damages the jury may assess, if finding a verdict for plaintiff.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 548-555; Dec. Dig. § 216.*]

13. APPEAL AND ERROR (§ 1003*)—VERDICT—CONCLUSIVENESS.

A verdict for a party whose evidence is substantial and presents issues of fact will not be set aside as against the weight of the evidence, though the court, on appeal, believes that it is against the weight of the evidence.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3938-3943; Dec. Dig. § 1003.*]

Appeal from Circuit Court, Jackson County; James H. Slover, Judge.

Action by Ralph Morgan Madden against the Missouri Pacific Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed, and cause certified to the Supreme Court.

Martin L. Clardy, of St. Louis, and Ed. J. White, of Kansas City, for appellant. Henry J. Latschaw, of Kansas City, for respondent.

JOHNSON, J. Action by a servant to recover damages for personal injuries he alleges were caused by the negligence of his master. A trial of the issues resulted in a verdict and judgment for plaintiff in the sum of \$7,500, and the cause is before us on the appeal of defendant.

The evidence of plaintiff tends to show the following state of facts: Plaintiff was employed in the yards and machine shops of defendant in Kansas City, Kan., as a machinist's helper, and worked under the direction of the machinist. He worked at night, and was injured during the night of January 27, 1910. A heavy metal brakebeam had been taken to the blacksmith shop to be repaired, and after it had been repaired and was still hot it was loaded crosswise on a truck and wheeled by plaintiff from the blacksmith shop into the roundhouse, where it was to be unloaded and placed under a locomotive. The machinist walked beside the truck, and, when it stopped at the place of unloading, directed plaintiff to help unload. The two men stood on opposite sides of the truck, and the order of the machinist contemplated that each should lift an end of the beam, raise the load, and carry it to the place where it was to be deposited. Both

men wore heavy gloves, and just before he started to lift his end the machinist took off one of his gloves to enable him to light his pipe. He did not replace his glove, but seized the beam with both hands and raised up his end, when, being burned on the bare hand by the heated metal, he suddenly dropped or threw down the beam end with such force that the truck was swung violently around, and plaintiff, who was stooping and just beginning to lift his end, was struck in the back by the truck and received the injuries of which he complains.

The evidence of defendant contradicts that of plaintiff on all points, and tends to show that plaintiff received no injuries, or, if he did, that they were not received in the manner claimed by him.

The petition alleges, in substance, that the machinist was the foreman of plaintiff, and that the injury was caused by his negligence in lifting the brakebeam and suddenly dropping it while plaintiff was in a place of danger. No reference is made to any statute of Kansas. The petition was not attacked by demurrer. The answer contains a general denial, an allegation that plaintiff and the machinist were fellow servants, and a plea that "a statute known and designated as section 22 of chapter 341 of the Laws of said state of Kansas, was enacted in the year 1905, which section provides that, in case of an injury being sustained by an employé of a railway company, notice in writing that such injury has been sustained, stating the time and place thereof, shall be given by or on behalf of the person injured to such railroad company within eight months after the occurrence of the injury; that the giving of such notice is a condition precedent to the maintenance of a suit for the alleged injury; and that no notice of the alleged injury claimed by plaintiff to have been sustained by him, such as is required by said statutes of Kansas, has ever been given to this defendant; and it pleads these facts in bar of plaintiff's action."

The section of the statutes (to part of which reference is thus made in the answer) was enacted by the Legislature of Kansas in 1905 (Laws 1905, c. 341), amended in 1907, and appears in the General Statutes of 1909 as section 6999. It is the fellow servant statute, and its material parts are as follows: "Every railroad company organized or doing business in the state of Kansas shall be liable for all damages done to any employé of said company in consequence of any negligence of its agents; or by any mismanagement of its engineers or other employés, to any person sustaining such damage: Provided, that notice in writing that an injury has been sustained, stating the time and place thereof, shall have been given by or on behalf of the person injured, to such railroad company within eight months after

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

the occurrence of the injury: Provided, however, that where an action is commenced within said eight months, it shall not be necessary to give said notice."

The statute was introduced in evidence by both parties, by defendant as section 22, c. 341, Laws 1905, and by plaintiff as section 6909, Statutes 1909. Defendant further introduced decisions of the Supreme Court of Kansas, to some of which we shall refer in the opinion. At the close of all the evidence defendant offered an instruction in the nature of a demurrer to the evidence, which the court refused. Counsel for defendant contend that this instruction should have been given, and, first, we shall address our attention to the questions raised in support of this contention.

[1] Though the petition alleges that the machinist was the foreman of plaintiff, and therefore the vice principal of defendant, the pleaded facts relating to the injury which find support in the evidence of plaintiff disclose that the alleged cause of the injury was negligence of a fellow servant, and not of a vice principal. The co-operation of plaintiff and the machinist in unloading the brake-beam from the truck was an act of fellow service; and under the dual capacity doctrine recognized in our jurisprudence the relation of the collaborators in the performance of such service is to be determined by the nature of the service, and not by any difference in rank between the collaborators. *McGowan v. Railway*, 61 Mo. 528; *Stephens v. Lumber Co.*, 110 Mo. App. 398, 86 S. W. 481; *Bokamp v. Railway*, 123 Mo. App. 270, 100 S. W. 689.

[2] The machinist will be regarded as the fellow servant of plaintiff, and our next subject is the question of whether or not the evidence of plaintiff discloses that his injury was caused by negligence of his fellow servant, or by a risk incidental to the employment, and therefore assumed by him as a part of his contract with defendant. Before the enactment of the fellow servant statutes, the rule in Kansas, as in this state, was the common-law rule that the principle of respondeat superior did not apply to fellow servants; and therefore that negligence of a servant that caused the injury to a fellow servant could not be imputed to the master, and that the risk of injury from such cause was one of the ordinary hazards of the employment assumed by the injured servant. But the fellow servant statute abrogates the old rule, so far as employes of railroad companies are concerned, and expressly provides that such companies shall be liable for all damages done to any employe of such company by the negligence of a fellow employe. Construing the statute, the Supreme Court of Kansas say, in *Railway v. Green*, 75 Kan. loc. cit. 512, 89 Pac. 1045: "Under this statute the elements of a cause of action against a railway company

are: Negligence of one employe in some matter connected with the operation of the road and damages to another in consequence of such negligence. If, after the master's common-law duties are all performed, a skilled employe negligently chooses and uses an insufficient appliance, or makes a negligent use of an appliance sufficient if properly handled, and as a consequence another employe sustains damage, the master is responsible; and the statute makes no provision for notice to the master, in advance of the act, that the employe is about to do a careless thing."

[3] In that case, as here, the work being done was the repairing of a locomotive, and we regard the decision as authority supporting the view we entertain that service of that character falls within the purview of the fellow servant statute of Kansas, as well as of the like statute of this state. *Prash v. Railroad*, 151 Mo. App. 410, 132 S. W. 57; *Turner v. Railroad*, 132 Mo. App. 43, 111 S. W. 841; *Huston v. Railroad*, 129 Mo. App. 583, 107 S. W. 1045; *Orendorff v. Railroad*, 116 Mo. App. 348, 92 S. W. 148.

[4] That the conduct of the machinist was negligent, and that the injury was not the result of a mere accident that ordinary care and prudence would not have anticipated, is a conclusion well sustained by the facts and circumstances of the case. This is not a case where the laborer whose act caused the injury was guilty of a mere error of judgment, as, for example, where he overtakes his strength, thinking he can lift or carry a load that turns out to be too heavy for him (*Pulley v. Standard Oil Co.*, 136 Mo. App. 172, 116 S. W. 430), but belongs to the class of cases where one of two or more collaborators, upon whose observance of reasonable care depends the safety of his fellows, negligently fails to exercise such care. *Briscoe v. Railroad*, 130 Mo. App. 513, 109 S. W. 93; *White v. Railroad*, 156 Mo. App. 563, 137 S. W. 645.

The jury were entitled to the conclusion that a reasonably careful and prudent person in the situation of the machinist would have realized the danger to plaintiff if he should raise and then suddenly drop his end of the beam while plaintiff was in the act of lifting his end, and that, with knowledge that the beam was hot, he would not have seized it with his bare hand, especially when he had gloves to use on such occasions.

[5] The injury appears to have been the direct result of the negligence of the machinist in failing reasonably to employ means at hand for the safe doing of the work. Since the cause of the injury was negligence for which defendant was liable under the fellow servant rule, it follows that the doctrine of assumption of risk can have no application. In this state the rule is well established that the servant does not and cannot assume risks created by the master's negligence. In Kansas the rule appears to be that if the servant, with full knowledge of the nature and

danger of a risk, continues in the service such risk will be regarded as one assumed by the servant, though it be caused by the negligence of the master. *Railroad v. Schroeder*, 47 Kan. 315, 27 Pac. 965. Under neither rule may the risk in question be considered one assumed by plaintiff.

[6] But it is argued by defendant that plaintiff cannot recover in this action, for the reason that his petition falls to ground his cause on the fellow servant statute of Kansas, and alleges only common-law negligence.

The petition does not state a common-law cause of action. The common law afforded a servant no cause of action against his master for an injury caused by the negligence of a fellow servant, and in common-law states a servant can have a right of recovery against his master in such cases only in virtue of some statute. In this state, where the common law is in force, the only instances in which a servant may hold his master liable for the negligence of a fellow servant are those falling within the purview of section 5434, Rev. Stat. 1909, which applies only to agents and servants engaged in the work of operating a railroad.

Since the petition pleaded facts which characterized the negligent and injurious act as that of a fellow servant, it cannot be said to have pleaded a common-law cause of action. We are aware that this view is not in harmony with that expressed by the Springfield Court of Appeals in *Ham v. Railroad*, 149 Mo. App. 200, 130 S. W. 407. In that case the petition alleged that the injury occurred in Arkansas, and was caused by the negligence of the plaintiff's fellow servants, who, with him, were engaged in the work of operating a railroad. Our learned Brethren of that court assumed that, since the petition failed to plead the Arkansas fellow servant statute, it bottomed plaintiff's cause of action on a common-law foundation, and held that the proof at the trial of the existence of a fellow servant statute in Arkansas disproved the pleaded cause, "because the common law had been abolished by statute, and plaintiff could not recover on the statute because he had not pleaded it." "Having pleaded his action," say the court, "on a common-law foundation, he must stand or fall by his cause of action as stated, and cannot be allowed, when he finds that he cannot recover at common law, to then shift his position to the statutory liability"—citing *Mathieson v. Railroad*, 219 Mo. 542, 118 S. W. 9.

[7] Of course, our Brethren are right in saying that a plaintiff cannot plead one cause of action and recover on another; but, in our opinion, they fall into a very material error in holding that the petition stated a common-law cause when, as we have shown, the liability of a master for an injury to his servant inflicted by the negligence of a fellow servant is a rule entirely foreign to the common law and must rest on statute. In that

case, as in this, the petition pleaded a statutory cause, and, had the cause accrued in this state, would have been invulnerable to attack, even by demurrer. But, since the cause arose in a sister state, the duty devolved on the plaintiff of alleging in his petition the statute of such state on which his right of recovery depended.

[8] The rule is well settled that when one relies on the law of a foreign country or of a sister state for his cause of action he is required to state in his pleading what that law is, and his failure to do so will subject the petition to attack by demurrer. But where, as here, such petition states a good cause of action under the statutory law of this state, and the defendant, failing to demur, files answer and thereby invites judgment on the facts as pleaded, the presumption arises that the law of such sister state is similar to our own; and the petition, thus aided by answer, will be deemed good, especially after verdict. *Lee v. Railway*, 195 Mo. loc. cit. 415, 92 S. W. 614; *Flato v. Mulhall*, 72 Mo. 522; *Burdick v. Railroad*, 123 Mo. 221, 27 S. W. 453, 26 L. R. A. 384, 45 Am. St. Rep. 528; *Biggie v. Railroad*, 159 Mo. App. 350, 140 S. W. 602; *Coleman v. Luchsinger*, 224 Mo. 1, 123 S. W. 441, 26 L. R. A. (N. S.) 934.

[9] Since the territory now occupied by the state of Kansas was acquired from France in 1803, and at no time was an English possession, we cannot presume, in the absence of proof to the contrary, that the common law is part of the jurisprudence of that state; but in the condition of the pleadings before us we should begin with the initial presumption that Kansas has a fellow servant statute similar to our own. *Hurley v. Railway*, 57 Mo. App. loc. cit. 682; *Flato v. Mulhall*, supra. As is said in *Lee v. Railway*, supra, "in the absence of any showing to the contrary, we will presume that the law of Kansas (a statutory law) is like the law of Missouri." In *Flato v. Mulhall*, the Supreme Court refused to indulge in any such presumption, holding that, in the absence of an exposition of the foreign law, "the law of the forum must govern." Whether we accept this view, or that expressed later in the *Lee Case*, the result is the same. A petition that states facts that would constitute a good cause of action under our law should not be held bad after answer to the merits.

[10] We do not find anything in the opinion in *Mathieson v. Railroad*, supra, greatly relied on by defendant, at variance with this view, which unquestionably finds strong support in *Lee v. Railroad*, supra. In the *Mathieson Case* the fellow servant statute of Kansas, considered by the court, contained a provision "that notice in writing of the injury so sustained stating time and place thereof, shall have been given by or on behalf of the person injured to such railroad company within ninety days after the occurrence of

the accident." The petition did not allege that provision, nor a compliance therewith; and the court held that it did not state a cause of action and was fatally defective, for the reason that the giving of the notice was a condition precedent that must be satisfied before a right to maintain an action would accrue. If our own fellow servant statute contained such provision, a plaintiff would be required to plead and prove compliance with it, since such compliance would be an indispensable element of his cause of action. *Reno v. St. Joseph*, 169 Mo. 642, 70 S. W. 123; *Strange v. St. Joseph*, 112 Mo. App. 629, 87 S. W. 2.

The crucial question in that case was not the one we are considering, but was the question of the omission from the averments of the petition of one of the prime elements of the right of the plaintiff to maintain an action. The fellow servant statute of Kansas now before us is an amendment of that considered by the Supreme Court in the *Mathieson* Case. The amendment consists of a change in the time for giving the notice from 90 days to 8 months, and of the following additional provision, viz.: "That where an action is commenced within said eight months it shall not be necessary to give said notice."

This suit was commenced in less than eight months after the injury, and consequently the plaintiff was not required to give any notice. The decision in the *Mathieson* Case can have no application to the present case; and, so far as the issues before us are concerned, the Kansas fellow servant statute should be treated as though it contained no provision for notice. So regarded, it is similar in material features to our statute; and, since the petition states a good cause of action under either statute, it should not be held fatally defective after verdict because of the omission to plead the statute of Kansas on which the action is founded. The demurrer to the evidence was properly overruled.

[11] The only instruction given at the request of plaintiff was on the measure of damages. Defendant complains that the instructions of plaintiff, in omitting to give the jury the legal elements upon which to base a verdict, left them free to explore fields not embraced within the bounds of the pleadings. The writer's own view of instructions of such character coincides with that of defendant; but the decisions of the Supreme Court and Courts of Appeals approve the practice, and regard such omission as being only non-direction, and not as constituting a misdirection of the jury.

[12] The instruction further is criticised by defendant, because it states the maximum damages the jury may assess in their verdict, if it be for plaintiff. Recently the Supreme Court considered the question thus

presented, and decided it against the contention of defendant. *Stid v. Railway*, 236 Mo. 382, 139 S. W. 172.

[13] Finally, defendant argues with much earnestness that the verdict is against the weight of the evidence. We believe it is, and, if we were authorized by law to weigh the evidence, would not hesitate to reverse the judgment. But we are compelled to admit the evidence of plaintiff is substantial, and presented issues of fact for the solution of the triers of fact. Finding the case in such situation, we could not set aside the verdict without assuming an authority the law does not bestow upon appellate tribunals.

The judgment is affirmed; but, as what we have said is in conflict with the decision of the Springfield Court of Appeals in *Ham v. Railroad*, supra, the cause is certified to the Supreme Court. All concur.

SHELTON v. METROPOLITAN ST. RY. CO.

(Kansas City Court of Appeals. Missouri.
Nov. 11, 1912. Rehearing Denied
Dec. 9, 1912.)

1. TRIAL (§ 140*)—QUESTIONS FOR JURY—CREDIBILITY OF WITNESSES.

Whether the testimony of witnesses as to the appearance, movements, and attitude of a person walking on an elevated railroad above them as they stood in the street at twilight, and while they could see him merely in silhouette, was entitled to credit, was a question for the jury.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 334, 335; Dec. Dig. § 140.*]

2. STREET RAILROADS (§ 98*)—INJURIES TO PERSONS ON TRACKS—CONTRIBUTORY NEGLIGENCE.

A pedestrian who at night crossed the trestle of a street railway company on which cars ran at frequent intervals is guilty of contributory negligence, where he failed to keep any lookout for approaching cars.

[Ed. Note.—For other cases, see *Street Railroads*, Cent. Dig. §§ 204-208; Dec. Dig. § 98.*]

3. STREET RAILROADS (§ 103*)—RAILROADS (§ 390*)—INJURIES TO PERSONS ON TRACKS—“HUMANITARIAN RULE.”

The humanitarian rule which may be invoked against railroads or street railroads for injuries to persons on their tracks applies where, regardless of the cause of the perilous condition of the traveler, the railroad's servant in charge of the engine or car, in the proper performance of duty, could have discovered the danger and averted it, but negligently or wantonly failed to perform that humane duty.

[Ed. Note.—For other cases, see *Street Railroads*, Cent. Dig. § 219; Dec. Dig. § 103;* *Railroads*, Cent. Dig. §§ 1324, 1325; Dec. Dig. § 390.*]

4. STREET RAILROADS (§ 81*)—RAILROADS (§ 370*)—INJURIES TO PERSONS ON TRACK—HUMANITARIAN RULE.

An engineer or motorman is required to keep a sharp lookout for pedestrians only at places where he has reason to expect they may be on the track, but, where a trestle of a street railway company has been used by the public as a footpath so constantly and notoriously as to raise a presumption of knowledge on the

part of the company, its servants are bound to exercise the same vigilance in looking for travelers in that place as in places where the public have a right to go on the tracks.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 172-177; Dec. Dig. § 81; Railroads, Cent. Dig. §§ 1262-1265; Dec. Dig. § 370.*]

5. STREET RAILROADS (§ 117*)—INJURIES TO PERSONS ON TRACKS—DUE TO STOCK CARS.

While the motorman of a street car is not bound upon seeing a pedestrian upon the track to give him warning or stop the car until something in the appearance or attitude of the traveler shows that he is oblivious to the peril, and cannot save himself, yet, where it appeared that the traveler was oblivious, and the motorman could, in the exercise of ordinary care, have avoided the injury, the question of negligence is one for the jury.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 239-257; Dec. Dig. § 117.*]

6. DEATH (§ 35*)—ACTION UNDER FOREIGN LAWS.

No action for wrongful death occurring in a foreign state can be maintained in the domestic forum, unless the action is granted by the laws of the foreign state.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 50; Dec. Dig. § 35.*]

7. STATUTES (§ 281*)—PLEADING FOREIGN LAWS.

A foreign statute on which a cause of action is based must be pleaded and proven as a fact.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 580, 581; Dec. Dig. § 281.*]

8. EVIDENCE (§ 80*)—PRESUMPTIONS—COMMON LAW OF OTHER STATE—HUMANITARIAN DOCTRINE.

The humanitarian rule is a common-law, and not a statutory, rule, and, in the absence of proof to the contrary, it will be presumed that it is recognized in the jurisprudence of a common-law state, and so, in an action in the domestic court to enforce a cause originating in a common-law state, it is not necessary to plead and prove the existence of that rule in such state.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 101; Dec. Dig. § 80.*]

9. EVIDENCE (§ 80*)—PRESUMPTIONS—LAWS OF OTHER STATES—COMMON LAW.

The territory of which the state of Kansas is a part, never having been subject to Great Britain, but having been a French possession at the time of its purchase by the United States, no presumption can be indulged that the common law exists therein, hence, one whose cause of action which depends on the common law and arose in Kansas has the burden, upon seeking to recover in another state, of pleading and proving the existence of the common law.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 101; Dec. Dig. § 80.*]

10. PLEADING (§ 433*)—DEFECTS CURED BY VERDICT.

Where the petition in an action depending on a rule of the common law, which arose in a state in which the common law had never been in force, failed to allege the existence of that rule in the state, and defendant answered over on the merits, it will after verdict be presumed that such rule did exist in the foreign state.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1451-1477; Dec. Dig. § 433.*]

Appeal from Circuit Court, Jackson County; Thos. J. Seehorn, Judge.

An action by Ruth Shelton against the Metropolitan Street Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

John H. Lucas and James E. Nugent, both of Kansas City, for appellant. Oldham & James, of Kansas City, for respondent.

JOHNSON, J. Plaintiff commenced this suit in the circuit court of Jackson county to recover damages for the death of her husband which she alleges was caused by negligence of defendant.

The cause of action, if one exists, arose in Kansas, and the petition pleads statutes of that state which, in certain instances, give to the widow of one whose death is caused by the negligence of another the right to maintain an action in damages. Sections 5319, 5320, Dassler's Gen. Stat. of Kansas 1905. Facts are alleged which bring plaintiff within the operation of those statutes, and a cause of action founded on what is known in this state as the "humanitarian doctrine" is pleaded. The petition does not plead the laws of Kansas relating to this species of negligence. Defendant did not attack the petition by demurrer or motion, but filed an answer tendering the general issue. A trial to a jury resulted in a verdict and judgment for plaintiff in the sum of \$5,000, and, after unsuccessfully moving for a new trial and in arrest of judgment, defendant appealed. The death of plaintiff's husband occurred a few moments after 9 o'clock in the evening of June 8, 1909, in Kansas City, Kan., at a place where the double tracks of one of defendant's street railway lines cross Reynolds avenue. This is a public street running east and west which crosses Sixth street at right angles. The two streets are on different levels; Reynolds avenue being much lower than Sixth street. Going south and east the tracks of defendant's railway run on Sixth street to a point just north of Reynolds avenue where they deflect to the southeast, leave Sixth street (which continues on south), and cross Reynolds avenue on an open trestle bridge. The bridge on Sixth street over Reynolds avenue is a short distance west of this railroad bridge, which is east of the east line of Sixth street. The latter bridge is about 75 feet long, and is double tracked. South-bound cars run on the west track, and it was one of such cars that killed the husband of plaintiff.

[1] There is strong evidence introduced by plaintiff which tends to show that the railway tracks from Sixth street southeastwardly had become a highway for pedestrians, and that such user had been so general and continuous that defendant must be held to have had knowledge of it and to have acquiesced in it. The husband of plaintiff used this pathway. He approached the trestle bridge from the southeast along the west track and without stopping, and, apparently without looking

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

ahead, proceeded to walk over the bridge. He had advanced some 10 or 12 feet on the bridge, walking on the cross-ties, when a south-bound electric street car struck him, and inflicted fatal injuries. The car carried an electric headlight, the way was unobstructed, and there was nothing to prevent the unfortunate man from seeing the car in ample time to escape injury, nor to prevent the motorman from seeing him in time to save him by stopping the car or giving warning signals. There is credible evidence to the effect that the deceased made no effort to avoid the car, and appeared to be oblivious of its approach until an instant before the collision, and that the motorman did not sound the bell nor attempt to stop until the moment of the collision. The speed of the car was six or eight miles an hour, and under the conditions obtaining the car could have been stopped in approximately 25 feet. The night was dark and a rainstorm was impending, but there was enough light cast by more or less distant street lamps to enable witnesses who lived on Reynolds avenue to observe the man go on the trestle and proceed in a manner indicative to them of inattention to his way. He wore a broad brim soft hat tilted forward and walked with downcast face. Counsel for defendant insist that the darkness was too great for these witnesses to discern these appearances, and that their testimony should be discarded as wholly incredible, but we think their credibility was an issue for the jury. They were on a much lower plane than the bridge, in looking up at the man saw him in silhouette, and it does not seem impossible for his general outlines, attitude, and movements to have been visible to them. The evidence does not show clearly whether the headlight carried on the car was of 16 or 32 candle power. It was one or the other, and we think it a fair inference from the evidence on this subject that a 32 candle power light was carried. The jury were entitled to find from all of the evidence that the headlight was strong enough and illuminated the track ahead a sufficient distance for the motorman to have seen the man on the track in ample time to have stopped the car in the intervening space. Had the man become aware of the approach of the car sooner than he did, he had two avenues of escape open to him, viz., to retrace his steps over the ties to solid ground, and then leave the track, or to cross over to the other track on the bridge. Each track was on a separate trestle, but the two were divided by a space that easily might have been crossed in a single step. These are the salient facts of the case, and the principal issues of law we are called upon to determine are those raised by the demurrer to the evidence which defendant argues should have been sustained.

[2] The first question we shall consider is that of the sufficiency of the facts we have stated to support the charge that the death of plaintiff's husband was caused by negligence

of defendant in failing to discharge a humanitarian duty it owed him. That the deceased was guilty of negligence that brought him into a perilous situation is a proposition that cannot be, and is not, disputed. If before going onto the bridge he had but lifted his eyes, he would have seen the car approaching, and would have realized that he could not cross the bridge in safety on the west track. And, even after he was on the bridge, he still could have escaped had he exercised reasonable care, either by turning back or by crossing over to the east track. The car was not coming fast, and its headlight illuminated the track. He was a vigorous man in the possession of unimpaired faculties, and the only reasonable explanation that may be given of his conduct in allowing the car to run him down is that he was walking, as plaintiff's witnesses say, with his attention diverted from the oncoming car and apparently riveted on the way immediately in front on his feet. The darkness was of a degree to require the exercise of special attention in walking over separated cross-ties, and doubtless the deceased found it a difficult and absorbing task to walk the ties in safety. No exculpatory explanation can be given for his conduct in going on the bridge with the car visible and in menacing proximity. He knew a car might come at any moment, and it was his duty to ascertain before going on the bridge that none would dispute his safe passage over a place so dangerous. A railroad track is a place of danger and the use of a railroad trestle bridge by a pedestrian is especially dangerous. In view of the proof of a general and continuous use of the bridge by pedestrians both by day and by night, we shall not say that any attempt of a pedestrian to cross the bridge in the night would be negligent in law, but we do say that one so using the bridge should exercise care commensurate with the dangers of the undertaking, and that the deceased did not exercise any care, but negligently placed himself in a situation of extreme peril. Such negligence precludes a recovery by plaintiff unless the evidence will support a reasonable conclusion that the motorman, had he been observing ordinary care, would have discovered the peril of the deceased in time to have saved him.

[3] The humanitarian rule is designed to deal with instances where, regardless of the cause of the perilous position of the traveler, the engineer or motorman of the approaching engine or car in the proper performance of his duty would have observed the danger and averted it, either by stopping or giving warning signals, but negligently or wantonly failed to perform such humane duty.

[4] It does not follow from the mere fact that a traveler is on the track in a dangerous place that the engineer or motorman must see him at the first moment and hasten to stop the engine or car, or give warning signals. An engineer or motorman is required

to keep a sharp lookout for pedestrians only at places where he has reason to apprehend they may be on the track, and is not held to the exercise of watchfulness at places where a pedestrian could not be present except as a trespasser. And the authorities generally and properly say that a railroad trestle bridge is no place for foot travelers, and that an engineer is not required to anticipate the presence of a traveler at such places, and to be on the lookout for him. But where, as in the present case, a bridge of this character has been used by the public as a footpath so constantly and notoriously as to raise the presumption that the company has knowledge of such use and by taking no steps to prevent it has silently acquiesced in it, the company is bound to anticipate that the use will be continued and to maintain the same vigilance in looking for travelers at such place as it would at places where people have a right to go upon the track, such as public crossings. The motorman in the case in hand was bound to anticipate the presence of travelers on the bridge and owed the deceased the duty of reasonable care to discover him there.

[5] The evidence shows that the motorman, with the aid of the headlight, could have seen the deceased some 75 feet away, and could have stopped the car in 25 feet. These facts of themselves would not be sufficient to support an inference of negligence on the part of the motorman. The mere fact that a traveler remains on the track after the approaching car is in threatening proximity would not indicate that he is unaware of the approach of the car, and will not leave the track in time to avoid injury. The humanitarian rule does not call for action on the part of the motorman until something in the appearance or attitude of the traveler proclaims to the watchful eye and careful mind that he is oblivious to his peril, and will not or cannot save himself. *Veatch v. Railroad*, 145 Mo. App. 232, 129 S. W. 404; *Bennett v. Railway*, 122 Mo. App. 703, 99 S. W. 480. Travelers often stay on the track until the last minute, and it would be unjust to require the operator of a car to stop or give warning every time he saw an able-bodied man on the track ahead. But we find facts and circumstances disclosed by the evidence that do support a reasonable inference that the peril of the deceased and his obliviousness and helplessness were obvious at a time when the car could and should have been stopped. The trestle presented obstacles to a hasty escape which were enhanced by the darkness. Whether he retreated by the way he came or crossed over to the other track, the deceased had to be careful of his movements, and could not proceed with celerity. In this respect the case is similar to that of *Williamson v. Railroad*, 139 Mo. App. 481, 122 S. W. 1113. And, further, the forward bend of the head of the

deceased, the position of his hat, the close attention he was giving his steps, and his unaltered progress were suggestive of his complete absorption by other objects of attention than the menacing danger. In these particulars the case is analogous to that of *Smith v. Railroad*, 129 Mo. App. 413, 107 S. W. 22, where we held the engineer was bound to take notice of such suggestive indications of obliviousness on the part of the endangered traveler. We conclude the evidence of plaintiff was sufficient to take the case to the jury on the issue of negligence under the humanitarian rule.

It is argued by counsel for defendant that the petition is fatally defective, and will not support the judgment, for the reason that it fails to allege facts showing that plaintiff had a cause of action under the laws of Kansas for the death of her husband. This insufficiency of the petition was allowed to go unchallenged by defendant until the motion in arrest, and the question we must decide is whether or not the defect is one that cannot be cured by verdict.

[6] Defendant is right in the contention that plaintiff could have no cause of action in this state if she had none under the laws of Kansas. As is said by Lamm, J., in *Newlin v. Railroad*, 222 Mo. loc. cit. 391, 121 S. W. 130: "No case under the *lex loci*, then no case under the *lex fori*." We applied this rule in *Chandler v. Railway*, 127 Mo. App. 34, 106 S. W. 553, and *Rahn v. Railroad*, 129 Mo. App. 686, 108 S. W. 570.

[7] Further we concede it was the duty of plaintiff to plead all of the facts constitutive of her cause of action which includes the fact that she had a cause of action under the laws of the state where the injury occurred. "When one relies on the law of a foreign country or of a sister state for his right of action, he is required to state in his pleading what the law of the foreign jurisdiction is. Such a law is to be pleaded and proven as a fact." *Lee v. Railway*, 195 Mo. loc. cit. 415, 92 S. W. 616.

[8] The humanitarian rule is a common-law, not a statutory, rule, and, in the absence of proof to the contrary, the presumption would be indulged that it is recognized in the jurisprudence of a common-law state, and, in an action prosecuted in our courts to enforce a cause which originated in a common-law state, it would not be necessary to plead and prove that the humanitarian rule obtains in such state, since we would assume, until it otherwise appeared, that the general jurisprudence of a sister state having the common law is the same as our own.

[9] The territory of which the state of Kansas is a part never was subject to Great Britain, but was a French possession at the time of its purchase by the United States. It was a stranger to the common law, and no presumption can be indulged that its fundamental jurisprudence is the same as

our own. Consequently the burden devolved on the plaintiff whose cause depends on a common-law rule to plead and prove that such rule belonged to the jurisprudence of the state of Kansas and the omission of such averment from the petition made it vulnerable to attack by demurrer. *Mathieson v. Railroad*, 219 Mo. 542, 118 S. W. 9.

[10] But in a number of cases the Supreme Court hold that the defect, if allowed to pass unchallenged before trial, will be deemed cured by an answer to the merits. By so answering the defendant, in effect, conceded that the petition stated a good cause under the laws of Kansas, and will not be allowed to take a contrary position in the motion in arrest. As is well said in *Lee v. Railway*, supra: "The defendant by its answer accepted the issue of fact tendered in the petition in the form as tendered; that is, without express reference to the laws of Kansas, the petition stated that the accident was caused by the negligence of defendant, and the answer expressly denied that fact. By so joining issue the defendant united with the plaintiff in inviting judgment on the facts as pleaded." Though we cannot presume that the common law was adopted in Kansas, we will presume, in the state of the pleadings before us, that the laws of that state are similar to our own laws, and and that the humanitarian rule is recognized and applied there as it is here. *Lee v. Railway*, supra, 195 Mo. loc. cit. 415, 92 S. W. 614; *Burdick v. Railway*, 123 Mo. 221, 27 S. W. 453, 26 L. R. A. 384, 45 Am. St. Rep. 528; *State v. Clay*, 100 Mo. 571, 13 S. W. 827; *Coleman v. Lucksinger*, 224 Mo. 1, 123 S. W. 441, 26 L. R. A. (N. S.) 934; *Biggle v. Railroad*, 159 Mo. App. 350, 140 S. W. 602.

The demurrer to the evidence was properly overruled. In what we have said we have answered the other points made by counsel for appellant in their brief.

The action was fairly tried, and the judgment is affirmed. All concur.

HINSHAW v. WARREN'S ESTATE.

(Springfield Court of Appeals. Missouri.
Dec. 2, 1912.)

1. LIMITATION OF ACTIONS (§ 28*)—CONTRIBUTION—LIMITATIONS.

A surety on a note who pays a judgment thereon can recover from his cosurety one-half of the amount paid, provided he sues therefor within the five years fixed by the statute of limitation.

[Ed. Note.—For other cases, see *Limitation of Actions*, Cent. Dig. §§ 134, 135; Dec. Dig. § 28.*]

2. LIMITATION OF ACTIONS (§ 83*)—SUSPENDING OF RUNNING OF LIMITATIONS—DEATH OF DEBTOR.

Where a surety on a note paid a judgment thereon, the subsequent death of his cosurety suspended the running of limitations as to the

time within which the suit for contribution must be brought, until letters of administration were issued.

[Ed. Note.—For other cases, see *Limitation of Actions*, Cent. Dig. §§ 426, 431-438; Dec. Dig. § 83.*]

3. EXECUTORS AND ADMINISTRATORS (§ 228*)—ESTABLISHMENT OF CLAIMS—FILING OF CLAIMS.

A claimant against a decedent's estate who makes out the claim, and takes it to the home of the clerk of the probate court to have it sworn to, without requesting the clerk to file it, does not thereby file the claim within the statute.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 642-647; Dec. Dig. § 228.*]

4. LIMITATION OF ACTIONS (§ 118*)—COMMENCEMENT OF ACTIONS—ACTS CONSTITUTING.

Whether an action has been commenced within the statute of limitations is determined by whether plaintiff complied with Rev. St. 1909, § 1756, providing that the filing of a petition in a court of record or a statement of account before a court not of record, and suing out of process therein, shall be deemed the commencement of a suit.

[Ed. Note.—For other cases, see *Limitation of Actions*, Cent. Dig. §§ 527, 528; Dec. Dig. § 118.*]

5. EXECUTORS AND ADMINISTRATORS (§ 225*)—PRESENTATION OF CLAIMS—STATUTORY LIMITATIONS.

Rev. St. 1909, §§ 190-194, providing that demands against decedents' estates not exhibited within two years after the granting of letters are barred, and prescribing the manner of exhibiting demands, are, when considered together, a special statute of limitations, without affecting the general statute of limitations, and a surety on a note who pays the judgment thereon must file his demand for contribution against the estate of the deceased cosurety within five years from the date of payment of such judgment, after deducting the time between the cosurety's death and the granting of letters on his estate.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 640; Dec. Dig. § 225.*]

6. LIMITATION OF ACTIONS (§ 4*)—TIME TO SUE—LEGISLATIVE AUTHORITY.

The Legislature may fix arbitrarily the time in which different actions may be commenced, and may fix the period of five years as the time in which a surety paying the debt may sue a cosurety for contribution.

[Ed. Note.—For other cases, see *Limitation of Actions*, Cent. Dig. §§ 10, 11; Dec. Dig. § 4.*]

7. EXECUTORS AND ADMINISTRATORS (§ 232*)—EXHIBITING OF CLAIMS—ESTOPPEL.

An administrator who long before the running of limitations agreed to waive service of notice of claim against decedent's estate was not thereby estopped from pleading limitations where claimant delayed the presentation of his claim until limitations had run.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 830; Dec. Dig. § 232.*]

8. EXECUTORS AND ADMINISTRATORS (§ 245*)—ALLOWANCE OF CLAIMS—LIMITATIONS—PLEADINGS.

To invoke the bar of limitations to a claim against a decedent's estate, it is only necessary to call the trial judge's attention to the fact, and it is not necessary to file a written plead-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes
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ing setting up limitations, either in the probate court, or in the circuit court on appeal.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 867-869; Dec. Dig. § 245.*]

Error to Circuit Court, Pulaski County;
L. B. Woodside, Judge.

Action by A. J. Hinshaw against the estate of Robert Warren. There was a judgment for defendant, and plaintiff brings error. Affirmed.

See, also, 162 Mo. App. 280, 144 S. W. 509.

Geo. M. Reed, of Waynesville, for plaintiff in error. Holmes & Holmes, of Rolla, for defendant in error.

GRAY, J. On the 5th day of October, 1904, a judgment was rendered in the circuit court of Maries county in favor of the Pulaski County Bank against W. W. P. Hinshaw, Robert Warren, and A. J. Hinshaw. On the 30th day of December of that year A. J. Hinshaw paid the judgment and costs in full. Robert Warren died on the 22d day of August, 1909, and letters of administration on his estate were issued on the 27th day of that month. On the 30th day of December A. J. Hinshaw prepared a demand against the estate of Robert Warren for one-half of the amount he had paid on said judgment. This demand was taken to the home of the clerk of the probate court, and there sworn to by Mr. Hinshaw before said clerk, who redelivered it to the representative of Mr. Hinshaw, who, in turn, sent it to Edwin Long, the administrator of the Warren estate, who, by writing entered on the back of the demand, waived notice of presentation of the same. On the 6th day of January, 1910, the demand was filed in the office of the clerk of the probate court. On the 9th day of May, 1910, the probate court refused to allow the demand, and assigned as reason therefor that it was barred by the statute of limitations. From this judgment the plaintiff appealed to the circuit court, and was defeated on trial before the court on the 25th day of March, 1911, and appealed to this court, but his appeal was dismissed, and he afterwards sued out a writ of error in this court.

Was the probate court justified in refusing the demand on the ground that it was barred by the statute of limitations? This is the only question in the case.

[1,2] There was testimony tending to prove that the note on which the judgment of the Maries county circuit court was based was signed by A. J. Hinshaw and Robert Warren as sureties for W. W. P. Hinshaw, and therefore, when the plaintiff in error paid that judgment on the 30th day of December, 1904, he was entitled to recover from Robert Warren one-half of the amount paid, provided he instituted his suit within the five-year statute of limitation. The death

of Robert Warren on the 22d day of August, 1909, stopped the running of the statute until letters of administration were issued on the 27th of the same month. If the delivery of the claim to the probate clerk at his home on the 30th day of December, 1909, was a filing of it with him as clerk of the court, or, if the acknowledgment of service on the claim by the administrator, on the 4th day of January, 1910, stopped the running of the five years statute of limitations, then the judgment must be reversed.

[3] The evidence shows that the claim was made out, but not sworn to, and on the evening of the 30th, after the clerk had gone to his home from his office, it was delivered to him, and that he swore the plaintiff to it and fixed his jurat to the oath, and delivered the claim to plaintiff's representative to be sent to the administrator for acknowledgment of service. There was no testimony that the clerk was asked to file the claim, and it was not until the 6th day of January, 1910, that it was taken to the probate office, and there marked "Filed" by the clerk. If the plaintiff had delivered his claim to the clerk in the office of the probate court and requested him to file it, and then obtained possession of it from the clerk for the purpose of sending it to the administrator, we would not hesitate to hold that it was really filed in the office of the clerk on the 30th day of December. But to take a paper to the home of the clerk for the purpose of having it sworn to, and with no request for the clerk to file it, was not, in our judgment, the filing of the paper within the meaning of the law. Did the delivery of the demand to the administrator on the 4th of January stop the running of the general statute of limitations?

[4] Section 1756, Revised Statutes, reads: "The filing of a petition in a court of record, or a statement or account before a court not of record, and suing out of process therein, shall be taken and deemed the commencement of a suit." Our courts have in several cases measured the limitation statutes by this section, and whether a suit was commenced within the statute of limitations has been determined by whether the plaintiff instituted his suit within the meaning of this section.

[5] The plaintiff in error claims the running of the general statute is arrested by serving the claim upon the executor or administrator, under section 194, Revised Statutes 1909, which reads: "Any person may exhibit his demands against such estate by serving upon the executor or administrator a notice, in writing, stating the amount and nature of his claim, with a copy of the instrument of writing or account upon which the claim is founded; and such claim shall be considered legally exhibited from the time of serving such notice, or a waiver

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Index

of such notice, in writing, by the executor or administrator." In order to properly construe this section, preceding ones must be considered. Section 190 deals with the classification of demands, and requires that general demands be legally exhibited against the estate within one year after the granting of letters in order to become fifth class demands; and that all demands exhibited after the end of one year, but within two years, shall be assigned to the sixth class. Section 191 provides that all demands not thus exhibited in two years shall be forever barred. Now, section 194 deals only with exhibiting of demands, and provides that a claim shall be considered legally exhibited from the time of serving the notice upon the executor or administrator. The Legislature in these sections was not dealing with the general statute of limitations at all, but only the special statute requiring claims to be exhibited and presented within a certain time. This is made apparent by sections 192 and 193, Revised Statutes 1909. The first provides that actions pending against any person at the time of his death, which by law survive against the representative, shall be considered demands legally exhibited from the time of the revival of the action; and section 193 provides that all actions commenced against executors and administrators after the death of the deceased shall be considered demands legally exhibited against such estate from the time of serving the original process on the executor or administrator. Now these two sections clearly provide that, notwithstanding suits were commenced in courts of record which would stop the running of the general statute of limitation, the demands included in those suits must be exhibited to the administrator in order that they may be put in the proper class, and not barred by the administration two years statute of limitations. The exhibiting of a demand to the administrator within the first year so as to get it in the fifth class, or during the second year to keep it from being absolutely barred, and presenting the claim to the court for allowance, are different things. As said in *Waltmar v. Schnick's Estate*, 102 Mo. App. loc. cit. 139, 76 S. W. 1053: "A preceding section provides that 'all demands not exhibited in two years from the grant of letters shall be forever barred.' Another section provides that 'all demands exhibited after the end of one year and within two years after letters are granted shall be placed in the sixth class.' It seems to us that the object gained by an exhibition of a demand under the statute is to stop the running of the statute of limitations. But it is not the commencement of a suit on the demand; it is only the exhibition of the foundation of a suit to be thereafter commenced." The statute of limitations referred to in the above quotation is the special statute found in the administra-

tion law. We concur in this view, that the object gained by exhibiting the demand is to stop the running of the special statute, and is not the commencement of the suit on the demand, but is only the foundation for a suit to be afterwards commenced.

In *McFaul v. Haley*, 166 Mo. 56, 65 S. W. 995, it is said: "The presentation of the judgment to the probate court in this case was in effect the institution of a suit on the judgment against the executor, as much so as would have been the presentation of a claim in the form of a note against the estate. Therefore the 20-year statute of presumption ceased to run when the claim was presented to the probate court." Our view that section 194 has reference only to the time when claims and demands shall be considered exhibited within the meaning of section 191 is supported by the decision of the Supreme Court in *McKee v. Allen*, 204 Mo. 655, 103 S. W. 76. On page 675 of 204 Mo., page 82 of 103 S. W., and in construing section 193, the court said: "This section, however, simply has reference to the time when claims and demands shall be considered exhibited within the meaning of section 185, Revised Statutes 1899."

[6] The Legislature has the right to fix arbitrarily the time in which different actions may be commenced, and has fixed, in actions for contribution of judgments, the period of five years, and has provided that suit must be commenced within that time or the action is barred. The statute we have quoted provides that the filing of the petition in the court of record shall be deemed the commencement of the suit. According to our view, the section of the statute found in our administration law providing that demands shall be exhibited within two years, and what shall be deemed a proper exhibit of the demand, in no wise affects our general statute of limitations, and therefore we hold that it was necessary for the plaintiff to file his demand in the office of the clerk of the probate court within five years from the day the plaintiff paid the judgment, after deducting the period of time between the death of the deceased and the granting of letters on his estate.

[7] It is further claimed by the plaintiff in error that the administrator should be estopped from pleading the statute of limitations. We find nothing in the record on which to base an estoppel. It is true several weeks before the claim was presented to him he was notified that plaintiff had a claim, and the administrator agreed to waive service when same was presented. This was long before the statute of limitations had run, and did not estop the administrator from pleading the statute when plaintiff delayed in presenting his claim until the statute had run.

[8] The plaintiff also insists that the statute of limitations must be pleaded in order

to be available, and that it was not done in this case. The probate court refused the demand on the ground that it was barred by the statute of limitations, and the evidence shows that this was an issue on the trial in the circuit court, and plaintiff asked instructions relating thereto. It was not necessary to file a written pleading setting up the statute of limitations either in the probate or circuit court. The probate court hears and determines demands in a summary way without formal pleadings, and on appeal to the circuit court the cause is tried anew, without formal pleadings. To invoke the bar of limitation, it was only necessary to bring that defense to the attention of the trial judge. *Wencker v. Thompson's Administrator*, 96 Mo. App. 59, 69 S. W. 743.

The judgment will be affirmed. All concur.

WILLIAMSON v. HARRIS.

(Springfield Court of Appeals. Missouri. Dec. 2, 1912.)

1. FRAUD (§ 11*)—FRAUDULENT REPRESENTATIONS—MATTERS OF FACT OR OPINION.

Mere expressions of opinion, as distinguished from representations of existing facts, cannot be made the basis of an action for fraud.

[Ed. Note.—For other cases, see *Fraud*, Cent. Dig. §§ 12, 13; Dec. Dig. § 11.*]

2. FRAUD (§ 20*)—FRAUDULENT REPRESENTATIONS—RELIANCE.

To be actionable, the vendor's false representations as to the quality of land must relate to a material fact relied upon by the purchaser.

[Ed. Note.—For other cases, see *Fraud*, Cent. Dig. §§ 17, 18; Dec. Dig. § 20.*]

3. VENDOR AND PURCHASER (§ 36*)—FRAUDULENT REPRESENTATIONS—MATTERS OF FACT—QUALITY OF LAND.

Where a purchaser of land not acquainted with the character of the local soil told the vendor that he wanted a rich soil that would not need commercial fertilizer, that he would not buy a farm which required such fertilizer at any price, and that he would have to rely upon the vendor's honesty as to the character of the soil, the vendor's false representations that the soil was rich and did not require fertilizer, when in fact it was thin, and the vendor had used fertilizer upon it for a number of years and knew that a good crop could not be produced without it, were more than mere expressions of opinion, and were actionable as misrepresentations as to a material fact.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 52, 53; Dec. Dig. § 36.*]

4. VENDOR AND PURCHASER (§ 45*)—ACTION FOR PRICE—QUESTION FOR JURY—RELIANCE ON REPRESENTATIONS.

In an action for the price of land, defended on the ground of the vendor's fraudulent misrepresentations, held on the evidence that whether the purchaser relied upon such representations was for the jury.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 77, 78; Dec. Dig. § 45.*]

Appeal from Circuit Court, Wright County; C. H. Skinker, Judge.

Action by H. G. Williamson against G. W. Harris. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

F. M. Mansfield, of Hartville, and Woodruff & Luster, of Springfield, for appellant. E. H. Farnsworth, of Mountain Grove, and Lamar, Lamar & Lamar, of Houston, for respondent.

COX, J. Plaintiff sold defendant a farm in Wright county, and the parties entered into a written contract by which defendant agreed to and did deposit \$1,000 in a bank to await the preparation of title papers and the execution of the deed by plaintiff. It was also agreed that on the completion of the terms of sale the \$1,000 was to be paid to plaintiff as a part payment on the land; but, if plaintiff should comply with the requirements of the contract upon his part and defendant should refuse to comply, the \$1,000 was to be paid to plaintiff as liquidated damages. As appears from the record before us, no question was made that plaintiff had not complied with the terms of the contract; but defendant refused to take the land, and alleged as reason therefor that fraud had been practiced upon him in the sale. The plaintiff brought suit for the \$1,000, and defendant sought to justify his refusal to take the land by alleging that he was induced to enter into the contract by fraud of the following character:

That defendant was a stranger in that section of the country and wholly unfamiliar with the character or productiveness of the soil, and that he told plaintiff and his agent with whom he dealt that he wanted a good rich soil that would produce a good crop without the use of commercial fertilizer and that he would not purchase a farm which required the use of such fertilizer at any price, and also told plaintiff that he was not familiar with the character of the soil in that locality but would have to rely upon his honesty to tell him the truth in regard to the character, quality, and fertility of the soil, and that plaintiff and his agent falsely and fraudulently represented that this farm was of a good rich soil and would produce good crops without the use of commercial fertilizer, when in fact the soil was thin and unproductive, and plaintiff knew that fact and had used commercial fertilizer on this land each year for a number of years. The evidence of defendant tended strongly to support the allegations of his answer, but at the close of his testimony the court peremptorily instructed the jury to find for plaintiff, and defendant has appealed.

The trial court held that the burden of proof was upon defendant, and the only question for our determination is whether his proof was sufficient to take his case to the jury on the question of fraud. The rules of law applicable to fraudulent representations

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

generally are well settled and as applied to the facts of this case present only two questions: First. Were the representations of such character as to come within the legal definition of fraud? Second. Did the defendant rely upon these representations in making the purchase?

[1] If the representations were mere expressions of opinion as distinguished from representations as to existing facts, they could not be made the basis of an action for fraud. *Brown v. Lead & Mining Co.*, 194 Mo. 681, 92 S. W. 699.

[2] To be actionable, the representations must relate to a material fact inducing the purchase, and not a mere expression of opinion. Do the alleged representations in this case meet that test?

[3] Generally, representations as to whether or not the soil of certain land is productive or will produce a certain amount of grain to the acre, etc., are regarded as mere expressions of opinion, and therefore not actionable; but in this case we have a different situation. This defendant was not acquainted with the character of the soil in that locality, and hence could not form an opinion of his own as to its fertility. Knowing that fact, he fixed a test by which to judge it, which was that it should produce a good crop without the use of commercial fertilizer, and notified plaintiff that he would not buy a farm that required the use of such fertilizer, and also notified him that he (defendant) was not competent to judge the productiveness of that soil and would have to rely upon plaintiff to tell him the truth about it. According to defendant's testimony, plaintiff abused his confidence and intentionally falsely represented to defendant that the soil was rich and fertilizer not required, when in fact the soil was thin and plaintiff had used fertilizer upon it for a number of years and plaintiff knew that a good crop could not be produced without the use of such fertilizer. When defendant fixed a test by which to judge the soil and notified plaintiff that he could not determine the question of fertility but would have to rely upon plaintiff's honor to tell him the truth about it, it would seem that common honesty would have required plaintiff to give defendant such information as he had, and the concealment of the fact that he had used a commercial fertilizer on the land for years, and the assertion that the use of such fertilizer was unnecessary, and the fact that defendant had notified him that he would not purchase land requiring the use of such fertilizer, in our judgment takes the representations out of the realm of mere expression of opinion and brings them under the rule of misrepresentation as to a material fact and is actionable. *Judd v. Walker*, 215 Mo. 312, 114 S. W. 979.

[4] Did defendant rely upon these representations? He testified that he did. He also testified that he sent his son to examine

the land to ascertain whether or not there was hardpan under the soil. The son made the examination and reported that he found none. Respondent contends that this evidence shows that defendant did not rely upon the representations of plaintiff, if made. If the representations as to character and fertility of the soil were true, yet, if there was hardpan under it, this fact might, in certain seasons, prevent a good crop, while in other seasons it would not. In the absence of any testimony as to the effect upon the soil of hardpan under it, we cannot say that the presence or absence of hardpan had any necessary connection with the fertility of the soil, and the fact that defendant made an investigation as to the presence or absence of hardpan upon his own account does not necessarily conflict with his testimony that he relied upon the representations of plaintiff as to the fertility of the soil.

We are of the opinion that the question whether the representations were mere expressions of opinion and should have been so regarded by defendant, or were misrepresentations of facts, and also the question as to whether defendant in fact relied upon the representations, were, under the evidence in this case, questions for the jury, and the court erred in giving a peremptory instruction to find for plaintiff.

Judgment reversed, and cause remanded. All concur.

WARREN v. COWDEN.

(Springfield Court of Appeals. Missouri.
Dec. 2, 1912.)

1. ANIMALS (§ 51*)—RUNNING AT LARGE—RESTRAINING—NOTICE TO OWNER.

The owner of a cow running at large having been personally informed that it was restrained, and the parties, though discussing it, not having agreed on the damages, *Rev. St. 1909, § 773*, dispensing with the written notice, provided by section 772, of the restraining, as a condition to recovery of damages, where it appears the owner had actual notice and the parties could not agree on the damages, applies.

[Ed. Note.—For other cases, see *Animals*, Cent. Dig. §§ 158-171; Dec. Dig. § 51.*]

2. ANIMALS (§ 51*)—RUNNING AT LARGE—RESTRAINING—NOTICE TO OWNER.

Where *Rev. St. 1909, § 773*, dispensing, under certain circumstances, with necessity of giving written notice, under section 772, of the restraining of a cow running at large, applies, it is immaterial, as regards the rights of the one restraining to recover damages, that he gave an insufficient written notice.

[Ed. Note.—For other cases, see *Animals*, Cent. Dig. §§ 158-171; Dec. Dig. § 51.*]

3. NEW TRIAL (§ 40*)—GRANTING ON COURT'S MOTION.

Though defendant did not except to instructions, the court may of its own motion notice error therein and grant him a new trial on account thereof.

[Ed. Note.—For other cases, see *New Trial*, Cent. Dig. §§ 62-66; Dec. Dig. § 40.*]

4. ANIMALS (§ 51*)—RUNNING AT LARGE—DISTRAINT—LIEN—DEPOSIT OF AMOUNT ADMITTED DUE.

Authorizing recovery by plaintiff in replevin for his cow, restrained, when running at large, by defendant, without plaintiff having deposited the amount which, by his tender, he admitted to be due defendant on account thereof, or without an instruction to render verdict for that amount, if the jury found for plaintiff as to the other issues, was error.

[Ed. Note.—For other cases, see *Animals*, Cent. Dig. §§ 158-171; Dec. Dig. § 51.*]

5. APPEAL AND ERROR (§ 854*)—REVIEW—ORDER FOR NEW TRIAL—REASONS ASSIGNED.

An order granting a new trial will not be reversed, good reasons appearing on the record for granting a new trial, though the reasons assigned by the trial court were unsound.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3403, 3404, 3408-3430; Dec. Dig. § 854.*]

Appeal from Circuit Court, Polk County; C. H. Skinker, Judge.

Replevin by L. P. Warren against W. T. Cowden. From an order granting defendant a new trial, plaintiff appeals. Affirmed.

Rechow & Pufahl, of Bolivar, for appellant. B. J. Emerson and L. Cunningham, both of Bolivar, for respondent.

NIXON, P. J. This is an action in replevin originating in a justice's court. On appeal, plaintiff obtained judgment, and the court, on motion, granted the defendant a new trial. From this order plaintiff appealed.

On August 6, 1911, plaintiff's cow entered the premises of the defendant and damaged defendant's corn. The defendant restrained her and claimed damages and compensation from the plaintiff under article 5 of chapter 6 of the Revised Statutes of 1909, concerning "animals restrained from running at large." The parties agreed that this law was in force in Polk county, the scene of the action. Section 772 of this article provides that domestic animals running at large may be restrained, and lays down a rule as to giving the owner of the animal written notice within three days of the taking up and requiring the notice to state the amount of compensation for feeding and keeping such animal or animals and damages claimed. Section 773 is as follows: "When notice not necessary.—If it shall appear and be proven on trial that the owner or owners of such domestic animals, as set forth in section 772, shall have actual notice that his or their said animals or stock were restrained, and by whom, and that the parties interested could not agree on the amount of damages claimed, then the three days' notice as required by section 772 shall not be necessary to a recovery."

The evidence in this record shows that defendant restrained plaintiff's animal on the evening of August 6, 1911 (Sunday), and personally notified plaintiff, who resided near by. We quote from defendant's testi-

mony: "The weather was hot and dry, and I told him (plaintiff) I would like for him to come and get the cow. He wanted to know what the damage was, and I told him that I would charge him a dollar or what the law allowed to putting her up and for the damages. I thought the law allowed 50 cents for putting one up, but I found out later that it was only 25. He said, 'All right.' He made no objection whatever. He said he did not have the money but he would do whatever was right about it. I said, 'I have been turning your stock over to you, and you have been promising to pay me, but you have never paid me a cent.' In fact, I had been turning his stock over to him time and again, and I told him that. He said he did not have the money, but would borrow it. I told him that while he was doing that—it was only a short time before this when I had turned over to him his stock and he promised to pay me and he never paid me a cent or said a word about it—couldn't he borrow that other, too, and bring it, and then he flew mad and said he wouldn't do it. He said he was fixing to go to Buffalo and would be gone about four days, that he wanted me to milk the cow and take care of her, and that when he came back he would come and settle. I said, 'By that time I don't know what might happen.' After he got mad he would not give me any satisfaction, and I came on home and allowed he would come and get the cow. If he had come and done the right thing, I would have turned the cow over to him; if he had come with the money."

The plaintiff's version is as follows: "On Sunday, August 6th, Mr. Cowden, the defendant, came and told me that he had taken up my cow. * * * I said, 'I do not want my cow on my neighbors,' and asked him if she had damaged him, and he said she had. I said, 'What is the damage?' He said, 'Well, I reckon about a dollar will pay the damages.' I said: 'Well, that is not too much, but I haven't got the money. I will go out and get it and come back and get my cow.' He said, 'When you go to get that, fetch me another \$1.50 for the damages for the time your cow was on my oats.' I said, 'I will pay you the other money like I agreed to pay it when I get so that I can, and when you get some men to assess the damages, and whatever the men say I will pay whether it is \$1.50 or \$5.' He said, 'I will hold your cow for that.' I said, 'You cannot do it.' He said, 'I will show you whether I can or not.' Then I said, 'Take good care of the cow, as she is giving lots of milk.' He said, 'I will do just as I please about it.' And then I went off and never talked to Mr. Cowden any more that time."

[1] It is apparent to any one that no agreement was reached between these parties, and hence section 773 is the governing statute in this case. This being true, no

written notice was necessary as required by section 772.

Defendant fed, watered, and milked the cow on Monday. On the morning of this day defendant was in Goodson, a town near by, and a man named Tom Gladdon saw him and told defendant he had a dollar for him to settle the matter, but defendant refused to accept it at that time and said plaintiff could get the cow at any time that day by paying \$2. On Tuesday morning about 7 o'clock defendant sent his son to plaintiff with the proposition that he would accept \$1.50. This was before he fed and milked the cow. Defendant testified that plaintiff told the boy that he (plaintiff) would sue his father for damages. About 11 o'clock the same morning, defendant was again in town, and two men acting for plaintiff offered defendant \$1.50, one of them stating that he had a dollar in his pocket, and the other stating that he had 50 cents. Defendant refused, saying that he had kept the cow two or three days, and that he would take \$2 as his damages. At this stage of the controversy, defendant, after consulting a lawyer and a justice of the peace, decided that he should give plaintiff a written notice, and on this day (Tuesday) he delivered the following notice to plaintiff's wife: "Goodson, Missouri, August 8, 1911. Mr. L. P. Warren: I herewith notify you that I have got your cow up and you can come and pay damages and you can take her. Yours, W. T. Cowden."

[2] In giving this notice, defendant was evidently attempting to comply with section 772; but, if that section governed this case, he would be out of court because he did not specify in the notice "the amount of compensation for feeding and keeping such animal and damages claimed." Of course, it need hardly be said that the fact that he attempted to give a written notice as required by section 772 would not change his rights under the law. *Bowles v. Abrahams*, 65 Mo. App. 10. The defendant then applied to a justice of the peace for the appointment of appraisers, following section 774, and they met on August 12th, viewed the damage, and made a written report in duplicate assessing the sum of 25 cents for taking up the animal, 50 cents for damages, and 25 cents for each day the cow was in defendant's care—a total assessment of \$2.25.

In the meantime, on August 8th, plaintiff instituted an action in replevin before a justice for the recovery of the cow. The verdict in the justice's court was for the defendant and was signed by four of the jurors. In the circuit court, by agreement, the case was tried by a jury of six men, and five of them signed the verdict for the plaintiff. Eleven instructions were given to the jury and five requested instructions were refused. The jury were instructed that it was admitted that plaintiff was the owner of the cow and that the issues should be

found for the plaintiff unless they found and believed from the evidence "that said cow on the 6th day of August, 1911, was running at large outside the inclosure of the plaintiff and was trespassing upon the premises of the defendant, and that the defendant took up said cow, and that he (the defendant) thereupon gave notice in writing to plaintiff that he had taken up said cow, and in said notice stated the amount of damages claimed by him and the amount of compensation for feeding and keeping said cow; or else that the plaintiff had actual notice that said cow was restrained and by whom restrained, and that he (the plaintiff) and the defendant could not agree upon the amount of damages demanded." As we have stated, the jury found the issues for the plaintiff. In its order granting defendant a new trial the court specified two grounds, viz.: (1) Because the court erred in giving instructions 1, 2, 3, and 4 in favor of the plaintiff. (2) Because the verdict of the jury is against the law and the weight of the evidence.

On the state of the evidence as to what occurred between the plaintiff and the defendant on Tuesday, August 8, 1911, the court gave the following instruction: "If the defendant sent the plaintiff word by his son that he would take one dollar and a half for his damages, and the plaintiff, on the same day and before the defendant had been to any further expense or trouble in caring for and feeding said cow, offered to pay the amount asked by the defendant, then there was nothing to arbitrate, and you must find the issues for the plaintiff."

We think this instruction was too favorable, if anything, for the plaintiff, and in case of retrial, if the plaintiff shall have deposited with the trial court the sum of \$1.50, the following instruction should be given in its place: "If the defendant sent the plaintiff word by his son that he would take \$1.50 for his damages and compensation, and the plaintiff on the same day and within a reasonable time accepted the offer and on the same day tendered the \$1.50, the amount asked by the defendant, then there was nothing to arbitrate, and you will find the issues for the plaintiff."

[3] Instructions 1, 2, and 3 were given by the court at plaintiff's request, and defendant saved no exception. The court gave instruction 4 of its own motion, and defendant saved no exception. Defendant himself could therefore make no complaint because of the giving of these instructions, and the question is raised whether the court may notice of its own motion a supposed error in the giving of these instructions and grant a new trial on that account. That it may is established by many authorities. *Head v. Randolph*, 83 Mo. App. loc. cit. 287; *Ewart v. Peniston*, 233 Mo., loc. cit. 707, 136 S. W. 422; *Parker v. Britton*, 133 Mo. App. 273,

113 S. W. 259; *Lovell v. Davis*, 52 Mo. App. 342; *Baughman v. National Waterworks Co.*, 58 Mo. App. 576; 29 Cyc. 921.

[4, 5] The evidence in this record does not present a case that required the defendant to proceed under the stray law. Further, the reasons assigned by the court in its order granting a new trial, under the view we have taken, were wholly insufficient to authorize the granting of the same. We are of the opinion, however, that material error was committed by the trial court in authorizing a recovery by the plaintiff without his having first deposited \$1.50, the amount he admitted to be due the defendant by his tender, or without instructing the jury to return a verdict for defendant for that amount in case they found for the plaintiff as to the other issues. In cases like the present, where an appeal has been taken from the granting of a new trial and reasons have been assigned by the trial court for its action, although these reasons are found by the appellate court to be unsound, yet, if there be good reasons appearing on the record for granting a new trial, the order granting it will be upheld. *Green v. Terminal Railroad Ass'n*, 211 Mo. 18, 109 S. W. 715; *Smart v. Kansas City*, 208 Mo. 162, 105 S. W. 709, 14 L. R. A. (N. S.) 565, 123 Am. St. Rep. 415, 13 Ann. Cas. 932.

We think the order granting a new trial should be affirmed, and it is so ordered. All concur.

STATE v. MARTIN.

(Springfield Court of Appeals. Missouri. Dec. 2, 1912.)

FALSE PRETENSES (§ 12*)—ELEMENTS OF OFFENSE—OBTAINING PROPERTY.

An essential of the offense of obtaining property under false pretenses, denounced by Rev. St. 1909, § 4565, is that the person defrauded has parted with something of value as the result of the false pretenses; and a debtor who obtains a credit by means of an order drawn on a third person, not indebted to him, does not obtain property or anything of value, and is not guilty of the offense.

[Ed. Note.—For other cases, see False Pretenses, Cent. Dig. § 16; Dec. Dig. § 12.*]

Appeal from Circuit Court, Howell County; W. N. Evans, Judge.

A. E. Martin was indicted for obtaining property under false pretenses. From a judgment sustaining a demurrer to the indictment, the State appeals. Affirmed.

Will H. D. Green, of West Plains, for the State. J. L. Van Wormer, of West Plains, for respondent.

COX, J. The prosecuting attorney filed an information charging defendant with the offense of obtaining property under false pretenses. The trial court sustained a demurrer to the information, and the state appealed.

The information charges that defendant was indebted to the Kilpatrick Mercantile Company in the sum of \$109.35, and in order to secure a credit of \$20 on this account he falsely represented that one A. J. Rhodes was indebted to him in the sum of \$20 and defendant then gave to the Kilpatrick Mercantile Company an order upon Rhodes for \$20, and thereby induced the mercantile company to give him a credit of \$20 upon his account with them. Does this conduct on the part of defendant constitute a crime under the statute?

The statute (section 4565, Stat. 1909) is as follows: "Every person who with intent to cheat or defraud any other shall designedly * * * by * * * false pretense obtain * * * from any person any money, personal property, right in action or other valuable thing or effects whatsoever * * *"—shall be punished, etc. The question for our determination is whether obtaining credit on an account is obtaining property or thing of value. We do not think so. The entry by the mercantile company of a credit of \$20 on the account of defendant with them on their books did not operate as a payment; hence defendant obtained nothing by the transaction, nor did the mercantile company part with any goods or property, or anything of value. If Rhodes was not indebted to defendant, and the order upon him by defendant was worthless for that reason, the parties were left in exactly the same condition after the transaction as before; and, while the mercantile company got nothing out of it, they lost nothing, and nothing of value was obtained from them by defendant. One of the essentials of this offense is that the party defrauded must have parted with something of value as a result of the false pretense or representation; and, since this element is wanting in the charge of this information, the demurrer thereto was properly sustained. *State v. Moore*, 15 Iowa, 412; *Moore v. Commonwealth*, 8 Pa. 260.

Judgment affirmed. All concur.

FRANK et al. v. ORGAN.

(Springfield Court of Appeals. Missouri. Dec. 2, 1912.)

LIMITATION OF ACTIONS (§ 47*)—BREACH OF COVENANT OF SEISIN—TIME OF BREACH.

Covenant of seisin is breached at date of the deed, and the statute then commences to run; the covenantor having then no estate, title, or possession, but merely a tax deed, void because based on a judgment against one dead at time of its rendition.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 254-258; Dec. Dig. § 47.*]

Appeal from Circuit Court, Dent County; L. B. Woodside, Judge.

Action by E. S. Frank and J. H. Ship

against John B. Organ. Judgment for defendant, and plaintiffs appeal. Affirmed.

Orchard & Cunningham, of Eminence, for appellants. Dalton & Arthur, of Salem, for respondent.

NIXON, P. J. The facts in this case are not controverted between the parties. This is a suit instituted in the circuit court of Dent county by the appellants against the respondent for breach of warranty and in which judgment was rendered against appellants, from which they appeal.

The land involved is the N. W. $\frac{1}{4}$ and the S. E. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of section 36, township 31, range 3 west, in Shannon county, Mo. On the 2d day of May, 1881, the N. $\frac{1}{2}$ of the above-mentioned section was sold for taxes on a judgment rendered in favor of the collector against Hamilton Brandon. The said Brandon was dead at the time of the rendition of the tax judgment. On the 20th day of August, 1892, respondent Organ sold said lands to appellants, together with other lands, for the price and sum of \$2.50 per acre. Thereafter the heirs of Hamilton Brandon, to wit, George Brandon and Bell Hodges, instituted a suit in the circuit court of Shannon county, Mo., against the appellants herein to test and quiet the title to said lands, and on the 14th day of September, 1907, judgment was rendered against these appellants and in favor of George Brandon and Bell Hodges, quieting the title in them and divesting the title out of these appellants. Then the appellants herein, on the 24th day of October, 1910, instituted suit in the circuit court of Dent county, Mo., against respondent for breach of warranty for the price paid for the lands, with 6 per cent. per annum from date of the purchase of said lands. On trial thereof, judgment was rendered in favor of respondent and against these appellants on the ground that the breach of warranty occurred at the time the deed was made, and that the cause of action was barred under the 10-year statute of limitation. The tax proceedings were regular on their face, and the testimony of Mr. Ship was that he had no knowledge or information that Hamilton Brandon, the defendant in the tax suit, was dead until the suit was filed to test and quiet the title, and that that was the first time they knew there was a paramount and outstanding title.

In the case of *Falk v. Organ et al.*, 180 Mo. App. 218, 141 S. W. 1, this court had occasion to examine and declare the law on facts substantially identical with those in the present record, and the opinion in that case is adopted as the declaration of law governing this case. In that opinion we said: "As we have seen, the facts are undisputed that on the day the deed with covenants of seisin was delivered to the plaintiff the defendants had no title whatever to the

land and no possession; that it was purchased by defendants at a tax sale, and the deed was void; that the defendants had never had any possession; and that they did not put the plaintiff in possession. This, as we have said, is an action by plaintiff (covenantee) against the defendants (covenantors) for the breach of a covenant of seisin. Seisin is of two kinds—seisin in law and seisin in deed. A covenant of seisin implies that the covenantor is possessed of both—that is, of the whole legal title—and the covenant is broken once and for all if the covenantor has not the possession, the right of possession, and the right of legal title. *Coleman v. Clark*, 80 Mo. App. loc. cit. 342; *Fitzhugh v. Croghan*, 2 J. J. Marsh. (Ky.) 429, 19 Am. Dec. 139; 2 Wash. on Real Prop. side page 657. "The law in this state is undoubtedly well settled that the covenant of seisin of an indefeasible estate in fee simple is a covenant in present, and is broken the moment of its creation, provided the title of the covenantor is totally defective, and he has no estate or possession in the land, and in such cases the covenants of seisin between the parties are personal and collateral to the land. If, however, any estate passes by the conveyance, or the covenantee takes actual possession of the land, such estate or possession will run with the land; and in such case the covenants would be substantially breached when the covenantee was deprived of the estate conveyed, or when he was ousted from actual possession of the land by the holder of the paramount title. In this case the facts indisputably show that the defendants were not, at the time of the execution of the deed to the plaintiff, the owners of the W. $\frac{1}{2}$ of the N. W. $\frac{1}{4}$ of section 17, township 32, range 3, the land conveyed, and were not in possession thereof, never put the covenantee in possession, and had no title or interest therein. Hence the covenant of indefeasible seisin was broken as soon as made, and the plaintiff was entitled to recover the purchase money with interest from the date of its payment and the execution of the deed. *Adkins v. Tomlinson*, 121 Mo. loc. cit. 495, 25 S. W. 573; *Evans v. Fulton*, 134 Mo. 653, 36 S. W. 230; *Allen v. Kennedy*, 91 Mo. 324, 2 S. W. 142; *Kirkpatrick v. Downing*, 58 Mo. 32 [17 Am. Rep. 678]; *Murphy v. Price*, 48 Mo. 247; *Webb v. Wheeler* [80 Neb. 438, 114 N. W. 636] 17 L. R. A. (N. S.) 1178. It therefore follows that at the time of the execution of the deed containing the covenants of warranty on the seventh day of November, 1885, the covenantors having no estate, title, or possession of the land conveyed, the covenantee received absolutely nothing by his purchase, and the covenant of seisin was breached technically and substantially on that day, and the statute of limitations commenced to run from that time."

On re-examination of the law we see no reason to modify in any respect the principles announced in that opinion. It therefore follows that the judgment in this case should be affirmed, and it is so ordered. All concur.

WILLIAMS et al. v. SCHOOL DIST. NO. 5 et al.

(Springfield Court of Appeals. Missouri. Dec. 2, 1912.)

1. SCHOOLS AND SCHOOL DISTRICTS (§ 111*)—TAXPAYERS' ACTION—RESTRAINING REMOVAL OF SCHOOL BUILDING—PLEADING—INJURY TO PLAINTIFF.

Resident taxpayers of a school district, in order to enjoin the district and its directors from removing a school building, must allege and prove that from defendant's acts their property rights are about to suffer a legal injury. It is not sufficient to merely allege injury without stating the facts, and, where the injuries are alleged to be irreparable, the petition must show in what respects it is irreparable, stating the facts from which the court can determine the nature of the injury.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. §§ 265-268; Dec. Dig. § 111.*]

2. INJUNCTION (§ 12*)—GROUNDS OF RELIEF—IRREPARABLE INJURY.

A court of equity may enjoin a threatened irreparable injury to property rights, even though no injury has then occurred.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 12; Dec. Dig. § 12.*]

3. SCHOOLS AND SCHOOL DISTRICTS (§ 111*)—TAXPAYERS' ACTION—REMOVAL OF SCHOOL BUILDING.

Under Rev. St. 1909, § 2534, which provides that threatened irreparable injury to property may be enjoined when there is no adequate remedy by an action for damages, taxing residents of a school district may restrain the district, or its officers, from exceeding their lawful powers in any way that will injuriously affect them, such as by an unauthorized removal of a school building.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. §§ 265-268; Dec. Dig. § 111.*]

4. SCHOOLS AND SCHOOL DISTRICTS (§ 111*)—ACTION TO ENJOIN SCHOOL DISTRICT AND OFFICERS—TITLE OR RIGHT OF PLAINTIFF—TAXPAYERS.

An injunction will not lie to restrain improper or unlawful acts by a school district or its officers at the suit of a resident merely, but it must be averred that the plaintiff is also a taxpayer.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. §§ 265-268; Dec. Dig. § 111.*]

5. SCHOOLS AND SCHOOL DISTRICTS (§ 111*)—ACTION TO ENJOIN SCHOOL DISTRICT AND OFFICERS—SPECIAL DAMAGE TO PLAINTIFF.

In the absence of proof that plaintiff, seeking to enjoin alleged illegal acts of the school district or its officers, in removing a school building, will sustain an irreparable or special or pecuniary damage therefrom, such act will not be enjoined.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. §§ 265-268; Dec. Dig. § 111.*]

6. SCHOOLS AND SCHOOL DISTRICTS (§ 111*)—TAXPAYERS' ACTION—PLEADING—GENERAL DENIAL—MATTERS IN ISSUE.

Allegation, in a petition to enjoin the removal of a school building, that the plaintiffs were resident taxpayers of the district, and that the removal of the building was unauthorized, would, if true, show that plaintiffs had a special interest in the subject-matter entitling them to an injunction, and such allegation, being an essential one, would be put in issue by a general denial.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. §§ 265-268; Dec. Dig. § 111.*]

Cox, J., dissenting.

Appeal from Circuit Court, Pulaski County; L. B. Woodside, Judge.

Action for injunction by Grant Williams and others against School District No. 5 and H. F. Cadwell and another, directors. From an order making a temporary injunction perpetual, defendants appeal. Reversed and remanded.

Bland, Crites & Murphy, of Rolla, for appellants. W. D. Johnson, of Crocker, F. H. Farris, of Rolla, and G. W. Goad, of Springfield, for respondents.

NIXON, P. J. This was an action for an injunction against School District No. 5 and its school directors for the purpose of enjoining and restraining them from moving a schoolhouse from an old to a new site. A temporary injunction was issued by the probate court and upon final hearing in the circuit court was made perpetual, from which the defendants appealed.

The petition for the injunction states, in substance, for plaintiffs' cause of action that the school district was properly organized under the laws of the state of Missouri, and that the defendants Cadwell and Joiner were the directors of the district; that on the 13th day of June, 1911, Cadwell, as one of the school directors, without authority of law, called a special election in said school district to select a site for the schoolhouse; that an election was held pursuant to said call on the 27th day of June at which it was voted to move the schoolhouse to a new site at or near the French road on the Iberia and Crocker road; that there was no notice whatever given of said election; that the defendants as directors were threatening illegally to move the schoolhouse to the proposed site, which was on one side of the school district and away from its center and a site to which the district had no title or interest, to the hindrance of the children of school age of the plaintiffs; also, that the threatened removal of the schoolhouse to said site would cause irreparable injury to plaintiffs who are resident taxpayers of said school district; and that said directors threatened to remove said schoolhouse and pay for the removal of the same out of the

sinking fund in direct violation of law; and that the plaintiffs are without remedy at law. The defendants for answer filed a general denial.

Appellants present to this court only one alleged error, namely, that the plaintiffs failed to show by their evidence that they were entitled to maintain the action.

It will be seen from the face of the petition that the plaintiffs do not assume to sue in a special or representative capacity, but in their own individual right, so that if the defendants had filed a special demurrer under section 1800, R. S. 1909, on the ground that the petition did not show that the plaintiffs had any legal capacity to sue, it would not have raised an issue of law; and if the defendants had filed an answer denying specially the legal capacity of the plaintiffs to sue, under section 1804, R. S. 1909, it would not have raised an issue of fact as to plaintiffs' legal capacity to sue. Under the pleadings neither in the trial court nor in this court has the legal capacity of the plaintiffs to sue been properly challenged by the defendants. The defendants having filed an answer denying the allegations of plaintiffs' petition, the plaintiffs were put to the proof of the constituent facts of their cause of action.

[1, 2] In order to recover in actions of this kind, the plaintiff must allege and prove the existence of his right, and also must affirmatively show that defendant's acts sought to be restrained will be in violation thereof; in other words, he must show that a legal injury is about to be inflicted upon his property rights. So that evidence of the existence of a right violated or threatened to be violated is a prerequisite to the granting of an injunction. And where it is clear that the plaintiff does not have the right that he claims, he is not entitled to an injunction, either temporary or perpetual, to prevent a violation of such supposed right. 22 Cyc. 749. Nor is it necessary, in order to authorize a court of equity to exercise its jurisdiction, that the wrong should actually have been consummated; such injunction may be obtained to prevent an irreparable injury upon a proper showing, even though no such injury has yet occurred. If such injury is threatened or impending to property or property rights, an injunction will be granted. It is further necessary in such cases that the petition must allege facts which clearly show that the plaintiff will sustain injury because of the acts complained of. It is not sufficient to merely allege injury without stating the facts, and, where the injuries are alleged to be irreparable, it must be shown in the petition in what respects they are irreparable; the facts must be stated so the court can determine the nature of the injury. *McKinzie v. Mathews*, 59 Mo. 99; *Schuster v. Myers*, 148 Mo. 422, 50 S. W. 103.

[3] It has been held that a court of equity may restrain public officers, school boards, and municipalities, when they are acting illegally or without authority and in breach of trust, and thereby causing irreparable injury. Our statute has provided that the remedy by writ of injunction shall exist in cases where an irreparable injury to real or personal property is threatened and to prevent the doing of any legal wrong whatever when in the opinion of the court an adequate remedy cannot be afforded by an action for damages. Section 2534, R. S. 1909. The right of taxpaying citizens to resort to equity to restrain municipal corporations or their officers from transcending their lawful powers or violating their legal duties in any mode which will injuriously affect the taxpayer, such as making an unauthorized appropriation of the corporate funds or an illegal or wrongful disposition of the corporate property, is unquestioned. *Dillon on Mun. Corp.* § 914. The right of resident taxpayers to invoke the interposition of a court of equity to prevent an illegal disposition of the moneys of a county, or the illegal creation of a debt which they in common with other property holders of the county may be otherwise compelled to pay, is also well settled. *Crampton v. Zabriskie*, 101 U. S. 601, 25 L. Ed. 1070. Our own Supreme Court, in the case of *Newmeyer v. Railroad*, 52 Mo. 81, 14 Am. Rep. 394, held that taxpayers can file bills in equity annulling illegal acts of county courts when such acts would increase their burdens of taxation; that in such cases the injury is a private one to the taxpayers, and they are the sufferers rather than the public and are a class specially damaged by such unlawful acts which would increase the burden of taxation upon their property. They therefore have a special interest in the subject-matter of such suit distinct from the general public and can maintain an action for the injury.

In this case the record shows that the plaintiffs wholly failed at the trial to offer evidence in any way sustaining the facts constituting their cause of action and that they were about to sustain irreparable injury. Their evidence, it is true, tended to show that one of them was a resident of the school district and that he voted at the special school election. No evidence whatever was offered showing or tending to show that the plaintiffs or either of them was a taxpayer of the school district, or had a child or children of school age, or that the removal of the schoolhouse would be more or less convenient to them, or that any school moneys had been expended or was proposed or threatened to be expended for the purpose of moving the schoolhouse to a new site. On the contrary, it appeared that the site was given, and that one French, a resident of the district, agreed to move the school-

house at his own expense. There was also no evidence showing that the two directors by any official act had taken any steps whatever, or were threatening to take any steps, to move the schoolhouse at the time the injunction was procured. The plaintiffs introduced both of such directors as their witnesses. The evidence showed that no record was made by the clerk of the special election to move the schoolhouse for the reason such removal was deemed illegal. The defendant Cadwell did testify that he helped to survey the acre of ground, and that the acre had been cleared off, but that they did not intend to move the schoolhouse under the illegal election. The defendant Joiner stated that it was not their purpose to locate the schoolhouse on the new site; that when they found the election was illegal they abandoned the idea, and nothing was thereafter done towards moving the schoolhouse at any time.

The trial court—as showing the theory upon which the case was tried and the judgment rendered—gave upon its own motion the following declaration of law for the plaintiffs: "The court declares that the testimony in this case is sufficient to show an interest on the part of some of the plaintiffs in the case sufficient to maintain this action. If they are residents of the district, that fact alone would be sufficient to give them an interest in the location of the schoolhouse to maintain an injunction, and the evidence in this case shows that the plaintiff Oldham was a resident of the district, and also that he participated in the election held by the people of the district to determine the location of the schoolhouse, and this testimony is sufficient to authorize an inference by the court that he was not only a resident of the district but also a legal voter in said district."

[4, 5] This seems to be a misapprehension of the law, as this is not an action to protect public rights, but to prevent a threatened personal injury. In such case, it is not sufficient to sustain the action that the plaintiffs should show that they were residents of the school district; they must also show that they were taxpayers. An injunction will not lie to restrain improper or unlawful conduct on the part of public officers at the suit of a resident of the county merely. It must be averred and shown that he is also a citizen and taxpayer, and that he will be greatly and irreparably injured by the acts which he seeks to enjoin. *Caruthers v. Harnett*, 67 Tex. 127, 2 S. W. 523. The plaintiffs in this case failed to show any injury to themselves as charged in the petition. The petition by a taxpayer praying that the disbursement of taxes be enjoined because illegally levied must state the amount of taxes paid by him, and to entitle him to relief he must offer proof of substantial and

serious damages, and not of a mere technical and inconsequential injury. *Robins v. Latham*, 134 Mo. 466, 36 S. W. 33; *Fugate v. McManama*, 50 Mo. App. 39. In the absence of proof that the plaintiffs as taxpayers would suffer irreparable injury by reason of the illegal appropriation of the school moneys of the district, the petition cannot be sustained. *Davis v. Hartwig*, 195 Mo. loc. cit. 399, 94 S. W. 507. An injunction will not lie to question improper or unlawful conduct on the part of a public officer at the suit of a resident of a county merely; it must be averred and shown that he (the complainant) is also a citizen and taxpayer, and that he will be greatly and irreparably injured by the act which he seeks to enjoin. *Spelling on Extra. Rems.* (2d Ed.) § 614, p. 509. The authorities of a school district will not be enjoined from moving the schoolhouse to another site where plaintiff does not show he will sustain any special or pecuniary injury different from that of the public. *High on Injunctions*, vol. 2 (4th Ed.) § 1263, p. 1280.

[6] The allegation in plaintiffs' petition that they were resident taxpayers of the school district and that the moneys of the district were about to be illegally appropriated by the acts of the school directors would, if true, show that they had a special interest in the subject-matter of the suit and were entitled to be protected by the court. The averment was a substantial one and was a constituent fact in the cause of action as stated in their petition, and, like the other essential allegations of the petition, was put in issue by the general denial. Plaintiffs, having wholly failed to prove the substantial facts constituting their cause of action, were not entitled to the perpetual injunction.

It is therefore ordered that the judgment be reversed, and the cause remanded.

GRAY, J., concurs. COX, J., dissents.

GOODE v. CENTRAL COAL & COKE CO.
(Kansas City Court of Appeals. Missouri.
Nov. 25, 1912.)

1. TRIAL (§ 139*)—PROVINCE OF JURY—REJECTING EVIDENCE.

Evidence may be rejected by the court as unworthy of belief only when opposed to the plain, undisputed physical facts; and when they are disputable it must go to the triers of fact.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 332, 335, 338-341, 365; Dec. Dig. § 139.*]

2. PLEADING (§ 433*)—CONFORMITY TO PLEADINGS AND EVIDENCE.

In an action for a miner's death, in which it was claimed that decedent assumed the risk, because the rock fall occurred over his place of work, which he was bound to make safe, allegations of the petition that defendant negli-

gently permitted the entry "at or near the point" where defendant directed decedent to work to be dangerous, when considered with other allegations that decedent, when the rock fell on him, had left the place of work and gone westward, near the west wall of the entry, to eat, were sufficient, in absence of demurrer or motion, to sustain a judgment for plaintiff, based on proof that the rock fall did not occur directly over the place where decedent had been working.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1451-1477; Dec. Dig. § 433.*]

3. PLEADING (§ 34*)—CONSTRUCTION.

A pleading must be read as a whole.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 66-75; Dec. Dig. § 34.*]

4. PLEADING (§ 34*)—OBJECTIONS AFTER JUDGMENT.

When first attacked after judgment, a pleading should be construed favorably to the pleader, and all doubts resolved in his favor.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 66-75; Dec. Dig. § 34.*]

5. DEATH (§ 14*)—MASTER'S LIABILITY—NEGLIGENCE.

The cause of action accruing to the wife for her husband's death while in defendant's employment must be grounded on defendant's negligence in performing or omitting some duty it owed to decedent.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 16; Dec. Dig. § 14.*]

6. MASTER AND SERVANT (§ 124*)—INSPECTION.

Rev. St. 1909, § 8447, requiring a daily inspection of the coal mines generating explosive gas, in which men are employed, does not require daily inspection of mines not generating explosive gases.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 235-242; Dec. Dig. § 124.*]

7. MASTER AND SERVANT (§§ 101, 102*)—SAFE PLACE TO WORK.

An employer is required to exercise reasonable care to provide his servants with a reasonably safe place of work.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 135, 171, 172, 178, 179, 180-184, 192; Dec. Dig. §§ 101, 102.*]

8. MASTER AND SERVANT (§ 286*)—INJURIES—JURY QUESTION—NEGLIGENCE.

What constitutes reasonable care by an employer generally depends on the particular circumstances; and if they afford room for reasonable difference of opinion the issue of negligence is for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1001, 1006, 1010-1050; Dec. Dig. § 286.*]

9. MASTER AND SERVANT (§ 124*)—MASTER'S DUTY—INSPECT A PLACE OF WORK.

A coal mine owner was bound to inspect the mine roof at reasonable intervals, and, on discovering an insecure rock, to remove it for the protection of workmen required to be near it.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 235-242; Dec. Dig. § 124.*]

10. TRIAL (§ 253*)—INSTRUCTIONS—IGNORING ISSUES.

An instruction, in an action for a coal miner's death by a rock fall, that the sole question was whether decedent was killed while working at his place of work, and if he was killed in a part of the mine which was not his working place the jury should find for plaintiff, was inapplicable, as ignoring the question of

whether the dangerous character of the work would have been discoverable by the employer in the exercise of ordinary care, and whether it did exercise ordinary care to discover it.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 613-623; Dec. Dig. § 253.*]

11. MASTER AND SERVANT (§ 265*)—INJURIES TO SERVANT—RES IPSE LOQUITUR DOCTRINE.

The fact that a rock fell upon a coal miner was not sufficient proof of negligence by the mineowner in not inspecting the roof.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 877-908, 955; Dec. Dig. § 265.*]

12. MASTER AND SERVANT (§ 265*)—NEGLIGENCE.

One suing for a coal miner's death must show that the rock which fell on him should have been discovered, by the exercise of reasonable care by the employer, in time to have prevented the injury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 877-908, 955; Dec. Dig. § 265.*]

13. TRIAL (§ 296*)—INSTRUCTIONS—CURE BY OTHER INSTRUCTIONS.

An erroneous instruction, which directed a verdict on the hypothesis stated, was not cured by contrary instructions.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 705-713, 715, 716, 718; Dec. Dig. § 296.*]

14. DEATH (§ 93*)—DAMAGES—PUNITIVE DAMAGES.

Rev. St. 1909, § 5427, providing that the jury, in an action for a wrongful death, may give such damages as they deem fair, with reference to the injuries resulting to the surviving parties, and "also having regard to the mitigating or aggravating circumstances" attending such wrongful act, does not authorize the award of punitive damages, except where the injury was wanton or reckless, so that they would be otherwise allowable.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 96; Dec. Dig. § 93.*]

Appeal from Circuit Court, Macon County; Nat M. Shelton, Judge.

Action by Catherine Goode against the Central Coal & Coke Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

B. R. Dysart and Walter C. Goodson, both of Macon (Massey Holmes, of Kansas City, of counsel), for appellant. Dan R. Hughes, of Macon, and Burns, Burns & Burns, of Brookfield, for respondent.

JOHNSON, J. Plaintiff's husband, a coal miner employed by defendant in one of its mines in Macon county, was killed in the mine by a large rock, which fell from the roof of an entry, and, claiming that his death was caused by negligence of defendant, plaintiff brought this action within six months after the death of her husband to recover the damages sustained by her in consequence of the alleged negligence.

The pleaded cause of action is founded on section 5426, Rev. Stat. 1909, and the damages claimed are those allowed in section 5427. The answer, in addition to a general denial, contains pleas of assumed risk and

contributory negligence. Plaintiff prevailed in the circuit court, where she recovered a judgment of \$5,000.

The husband of plaintiff, in company with other miners, was engaged in the work of "drawing pillars." In the preceding stages of the work in that part of the mine, the coal had been removed from entries and rooms, and thick pillars or walls of coal had been left standing, for the purpose, in part, of supporting the roof. Afterward these pillars were removed to obtain the coal in them. Plaintiff and his fellow servants had been working eight days mining the coal in one of such pillars, and just before the event in controversy had been loading coal loosened by blasts from the pillar into tram cars.

The parties agree that it was the duty of miners thus employed to attend to the safety of the place in which they were working; and the great weight of the evidence is to the effect that defendant owed such miners the duty of reasonable care to keep all other places, such as entries and the like, in a reasonably safe condition. The death of plaintiff's husband occurred at the noon hour, while he and his companions were at lunch. According to the evidence of plaintiff, the men had withdrawn from the place of their work to a place, perhaps, 20 feet distant therefrom and in the entry, and were seated eating their lunches, which they had brought with them, when a rock, 12 or 15 feet long, four feet wide, and 2 or 3 feet thick, fell from the roof, killing the husband of plaintiff.

The main dispute in the evidence is over the fact of the position of this rock before its fall. If, as witnesses for plaintiff insist, the rock was not over the place where the men were at work before noon, there is substantial support in the evidence for the conclusion that it was in a part of the roof under the direct supervision and control of defendant; but if, on the other hand, the rock was over the place where the men were working plaintiff cannot recover, since the death of her husband should be ascribed to his own negligence in failing to perform one of the tasks of his employment.

[1] Without going into details, we content ourselves with the declaration that the contention of each disputant finds substantial support in the evidence. Counsel for defendant lay great stress on the testimony of certain witnesses, among them the state mine inspector who examined the place after the casualty, and who stated that the stain of blood and brains left on the floor showed that the place of the killing was less than five feet from the pillar, and therefore was under the part of the roof which the miners at work on the pillar were bound to keep in a safe condition. Opposed to this testimony is that of fellow workmen of the deceased, who assert that they and the deceased were seated from 15 to 25 feet from the

pillar, and describe the fallen rock as being in a place where it could not have been, had it fallen from a position in the part of the roof that was under the control of the deceased and his fellow laborers. To hold, as counsel for defendant insist we should, that the evidence of plaintiff is opposed to the plain physical facts of the situation would require us to give conclusive effect to the testimony of defendant's witnesses descriptive of such facts, and to reject as unworthy of belief the contradictory testimony of unimpeached witnesses, who give a vitally different description of them. It is only where the testimony of witnesses is opposed to the plain, undisputed and indisputable physical facts of the occurrence in question that it will be rejected by the court as unworthy of belief. Where the physical facts are disputed and disputable, such controversy must go to the triers of fact as one of the issues for them to decide. In the present case the question of whether the rock was over the place where the men had been at work, or was in another place from 15 to 25 feet distant therefrom, was a question of fact for the jury to determine. The learned trial judge committed no error in sending this issue to the jury.

[2] It is argued by counsel for defendant that the petition is so fatally defective it will not support the judgment, and our attention is called to the allegation "that the defendant and its officers and agents carelessly and negligently left and permitted the said entry in said mine *at and near* the point where defendant * * * directed the said James V. Goode to work * * * to be unsafe and dangerous," etc. Counsel say that in this allegation plaintiff has pleaded herself out of court, since she expressly states that the unsafe place was the place where the deceased was required to work, and the proof shows that it was his own duty to keep that place safe. The well-known rule is invoked that a plaintiff will not be allowed to plead one cause and recover on another, especially on one contradictory of that pleaded.

[3, 4] A sufficient answer to this argument is found in other parts of the petition, which explain and give definite meaning to the expression "at and near." These allegations are to the effect that the deceased had left his working place and had gone "westward to or near the west wall of said main entry, for the purpose of eating his lunch," etc. This position coincides with the position the witnesses for plaintiff say the deceased occupied at the time of his death. There is no substantial variance between allegation and proof. The petition must be read as a whole, and, since it was not attacked until after judgment, should be scanned with a friendly eye, and all doubts resolved in favor of the pleader. If defendant thought the two allegations to which we have referred were inconsistent or uncertain, he had his remedy, which, as to all but fatal

defects, must be invoked before answer. A liberal interpretation of the petition brings it into harmony with the judgment; and therefore the objection of defendant to its sufficiency to support the judgment is overruled.

[5] Further, it is argued by defendant that the demurrer to the evidence of plaintiff should have been given, for the reason that no proof was adduced tending to show that an inspection of the rock by defendant before its fall would have disclosed the fact that it was unsafe and likely to fall. The cause of action, if any, inuring to plaintiff of necessity must be grounded on negligence of defendant in the performance of, or in the omission to perform, some duty it owed its servant.

[6, 7] Since the petition does not allege, and the proof does not show, that this mine was one "generating explosive gas," the duty of defendant towards its servant was not measured by the provisions of section 8447, Rev. Stat. 1909, which require daily inspection of mines "generating explosive gas in which men are employed." *Timson v. Coal Co.*, 220 Mo. 580, 119 S. W. 565. The duty of defendant was defined by the general rule, requiring a master to exercise reasonable care to provide his servant a reasonably safe place in which to work.

[8, 9] Just what is reasonable care in a given case is a question generally to be solved in the light of the peculiar facts and circumstances of the case; and where they afford room for a reasonable difference of opinion about the characterization of the act alleged to have been negligent the issue of negligence or no negligence becomes one of fact for the jury to determine. The duty of defendant towards its servant called for the exercise of reasonable care to discover dangerous defects in the entry roof in question and to rectify such defects. That is to say, defendant was duty bound to inspect the roof at reasonable intervals, and, on discovering the presence of an insecure rock or other material, to remove such menace to the safety of its servants whose service compelled them to use the entry. There is evidence tending to show that defendant did not inspect the rock at reasonable intervals, and to support a reasonable inference that, owing to its size, form, weight, position in the roof, and the character of its surroundings, a reasonable inspection would have disclosed the danger of allowing the rock to remain in its overhead position. We think the evidence of plaintiff sustains the charge of negligence and tends to show that such negligence was the proximate cause of her husband's death. The demurrer to the evidence was properly overruled.

[10] We find prejudicial error in the instructions given at the request of plaintiff. One of the instructions is as follows: "The jury are instructed that the sole question in this case for the jury to determine is as to

whether or not the deceased, James V. Goode, came to his death while at work in his working place; and if the jury believe and find from the evidence that the deceased was killed by a rock falling from the roof of the entry in a part of the mine that was not his working place, while in the exercise of due care, then it will be your duty to find for the plaintiff."

[11, 12] It will be noticed that in this instruction, which assumes to cover the whole case and to direct a verdict, the jury were required to find for plaintiff on the sole hypothesis that her husband was killed by a rock falling from the roof of the entry at a place that was not his working place, without reference to the issues of whether or not the dangerous character of the rock would have been discoverable to an ordinarily careful and prudent master, in the exercise of due care towards his servant, and whether or not defendant did employ due care in the discharge of its duty of mastership. The fact that the rock fell, of itself, was not sufficient proof of negligence. *Wojtylak v. Coal Co.*, 188 Mo. 260, 87 S. W. 506. The burden was on plaintiff to satisfy the jury that the rock not only was in a dangerous condition, but that such condition would have been discovered by defendant, had reasonable care been exercised in time to have prevented the injury. The instruction under consideration ignored that burden and lessened the load the law required plaintiff to carry to the end of the case.

[13] The error cannot be deemed cured by the other instructions given at the instance of plaintiff. Assuming to cover the whole case and directing a verdict, the instruction offered a hypothesis which the jury might select to the exclusion of all others; consequently such other hypotheses should not be regarded as curative, but as contradictory, of that we pronounce erroneous and harmful.

[14] In view of the possibility of a retrial of the case, we deem it necessary to say that, since the case involves no issues of malice, wantonness, or recklessness, but is merely an action for negligence, the instruction on the measure of damages should not present any issue of "mitigating or aggravating circumstances." These words, as used in the statute (section 5427, Rev. Stat. 1909), are intended to apply only to cases in which it would be proper to allow punitive damages, and have no application to other cases grounded in tort. *Boyd v. Railroad*, 236 Mo. 54, 139 S. W. 561; *Barth v. Railway*, 142 Mo. 535, 44 S. W. 778; *Morgan v. Durfee*, 69 Mo. 469, 33 Am. Rep. 508; *Nichols v. Winfrey*, 79 Mo. 544.

The court say, in *Barth v. Railway*, supra: "It is now the settled rule of decision in this court that where there is neither allegation of malice, wickedness, or wantonness, in the tort complained of, nor evidence of any aggravating circumstances, it is im-

proper in the instruction to include the words 'having due regard to the mitigating or aggravating circumstances.' These words are only proper in a case in which punitive damages or smart money may be allowed. *Stoher v. Railroad*, 91 Mo. 509 [4 S. W. 389]; *Parsons v. Railroad*, 94 Mo. 286 [6 S. W. 464]."

Our decision in *Ogan v. Railroad*, 142 Mo. App. 248, 126 S. W. 191, relied on by plaintiff, is not in conflict with this ruling.

The judgment is reversed, and the cause remanded. All concur.

CROWLEY v. CROWLEY.

(Kansas City Court of Appeals. Missouri. Nov. 11, 1912. Rehearing Denied Dec. 9, 1912.)

1. HUSBAND AND WIFE (§ 144*)—SEPARATE PROPERTY—RENTS.

Rev. St. 1909, § 8309, provides that all the income, increase, and profits from a married woman's real estate shall remain her separate property, and not be liable for her husband's debts, unless reduced to his possession with her express consent, provided that it shall not be deemed to have been reduced to the husband's possession by his use and care thereof, unless by the terms of said assent in writing full authority be given by the wife to the husband to dispose of the same for his own use, but such property shall be subject to execution for any liability of her husband created for necessities for the wife or family. *Held*, that where a husband and wife lived together peaceably for a number of years on a farm belonging to the wife, without any thought of the existence of the relation of debtor and creditor, and the farm rents were collected and disposed of by the husband without the wife's written consent, he supporting and providing for the family, she cannot recover against his estate for such rent collected, on the ground that she never gave her written consent to his use thereof.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. §§ 545-553; Dec. Dig. § 144.*]

2. STATUTES (§ 188*)—CONSTRUCTION.

The plain terms of a statute cannot be frittered away by refined reasoning.

[Ed. Note.—For other cases, see *Statutes*, Cent. Dig. §§ 266, 267, 276; Dec. Dig. § 188.*]

3. STATUTES (§ 174*)—CONSTRUCTION—UNREASONABLE CONSTRUCTION.

A construction should not be entertained which would attribute to the Legislature an intention to apply the statute to an impossible situation.

[Ed. Note.—For other cases, see *Statutes*, Cent. Dig. § 254; Dec. Dig. § 174.*]

4. HUSBAND AND WIFE (§ 39*)—CONTRACTS.

A wife may now contract with her husband as if sole.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. §§ 220, 221; Dec. Dig. § 39.*]

5. TENANCY IN COMMON (§ 28*)—RENTS.

One cotenant, who rents the land and collects the rent, will be liable therefor to the other cotenant.

[Ed. Note.—For other cases, see *Tenancy in Common*, Cent. Dig. §§ 76-88; Dec. Dig. § 28.*]

Appeal from Circuit Court, Ray County; Francis H. Trimble, Judge.

Action by Zerelda A. Crowley against General B. Crowley, administrator. From a judgment for plaintiff, defendant appeals. Reversed.

Frank P. Dibelbiss and Albert M. Clark, both of Richmond, for appellant. Lavelock & Kirkpatrick, of Richmond, for respondent.

ELLISON, J. In the year 1899 David Crowley and plaintiff were married. Two years thereafter he, being joined by plaintiff, deeded a large farm, with some other property, to plaintiff's father. On the same day the father deeded the property to plaintiff. Each conveyance was the usual warranty deed, and each for the expressed consideration of "one dollar and other valuable considerations." David and plaintiff lived together harmoniously as man and wife for near 10 years, when he died. During this time the farm was rented by David, and the rents collected by him, just as it had been before he caused its conveyance to plaintiff. No objection to this was made by plaintiff, nor was any claim made that the rents should be paid over to her; but she never gave her express assent in writing that David should collect the rents for his own use and benefit, which she claims was necessary under section 8309, R. S. 1909, before her title would be divested. After David's death plaintiff presented the present claim to the probate court against his estate for each year's rent, aggregating \$8,560. The probate judge was disqualified, and the cause was certified to the circuit court for trial, as provided by statute. The judgment in the latter court was for plaintiff.

[1] That portion of section 8309, R. S. 1909, relied upon by plaintiff, reads that all "income, increase and profits" from a married woman's real estate shall "be and remain her separate property and under her sole control, and shall not be liable to be taken by any process of law for the debts of her husband," unless it be reduced to the possession of the husband "with the express assent of his wife: Provided, that said personal property shall not be deemed to have been reduced to possession by the husband by his use, occupancy, care or protection thereof, but the same shall remain her separate property, unless by the terms of said assent, in writing, full authority shall have been given by the wife to the husband to sell, encumber or otherwise dispose of the same for his own use and benefit, but such property shall be subject to execution for the payments of the debts of the wife contracted before or during marriage, and for any debt or liability of her husband created for necessities for the wife or family." The literal reading of the statute is that the rents of a married woman's real estate remain her separate

property, although used and disposed of by the husband, unless she shall have expressly consented in writing that he might dispose of it for his own use and benefit. In this case plaintiff's deceased husband, through a series of years, did use and dispose of the rents and profits of her land without her consent in writing. And her counsel, in effect, says: There is the letter of the statute, in which it is declared that her property has been taken from her without her consent being given in the only way the law will permit her to give it; therefore a liability has necessarily arisen to compensate her for its unlawful taking. Looking straight at the statute, without a glance to either side, counsel is right, and our duty would be done in directing that the plaintiff have her recompense.

[2] But ought not the reason of the thing to have its weight? It is true that plain terms of a statute should not be argued away by logic or reason, for it is said that the command of a statute is reason enough for those to whom it is addressed. Yet we all know that unless there is something on the face of the law which requires that reason should be excluded, it necessarily must have its weight and influence in determining the meaning of the law.

[3] There are two things which must be admitted in arriving at a correct determination of this controversy: One is that the Legislature ought not to be said to have intended a law to have application to a situation where it would not be possible to apply it; and the other is that literal effect cannot be given to this statute in all instances which arise between a husband and wife amicably and jointly presiding over a family. It reads that the income from her real estate is her property, and its use or disposal by the husband does not make it his; and plaintiff has cited us many cases where the husband has attempted to convert the wife's note or other personality by transferring same to others without her express written consent, in which it is held that it would remain hers and might be recovered from the transferee. *McGuire v. Allen*, 108 Mo. 403, 18 S. W. 282; *Hurt v. Cook*, 151 Mo. 416, 52 S. W. 396; *McKee v. Downing*, 224 Mo. 115, 124 S. W. 7; *Egger v. Egger*, 225 Mo. 116, 123 S. W. 928, 135 Am. St. Rep. 566; *Moeckel v. Helm*, 46 Mo. App. 340; *Nunn v. Carroll*, 83 Mo. App. 135.

But those cases do not present the situation of the parties to this controversy; nor do any others which plaintiff has cited. Here the husband and wife lived together in domestic peace and contentment, and the rents of the farm were collected and disposed of by him; he supporting and providing for the family, with no thought by either of a debtor and creditor relationship. The bread upon the table may be made of the wheat or corn which the husband has gotten as rent from the wife's farm. He eats

it, and thereby uses and consumes the "income and profits" of her land. Must he have her express written consent in writing? Plaintiff's position is that no other kind will destroy the wife's right of property. Husband, wife, and family, at her verbal request, visit a neighboring town and enjoy its entertainments. He has used rent money of her land for expenses, including that of himself and the children. Should he have gotten her written consent expressly directing how this was to be done? Endless illustrations could be given, showing the literal terms of the statute cannot be applied to all of the conditions which do necessarily attend harmonious marital life.

Authorities in other states support this statement, though their statutes are not, in all respects, like ours. Most of them secure to the wife a separate estate, with its income free from the claim of her husband, in much the same manner ours does. The only one we have been cited to, containing a restriction practically like ours on the mode of acquisition of such property by the husband, is that of Pennsylvania. The statute of New York secured to the wife, as her separate property, her real estate "and the rents, issues and profits thereof, in the same manner and with like effect as if she were unmarried, and the same shall not be subject to the disposal of her husband, nor be liable for his debts." In that state, where the wife without objection permitted the husband to use rents of her real estate partly, at least, in support of the family, as if his own, it was held she could not afterwards compel him to account to her. *Smith v. Smith*, 125 N. Y. 224, 229, 26 N. E. 259. In Indiana it is held that where she is living in harmony with her husband, and allows him to use and dispose of the income of her property, as distinguished from the property itself, and thereby encouraging him to live in manner and style more expensive, she cannot, after his death, set up a claim thereto and perhaps impoverish his estate. *Bristor v. Bristor*, 93 Ind. 281.

[4] As stated above, our statute (section 8309) reads that the husband's use and disposal of the rents and income of his wife's separate property is required to be by her express written consent. At the same time, other parts of the statute should have influence in the construction of that particular part. The wife may now contract with the husband as if sole (*Rice v. Sally*, 176 Mo. 107, 75 S. W. 398), and the rents and income from her separate estate are liable for support of the family (sections 8308, 8309, R. S. 1909). If she, while living amicably with her husband, in joint care of the family and jointly interested in its well-being, foregoes her privilege of exacting a contract from him to repay her the income of her property, which she knows he is collecting, and which she is necessarily enjoying, directly or indirectly, should she be permitted, after a

long series of years of peaceful married life, and after his death, to set up a claim, which no limitation could bar, it would work a great wrong. *McGlinsey's Appeal*, 14 Serg. & R. (Pa.) 64.

An Iowa statute secures to the wife her separate property and its income, and, like our statute, permits her to maintain an action against the husband who has taken it to himself. Another statute, like ours, makes her property liable for the support of the family. The Supreme Court of that state disallowed her claim, presented after his death, for using a part of the money arising from the collection of drafts. After referring to these sections of the statute, the court said: "These two sections are contained in the same chapter of the Code, and as they relate to the same subject-matter they must be construed together. Under the latter section the property of both husband and wife can be compulsorily made liable for the expenses of the family and the education of the children. Without doubt, we think, the same thing may be accomplished by voluntary action. If, therefore, a wife devotes her property to such purposes, or knows it is being done by her husband, and makes no objection, she does not thereby become the creditor of her husband, because she has only discharged a legal obligation resting on her, as well as her husband, and the latter did not agree or promise he would recompense her for so doing. Broad as section 2204 may seem to be, it should not be construed so as to include property which a wife knows is being applied from day to day through a period of years to the discharge of a legal obligation resting on her equally with her husband. Her consent that it should be so applied must be presumed, and if she desires to hold her husband liable for such property at some future day she should obtain his obligation or promise to pay. This much, at least, is required before she can become the creditor of her husband under the circumstances of this case." *Courtright v. Courtright*, 53 Iowa, 57, 4 N. W. 824.

Though our statute requires the wife's written consent, we, with defendant's counsel, have thought proper to investigate the views of courts in jurisdictions which have not such restrictive statute, with a view to a better understanding of the decisions in our own courts to which we will now refer. In *Bank v. Winn*, 132 Mo. 80, 90, 33 S. W. 457, where creditors were claiming that a conveyance from husband to wife to secure her for money used by him with her acquiescence, which she had inherited, was fraudulent, there was evidence tending to show that the land conveyed was of greater value than his debt to the wife. In order to increase the debt, the wife contended she was entitled to interest. But, notwithstanding there was no written consent, the court held that, in the absence of an agreement

by the husband to pay interest, none was chargeable, and, as was done by the Supreme Court of Iowa, cited the common liability of the wife with the husband to aid in support of the family, as provided by our statute above cited.

Another case (*Donovan v. Griffith*, 215 Mo. 149, 169, 114 S. W. 621, 20 L. R. A. [N. S.] 825, 128 Am. St. Rep. 458, 15 Ann. Cas. 724), decided by our Supreme Court as late as 1908, was where the heirs of the deceased wife sought to have the surviving husband declared a trustee in certain lands the title to which was in his name, and certain other lands the title to which was in the joint names of the husband and the deceased wife. The question arose whether the husband should be charged with rents collected and disposed of by him. The court held that he should not be. We cannot see how this plaintiff can escape the controlling authority of that case. The court stated that "it must not be overlooked that he and his wife were living together, both of whom doubtless enjoyed the benefits and products of such land. There is an entire absence of any dispute while they were living together as husband and wife, up to the time of her death, as to the control of the premises, or as to whom the rents should be paid." The court then refers to the right of the wife to have contracted with the husband, if she had desired to keep her claim on the rents she knew he was using, and stated that the law would not favor the implication of a contract where they were living together in harmony and enjoying the products of the land in a manner satisfactory to themselves.

Besides these cases from our Supreme Court, defendant's counsel have cited a like decision made by us in an opinion by Smith, P. J. *Holt v. Colyer*, 71 Mo. App. 280. In addition to these cases from our own courts, we find that the statute in Pennsylvania secured to the wife her property as her separate estate and contained this provision, viz.: "Nor shall such property be sold, conveyed, mortgaged, transferred, or in any manner encumbered by her husband, without her written consent first had and obtained and duly acknowledged," etc. It was held in *Hauer's Estate*, 140 Pa. 420, 21 Atl. 445, 23 Am. St. Rep. 245, that where the wife, living in harmony with the husband, with no thought of debtor and creditor relationship, permits him to receive and use as his own the rents of her separate property, she cannot at his death recover them, without proof of an understanding that he was to account for them. The court distinguished between using the principal or corpus of the wife's property and merely the interest or income of it.

[5] Plaintiff's counsel have sought to show that *Donovan v. Griffith*, *supra*, was inapplicable, for the reason stated that the husband and wife were tenants in common of

the real estate, and by an entertaining argument, oral and written, it is maintained that one tenant in common is not liable to his cotenant for rents collected. It, however, will be observed that the court does not consider that feature of the case as in any way influencing its decision. Besides, while where there is an occupancy by one tenant in common, without demand of sharing by the other, the occupying tenant cannot be called to account for rents by the other, yet if one tenant rents the land and collects the rent, as in the Donovan Case, as to a part of the land, he will be held liable to the other. *Bates v. Hamilton*, 144 Mo. 1, 45 S. W. 641, 66 Am. St. Rep. 407.

Again, counsel seek to distinguish the Donovan Case by the assertion that it was dealing with an equitable separate estate, instead of a statutory separate estate involved in this case. We do not see where there is any difference, so far as concerns this question. Schouler, in his work on Domestic Relations (section 102), says that, in view of the sweeping character of the married woman's statutes, whatever distinction there is "becomes of comparatively little consequence." So a like statement is made by the court in *Hauer's Estate*, 140 Pa. loc. cit. 427, 21 Atl. 445, 23 Am. St. Rep. 245.

The result of the foregoing views is to reverse the judgment. All concur.

HARE v. SISTERS OF MERCY.

(Supreme Court of Arkansas. Nov. 18, 1912.)

1. WILLS (§ 673*)—TRUSTS—CREATION.

A will devised one-half of the testatrix's estate to certain Sisters of Mercy "for the support and maintenance" of a daughter of the testatrix during her life, and after the daughter's death "for the purpose to educate poor Catholic children." *Held*, that the testatrix did not incidentally state the motive which led her to make an absolute gift, but created an express trust by imposing an obligation for the support and maintenance of her daughter during her life.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1582-1584; Dec. Dig. § 673.*]

2. CHARITIES (§ 45*)—CARE OF INDIVIDUALS—COMPENSATION—QUANTUM MERUIT.

Where, under a will, a charitable organization was made trustee of an express trust for the support and maintenance of the testatrix's imbecile daughter, with the right to use all of said property not required for such purpose at its own discretion, and with no requirement for an accounting, and thereafter accepted the provisions of the trust and cared for the child for 19 years, it could not thereafter, without offering to return the trust moneys received, have payment upon a quantum meruit for the maintenance of the imbecile, even though the portion of the testatrix's estate devised them was not so productive as it was expected to be, on account of the invalidity of the will of the husband of the testatrix and father of the imbecile, as the parties cannot be placed in statu quo.

[Ed. Note.—For other cases, see Charities, Cent. Dig. §§ 80, 81, 102-104; Dec. Dig. § 45.*]

3. TRUSTS (§ 312*)—SALE OF ESTATE—RECOVERY OF PURCHASE PRICE—INVALIDITY OF WILL.

Where a trustee had accepted the obligations of an express trust for the care of an imbecile child, created by will, and had been forced by the invalidity of the will of the husband of the testatrix to return the purchase price of property purchased from it, which was supposed to have passed to the testatrix, and thence to the trustee under the invalid will, it may recover such sum from the estate of the imbecile whose custody was undertaken.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 431; Dec. Dig. § 312.*]

McCulloch, C. J., dissenting.

Appeal from Sebastian Chancery Court; J. V. Bourland, Chancellor.

Action by the Sisters of Mercy against Ella Hare. From a judgment for plaintiff, defendant appeals. Reversed and remanded, with directions.

This suit was brought by appellees to recover on a quantum meruit for the maintenance and support of Ella Hare, for 19 years, at the rate of \$150 per month, and resulted in a judgment in their favor for \$41,330.76, which the court declared a lien against her estate, and ordered the same sold in satisfaction thereof. From this judgment, the appeal comes.

The mother of Ella Hare, an imbecile, disposed of her estate in Sebastian county by will; the clauses of same which are necessary to be considered being as follows:

"I give, devise and bequeath to the Sisters of Mercy at Fort Smith, known as Saint Ann's Convent, one-half of all my estate, real and personal, after deducting the legacies and bequest mentioned in this, my last will and testament, for the support and maintenance of my daughter Ella Hare, during her life, and after the death of my said daughter, Ella Hare, I give, devise and bequeath to the said Sisters of Mercy, the said half of my estate, real and personal, for the purpose to educate poor Catholic children. I give, devise and bequeath to the pastor of the parish of the Church of the Immaculate Conception, at Fort Smith, in the county of Sebastian, state of Arkansas, half of all my estate, real and personal, to be used by the said pastor for the said purposes of helping to establish a school in said parish for the education of Catholic boys and for helping to educate young men of the parish for the priesthood."

John Hare, the husband of Mary A. Hare and the father of the imbecile, Ella Hare, died, possessed of a considerable estate, in 1883, making his wife the sole beneficiary in his will, and also his executrix.

Appellee, the Sisters of Mercy, is a corporation, a benevolent, religious body, associated in its work with the Church of the Immaculate Conception at Ft. Smith, Ark., and has been since its organization in 1860.

John and Mary A. Hare, deceased, were both members of said church. Mary A. Hare

administered the estate of her said husband, and the administration was closed long before her death in 1893; and at the close thereof the probate court of Sebastian county made an order vesting the entire estate of John Hare in her. The estate consisted of real estate in and near to Ft. Smith, of the value of about \$26,000 at the time of her death. Only a small part of it was improved, and Mary A. Hare had no estate at the time of his death, but received \$2,000 insurance on his life, erected some buildings on the real estate formerly owned by him, and acquired other real estate of her own, part of which she improved; and her real estate, when she died, was worth \$9,800 and her personal estate \$1,347.87, and the demands against her estate amounted to \$4,276.55. After her death her administrator was appointed executor of the estate of Ella Hare, and, upon the court's finding that she was mentally incompetent, directed the payment to the Sisters of Mercy of \$25 per month for her care, which was done as long as the administrator lived. After his death Sister Aloysius, now Mother Superior of appellee, was appointed guardian, and acted as such until A. A. McDonald was appointed. During the administration of her estate, appellee received from the administrators funds arising from the sale of real estate which belonged to John Hare at his death, and other sources, in all, the sum of \$6,778.66. The settlements of the administrator of Mary A. Hare's estate show that he paid appellee, on Ella Hare's account from 1893 to 1904, the sum of \$3,174.93, and that it received from the sale of lot 7 block 564, Reserve addition to the city of Ft. Smith, which belonged to the estate of Mary A. Hare, \$9,000. During the administration of the estate, all the real property owned by John Hare at the time of his death, except that part of same sold and conveyed to Tillman Shaw, was sold by Matt Gray, administrator of her estate, who, at the time, received from said estate, \$6,955 in addition to the \$3,000 for lands condemned belonging to said estate of John Hare; and, in addition to these sums, he received, as shown by annual statements, exclusive of the fourth annual statement, which was lost, as such administrator, \$15,187.63, rent on the improved property belonging to the estate of John Hare and Mary A. Hare; and his accounts show the disposition of all funds collected by him from all sources. Appellee, claiming to be the owner thereof through the will of Mary A. Hare, conveyed to Tillman Shaw certain property (three lots in the city of Ft. Smith and a tract of land known as the Hare wagon yard, which had belonged to the estate of John Hare) for \$21,000, one of which lots, valued at \$9,000, was the property of Mary A. Hare at the time of her death. The \$21,000 received was equally divided between appellee and the pastor of the Church of the Immaculate Conception of Ft. Smith, in accordance with the

direction of the will of Mary A. Hare. After such conveyance A. A. McDonald was appointed guardian of Ella Hare, and brought suit to recover various pieces of land sold by the executrix of the estate of John Hare and the administrator of the estate of Mary A. Hare, and of said property which had belonged to the estate of said John Hare, which was sold to said Tillman Shaw, and recovered same; the will of said John Hare being declared invalid as to Ella Hare, his only surviving child, whose name was omitted therefrom. *McDonald v. Shaw*, 92 Ark. 15, 121 S. W. 935, 28 L. R. A. (N. S.) 657. The land recovered in said suits and now owned by said Ella Hare is of the reasonable value of \$34,000, and consists, nearly all, of real estate in the city of Ft. Smith, a large part of which is unimproved. The Sisters of Mercy had to refund to Tillman Shaw \$5,500, the half of the purchase price of said property, belonging to the estate of John Hare, sold by them to him.

They took charge of Ella Hare upon the death of her mother, and have cared for her properly and well until now. She is an imbecile, about 40 years of age at this time, can neither talk nor walk, and has about as much intelligence as a child of three or four years, and has had constant nursing and attention and been well provided for during all this time.

Upon the recovery of that portion of said estate which belonged to John Hare, they brought this suit, alleging: "That Mary A. Hare believed, at the time of making her will, that she was the owner of all of the property devised to her by John Hare, and intended by her will to so devise all of said property, and thought she had done so. That plaintiff, at the time it assumed charge of Ella Hare, in good faith, believed that, under the will of Mary A. Hare, it was to receive not only such property as in fact belonged to the estate of Mary A. Hare but also such property as belonged to the estate of John Hare, and which Mary A. Hare intended to devise to plaintiff under her said will. That, acting upon such belief, it assumed the charge of Ella Hare, and was willing to be bound by the terms of said will as it and the said Mary A. Hare understood said will to be, and give the said Ella Hare such attention as she might need as long as she lived." That because of the decree of the court, adjudging the will of John Hare invalid, and that Ella Hare was entitled to all of the real estate left by him at his death, "the consideration for the maintenance and support of said Ella Hare failed, and said plaintiff has not been paid for the support and maintenance of said Ella Hare for the time for which she has been taken care of, and that it was worth \$150 per month, making a total of \$31,500, for which judgment, with interest, was prayed."

The answer denied the allegations of the complaint, and that plaintiff had "received

no adequate compensation for the maintenance and care bestowed upon her, and says that by its own admission in its complaint filed herein it has cared for her under and by virtue of the terms in the will of Mary A. Hare," and alleges, further, that the estates of both John Hare and Mary A. Hare have been wound up and finally settled, the administrators discharged, and that appellee has received "from the estate of Mary A. Hare all it could ever hope to receive; and its obligation to support, maintain, and care for this defendant as long as she lives was irrevocably fixed."

The court rendered judgment for \$31,000, and declared same a lien against the property of Ella Hare and ordered it sold for satisfaction thereof. From this judgment, this appeal comes.

Winchester & Martin, of Ft. Smith, for appellant. Read & McDonough and Falconer, Youmans & Woods, all of Ft. Smith, for appellee.

KIRBY, J. (after stating the facts as above). It is not disputed that the estates of both John and Mary A. Hare have been wound up and finally settled and all the property belonging to both disposed of, except the said property sold to the said Tillman Shaw; nor can it be disputed that the Sisters of Mercy have realized out of said estate all they would have received, had the will of John Hare operated to convey his entire estate to Mary A. Hare, as they thought it did, except the \$5,500 they had to refund to Tillman Shaw, by reason of their not being the owners of the one-half undivided interest they attempted to convey to him; and they say they would have been satisfied with this disposition of the property of these estates and willing to care for the imbecile, Ella Hare, throughout her life in consideration thereof, and took charge of her and the estate with the expectation of doing so.

It was the intention of Mary A. Hare, as plainly expressed in her will, to leave one-half of her estate, after the payment of her debts and the small bequests and legacies to appellees, the Sisters of Mercy, for the support and maintenance of her daughter, Ella Hare, during her life, and thereafter to said Sisters of Mercy, to be used in educating poor Catholic children. It was, doubtless, also, John Hare's intention to leave all of his estate to his wife, Mary A. Hare, in accordance with his will, which was invalid under the law, as against Ella Hare, his only child; her name having been omitted therefrom. It may be, and doubtless is, true that the Sisters of Mercy believed that the will of Mary A. Hare conveyed, not only her own estate, but also all the estate that had formerly belonged to her husband, and was attempted by him to be devised to her, and, so believing, they took charge of Ella Hare under the provisions of

the will, and have since furnished her care, maintenance, and support. The will of John Hare was inoperative to convey his estate to Mary A. Hare, and some of it has been recovered by Ella Hare; and the Sisters of Mercy have been required to refund \$5,500, that portion of the purchase money received by them from the sale of the one-half undivided interest of certain of his said property which they sold and attempted to convey, claiming to be the owner thereof, under the will of Mary A. Hare. On that account they claim that the consideration for their taking charge of Ella Hare and furnishing her maintenance and support, under the provisions of her mother's will, has failed, and that they are entitled to pay for the reasonable value of the care, maintenance, and support so furnished to Ella Hare for the past 19 years.

[1] It is manifest from the provisions of the will that Mary A. Hare was not incidentally stating the motive which led her to make an absolute gift of the property to the Sisters of Mercy, but intended, as clearly expressed, to impose an obligation for the support and maintenance of her imbecile daughter throughout her life, and an express trust was thereby created. Bloom v. Strauss, 78 Ark. 57, 84 S. W. 511.

[2] It was a gift in trust, with the right upon the part of the trustee to use all of said property, not required for the maintenance and support of said child, at their own discretion, and without accounting therefor; and they accepted said trust. It is undisputed that they have received from the two estates of the parents of this imbecile ward the sum of \$16,500, which they have not returned. It would be manifestly unfair and unjust now to permit them to repudiate the obligation and the trust, and recover upon a quantum meruit for services already rendered and maintenance furnished a sum more than sufficient to consume the entire estate belonging to said imbecile, with no corresponding obligation on their part to maintain, support, and care for her in the future, as the decree rendered below does, thus defeating the obvious purpose of the testator and leaving entirely without protection for the remainder of her life the imbecile ward, Ella Hare, while permitting the consumption of all the remaining estates of both her father and mother by the trustee, who expected, on accepting the trust and taking charge of her, to care for, maintain, and support the said Ella Hare throughout her whole life for the one-half of said estates, which they understood was devised to them for that purpose. It is true, as urged, that the imbecile has been as well cared for by them as she could have been by any one, and that it was the intention of her father to leave all of his estate to her mother, and of her mother to leave all of her estate to the church and appellee, except the few small legacies provided for,

for her care and support during her lifetime and the church's benefit thereafter; but it does not follow, as insisted, that it would be only equitable that they should have what they thought they were going to receive, and what their testator intended to give, and that they would receive nothing more if the judgment of the lower court was affirmed.

[3] The parties cannot be placed in statu quo, and the majority of the court have concluded that, since they have expressed a willingness to carry out the purpose of the trust and care for and maintain said Ella Hare for life, under the provisions of the will, if they had received what they thought they were going to get, the court, in the administration of the principles of equity, will permit them to recover of the said Ella Hare the \$5,500 they have had to refund of the purchase money of the lands sold to Tillman Shaw, afterwards recovered by Ella Hare, and charge the same as a lien against the property of Ella Hare. By so doing, they will be placed in the position they would have occupied had no suits been brought by Ella Hare for the recovery of the lands of her father's estate, and his will had, in law, as it attempted to do in fact, conveyed same to her mother.

They are entitled to a judgment for that amount, with interest from the time of its return, and the same to be declared a lien and enforced against her property, leaving the obligation of the trust created by the will, for her support throughout the remainder of her life, unimpaired.

The court should have rendered such judgment, and for the error of the decree as rendered the cause is reversed and remanded, with directions to enter a decree in accordance with this opinion.

MCCULLOCH, C. J. (dissenting). I concur fully in the conclusion of the majority that the limit of appellee's recovery must be the sum of \$5,500, which is to be refunded to Tillman Shaw, being the price of the property sold to him. This restores appellee to the situation which it would have occupied if it had received the expected benefits under the will of Mary Hare; and it can justly claim no more.

I do not, however, agree that appellee ought to recover anything from the estate of Ella Hare. It voluntarily accepted the custody of the imbecile under the terms of Mary Hare's will, and if less property was realized than expected that was the mistake of appellee alone; and it is my opinion that no principle of equity will justify a claim against the estate of an imbecile because of disappointment in the quantity of property received under the will. Mary Hare did not attempt to devise any property, except that which she owned, so it cannot be said that there was a mutual mistake. I think there is no equity in the complaint, and that it should be dismissed.

WILKERSON v. STATE.

(Supreme Court of Arkansas. Nov. 25, 1912.)

1. CRIMINAL LAW (§ 447*)—PAROL EVIDENCE—CONVICTION OF CRIME.

Where a judgment entry, offered in evidence to show that a witness had been convicted of petit larceny, did not show such a conviction, it was not error to exclude the testimony of the justice of the peace rendering the judgment that he intended it as a conviction for petit larceny, since the entry, to be admissible, should have been corrected and amended, upon proper notice, at a hearing for that purpose.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1029-1031; Dec. Dig. § 447.*]

2. CRIMINAL LAW (§ 1036*)—RESERVATION OF GROUNDS OF REVIEW—NECESSITY OF OBJECTIONS.

Where accused neither objected to the testimony of a witness, nor moved that it be excluded from the jury, he could not complain thereof on appeal, even if the court erred in excluding the evidence offered to show the conviction of such witness for petit larceny.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2639-2641; Dec. Dig. § 1036.*]

3. HOMICIDE (§ 254*) — EVIDENCE — SUFFICIENCY.

On a trial for homicide, evidence held sufficient to support a conviction for murder in the second degree.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 533-538; Dec. Dig. § 254.*]

Appeal from Circuit Court, Lafayette County; Jacob M. Carter, Judge.

Nick Wilkerson was convicted of murder in the second degree, and he appeals. Affirmed.

The indictment charged appellant with the crime of murder in the first degree, alleging that he "did unlawfully, willfully, feloniously, and of his malice aforethought, and of premeditation and deliberation, kill and murder one Amanda Turner by then and there striking, beating, and cutting her with a certain axe," etc. The indictment was sufficient.

There was proof tending to show that on the morning of the killing the appellant sold Amanda Turner a pocketbook and when she placed her money in the pocketbook the appellant handled some of it. He had in his hands a \$5 gold piece, and said that he used to have one, and if he ever got another one he would keep it. Amanda Turner also had some silver and greenbacks. She took the money out of her stocking and put it in the pocketbook and put the pocketbook down in her bosom.

Without going into details, the testimony tended to show that the appellant had the opportunity to commit the crime. He was seen in the vicinity of Amanda Turner's house the morning she was killed, and was also seen in the vicinity shortly after the killing. Amanda Turner was murdered by some one cutting her in the head with an axe. The axe was found with blood on it, under the house, and the cuts on her head and face indicated that the killing was done

with an axe. When she was found, one stocking was pulled down. It was shown that she carried her pocketbook in her stocking.

The testimony tended to show that the motive for the crime was robbery. It was shown that the appellant, on the day of the killing, and some time afterwards, in company with a companion, went to the house where Amanda Turner was killed, and he was heard to remark that the officers had a writ for him, and he was going to leave. He left the community, and was arrested, some time after the killing, in Texas.

Tom Lucas, who was in jail with appellant, testified that appellant said he was "sitting on the bed making a cigarette, and told her [Amanda Turner] to give him the pocketbook, as he wanted to put \$5 in it. Said she finally laid down on the bed, and Bill brought him the axe, and he hit the woman and then threw the axe under the house, and kicked it and cut his shoe. After that he pulled my shoe one night and woke me and asked me if I was going to appear against him, and I told him I didn't know, and he fell over and cried and prayed."

It was shown that appellant's shoe had holes cut in it. He said one of the holes was cut because the lining hurt his foot. The other hole he had not noticed before his testimony was given.

A witness by the name of Mark Hanna Washington testified as follows: "The defendant did not sleep in the cell with me and Tom Lucas. I saw him and Lucas talking one night and also one day. They were whispering. One night defendant pulled my foot and then pulled Tom's and Tom went down to the cell and they talked. I could hear what they said, and he told Tom he did not want him to go and testify against him as to what he told him about the woman; and Tom said he wouldn't."

In the examination of this witness the following occurred: "Q. Have you ever been arrested and tried and convicted for stealing? A. No, sir. Q. Were you ever arrested and carried before Squire W. L. Nance, justice of the peace, charged with having stolen Mr. Austin's watch, and fined \$5? A. Yes, sir. Q. What did you say you hadn't been arrested for? A. I had not just for stealing — Q. Didn't you say you was fined \$5? A. Yes, sir. Q. What else did they do to you? A. They never done nothing to me. Q. Was there a jail sentence against you? A. No, sir. Q. Well, wasn't you put in jail? A. They just put me in jail, and Mamma paid my fine—\$5."

At this juncture appellant's counsel offered to introduce page 453 of Justice W. L. Nance's record. The court stated, "That judgment doesn't show that he was convicted

of petit larceny." Appellant's counsel then asked permission to introduce Justice Nance and let him amend his record to show that the judgment was intended by him to apply as petit larceny. The court stated as follows: "I don't think he could amend it any by showing what it means. The court judicially knows that the lowest fine for petit larceny is \$10, and some time in jail. There is no judgment on that record showing that he was convicted of the crime of petit larceny." The court therefore refused to allow the testimony to be introduced.

The appellant was convicted of murder in the second degree and sentenced to 10 years in the penitentiary.

Hal. L. Norwood, Atty. Gen., and Wm. H. Rector, Asst. Atty. Gen., for the State.

WOOD, J. (after stating the facts as above). The instructions of the court applicable to the facts in evidence were correct, and we deem it unnecessary to set them out and comment upon them, as they only involve familiar principles of law that have been often announced by this court.

[1, 2] There was no error in the ruling of the court in refusing to permit appellant to show by the justice of the peace that he intended by the page of his record which appellant offered to introduce to enter a judgment against the witness Mark Hanna Washington for petit larceny. The record shows that the lower court examined the offered page and found that it did not show that the witness Washington was convicted of petit larceny. This being true, it was not error for the court to refuse to allow the appellant to vary or contradict this record by the testimony of the justice, to the effect that he intended the judgment entry as a conviction for petit larceny. If the justice made a mistake in his judgment entry, it should have been corrected and amended, upon proper notice, at a hearing for that purpose, and after being so amended could then have been introduced in evidence. Moreover, the appellant, after excepting to the court's action in refusing to allow the docket to be introduced, permitted the witness Washington to testify without further objection, and without moving the court to exclude his evidence from the jury. Appellant therefore cannot complain of the testimony of the witness Washington.

[3] The testimony shows a most horrible murder, and appellant, if guilty at all, was guilty of murder in the first degree. The testimony was amply sufficient to sustain a verdict for that degree, and he cannot complain because the jury found him guilty of a lower offense.

Affirmed.

MITCHELL v. CHICAGO, R. I. & P. RY. CO.
(Supreme Court of Arkansas. Nov. 25, 1912.)

1. MASTER AND SERVANT (§ 278*)—INJURY TO SERVANT—NEGLIGENCE—EVIDENCE.

A brakeman on a work train was sent out to flag trains, and he crawled under a gondola car on a storage track while watching for approaching trains. The work train backed in on the storage track and struck the car, fatally injuring the brakeman. There was nothing to show that the trainmen were in a position to see the brakeman while under the car, or that any of them did see him prior to the accident. *Held*, not to show actionable negligence.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 954, 956-958, 960-969, 971, 972, 977; Dec. Dig. § 278.*]

2. MASTER AND SERVANT (§ 240*)—CONTRIBUTORY NEGLIGENCE—EVIDENCE.

The brakeman was guilty of contributory negligence as a matter of law; for, though he could assume that proper signals would be given when the work train approached, he was not absolved from the duty of looking out for approaching trains, in view of the fact that he had put himself in a position where his peril could not be easily discovered.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 751-756; Dec. Dig. § 240.*]

Appeal from Circuit Court, Lonoke County; Eugene Lankford, Judge.

Action by Laura H. Mitchell, administratrix of Frank Mitchell, deceased, against the Chicago, Rock Island & Pacific Railway Company. From a judgment for defendant, plaintiff appeals. Affirmed.

J. H. Harrod, of Little Rock, for appellant. Thos. S. Buzbee and John T. Hicks, both of Little Rock, for appellee.

McCULLOCH, C. J. Deceased, Frank Mitchell, was a brakeman in the service of appellee, and was run over by a train and injured, from which injuries death ensued; and the administratrix of his estate instituted this action to recover damages for the benefit of the estate on account of pain and suffering endured by deceased, and for the benefit of the next of kin for damages which resulted from the loss of contributions.

Mitchell was brakeman on a construction train engaged, at the time of his injury, in cleaning out ditches along the track in and near Forrest City, Ark. The injury occurred shortly after the noon hour on May 25, 1909, while the train was in the yards at Forrest City. The work train was on the main track while the crew of men were at work cleaning the ditches, and it was necessary to put out a flagman toward the east to protect the train and crew from trains approaching from that direction. This duty was assigned to deceased, Mitchell, and he proceeded to a distance of about 500 feet east of the work train, and remained there several hours. On a storage track, running parallel with the main track and on the north side of it, was a loaded dirt car, called a gondola car. This car had been set over on that track

before that, probably the day before; and the testimony shows that Mitchell crawled under the side of that car, in order to get in the shade while he was on watch for approaching trains. When the time came to quit work at noon, the signal was given for moving the work train, and it moved up to the switch and backed in on the storage track, striking the gondola car under which Mitchell was resting, and both of his legs were run over and cut off. He was sitting under the car between the rails, facing the south, with his feet extending over the south rail. His position was between the front and rear trucks; and the evidence shows that the journal boxes extended out an unusual distance on this particular kind of car and obscured his protruding legs more than would have been done if it had been a car of the ordinary make. He was seen in this position by a brakeman just a few moments before the train backed in; but the first that was known of his injury was when the car was moved and his screams were heard by the men in charge of the train. Several loaded dirt cars were attached to the backing engine; and the testimony establishes the fact that no lookout was kept from the end of these cars as they were backed upon the storage track.

The trial judge instructed the jury to return a verdict in favor of the defendant, and the only question on this appeal is whether or not there was error in that ruling; it being contended by appellant that there was enough testimony to go to the jury on the question of the negligence of appellee's servants in failing to give signals or keep a proper lookout, and also on the question of contributory negligence on the part of deceased. We are of the opinion that the action of the trial court in giving the peremptory instruction was correct, and that the judgment below should be affirmed.

[1] There is no evidence sufficient to warrant a finding that the men in charge of the train saw deceased in his perilous position, so as to be chargeable with negligence in failing to protect him after observing him in that position. No witness testified that any of the men on the train were in a position to have seen deceased while he was under the dirt car. There is one witness who testified that the fireman, immediately after the injury, exclaimed, "I think we have pinched Mitchell back there;" but that was after Mitchell's screams were heard; and it is not sufficient to establish the fact that the fireman, or any other man on the train, saw Mitchell under the car before it was moved. Conceding that it was possible for men on the engine to have seen Mitchell's legs protruding from underneath the car, yet there is no evidence that any of the men did see them.

[2] Now, Mitchell's conduct in crawling under the car and remaining thereunder

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

without taking notice of the approaching train backing in upon the sidetrack is such that different minds cannot draw different conclusions as to it being an act of negligence; and this bars a recovery of damages, regardless of any negligent act of the trainmen in failing to give signals or in failing to keep a lookout. Deceased was put there for the purpose of guarding the train; but he knew that any position on the track was a place of danger, and that it was particularly dangerous to crawl beneath a car. While he had a right to assume that proper signals would be given when the train approached, yet this did not absolve him from the duty of taking heed for his own safety and looking out for the approach of a train on the storage track. He was not misled in any way by the circumstances. On the contrary, the course of the work there was sufficient to put him upon notice that there was a probability that when the men ceased work at noon, and the cars were loaded with dirt, they would be backed onto the storage track. Be that, however, as it may, the conclusion is irresistible that when he crawled under the car and put himself in a position where his peril could not be easily discovered, and thereafter failed to look out for approaching trains on that track, he was guilty of an act of negligence which, notwithstanding any negligence on the part of the other trainmen, bars a recovery of damages on account of the injury.

The judgment of the circuit court is therefore affirmed.

THOMAS v. JACKSON.

(Supreme Court of Arkansas. Nov. 18, 1912.)

1. TRIAL (§ 260*)—INSTRUCTIONS—REQUESTS.

Defendant was not prejudiced by the denial of instructions which were covered by instructions given.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651-659; Dec. Dig. § 260.*]

2. APPEAL AND ERROR (§ 301*)—RESERVATION OF GROUNDS OF REVIEW—MOTION FOR NEW TRIAL.

Objections to instructions and to the admission and exclusion of evidence are waived, where the party objecting fails to preserve exceptions to the rulings by assigning them as a ground in his motion for a new trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1743, 1753-1755; Dec. Dig. § 301.*]

3. DAMAGES (§ 123*)—BREACH OF CONTRACT—SUBSTANTIAL PERFORMANCE.

Where work has been done substantially in compliance with the terms of a contract, or where there has been an acceptance of the work by the contractee, a contractor may, notwithstanding defects therein, recover the contract price, less the cost of correcting such defects.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 320-325; Dec. Dig. § 123.*]

Appeal from Circuit Court, Lawrence County; R. E. Jeffery, Judge.

Action by Earl Thomas against W. T. Jackson. Judgment for plaintiff, and defendant appeals. Affirmed.

Appellee brought suit against appellant for a balance of \$329.21 due upon a contract for the building of a bungalow in Hoxie, and for foreclosure of a mechanic's lien. Appellant filed answer and cross-complaint, denying any indebtedness, admitted the payment of \$450 on the contract price for use in the purchase of materials and paying of laborers, denied that appellant complied with his contract, claimed damages for defective and unworkmanlike construction and bad materials, alleged that it would cost the sum of \$600 more than the balance claimed under the contract to put the house in such condition as appellee agreed to construct it, and that it was not constructed in substantial compliance with the contract, and that he was damaged in the said sum of \$450 already expended thereon. The facts are, substantially, that the written contract was entered into between the parties for the construction of a one-story bungalow in the town of Hoxie, appellee agreeing to furnish materials and build the house for \$743.46; the house to be built according to a certain plan drawn by appellant, with the interior and exterior arrangements as shown in the plan and certain photographs, the contract not including the canvassing, papering, and painting of the house. "Said plan includes one fireplace, chimney exposed inside, and is to be built outside of red pressed brick." Appellee testified that he was to be paid certain amounts for extras, as set out; the whole amount of the contract price, with extras, being \$781.46. He acknowledged receipt of \$450, and also a credit of \$2.25 for broken glass, and claimed a balance due of \$329.21.

The appellant moved into the house with his family at about the time appellee was constructing the chimney, and, discovering that he was not going to use a certain kind of brick made in Coffeyville, refused to permit him to build the chimney, notwithstanding appellee was insisting on doing so and using a red pressed brick purchased from Jonesboro, which he claimed and stated was in accordance with the terms of the contract, and also that he was unable to get the Coffeyville brick because of the excessive freight rate. Appellant testified that the house was not placed upon a level foundation; that the floors sagged; that one wall was 12 inches lower than the opposite wall; that the window and door casings were not square; and that one side of the roof was longer than the other—the comb not being in the center of the house—and that it would cost more to build the house properly in accordance with the contract than the original contract price; and that it had cost him \$75 to construct the chimney, which he refused to let appellee build, because he was

not going to use the Coffeyville brick therein. After the contract was entered into, appellee showed appellant a brick made in Coffeyville, which was being used at the Baptist Church, and told him he thought he could get the brick to build the chimney from the church, and would use that kind if he could procure it. He was unable to get this brick and was using another red pressed brick, which he claimed was in accordance with the contract, when appellant refused to permit him to proceed further with the construction.

Many witnesses testified as to the kind and character of the work, and their testimony is conflicting as to whether or not it was done in a neat and workmanlike manner. They also testified as to the cost of remedying certain defects, and appellee testified that the chimney could have been finished with materials in accordance with the terms of the contract already placed upon the ground by him with two or three days more work.

The court refused to give each of the five instructions requested by appellant, and gave six, none of which were objected or excepted to. The jury returned a verdict for appellee for \$300, and from the judgment thereon this appeal comes.

Earl Thomas, pro se. Smith & Blackford, of Walnut Ridge, for appellee.

KIRBY, J. (after stating the facts as above). [1] It is contended that the cause should be reversed for the failure to give said requested instructions; but we have examined same carefully, and the only two which correctly state the law were sufficiently covered by the instructions given by the court, none of which were excepted to, and no prejudice resulted from the refusal to give them.

[2] Appellant objected, it is true, to the giving of each of said instructions by the court, but he failed to preserve his exceptions by carrying them into his motion for a

new trial as a ground therefor, and thereby waived the right to complain of error in the court's ruling thereon. *St. L., I. M. & S. Ry. Co. v. Fayetteville*, 75 Ark. 534, 87 S. W. 1174; *Burris v. State*, 73 Ark. 455, 84 S. W. 723; *McCarroll v. Stafford*, 24 Ark. 224; *Ray v. Light*, 34 Ark. 421. He likewise waived the right to complain of error in the admission and exclusion of evidence. *Fourche River Lbr. Co. v. Bryant Lbr. Co.*, 97 Ark. 632, 135 S. W. 796; *Railway v. Goset*, 70 Ark. 427, 68 S. W. 879; *Railway v. Deshong*, 63 Ark. 443, 39 S. W. 260; *Ince v. State*, 77 Ark. 418, 88 S. W. 818; *Allen v. State*, 70 Ark. 337, 68 S. W. 28. It is undisputed that appellant moved into the building and occupied it with his family after it was constructed, and that he still continues to do so.

[3] When work has been done substantially in compliance with the terms of the contract, or there has been an acceptance of the work by the contractee, the contractor may, notwithstanding defects therein, recover the contract price, less the cost of correcting such defects. A substantial performance is all that is required to authorize a recovery of the contract price, less the additional cost of a literal compliance with the contract. *Mitchell v. Caplinger*, 97 Ark. 281, 133 S. W. 1032; *Fitzgerald v. La Porte*, 64 Ark. 34, 40 S. W. 261; *Ark.-Mo. Zinc Co. v. Patterson*, 79 Ark. 506, 96 S. W. 170; *Harris v. Graham*, 86 Ark. 570, 111 S. W. 984.

Appellee was entitled to recover on the contract upon a substantial performance of it, or an acceptance of the work by the contractee, notwithstanding defects therein, the contract price, less the cost of correcting such defects. The jury only allowed \$29.21 credit to appellant upon his claim of defective and unfinished work, but the issues were fairly submitted to them by the instructions given, and they have found them in favor of the appellee upon conflicting testimony, and their verdict will not be disturbed.

Finding no prejudicial error in the record, the judgment is affirmed.

FOARD COUNTY v. SANDIFER.

(Supreme Court of Texas. Nov. 27, 1912.)

1. APPEAL AND ERROR (§ 1175*)—CONCLUSIONS OF FACT OF COURT OF CIVIL APPEALS—STATUTORY PROVISIONS.

Where the facts are undisputed, the Supreme Court on writ of error to review a judgment of the Court of Civil Appeals will not send the case back on the ground that the Court of Civil Appeals failed to announce conclusions of fact, as required by Rev. Civ. St. 1911, art. 1639.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4253; Dec. Dig. § 1175.*]

2. COUNTIES (§ 152*)—CONTRACTS—"DEBT."

A claim for commissions under a contract by which a county listed its school land with a broker for sale for a commission made payable out of the county funds is not a debt within Const. art. 11, § 7, forbidding the creation of a debt unless provision is made at the time for its payment, where the claim becomes due in the current year, and the county has ability by taxation to raise the fund for its payment.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 215-217; Dec. Dig. § 152.*]

For other definitions, see Words and Phrases, vol. 2, pp. 1864-1886; vol. 8, p. 7628.]

3. COUNTIES (§ 122*)—SCHOOL LANDS—SALE BY BROKER—COMPENSATION—CONTRACTS.

A contract by which a county listed school land with a broker for sale at \$4 per acre net, with 5 per cent. interest from date of sale, payable annually or semiannually, and the price being payable 20 years from date of sale with option of the purchaser to pay after 10 years, fixes the minimum price for which a sale may be made, but does not mean that the school fund shall receive no more than that amount, and provides that the compensation shall be paid out of county funds, and, so construed, the contract is valid.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 82, 136, 181, 182; Dec. Dig. § 122.*]

4. EVIDENCE (§§ 60, 65*)—PRESUMPTIONS—KNOWLEDGE OF LAW.

The court in construing a contract by which a county listed land with a broker for sale must presume that the county and the broker knew the law, and intended to obey it.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 81, 85; Dec. Dig. §§ 60, 65.*]

5. CONTRACTS (§ 153*)—CONSTRUCTION—VALIDITY.

A contract, susceptible of two constructions, one of which will make it illegal and the other lawful, must be so construed as to make it legal.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 734; Dec. Dig. § 153.*]

Error to Court of Civil Appeals of Second Supreme Judicial District.

Action by C. P. Sandifer against Foard County. There was a judgment of the Court of Civil Appeals (134 S. W. 823) reversing a judgment for defendant, and defendant brings error. Affirmed and rendered.

G. W. Walthall, of Crowell, Stephens & Miller, of Ft. Worth, and Gregory, Batts & Brooks, of Austin, for plaintiff in error. W. D. Berry and F. P. McGhee, both of Vernon, and McGregor & Gaines, of Austin, for defendant in error.

BROWN, C. J. This suit was instituted in the district court to recover of said county reasonable compensation for selling the school lands of said county under this contract: "This order entered into the 13th day of February, 1909, by and between the commissioners' court in and for Foard county, Texas, parties of the first part, and C. P. Sandifer, of Foard county, Texas, party of the second part, witnesseth: That the parties of the first part have this day listed for exclusive sale with the party of the second part for a term of six months from date herewith the following described property, to wit: 17,712 acres of land the same being Foard county school lying and being situated in Bailey county, Texas, at and for the sum of \$4.00 per acre with five per cent. interest from date payable annually or semiannually, said price being net to the county of Foard, state of Texas, and payable twenty years from date of sale with option to the purchaser to pay any part or all the principal at or on any interest paying period after ten years from date of sale. It is also understood and agreed that the sale of the above described land is to be made subject to a lease now on said land which expires on the 30th day of September, 1913. The party of the first part agrees to deed said land in subdivisions, provided the party of the second part thinks necessary to do so in disposing of the said land to the better advantage to the county." The agreement was entered upon the minutes of the county court of said county, and signed by the county judge and commissioners and by Sandifer. There is no complaint as to the regularity of the making of the agreement. Within a short time Sandifer sold the land to G. T. Oliver, 17,712 acres of free school land, for the sum of \$119,556.00, with interest from April 14, 1909. The sale was duly consummated, and the land conveyed to Oliver. Sandifer claimed as his commission 5 per cent. on the amount the land sold for. The county resisted the recovery on two grounds, to wit: First. The contract created a debt upon the county and made no provision for its payment, which was in violation of section 7 of article 11 of the Constitution, which reads: "But no debt for any purpose shall ever be incurred in any manner by any city or county unless provision is made at the time of creating the same, for levying and collecting a sufficient tax to pay the interest thereon and provide at least two per cent. as a sinking fund; and the condemnation of the right of way for the erection of such works shall be fully provided for." Second. That the contract provided for payment out of the proceeds of the school land, which was in violation of the law. The district court gave judgment for the county, from which Sandifer appealed to the Court of Civil Appeals of the Second Supreme Judicial Dis-

trict, which reversed the judgment of the district court, and remanded the cause for another trial. The county applied for a writ of error to this court upon the ground that the decision of the Court of Civil Appeals practically settles the case, and the writ was granted upon that ground.

[1] Judge Ocle Speer, who wrote the opinion, correctly announced the law, but overlooked the requirements of article 1639, Revised Statutes 1911, and announced no conclusions of fact, which is very important to this court in reviewing the judgment. We will not send this case back, because the facts are practically undisputed. If they were not, it would be necessary to return the record for a compliance with the said article.

[2] We were inclined to hold that the terms of the order entered created a debt within the meaning of the section of the Constitution above copied. But we find in the statement of facts this evidence, which is not contradicted: "In making our levies and assessments, we generally figure as to about what amount we think will be necessary to pay the expenses of the county, and we make the levy so as to meet the expenses as estimated by us. We have never made a levy at the highest limit which we are authorized to levy. If we were to make the levy at the limit, that would place enough money in the general fund of the county to pay all the general running expenses of the county, and also pay the amount of commissions claimed by Mr. Sandifer in this suit." The contract required the sale to be made in six months by July 13, 1909. It was consummated before that time. The claim could have been provided for during the current year by a levy of a tax for that purpose. The power of the county to levy taxes had not been exhausted. It was necessary that the levy should have been made, and the test is, Did the county have sufficient power to pay the claim? There is no denial of that fact, which was proved, as was shown, by the evidence of Burk, the county judge of Foard county. In *City of Corpus Christi v. Woessner*, 58 Tex. 467, Judge Stayton said: "We are of the opinion that the issuance of warrants on current expenses of a city, which do not exceed the current revenue derived from taxation, permitted by law to be levied to meet current expenses, and such other revenue as a city may have from other sources than taxation, cannot be said to be the creation of a debt prohibited by law unless a special tax be levied to meet the interest and create a sinking fund. The evidence shows that the revenue of the city for the year 1879, if it had been applied to proper municipal purposes, would have been more than sufficient to meet the payment of the warrants sued upon, after paying all other current and proper expenses. And it further appears that in addition to the money raised by taxation, permitted by law to meet cur-

rent expenses, the city has an income of \$4,000 per year for many years to come from her wharf interests, and that from these two sources at the time of the trial of this cause there was a surplus in the treasury." We cite *Terrell v. Dessaint*, 71 Tex. 770, 9 S. W. 593; *McNeal v. City of Waco*, 89 Tex. 83, 33 S. W. 322; *City of Cleburne v. Cleburne Water Co.*, 14 Tex. Civ. App. 229, 37 S. W. 655. In *McNeal v. City of Waco*, 89 Tex. 88, 33 S. W. 324, by his irresistible logic, Judge Denman reaches this conclusion: "We conclude that the word 'debt,' as used in the constitutional provisions above quoted, means any pecuniary obligation imposed by contract, except such as were at the date of the contract within the lawful and reasonable contemplation of the parties, to be satisfied out of the current revenues for the year or out of some fund then within the immediate control of the corporation." The commissions in this case were by law made payable out of the county fund. It became due in the current year, and there was ability in the county by taxation to raise the fund for its payment. The claim did not constitute a debt within the meaning of the Constitution.

[3] Plaintiff in error also asserts that the contract between the county and Sandifer bound the county to pay to Sandifer all of the proceeds of the sale in excess of \$4 per acre, which was forbidden by law; the county being required to pay the cost of sale. The writer was inclined to that view of the contract, but upon further consideration of the facts and the able argument of counsel for defendant in error we conclude that the effect of the language, "at and for the sum of \$4.00 per acre," etc., is to set the minimum price for which sale might be made at \$4 per acre, and does not mean that the school fund should receive no more than that amount per acre. The law forbids the county to pay the cost of selling out of the school fund either in land or the proceeds of it.

[4] We must presume that both parties knew the law and intended to obey it. *Tomlinson v. Hopkins County*, 57 Tex. 575.

[5] It is a well-established rule of construction that language in a contract which is susceptible of two constructions, one of which would render the contract illegal, and the other would make it lawful, that contract which would conform the contract to the law must be adopted. *Clark on Contracts*, p. 593; *Evans v. Pike*, 118 U. S. 241, 6 Sup. Ct. 1090, 30 L. Ed. 234; *Hobbs v. McLean*, 117 U. S. 576, 6 Sup. Ct. 870, 29 L. Ed. 940. The rule of construction is stated by Clark thus: "Where a particular word, or the contract as a whole, is susceptible of two meanings, one of which will render the contract valid, and the other of which will render it invalid, the former will be adopted so as to uphold the contract. Thus, where a document was expressed to be given 'in consideration of your being in advance' to a

person, and it was argued that this showed a past consideration which would not support the promise, the court held that the words 'being in advance' might mean a prospective advance, and be equivalent to 'in consideration of your being in advance,' or 'on condition of your being in advance.' So, also, where a contract is susceptible of two constructions, one of which will render it unlawful as being in violation of law or contrary to public policy, that construction which will render it lawful will be adopted."

The fact that the land was to be sold on credit for a time not less than ten years, and no provision made for any cash payment, excludes the construction that compensation was to be made from the proceeds of the sale. See authorities last above cited. The construction which makes the contract legal is most consistent with the facts, and must be adopted. If the commissioners' court had in plain words agreed to pay Sandifer a part of the proceeds of the sale of school land, that body would have violated the law. We must presume that a violation was not intended. The decisions of this court which were made before this contract was made are so plain that they could not have been misunderstood, if known to the parties, and the law conclusively presumes that they were known. *Tomlinson v. Hopkins*, supra. We conclude that the contract between the parties limited the minimum price to \$4 per acre, and that the compensation to be paid was not fixed by the terms of the written contract. The compensation for making the sale was fixed by law at a reasonable sum, considering all of the facts. Quite a number of witnesses testified that 5 per cent. on the gross sale was a customary and reasonable consideration for services rendered by Sandifer to Foard county, and there does not appear to be a conflict on that issue. Plaintiff in error has requested this court to take jurisdiction because the judgment of the Court of Civil Appeals practically settles the case, which calls upon this court to enter final judgment.

It is therefore ordered that the judgment of the Court of Civil Appeals reversing the judgment of the district court is approved; and it is further ordered that the defendant, C. P. Sandifer, have and recover of and from Foard county the sum of \$5,977.80, together with all costs of suit.

ANSLEY REALTY CO. v. POPE et al.

(Supreme Court of Texas. Dec. 4, 1912.)

1. SPECIFIC PERFORMANCE (§ 32*)—CONTRACTS ENFORCEABLE.

An executory contract to sell land as an agent is not subject to specific performance.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 89-99; Dec. Dig. § 32.*]

2. SPECIFIC PERFORMANCE (§ 6*)—NATURE OF REMEDY—MUTUALITY.

The right to specific performance is in its very nature mutual, and one party cannot be entitled to that right under a contract without the same right extending to the other.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 9-11; Dec. Dig. § 6.*]

3. BROKERS (§ 52*)—VENDOR AND PURCHASER (§ 3*)—RIGHT TO COMMISSION—NATURE OF CONTRACT PROCURED.

Where defendants, owners of land, entered into a contract reciting that they gave to the parties of the second part the exclusive sale of land for 90 days, agreeing to deed any or all of it to the parties of the second part or to any person to whom they might sell, and that, should there be any land remaining after, the expiration of the time specified, then the parties of the second part should buy the same for themselves, the agreement was one for the sale of land and not for a mere agency; the parties of the second part being bound at all events to take the entire land if they did not sell it, and both they and defendants being entitled to specific performance, and hence brokers who brought the parties together were entitled to commissions as for a sale of land.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 73; Dec. Dig. § 52.* Vendor and Purchaser, Cent. Dig. § 3; Dec. Dig. § 3.*]

4. APPEAL AND ERROR (§ 1052*)—REVIEW—HARMLESS ERROR.

In an action by brokers to recover compensation for negotiating a sale of land, where it appeared that they introduced the parties who consummated the sale, the admission of testimony by one of such brokers that his firm sold the land in controversy was harmless, where that issue was not submitted to the jury, and did not affect the right of recovery.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4171-4177; Dec. Dig. § 1052.*]

Error to Court of Civil Appeals of Second Supreme Judicial District.

Action by the Ansley Realty Company against J. B. Pope and A. M. Smith. A judgment for plaintiff was reversed by the Court of Civil Appeals (135 S. W. 1103), and plaintiff brings error. Judgment of Court of Civil Appeals reversed, and that of the district court affirmed.

H. B. White, of Clarendon, W. B. Chauncey, of Dalhart, and Gregory, Batts & Brooks, of Austin, for plaintiff in error. A. T. Cole, of Clarendon, and Stephens & Miller, of Ft. Worth, for defendants in error.

BROWN, C. J. Plaintiff in error, hereafter called the Realty Company, sued J. B. Pope and A. M. Smith, hereinafter called defendants, in the district court of Donley county, seeking to recover commissions upon certain lands sold by defendants to the Monarch Land & Loan Company, who were procured as purchasers by plaintiff under a contract with defendants for the sale of the land. The facts were not stated by Judge Dunklin, as provided for by article 1639 of the Revised Civil Statutes of 1911; but we will be able to decide the case upon the record.

At a date prior to the 14th day of August, 1907, by oral contract, defendants employed the Realty Company to sell eight sections of

land situated in Moore county, four sections of patented land and four sections of school land, in the aggregate 5,120 acres, at the price of \$8 per acre for the patented land and \$7.50 per acre for the school land, the compensation to be 5 per cent. on the gross sales. The Monarch Land & Loan Company were engaged in the town of Amarillo in buying and selling land, and had an agent in Moore county who learned of the fact that the Ansley Realty Company had the agency to sell the land in question, and through its agent, McFarland, the Monarch Company and the Realty Company were brought into contact, and the sale of the land and the terms thereof were discussed, and the agent of the Monarch Company concluded to buy the land, but did not close the trade, but went to Pope and Smith to try for better terms. The price was satisfactory. The purchasing agent of the Monarch Company told Pope and Smith of their having applied to plaintiff to purchase, and what had occurred. After their consultation this contract was entered into:

"The State of Texas, County of Donley.

"This contract made and entered into by and between A. M. Smith and J. B. Pope, of Donley county, Texas, as parties of the first part, and the Monarch Land & Loan Co., of Amarillo, Texas, as parties of the second part, witnesseth: That the parties of the first part herein give to the parties of the second part, the exclusive sale of the following described land, to wit: Sections 302, 303, 304, 327, 328, 329, 330, 345, block 44, Moore county, Texas, for ninety days from the twenty-first day of August, providing a sale now pending is not closed on or before that date. The price agreed upon and for which the parties of the first part agree to sell is \$8.00 per acre, straight through, school and patented, and parties of the first part further agree to deed any or all of the above described land, not less than 160 acres in one deed to the Monarch Land & Loan Co. or any person or persons they may sell to for whatever price the said Monarch Land & Loan Co. may sell for, and all excess above the aforesaid price shall be retained by the party of the second part as their commission. The terms shall be forty per cent. cash payment, the balance one and two and three years at 8 per cent. interest. The deferred payments shall be evidenced by vendor lien notes on the above described land. The party of the first part further agrees to furnish each purchaser with a warranty deed and abstract showing good and perfect title. The parties of the second part agree to sell all of the eight sections as per contract, but should there be any remaining after the expiration of the time specified, then the parties of the second part further agree to buy the same themselves. Signed in duplicate this 14th day of August, 1907. A. M. Smith. [Seal.] J. B. Pope. [Seal.] Monarch Land & Loan Co. [Seal.] S. F. Hiatt, Pres. [Seal.]"

Upon the back of the contract was indorsed the following: "The terms of the contract on the reverse side hereof are hereby extended as to time to and including January 21, 1908, and it is expressly agreed that all supposed claims or claims of either party hereto growing out of any supposed breach or breach of said contract by either party up to this date are hereby waived. Witness our hands at Clarendon, Texas, this 18th day of November, 1907. Monarch Land & Loan Co., by S. F. Hiatt, President, A. M. Smith, J. B. Pope."

The Monarch Company sold all of the land except one tract, which was deeded to it by Smith and Pope. Plaintiff alleged that Smith and Pope had employed it to sell the same land at \$8 per acre, and that it secured the Monarch Company as purchaser for all of the said land at the price named, and that the said Monarch Company did purchase from defendants all of the land at \$8 per acre. The defendants claimed that the transaction between them and the Monarch Company was not a sale, but an employment of the Monarch Company as agent to sell the same land.

These propositions are essential to the right of plaintiff to recover: (1) That Smith and Pope sold the land to the Monarch Company. (2) That the Monarch Company was procured by the Realty Company as purchaser of the land.

[1-3] Counsel for defendants in error state the issues correctly thus: "Everybody conceded that there was a trade consummated between Pope and Smith and the Monarch Land & Loan Company on the 14th of August, 1907, just as Dan Ansley stated. The controverted question was as to whether this trade was one for the sale of the land, or for the exclusive agency for its sale. If the former, the plaintiffs were entitled to win; if the latter, the defendants were entitled to win." Whether the transaction was a sale or the creation of an agency must, in this case, be determined by the terms of the contract itself. The character of the instrument can best be determined by ascertaining the remedy to which each party would be entitled in case of refusal of the other to comply. If it was an executory contract of sale of the land by Pope and Smith to the Monarch Company, either party could enforce specific performance of it. If it were an employment of the Monarch Company as agent to sell the land, then specific performance could not be had. *Chinnock v. Sainsbury*, 30 L. J. (N. S.) 409. To apply this test, we will assume that the Monarch Company declined to sell any of the land as agent, electing to receive a deed for the whole at \$8 per acre, but Pope and Smith refused to convey. The contract contains this language: "And parties of the first part further agree to deed any or all of the above-described land, not less than 160 acres in one deed to the Monarch Land & Loan Company, or any person

or persons they may sell to for whatever price the said Monarch Land & Loan Co. may sell for." Upon compliance with the terms of the agreement—that is, payment of 40 per cent. cash and executing notes for the remainder as prescribed—the Monarch Company could have maintained an action for specific performance of the contract. But, to give the instrument the character of a sale, the right to specific performance must be mutual. Waterman on Specific Performance, pp. 260, 261; Pomeroy on Specific Performance, p. 6, from which we quote, as follows: "The right to a specific performance, if it exists at all, is, and necessarily must be, mutual; in other words, it is and must be held, and be capable of being enjoyed, alike by both parties in every agreement to which the jurisdiction extends." By the terms quoted the Monarch Company could have demanded the conveyance to it of all of the land. In the same contract this language occurs: "The parties of the second part agree to sell all of the eight sections as per contract, but, should there be any remaining after the expiration of the time specified, then the parties of the second part further agree to buy the same themselves." This gave to Pope and Smith the right at the end of the time limiting sale to have specific performance of the contract by conveying all of the land unsold to the Monarch Company at the price of \$8 per acre. The mutual right of specific performance by conveyance and payment was secured by the terms of the instrument; that is, each had the right upon performance of his or its agreement to compel performance by the other party. The plain meaning of the instrument is that Pope and Smith sold to the Monarch Company the eight sections of land at \$8 per acre, with the option to have the land conveyed to it direct at once, or to sell to others within 90 days at a price to be fixed by it, and to have the deeds made to its vendees instead of to the Monarch Company, but at the expiration of 90 days the Monarch Company was bound to accept a conveyance from Pope and Smith of all unsold land and to pay therefor as specified. There was no contingency upon which the Monarch Company could decline to accept conveyance to its vendees or to itself. This, as a matter of law, constitutes a sale of the land and not the creation of an agency to sell; for, if it were a contract of agency, it could not be specifically enforced by either party against the other. Pomeroy, Specific Performance, § 48; Chinnock v. Sainsbury, 30 L. J. Ch. (N. S.) 409. If it had been an agency, a breach might have given a right of action for damages, but not for specific performance.

[4] Under the charge given by the court, before the jury could find for plaintiff they were required to find that the transaction was a sale by defendants to the Monarch

Company, that the plaintiff as agent of defendant procured the purchaser, and that the sale to the Monarch Company resulted from the service of the plaintiff in error. The jury found for the plaintiff. Therefore we must accept the verdict as a finding of the facts necessary under the charge to sustain it. The Court of Civil Appeals reversed the judgment of the district court, and remanded the case, Mr. Justice Dunklin dissenting. The Court of Civil Appeals stated the ground of reversal thus: "There was error which will require a reversal of the judgment in permitting Ben T. Ansley, one of the plaintiffs, to testify that his firm sold the land in controversy to the Monarch Land & Loan Company about the 14th day of August, 1907, such testimony being a conclusion of the witness upon one of the vital issues in the case to be determined by the jury." We are of opinion that this ruling, if error, was harmless because that issue was not submitted to the jury, and it did not affect the right of recovery, because the plaintiff furnished the purchaser who was accepted by Pope and Smith, and conveyance made. Admitting that the Ansley Realty Company did not sell to the Monarch Company, having furnished the purchaser who was accepted, the Realty Company was entitled to recover.

It is ordered that the judgment of the Court of Civil Appeals be reversed, and that the judgment of the district court be affirmed.

RANKIN et al. v. RANKIN.

(Supreme Court of Texas. Dec. 11, 1912.)

1. EVIDENCE (§§ 121, 230*)—DECLARATIONS OF GRANTOR—ADMISSIBILITY.

Declarations by a grantor made before or after the execution of a deed are not competent to prove fraud and undue influence, but if made at the time of the execution of the deed, they are competent as a part of the res gestæ.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 303, 307-338, 835-851, 1117, 1119; Dec. Dig. §§ 121, 230.*]

2. EVIDENCE (§ 268*)—DECLARATIONS OF GRANTOR—ADMISSIBILITY.

Declarations by a grantor made after making a deed are not admissible to show the grantor's mental condition at the time of the execution of the deed, unless made so near to that time as to justify the inference that such mental condition existed at that time.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1061, 1062; Dec. Dig. § 268.*]

3. DEEDS (§ 203*)—SUIT TO SET ASIDE—EVIDENCE—ADMISSIBILITY.

In a suit by the executor to set aside a deed executed by testatrix to her daughter-in-law on the ground of fraud and undue influence, evidence that defendant's attorney had offered to give an heir his part if he would have nothing to do with the case was inadmissible.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 602, 604-611; Dec. Dig. § 203.*]

4. DEEDS (§ 203*)—SUIT TO SET ASIDE—EVIDENCE—ADMISSIBILITY.

Evidence that the son of testatrix did not object to the placing of the land in the inven-

tory of the estate of testatrix was inadmissible unless pertinent in a chain of circumstantial evidence.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 602, 604-611; Dec. Dig. § 203.*]

5. DEEDS (§ 203*)—SUIT TO SET ASIDE—EVIDENCE—ADMISSIBILITY.

Where a son procured his mother to make a deed of her land to his wife in order that he might have the control over it as his own, all evidence which would be admissible if the deed had been made to the son would be admissible in a suit by the mother's executrix to set aside the deed.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 602, 604-611; Dec. Dig. § 203.*]

Error to Court of Civil Appeals of Third Supreme Judicial District.

Action by J. T. Rankin, executor, against L. A. Rankin and others. There was a judgment of the Court of Civil Appeals (134 S. W. 392) affirming a judgment for plaintiff, and defendants bring error. Reversed and remanded to the District Court for trial.

A. J. Harvey and Lipscomb & Poole, all of Hempstead, and W. W. Searcy, of Brenham, for plaintiffs in error. J. D. Harvey and Keet McDade, both of Hempstead, J. V. Meek, of Houston, and J. P. Buchanan, of Brenham, for defendant in error.

BROWN, C. J. We copy the following findings of fact by the Court of Civil Appeals:

"From the evidence in the record, we find the following to be the facts as bearing on the issues made by the pleadings:

"(1) Mrs. Charlotte Rankin, on June 23, 1897, executed a deed to Mrs. L. A. Rankin, wife of Harry W. Rankin, to 100 acres of land out of a 300-acre tract, in Ellis county, Tex.; the consideration recited in said deed being \$25 cash and love and affection. No attack is made on this deed.

"(2) On November 24, 1898, the said Mrs. Charlotte Rankin executed a deed to the said Mrs. L. A. Rankin for the remaining 200 acres of said tract of land, for the recited consideration of \$50 cash and love and affection. This is the deed which is attached in this suit.

"(3) Each of said deeds conveyed title to Mrs. L. A. Rankin in her separate right. No consideration was paid for the execution of either of said deeds. Both of said deeds were in the handwriting of Harry Rankin, were executed at his house, and when the last deed was executed there was no one present besides the grantor, Harry Rankin, and his wife, except one J. T. Houx, who was a particular friend of said Harry Rankin, and who signed the same, and also a written memorandum attached thereto, as a witness. The evidence does not fully develop the circumstances under which the first deed was executed, but does show that the same was at the solicitation of said Harry Rankin.

"(4) Said deed to the 200-acre tract was executed under the following circumstances: Mrs. Charlotte Rankin, being at the house of Harry Rankin, was informed by him that the first deed incorrectly described the land intended to be conveyed, and presented her the second deed, informing her that it was a substitute for the former deed and conveyed the same land intended to be conveyed by the former deed. Believing these statements to be true, Mrs. Rankin signed the same, and also the memorandum attached to the same. This memorandum recited that Mrs. Charlotte Rankin was to retain possession of said land during her lifetime and was to pay all taxes thereon.

"(5) This deed was witnessed by said Houx only, and was not acknowledged before any officer, and was not filed for record until August 17, 1908, nearly ten years after its execution, and some nine months after the death of Mrs. Charlotte Rankin. Neither Harry Rankin nor his wife ever set up any claim to said land during the lifetime of Mrs. Charlotte Rankin, and the execution of said deed, as a deed containing 200 acres of land, was not known to any of the other heirs of Mrs. Charlotte Rankin until some months after her death. Some time after the execution of said last deed they learned that Mrs. Charlotte Rankin had executed a deed to the wife of Harry Rankin for 100 acres of said Ellis county tract. This deed had not been filed for record when the second deed was executed, but was filed for record in Ellis county February 13, 1899.

"(6) At the time of the execution of said deeds, Mrs. Charlotte Rankin was over 70 years old. She was, and for some time prior thereto had been, in feeble health and weak in mind, and on account of the condition of her eyes could not see without glasses, and then with great difficulty. This physical and mental condition so continued to the time of her death.

"(7) Mrs. Charlotte Rankin had four sons, all of whom, except T. J. Rankin with whom she lived, were married, and all of whom lived in the same town with her. So far as the record shows, none of the parties ever lived in Ellis county.

"(8) Mrs. Charlotte Rankin never knew, nor did she have any reason to suppose, that the second deed was other than it was represented to her to be at the time she signed the same.

"(9) The land conveyed in the second deed was worth about \$40 per acre when said deed was executed, and from \$70 to \$75 per acre at the time of the trial.

"(10) Harry Rankin had great influence with his mother.

"(11) By said deeds conveyance was made to Mrs. L. A. Rankin in her separate right, because there were unsatisfied judgments against Harry Rankin and he was insolvent.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

"(12) Mrs. Charlotte Rankin executed a will on October 21, 1899, at which time she thought the said deeds executed by her had perhaps been destroyed, but did not feel sure that such was the case. In said will she bequeathed her property equally to her son T. J. Rankin and to her three daughters-in-law, in trust for their children, except that, in addition to his one-fourth, she also bequeathed to her son T. J. Rankin, with whom she had long made her home, the home in which she lived. She was at the time of the execution of said deeds a widow, and so remained to the time of her death. The fifth clause in said will was as follows: 'I have heretofore given a deed to Lou Adell Rankin to one hundred acres of land in Ellis county, and in the event said deed was not destroyed but still exists, I value the same at \$2,500, and desire that the same be charged up to the interest of said Lou Adell Rankin in making division of my said estate.' In addition to the general issue, the defendants pleaded the four-year statute of limitations. No issue was raised by the pleadings as to want of proper parties. The jury returned a verdict for the plaintiff, appellee herein, and judgment was entered canceling said deed, from which judgment the defendants appealed."

It is admitted by attorneys for all parties and held by the honorable Court of Civil Appeals that the declarations of Mrs. Rankin were not admissible to prove the fraud charged to have been practiced upon her by H. W. Rankin, nor to prove the undue influence claimed to have been exercised over her whereby she was induced to execute the deed in question.

[1] The general rule on this point is expressed thus: "Where the execution of a will is proved in the mode required by law, the declarations of the testator, made before or after the execution of the instrument, are not competent to prove fraud, duress, or forgery, or to disprove the execution; they are hearsay, merely. But such declarations, made at the time the instrument was executed, are admissible as part of the *res gestæ*. The rule upon these points is the same in the case of wills that it is in the case of deeds."

[2] It is conceded by counsel for defendant in error, in a candid and clear presentation of his client's case, that the declarations of Mrs. Rankin, made subsequent to the making of the deed, not in the presence of H. W. Rankin nor his wife, are not competent to prove the fraud or the undue influence upon which this action rests. But it is claimed that the evidence was pertinent to prove the "state of Mrs. Rankin's mind." It must be the condition of her mind at the time of the transaction which is permitted to be proved, because such condition at a different date could not throw any light on the transaction. The declarations made by Mrs. Rankin that a certain fact had been

misrepresented to her at a previous time might be so extravagant as to show a disordered mind when she made the declaration, but could not prove her mental condition when the deed was made, unless made so near to that date as to justify the inference that existed at that time. It has generally been held that the truth or falsity of the declaration is of no importance except as it affects the question of mental weakness.

In the case of *Throckmorton v. Holt*, 180 U. S. 573, 21 Sup. Ct. 482, 45 L. Ed. 663, the Supreme Court of the United States, speaking through Judge Peckham, said: "After much reflection upon the subject, we are inclined to the opinion that not only is the weight of authority with the cases which exclude the evidence both before and after the execution, but the principles upon which our law of evidence is founded necessitate the exclusion. The declarations are purely hearsay, being merely unsworn declarations, and when no part of the *res gestæ* are not within any of the recognized exceptions admitting evidence of that kind. Although in some of the cases the remark is made that declarations are admissible which tend to show the state of the affections of the deceased as a mental condition, yet they are generally stated in cases where the mental capacity of the deceased is the subject of the inquiry, and in those cases his declarations on that subject are just as likely to aid in answering the question as to mental capacity as those upon any other subject. But if the matter in issue be not the mental capacity of the deceased, then such unsworn declarations, as indicative of the state of his affections, are no more admissible than would be his unsworn declarations as to any other fact. When they are not a part of the *res gestæ*, declarations of this nature are excluded because they are unsworn, being hearsay only, and, where they are claimed to be admissible on the ground that they are said to indicate the condition of mind of the deceased with regard to his affections, they are still unsworn declarations, and they cannot be admitted if other unsworn declarations are excluded. In other words, there is no ground for an exception in favor of the admissibility of declarations of a deceased person as to the state of his affections, when the mental or testamentary capacity of the deceased is not in issue. When such an issue is made, it is one which relates to a state of mind which was involuntary and over which the deceased had not the control of the sane individual, and his declarations are admitted, not as any evidence of their truth, but only because he made them, and that is an original fact from which, among others, light is sought to be reflected upon the main issue of testamentary capacity. The truth or falsity of such declarations is not important upon such an issue (unless that for the purpose of show-

ing delusion it may be necessary to give the evidence of their falsity); but the mere fact that they were uttered may be most material evidence upon that issue. The declarations of the same man are under his control, and they may or may not reflect his true feelings, while the utterances of the man whose mind is impaired from disease or old age are not the result of reflection and judgment, but spontaneous outpourings arising from mental weakness or derangement. The difference between the two, both as to the manner and subject of the declarations, might be obvious. It is quite apparent therefore that declarations of the deceased are properly received upon the question of his state of mind, whether mentally strong and capable or weak and incapable, and that from all the testimony, including his declarations, his mental capacity can probably be determined with considerable accuracy. Whether the utterances are true or false cannot be determined from their mere statement, and they are without value as proof of their truth, whether made by the sane or insane, because they are in either case unsworn declarations."

We first note that there is nothing in the declarations of Mrs. Rankin concerning the fraud which tends to prove that her mind was weak at the time she made the deed. According to the evidence of the witness her mind was quite clear at the date of her detailed statements. If those statements were correct, she remembered well the details of the transaction, which fact tends to negative the claim of mental weakness. If they were not true, but simply the creatures of a disordered mind, then they show no reason to disturb her conveyance; but there is no proof of fraud or improper influence. It follows that the judge of the district court erred in submitting the issues of fraud and undue influence to the jury, there being no sufficient or competent evidence to prove either issue, and the judgment must be reversed.

It was the duty of the district judge, before whom the trial was had, to decide whether or not the declarations of Mrs. Rankin tended to prove that at the time she executed the deed in question her mind was in such condition as to disqualify her to execute that instrument or to render her susceptible to undue influence over her will power by her son. We are of the opinion that the declarations were not competent to prove either fact and should have been excluded from the jury and should not be admitted upon another trial.

We have hesitated to remand this case upon the record as it is before us, but we realize that fraud is oftentimes very difficult to prove and is peculiarly a fact which must be established by circumstantial evidence. It is very difficult to express in a record the full force of evidence of that character.

The trial judge has a better opportunity to determine the admissibility of evidence, that is, whether it tends to prove a given fact, than this court has from the record. On the other hand, juries are liable to give undue weight to circumstances which characterize this character of litigation, which fact renders more imperative the exercise by the judge of his judgment upon the relevancy of the evidence upon issues of fraud or unfairness in such transactions.

In submitting this case to another jury the declarations of Mrs. Rankin as to the fraud of H. W. Rankin, or as to influence exercised or deception practiced upon her by him, should not be permitted to go to the jury, because as a matter of law such declarations are not competent to prove either fact, and the declarations relied upon do not tend to prove mental condition at the time the deed was executed.

It is unnecessary to pass upon the objection made to the testimony of the witness Haney, as we hold the declaration related by him to be inadmissible.

[3] The evidence to the effect that Lipcomb, the attorney for plaintiff in error, had offered to give Gus Rankin his part if he would have nothing to do with the case, was improperly admitted; it did not tend to prove or disprove any issue in this case.

[4] As the record comes to this court we are not prepared to say that there was error in admitting the evidence to the effect that H. W. Rankin did not object to the placing of the land on the inventory of his mother's estate. Of itself that action could prove nothing, but it might be pertinent in a chain of circumstantial evidence.

[5] We believe that we have stated the principles which should govern in another trial sufficiently without discussing each assignment. If H. W. Rankin procured his mother to make the deed to the land in the name of his wife in order that he might have the control of it as his own, all evidence which would be admissible if the deed had been to H. W. Rankin will be admissible in this case on another trial.

It is ordered that the judgments of the district court and Court of Civil Appeals be reversed, and the cause remanded to the district court for trial in accordance with this opinion.

STATE v. SAVAGE et al.

(Supreme Court of Texas. Dec. 11, 1912.)

1. INTOXICATING LIQUORS (§ 82*)—LOCAL OPTION ELECTION—LIABILITY ON BOND—NECESSITY OF VALID ELECTION.

A valid local option election resulting in the adoption of the law is essential to any liability on a liquor dealer's bond given under the local option law.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 85-95; Dec. Dig. § 82.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

2. COURTS (§ 90*)—DECISIONS OF COURT OF CRIMINAL APPEALS—CONCLUSIVENESS.

The Supreme Court will generally follow the decisions of the Court of Criminal Appeals upon questions involving penal laws.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 313-321, 351; Dec. Dig. § 90.*]

3. APPEAL AND ERROR (§ 1108*)—DETERMINATION—LAW APPLICABLE—CONCLUSIVENESS.

The rule that if, after conviction for a criminal offense, it is finally determined that the law upon which the conviction rests is invalid, or not in force, the court will decide the case on appeal according to the status of law at that time is applicable to an action on a liquor dealer's bond, and, where pending an appeal of an action on the bond, there was a determination, in a contest of the election, that local option had never been legally adopted in the particular county, the court may determine that the bond was of no force and effect, though the law provides that a contest shall not suspend the enforcement of the law.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4410; Dec. Dig. § 1108.*]

4. EVIDENCE (§ 43*) — JUDICIAL NOTICE — PRIOR DECISION.

While a court cannot consult the record in any other case to ascertain a fact not shown by the record in the case before it, it may go to its decision in another case for the law that is determinative of, or applicable to, a case under review, so that, on an appeal of an action on a liquor dealer's bond, the Court of Civil Appeals properly took judicial notice of its prior decision determining that the local option election in the county in which the bond was given was invalid.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 62-65; Dec. Dig. § 43.* Appeal and Error, Cent. Dig. §§ 2959, 2960.]

Error to Court of Civil Appeals of Second Supreme Judicial District.

Action by the State against Z. Z. Savage and others on a liquor dealer's bond. From a judgment in the Court of Civil Appeals (138 S. W. 211), reversing a judgment for the State and dismissing the cause, the State brings error. Affirmed.

Henry S. Bishop, of Amarillo, and Theodore Mack, of Ft. Worth, for the State. Reeder & Graham, of Amarillo, and Williams & Stedman, of Austin, for defendant in error.

PHILLIPS, J. This was a suit in which the state of Texas on March 4, 1910, recovered a judgment in the district court of Potter county upon a liquor dealer's bond entered into on September 11, 1908, by Z. Z. Savage as principal and the other defendants in error as sureties, to enable Savage to conduct the business of selling intoxicating liquors on prescription as permitted by the local option law, which had been declared by the proper authorities to be in force in that county as the result of a local option election held on December 3, 1907. From the judgment in favor of the state, the defendants appealed to the honorable Court of Civil Appeals for the Second District. The local option election held in Potter county on December 3, 1907, was contested, and the case was likewise appealed to the same Court of

Civil Appeals. Subsequent to the rendition of the judgment in the present case, and while its appeal was pending in the Court of Civil Appeals, the court decided the appeal in the election case, and, in holding that the election was void, in effect adjudged that the local option law, which, as supposed at the time, required the execution of the bond on which the judgment here was founded, had never been in force in Potter county. *Savage v. Umphres* (Civ. App.) 131 S. W. 291. In consequence of the decision of the court in the election case, these defendants thereupon filed in that court a motion that the present judgment be reversed and the cause dismissed. The motion to dismiss was sustained by a majority of the court, and judgment was rendered in favor of the defendants upon the ground, as stated in the opinion, that the court took judicial notice of its decision in the election case, and, as it had itself therein decided that there was no law requiring the bond, there could be no recovery for its alleged violation. Mr. Justice Speer entered his dissent, holding that the question as to whether the local option law had been adopted in Potter county was one of fact, and so remained notwithstanding the judicial determination of the Court of Civil Appeals; that the court could not take cognizance of its own decision in the election case without proof of such decision in the record; and as the record did not disclose it, and none of the errors complained of was reviewable in the state of the record in the other respects, the judgment of the trial court should be affirmed.

[1] The members of the Court of Civil Appeals were unanimous in the holding that the provision of the act of the Thirtieth Legislature (chapter 8, p. 447, Acts 1907), relating to the contest of a local option election, which declares that "pending such contest the enforcement of the local option law in such territory shall not be suspended," was without application to the case, for the reason that, after the court's decision of the election case, the contest of the election was no longer pending, and the question of liability upon the bond was to be determined by it according to the status of the local option law in the county named at the time of its decision of the appeal. To our minds there can be no question as to the soundness of this position. A valid election resulting in the legal adoption of the law was essential to the accrual of any liability upon the bond for, as is said by the court, if the local option law had not been adopted in the county, there was no law requiring the bond. The condition of the bond was in purpose and effect that the principal would not violate the law by making sales other than those permitted by it—that is, upon prescription—and, if there was no law to violate, there could be no actionable breach of the bond.

The decision of the Court of Civil Appeals in the election case was that the local option law had never been in force in the county as the result of the election of December 3, 1907, and there was therefore no law upon which the validity of this bond as a penal obligation might rest.

[2, 3] It is contended by counsel for the plaintiff in error that the judgment upon the bond is entitled to affirmance by virtue of the provision of the act of 1907, above quoted, inasmuch as the constitutionality of that provision was upheld by the Court of Criminal Appeals in *Ex parte McGuire*, 57 Tex. Cr. R. 38, 123 S. W. 425, in which connection it is urged that we should follow the decisions of that court upon questions involving the penal laws. Such, generally, is the duty and habit of this court. *State v. Schwarz*, 103 Tex. 119, 124 S. W. 420. In *Ex parte McGuire*, the Court of Criminal Appeals, under the authority of the act of 1907, refused, while the contest of the election herein referred to and involved in *Savage v. Umphres* was still pending, to release by habeas corpus a relator charged with the violation of the local option law declared by the proper authorities to have been adopted by the election. In the later case, however, of *Henry v. State*, 61 Tex. Cr. R. 187, 135 S. W. 571, that court, on the appeal, dismissed the prosecution against a defendant found guilty of violation of the local option law in Potter county, while the contest of this election was pending, upon the ground that, since the judgment of conviction, the decision in *Savage v. Umphres* had settled that the law had never been in force in the county, and that the prosecution was therefore without authority of law. In other words, in that case the court applied the rule that, if after conviction for a criminal offense it is finally determined that the law upon which the conviction rests is invalid or was not in force, the court will decide the case on appeal according to the status of the law at that time. Actions on penal bonds of this character are governed by the same principle. Giving it effect because of its force as a rule of decision of the Court of Criminal Appeals upon a question involving a penal law of the state, as we are urged to do by the plaintiff in error, and because, as well, of our opinion of its soundness, it follows that the holding of the Court of Civil Appeals upon this feature of the case was correct.

[4] The case is therefore to be determined, in our opinion, solely by the law of judicial notice. The Courts of Civil Appeals are essentially appellate in their character, and have not the power to ascertain facts in the first instance, unless necessary to the proper exercise of their jurisdiction within the purview of article 998, Revised Statutes of 1895. The question as to whether the local option law had been legally adopted in Potter county necessarily affected the decision

by the Court of Civil Appeals of this case, whether considered as one of fact or law, but it did not involve "the proper exercise of its jurisdiction." It had no bearing upon the court's jurisdiction of the case as distinguished from its decision of it, and therefore had no relation to the exercise of its jurisdiction. But, in the use of their powers as courts of review, the Courts of Civil Appeals are at liberty to ascertain the law as embodied in their own decisions or the decisions of other appellate courts, and make application of it if in their opinion it is of influence in the determination of the case under consideration. To deny to the court in its deliberation upon this case the right to consult its own decision in the election case, in which it had judicially determined and declared the status of the local option law in Potter county, is to say, it seems to us, that that decision is to be regarded only as a fact, and cannot be regarded as a declaration of law in itself conclusive of the case before it. Because, ordinarily in cases involving the local option law, it is required that certain proof be adduced to establish that the law is in force, is it necessary for an appellate court, in its consideration of a case in which the judgment depends upon the existence of such law, to be advised by proof that it had itself decided that the law had never been in force, and, in effect, that there was no law to support the judgment? In other words, because ordinarily the existence of the law is a question of fact, is a conclusive appellate court decision, which declares the law never existed, to be regarded also merely as a fact to be proven before given effect? To so hold is but to affirm that an appellate court decision is only a piece of evidence. It is to say that whether it is authority, unless proven, depends upon the character of the legal question decided. It confuses the mode by which the local adoption of a law of this kind is established with the judicial determination by a court of last resort of the status of the law itself. It confounds a status of a law as fixed by such judicial decision with one ordinarily the result of proof, and denies to the decision so fixing its status the authority of law because the adoption of the law in other cases is a matter of evidence.

The jurisdiction of the Court of Civil Appeals over the election case was final. By the act of the Thirtieth Legislature, its decision in that case conclusively determined the status of the law in Potter county as it related to the bond in this case. It was binding not only upon itself, but upon all inferior courts in the subsequent adjudication of all cases affected by the law. As the decision of a court of last resort upon a question duly presented and passed upon, it became a part of the law of the state, and its authority, as a holding that the law in question had not been adopted in Potter

county, no more depended upon its proof than would its decision upon any other question. It is an accepted rule that an appellate court cannot consult the record in another case to ascertain a fact not shown by the record in the case before it. *Armendiaz v. Serna*, 40 Tex. 291. But it can go to its decision in another case for the law that is determinative of, or applicable to, the case under review. Whatever such decision has declared to be the law upon the question decided is the law because of the authority of the court to declare it, and not because it may be established by evidence that the decision was rendered. If the decision involves a law of this kind that is required to be proven before given effect, its validity, or whether it has been legally adopted that the law is of such character, cannot deprive the decision of its force as authority upon the legal question decided, or determine whether it may be so recognized by the court in its consideration of other cases.

In its decision in the election case the Court of Civil Appeals determined, as a matter of law, that the local option law had not been adopted in Potter county. The direct question in the case was the validity of the election; and, in holding that the election was invalid, it was necessarily determined, as a matter of law, that there had been no adoption of the law, thereby fixing its legal status. It was not merely probative of the status of the law, as it must be held if it was required to be proven before it could be considered. It was direct legal authority upon the question as pronounced by the tribunal having the ultimate power of determining it. No higher authority existed, or could exist, upon the question. It possessed, unproven, all of the authority that it would have had if proven; and, if it had been possible for it to be introduced in evidence and incorporated in the record, it would have been serviceable to the court, not as proof, but only as a legal authority. The court in our opinion had the undoubted right to take judicial notice of the decision and to decide the present case in the light of its holding. It would prove highly embarrassing to an appellate court to be compelled to ignore its own decisions upon questions of like character, and to give effect in its judgments to laws that it had itself declared were invalid or had not been legally enacted or adopted, and we do not think that it should be so fettered by a technical rule. The same question was so decided by the honorable Court of Civil Appeals for the Fifth District through Mr. Justice Talbot in *Edgar v. McDonald* (Civ. App.) 106 S. W. 1135, and the same rule was applied by Mr. Justice Neal in *Avocato v. Dell' Ara* (Civ. App.) 84 S. W. 444. This holding is further supported by the following authorities: *Butler v. Eaton*, 141 U. S. 243, 11 Sup. Ct. 985,

35 L. Ed. 713; *Thompson v. Maxwell Land Grant Company*, 168 U. S. 456, 18 Sup. Ct. 121, 42 L. Ed. 539; *Blenville Water, etc., Co. v. Mobile*, 186 U. S. 217, 22 Sup. Ct. 820, 46 L. Ed. 1132; *Alexander v. Gish* (Ky.) 17 S. W. 287; *Cash v. State*, 10 Humph. (Tenn.) 111; *Allen v. Swoope*, 64 Ark. 579, 44 S. W. 78; *Mower v. Kemp*, 42 La. Ann. 1015, 8 South. 830; *Poole v. Seney*, 70 Iowa, 275, 24 N. W. 520, 30 N. W. 634; *Town of South Ottawa v. Perkins*, 94 U. S. 268, 24 L. Ed. 154.

The judgment of the Court of Civil Appeals is affirmed.

HENRY et al. v. PHILLIPS.

(Supreme Court of Texas. Dec. 11, 1912.)

1. DEEDS (§ 61*)—DELIVERY—ACTS CONSTITUTING.

A grantor who duly executed a deed to his stepdaughters, whom he regarded as his own children, and placed it in an envelope containing an indorsement of his name and the names of the grantees, separated by the word "or," and who delivered the same to the cashier of a bank with the statement, "Here is a deed * * * to Miss J. K. and Mrs. P. H. [the grantees] that I want to lay away in the vault for safe-keeping, and the deed to be delivered after my death to them," thereby delivered the deed to the bank in escrow for delivery to the grantees after his death, and title passed to the grantees, and it was immaterial whether he did or did not part with the custody of the deed, or whether, after depositing it in the bank, he retained control over it.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 140, 141; Dec. Dig. § 61.*]

2. DEEDS (§ 56*)—DELIVERY—INTENTION OF GRANTOR.

The question of delivery of a deed is one of intention of the grantor, and an actual or manual delivery by him in person to the grantee is not essential to pass title, and where it appears that the deed was duly executed, and it was the grantor's purpose to deliver or have it delivered to the grantee, the law will aid the intention, and give it effect as if the deed had been actually delivered.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 117-123, 125; Dec. Dig. § 56.*]

3. DEEDS (§ 66*)—DELIVERY—INTENTION OF GRANTOR—QUESTION OF COURT AND JURY.

What constitutes a delivery of a deed essential to pass title is one of law; but whether there has been in fact a delivery is for the jury.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 127, 633; Dec. Dig. § 66.*]

4. DEEDS (§ 56*)—DELIVERY—INTENTION OF GRANTOR.

Where a grantor executes a deed and his intention to deliver it is clear, title passes to the grantee, though the grantor retains control of the deed during his lifetime.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 117-123, 125; Dec. Dig. § 56.*]

5. EVIDENCE (§ 230*)—ACTS OF GRANTOR IMPEACHING TITLE—ADMISSIBILITY.

That a grantor subsequent to the execution of a deed and delivery to a third person in escrow for delivery to the grantee after the grantor's death listed the property for sale, and offered to sell the tract described in the deed and other property, could not be proved

after the grantor's death against the grantee, since it was in disparagement of his deed.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 835-851; Dec. Dig. § 230.*]

6. APPEAL AND ERROR (§ 837*)—ADMISSION OF INCOMPETENT TESTIMONY WITHOUT OBJECTION—FINDINGS.

The court on appeal can only base its findings on competent testimony, and incompetent testimony received without objection cannot form the basis of findings of facts in an appellate court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3262-3278; Dec. Dig. § 837.*]

7. EVIDENCE (§ 448*)—PAROL EVIDENCE—VARYING CONTRACTS.

Parol evidence is inadmissible to show the construction placed on a written contract by the parties thereto, where there is no ambiguity in the contract, and the intent of the parties may be ascertained therefrom.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2066-2082, 2084; Dec. Dig. § 448.*]

8. EVIDENCE (§ 417*)—PAROL EVIDENCE—VARYING CONTRACTS.

Where, on the issue of delivery of a deed to pass title to the grantees, it appeared that the grantor executed a deed to the grantees, and placed it in an envelope containing an indorsement of his name and the names of the grantees, separated by the word "or," and that he delivered the same to the cashier of a bank, evidence of his statement to the cashier at the time that there is a deed to be placed in the bank for safe-keeping for delivery after his death to the grantees was competent to show the grantor's intent to deliver the deed to the grantees, and was not inadmissible as varying the memorandum, though given the dignity of a contract or a written memorandum of instruction.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1874-1899; Dec. Dig. § 417.*]

9. EVIDENCE (§ 466*)—PAROL EVIDENCE—ABANDONMENT OF WRITTEN CONTRACTS.

It is competent to show by parol that a written contract entered into with the solemnity required by law has been abandoned by the parties.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2145; Dec. Dig. § 466.*]

10. ESCROWS (§ 13*)—DELIVERY IN ESCROW—EFFECT.

Where a grantor delivers the deed to a third person in escrow for delivery to the grantee, after the grantor's death, a delivery by the third person after the grantor's death relates back so as to divest the title of the grantor by relation from the first delivery.

[Ed. Note.—For other cases, see Escrows, Cent. Dig. § 14; Dec. Dig. § 13.*]

Error to Court of Civil Appeals of Sixth Supreme Judicial District.

Action by W. H. Phillips, administrator, against Pat Henry and others. There was a judgment of the Court of Civil Appeals (135 S. W. 382) reversing a judgment for defendants and rendering a judgment for plaintiff, and defendants bring error. Judgment of Court of Civil Appeals reversed, and judgment of trial court affirmed.

Thos. P. Steger, of Bonham, J. G. McGrady, of Ft. Worth, and Mark McMahon, of Bonham, for plaintiff in error. Richard B. Sample and S. F. Leslie, both of Bonham, for defendant in error.

DIBRELL, J. This suit was begun in the district court of Fannin county on January 26, 1907, by the administrator of T. J. Patillo, deceased, against Mrs. Mary Henry and Josephine Riddings and their husbands, D. P. Henry and C. C. Riddings, to cancel a certain deed of date May 9, 1905, executed by the said Patillo to Mrs. Mary Henry and Josephine Kearnes, now Riddings, and conveying about 81 acres of land situate in Fannin county, with full and particular description thereof by references to the survey and metes and bounds, and to quiet said estate in its title to and possession of said premises.

Plaintiff alleged that on May 9, 1905, T. J. Patillo signed and executed the deed in question to Mrs. Mary Henry and Josephine Kearnes, now Riddings, purporting to convey the land therein described, and retained possession of the deed until his death on the 13th day of September, 1906; that prior to his death Patillo, being undecided whether or not he would deliver the deed to the grantees therein, deposited the deed for safe-keeping with the First National Bank of Bells, Grayson county, where it remained undelivered to said grantees until after the death of said Patillo. Defendants in substance alleged that the grantor in said deed, T. J. Patillo, bore great love and affection for the grantees in said deed, who were the daughters and only children of his deceased wife, and felt under obligations to them, which he often expressed, and he intended to convey to them certain tracts of land; that pursuant to such intention Patillo on May 9, 1905, caused the deed in question to be written, signed, and executed, same conveying the land therein described to the defendants, Mrs. Mary Henry and Josephine Kearnes, now Riddings, and about June 1, 1905, delivered said deed in person to one S. D. Simpson, cashier of the First National Bank of Bells, Texas, and instructed said Simpson to hold the deed until Patillo's death, and then deliver it to Josephine Kearnes and Mary Henry; that the deed so executed and delivered to Simpson in escrow was an absolute and unconditional deed, and conveyed the property therein described to the grantees named. Defendants further allege that being the owners of the land in controversy, upon the death of their grantor, T. J. Patillo, which occurred on September 13, 1906, they are entitled to the rents arising out of the use of said land, and claim the sum of \$700 as accrued rents under appropriate allegations. The case was tried with a jury, the verdict being for defendants against plaintiff upon the issue of the delivery of the deed, and upon the issue of rents the sum of \$369. Upon the second appeal of the case the judgment of the lower court was reversed and rendered by the Court of Civil Appeals of the Sixth

District in favor of the administrator of T. J. Patillo's estate.

The case as it comes to this court presents but one question of law for our decision. The trial, so far as is disclosed by the record, was had without any exceptions to the court's ruling, and, so far as we are able to judge, there is no conflicting evidence upon any issue of fact in the case. The question of law is whether or not T. J. Patillo after he executed the deed to Mrs. Mary Henry and Josephine Kearnes to the land therein described and deposited it in the bank for safe-keeping, and for delivery to the grantees after his death, thereby parted with his title to said land.

The Court of Civil Appeals makes the following findings of fact, which for the purpose of clearness we desire to quote: "The deed was dated May 9, 1905, and its execution was duly acknowledged by Patillo on the same day. It was as follows: 'Know all men by these presents that I, T. J. Patillo, county of Fannin, State of Texas, for and in consideration of the sum of \$25.00 to me in hand paid by Mrs. Mary Henry, wife of Pat Henry, and Miss Josephine Kearnes, the receipt of which is hereby acknowledged, and the further consideration of the love and affection I have for the said Mary Henry and the said Josephine Kearnes, they being my stepdaughters, have granted, sold and conveyed, and by these presents do grant, sell and convey unto the said Mrs. Mary Henry and Miss Josephine Kearnes, of the county of Fannin, State of Texas, all that certain tract or parcel of land situated on the waters of Caney creek in Fannin county about ten miles Northwest of Bonham (and further describing the land in controversy); Mrs. Mary Henry is to have an undivided two-thirds in the whole of the above described land and Miss Josephine Kearnes the other one-third undivided interest.' Some time in the spring of 1905, a sealed envelope, afterwards found to contain the deed, with the words, 'After ten days return to Pat Henry, County Clerk, Fannin County, Bonham, Texas,' printed on the left hand top thereof, and indorsed in Patillo's handwriting, 'T. J. Patillo or Mary Henry and Miss Josephine Kearnes,' was delivered by Patillo to Simpson, then the cashier of a bank at Bells, Tex., Simpson was the only witness who testified as to the circumstances accompanying the delivery to him of the deed. His testimony, so far as material, was as follows: 'I never saw the deed from T. J. Patillo to Mrs. Mary Henry and Miss Joe Kearnes, but, as I remember, Mr. T. J. Patillo handed me a large envelope, saying that it contained a deed of some land to Miss Joe Kearnes and Mrs. Pat Henry. I never delivered the deed to anybody. I was acquainted with the said T. J. Patillo. I received the envelope in which Mr. T. J. Patillo told me there was a deed from him, the said Patillo, as cashier of the bank, for

safe-keeping. I received the envelope from Mr. T. J. Patillo, in which he said there was a deed, some time in the spring of 1905, but I do not remember the exact date. I was at that time cashier of the First National Bank at Bells, Tex. There are so many papers put in the bank for safe-keeping it is impossible just what each and every one person says when they leave the papers. I cannot state the exact words, but I believe I am correct when I say that he says: "Simpson, here is a deed of some land to Miss Joe Kearnes and Mrs. Pat Henry that I want to lay away in the vault for safe-keeping, and the deed to be delivered after my death to them." I do not remember that he said anything about reserving any right to recall the deed.' In the latter part of August, 1905, Patillo authorized the witness Springfield, a real estate agent, to sell the land for him, and frequently thereafterwards talked with said Springfield about the prospect of effecting a sale thereof. In the spring of 1906 the witness Dover proposed to buy a part of the tract. Patillo declined to sell him a part, but offered to sell him the entire tract. Patillo died September 18, 1906. About September 15, 1906, the envelope containing the deed was delivered by the witness Blanton, who had succeeded Simpson as cashier of said bank, to Mrs. Mary Henry, who had same spread upon the records of Fannin county, Tex. It was shown that Patillo spoke of the grantees named in the deed as his daughters, and was very kindly disposed toward them. It was further shown that in the spring of 1906 in reply to a letter written to him by a daughter of Mrs. Mary Henry, in which she stated that, if she should ever want to live in the country, she would like to live in the home place on the land in controversy, he wrote to her, saying that he was an old man, and did not expect to live long as his health was failing him, and that he had arranged his business, so that, if her father wanted to live in the country, they could live there."

In addition to the facts found by the Court of Civil Appeals, it was shown by the witness Simpson that at the time the sealed envelope was delivered to him by Patillo he did not remember that there was any indorsement on the envelope from which it may be inferred his attention was not called to such indorsement by Patillo, and by the witness Pat Henry that T. J. Patillo married the mother of Madams Mary Henry and Josephine Ridings when they were of the tender ages of ten and three years, respectively, and that Patillo had no children of his own; that he had never been married before and never married after the death of his wife, which took place in 1891, and that he seemed to love the grantees as if they were his own children; that he lived at the home of Mrs. Mary Henry for about four years, having there a room furnished by himself, and which he called his home; that Mrs. Patillo,

the mother of grantees, died intestate and left community property of herself and husband consisting of real estate, which was disposed of by Patillo after his wife's death.

In the opinion rendered by the Court of Civil Appeals upon the record as above disclosed, it is held that there was no sufficient evidence to make an issue to be submitted to the jury as to whether or not there was such a delivery of the deed executed by Patillo to the defendants as to pass to them the title to the land in controversy. The language of that court is: "We are of the opinion that when the testimony recited, which is all there is in the record material to the question, is considered with reference to the rules of law controlling such cases, it must be said that it did not make such an issue, and that the trial court should have instructed the jury to find against the contention made that the delivery of the deed by Patillo to Simpson had the effect to pass the title to the land to the grantees named in it."

[1] We are not able under any view of the law, as we understand it, applied to the facts of this case to agree with the conclusion of law reached by the honorable Court of Civil Appeals, but, to the contrary, we think that under the facts, as found by that court and herein set out, no issue is made against the contention of defendants below that Patillo made and executed a valid deed conveying to Madams Mary Henry and Josephine Ridings the land in controversy, and that he left said deed in escrow with the bank for safe-keeping and for delivery to said grantees after his death. Stress seems to be laid upon the idea that Patillo did not by any act or declaration of his lose control of the deed after he had duly executed it and placed it in the bank for safe-keeping and delivery to the grantees after his death. We do not think from the findings of fact that there is any evidence, or any circumstance proven by any competent testimony in the findings of the appellate court, or in the record, that proves, or tends to prove, that Patillo did not part with all control over the deed when he handed it to the cashier of the bank with the declaration that he desired the deed, which he said conveyed some land to the grantees, deposited in the vault of the bank for safe-keeping and delivery to them after his death. But why cavil over the issue whether the grantor did or not deposit the deed with the bank for safe-keeping and subject to his control, if he executed the deed conveying the land therein described to the grantees named, and declared his desire that it should be delivered to them after his death? His act in executing the deed accompanied with his positive declaration of his purpose in so executing it and his desire that it should be delivered to the grantees after his death had the effect in law to convey the title in the land to the grantees

in the deed with possession and the usufruct in the grantor. It had precisely the same effect as if he had made and delivered the deed to the grantees, conveying them the fee, reserving to himself in the deed the use and enjoyment of the land for and during his natural life.

[2] The question of delivery of a deed is one of intention on the part of the grantor, and an actual or manual delivery by the grantor in person to the grantees is not essential to pass the title. *Brown v. Brown*, 61 Tex. 60; *Devlin on Deeds*, § 275. If it be shown that the deed was duly executed by the grantor and that it was his purpose and intention to deliver, or have delivered such deed to the grantees, the law will aid such intention and give it like effect as if the deed had been actually delivered.

[3] What constitutes a delivery of a deed is a question of law, but whether there was in fact a delivery of the deed under consideration is a question of fact, to be determined by the jury. *Towery v. Henderson*, 60 Tex. 295. Suppose Patillo, after having executed the deed, declared his purpose was to convey the land to the grantees, and that he desired the deed delivered after his death, had retained possession or control of it during the remainder of his life, without otherwise having disposed of the land. Under the rule well recognized, applicable to such cases, the title to the land would have vested in the grantees named in the deed. Especially would this seem to be true when applied to the facts of this particular case. It was unquestionably the intention of Patillo to deliver the deed to the grantees. *Hubbard v. Cox*, 76 Tex. 242, 18 S. W. 170; *Dill. on Deeds*, § 262; *Devlin on Deeds*, §§ 262, 281, 283; 18 Cyc. 562 (d); *Belden v. Carter*, 4 Day, 66, 4 Am. Dec. 185.

[4] We are aware that it is a general rule of law recognized by the text-books, and said to be in accord with legal reasoning, that a deed should not be effective where the grantor reserves the right to recall the same prior to his death, but even the rule thus stated with the qualification that it be attended with a reservation of the right to recall the deed is not of universal adoption. It is generally conceded that each case must rest upon its own peculiar facts and circumstances. Where the grantor executes the deed, and his intention to deliver the same is clear, the title passes to the grantee, irrespective of the fact that the grantor retains control of the deed during his lifetime. In the case of *Belden v. Carter*, *supra*, the court in passing upon the immediate question here under review said: "The grantor delivered the deed to Wright, with a reservation of a power to countermand it, but this makes no difference; for it was in the nature of a testamentary disposition of real estate, and was revocable by the grantor during his life, without an express reserva-

tion of that power. The case, then, stands upon the same footing as if there had been no reservation of a power to countermand the deed. It was a delivery of a writing as a deed to the use of the grantee, to take effect at the death of the grantor, deposited in the hands of a third person to hold till that event happened, and then to deliver it to the grantee. The legal operation of this delivery is that it became the deed of the grantor presently; that Wright held it as a trustee for the use of the grantee; that the title became consummate in the grantee by the death of the grantor; and that the deed took effect, by relation, from the time of the first delivery." It is stated in a note to the foregoing decision that the doctrine there announced has been approved in the following cases, all of which we have not examined, but quote for the benefit of those who may further desire to investigate the subject. The rule seems to be founded in sound reason. *Stewart v. Stewart*, 5 Conn. 320; *Jones v. Jones*, 6 Conn. 113, 16 Am. Dec. 35; *Alsop v. Swathel*, 7 Conn. 503; *Merrills v. Swift*, 18 Conn. 262, 46 Am. Dec. 315; *Church v. Gilman*, 15 Wend. (N. Y.) 661, 30 Am. Dec. 82; *Tooley v. Dibble*, 2 Hill (N. Y.) 643; *Hathaway v. Payne*, 34 N. Y. 106; *Stanton v. Miller*, 65 Barb. (N. Y.) 73; *Stephens v. Rinehart*, 72 Pa. 440; *Wallace v. Harris*, 32 Mich. 380; *Bell v. Farmers' Bank*, 11 Bush (Ky.) 41, 21 Am. Rep. 205; *Bryan v. Wash*, 7 Ill. (2 Gilman) 585; *Guard v. Bradley*, 7 Ind. 605; *Carter v. Mills*, 30 Mo. 439; *Cooper v. Jackson*, 4 Wis. 537.

We think it immaterial, as it relates to the purpose and effect of the execution of the deed by Patillo, whether he did or not part with its custody, or whether after depositing the deed in the bank for safe-keeping he retained control over it. In what manner this fact or circumstance might control the question as to what Patillo's purpose and intent were in executing and delivering the deed we are not able to see. We have his positive declaration that the deed was for land granted by him to the grantees named in the instrument, and that he desired and intended that the deed should be delivered to them after his death. This declaration evidenced his purpose and intent in executing the deed to convey the land to the grantees, and to have the deed delivered to them after his death. Or what was in legal effect the same, he had conveyed to the grantees the property, but desired to retain possession and enjoy the fruits of the land while he lived, knowing that a deed takes effect only from the date of its delivery. *Tuttle v. Turner*, 28 Tex. 773; *Devlin on Deeds* (2d Ed.) § 284.

If the deed had been taken by Patillo during his lifetime from the bank, and found among his effects after his death and the land not otherwise disposed of by him, in view of his declaration to Simpson, the grantees would unquestionably take the title to

the land under the deed. The avowed purpose of the grantor in executing the deed that it was to convey the land to the grantees named therein, to be delivered to them after his death, and the finding of the deed in his possession, as above assumed, not destroyed but held intact, and the property not otherwise disposed of would not only be evidence and circumstance sufficient to establish the effectiveness of the deed in question and the grantees' rights thereunder, but it would do so undubitably. Here we find the deed was duly executed, deposited in a bank for safe-keeping, and delivery upon the death of the grantor. Whatever view might be taken of the grantor's right to control the deed, we have the declaration of his purpose, and the fact that the grantor lived for many months within a short distance of the bank and never called for the deed, or disposed of the land. What more may it be thought was necessary to be shown to establish grantees' title?

On the other hand, let us see what facts there are in the record to rebut those of the grantor's purpose to convey the property and place the deed in escrow to be delivered upon the contingency of his death to the defendants. The deed was in the handwriting of and acknowledged before a notary who had his office in the courthouse in Bonham, in Fannin county, and who was shown to have died before the trial of the case. The deed was placed in a large envelope, upon which was indorsed in the grantor's handwriting: "T. J. Patillo or Mary Henry and Miss Joe Kearnes." The record is silent as to when this indorsement was placed upon the envelope, or for what purpose. The deed was subsequent to its execution deposited in the bank in Bells, in Grayson county, where it remained until after the death of Patillo, when it was delivered by the officers of the bank to one of the grantees, and placed on record.

[5] There is in the record no other fact or circumstance relative to this subject established by any competent testimony. The testimony of the witness to the effect that after the date of the deed's execution by Patillo he listed the property for sale, and inquired often as to whether it could be sold, and of another that Patillo refused to sell him a portion of the land, but offered to sell the entire tract, was not competent testimony to prove any issue in the case. The only relevant purpose for which this testimony could have been offered was for the purpose of showing that Patillo did not execute the deed in question for the purpose of conveying the land therein described. For this purpose it was not admissible, being hearsay evidence and in disparagement of the grantor's deed duly executed. *Hays v. Hays*, 66 Tex. 609, 1 S. W. 895; *Snow v. Starr*, 75 Tex. 416, 12 S. W. 673; *Gilbert v. Odum*, 69 Tex. 670, 7 S. W. 510; *Devlin on Deeds*, § 281a.

[6] While the admission of this testimony ✓

was not objected to by counsel for defendants, that fact would be important only in the event its admission was afterwards complained of as violative of a right reserved to defendants. Such incompetent testimony can never form the basis of a finding of facts in an appellate court, notwithstanding its presence in the record without objection. When the appellate court comes to apply the law to testimony constituting the facts of the case, it can only base its conclusion upon such testimony as is under the law competent. That which is not competent testimony should be given no probative force. The admission of such testimony is no talisman to give effect to that which is irrelevant and incompetent to sustain or deny a material issue in a case.

[7] We recognize the rule invoked by defendant in error to the effect that parol testimony is not admissible to show the construction placed upon a written contract by the parties themselves, where there is no ambiguity in the language of the instrument, and when the intent of the parties may be ascertained from the contract as written. *Soell v. Hadden*, 85 Tex. 187, 19 S. W. 1087.

[8] But we do not think that rule can in any sense be made applicable to the facts of this case. The memorandum indorsed on the back of the envelope as heretofore set out is meaningless, unless its meaning may be supplied by conjecture. If the court was authorized to say its meaning was that Patillo desired the envelope with its contents delivered to him or to the grantees named in the deed, the contention of defendant in error to the effect that Patillo's declaration to Simpson was incompetent because it varied a written contract would not be maintainable, for the reason there is nothing in the record showing at what time or under what circumstances the indorsement was made on the envelope. The material question is what was the intent or purpose of Patillo at the very time he delivered the deed to Simpson. Whatever purpose he may have had before that time inconsistent with the purpose he had at the time he deposited the deed with Simpson is immaterial to the vital question. If the indorsement may be given the dignity of a written contract, or a written memorandum of instruction, it certainly can have no greater dignity than such.

[9] It is competent to show by parol that a written contract entered into with all the solemnity of the law has been abandoned by the parties. Whatever intention Patillo might have had before he handed the sealed envelope with its contents to Simpson with reference to the disposition of the deed inconsistent with the instruction then given him must be treated as abandoned. The testimony was competent, and is conclusive of the issue as to the grantor's intent to deliver the deed to the grantees therein. *Steffan v. Bank*, 69 Tex.

517, 6 S. W. 823; *Hubbard v. Cox*, 76 Tex. 244, 13 S. W. 170.

[10] The questions considered by this court have been those of law growing out of the facts as found by the honorable Court of Civil Appeals, and, as we construe the legal effect of such facts, the deed in question was executed and delivered by the grantor to the bank in escrow to be delivered to the grantees therein after the death of the grantor, and such delivery, having been made upon the happening of the contingency, related back so as to divest the title of the grantor by relation from the first delivery. *Bury v. Young*, 98 Cal. 446, 33 Pac. 338, 35 Am. St. Rep. 188. In view of the law applicable to the facts of this case, as we understand it, and as we have herein declared it to be, there remains to us no alternative but to reverse the judgment of the Court of Civil Appeals, and affirm that of the trial court. The issues were all fairly and properly presented to the jury by the trial judge, and we see no reason why that judgment should be disturbed.

The judgment of the Court of Civil Appeals will therefore be reversed, and that of the trial court affirmed; and it is accordingly so ordered.

BURFORD v. STATE.

(Court of Criminal Appeals of Texas. Nov. 27, 1912.)

1. INCEST (§ 14*)—EVIDENCE—SUFFICIENCY.

Where accused, charged with incest with his stepdaughter, had been married prior to his marriage to the mother of prosecutrix, the state should clearly show that at the time of the second marriage his first wife was dead, or that the first marriage had been annulled.

[Ed. Note.—For other cases, see *Incest*, Cent. Dig. § 12; Dec. Dig. § 14.*]

2. CRIMINAL LAW (§ 600*)—CONTINUANCE—ABSENCE OF WITNESSES—ADMISSION BY STATE.

The state, to avoid a continuance on the ground of the absence of a witness for accused, must admit, not only that the absent witness would, if present, testify as stated, but must admit that the testimony is true.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1842-1847, 1604; Dec. Dig. § 600.*]

3. CRIMINAL LAW (§ 507*)—ACCOMPLICE—EVIDENCE—CORROBORATION.

Where, on a trial for incest, prosecutrix testified that she submitted through fear, but the evidence disclosed that the relations had existed for more than three years, and that she had voluntarily taken trips to other counties with accused, and had occupied the same room with him at hotels, without making any outcry, she was an accomplice, as a matter of law, and, to support a conviction, her testimony must be corroborated in a way tending to connect accused with the offense on the occasion alleged.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1082-1096, 1098; Dec. Dig. § 507.*]

Appeal from District Court, Reeves County; S. J. Isaacks, Judge.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

W. H. Burford was convicted of incest, and he appeals. Reversed and remanded.

Gibson & Wilson, of Pecos, and J. E. Starley, of Bartow, for appellant. O. E. Lane, Asst. Atty. Gen., for the State.

HARPER, J. Appellant was indicted for incest, having carnal knowledge of his stepdaughter, Miss Willie Boyd.

[1] One of the serious questions raised in the case is that the record contains no proof that appellant's first wife was dead, or he had been divorced from her. That he married his second wife is amply proven, he testifying: "I am the husband of Mrs. Alice Burford [the mother of the prosecuting witness]. We have been married something like 17 years. I have six children, but one of them is by my first wife. He is a boy 21 years old, living in the Indian Territory." As the record clearly disclosed that appellant had been married prior to his marriage to the mother of the prosecuting witness, on another trial it should be made clear that at the time of his second marriage his first wife was dead, or the marriage had been annulled. *McGrew v. State*, 13 Tex. App. 342. It might be said that the circumstances, admission of appellant, etc., are sufficient to establish this fact; but, as the case will be reversed on other grounds, we call attention to it, so this evidence may be made more full.

[2] When the case was called for trial, the appellant moved to continue on account of the absence of the present Mrs. Burford, who had been regularly summoned. Some of the testimony he proposed to prove by this witness was material. The state sought to avoid the force of the application by admitting, if she was present, she would testify as stated. This is an insufficient admission. The state must admit that the testimony is true, or the continuance should be granted.

[3] The court charged the jury: "Where a female and a male are prohibited by law from carnally knowing each other, as given you in charge in paragraph 1 hereof, and the female should unite with the male in having an incestuous intercourse, involuntarily and unwillingly, and only because of fear or intimidation unite with him in the commission of the carnal act, then in such instance the female would not be an accomplice in law." The defendant requested a special instruction, which was refused, instructing the jury that the prosecuting witnesses was an accomplice, and before they would be authorized to convict they must find, from the testimony, other testimony tending to prove the act of carnal intercourse charged in the indictment. While it is true that the prosecuting witness testified that she submitted through fear at the time she says the act of intercourse took place on which this prosecution is based, yet, if her testimony is to be accepted as true, the relations had existed for more than three years. Appellant had

taken her to El Paso with him, had taken her to the Dallas fair, had taken her to Ft. Worth, where they stopped at the Richelieu hotel, both occupying the same room, and at no time had she made an outcry. These facts, as she had voluntarily gone with appellant on these trips, would, where the course of conduct had lasted for such great length of time, make her an accomplice in law, and the paragraph of the court's charge complained of should not have been given, but the jury should have been instructed that she was an accomplice, and her testimony must be corroborated in a way tending to connect defendant with the offense on the occasion alleged; for, even though the evidence should show he had incestuous intercourse with her in Ft. Worth, El Paso, or Dallas, yet appellant could not be indicted, prosecuted, and convicted of these offenses in Reeves county.

There are other grounds stated in the motion for new trial; but we do not deem it necessary to discuss them at this time. On account of the above errors, this judgment is reversed, and the cause remanded.

CARPENTER v. STATE.

(Court of Criminal Appeals of Texas. Nov. 27, 1912.)

CRIMINAL LAW (§ 1172*)—HARMLESS ERROR—ERRONEOUS INSTRUCTIONS.

Where accused, on trial for carrying a pistol, did not have any authority from the sheriff to carry it, and the evidence of threats only showed threats generally, long before the date of the offense, and the court charged that if accused, on the occasion, had reasonable ground for fearing an unlawful attack, and the danger was so threatening as not to admit of the arrest of the person about to make the attack, he should be acquitted, and that the law permits one to carry a pistol when his life is threatened, and he believes honestly that the threats will be executed, any error in a charge, that if accused, when he carried the pistol, had not been called on by any officer to assist in suppressing an unlawful assembly he should be convicted, was not prejudicial, since, in view of the evidence and the other instructions, no other verdict than that of guilty could properly be rendered.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3128, 3154-3157, 3159-3163, 3169; Dec. Dig. § 1172.*]

Appeal from Frio County Court; S. T. Dowe, Judge.

Frank P. Carpenter was convicted for unlawfully carrying a pistol, and he appeals. Affirmed.

John T. Bivins and Magus Smith, both of Pearsall, for appellant. O. E. Lane, Asst. Atty. Gen., for the State.

PRENDERGAST, J. Appellant was convicted for unlawfully carrying a pistol on April 25, 1911, and fined \$100, the lowest penalty.

The uncontradicted evidence shows that on April 25, 1911, appellant went to the town

of Dilley, in Frio county, in his buggy. After reaching there, he went to the depot, received a shipment of intoxicating liquors, proceeded to "tank up" on it, got pretty drunk, and then went over to the store of Mr. Crawford, where he and his clerk were, and raised a row with Mr. Crawford, because he claimed that Crawford had charged some of the Mexicans living on his place 20 cents each too much on three sacks of flour, and then told Crawford that he (appellant) had a pistol, and that Crawford had better get his; that he then went from this store out to his buggy, where his pistol was, got it, stuck it in his pants, and proceeded to go back into the town to the bank building. Swink, Crawford's clerk, who was present at the time he raised a row with Crawford and told him to get his pistol, hearing later that appellant had his pistol on, went out, hunted him up, and asked him if he had a pistol. Appellant replied he did, and upon the request of this clerk, who was a special friend of appellant, he gave the pistol to him. As stated above, this was the uncontradicted evidence, and was appellant's evidence on the trial.

Appellant's claim and defense was that he had a right to carry a pistol, had done so for years, and nobody had questioned his right to do so up to this time. There is no proof in the record whatever that he was ever seen by any one at any other time and place with a pistol, although appellant claimed that he had carried it about his person for several years. He testified that several years before this, while Mr. Kinsel was sheriff, Kinsel gave him a deputyship, which had expired several years before this occurrence, when that sheriff went out of office; that when Mr. Riggan, the next sheriff, came in he applied to him for a deputyship, stating to him that Mexicans in his neighborhood were stealing hogs and yearlings, and that they needed an officer out there; that this sheriff declined to appoint him as deputy, stating that he had already the number of deputies allowed by law and could not appoint him, and did not appoint appellant, but told him that if he caught anybody stealing hogs or yearlings to arrest them, and he would protect him; that afterwards, when the present sheriff, Hess, went into office on December 17, 1910, he applied to him for a deputyship, stating substantially the same thing to Mr. Hess; that Mr. Hess declined to appoint him for the same reason that his predecessor had declined; that after he got drunk and had this row with Mr. Crawford and had the pistol on his person in the town of Dilley, as shown above, some of his friends advised him that he had better get a written deputyship from the present sheriff, Mr. Hess, and have it dated back to December 17, 1910, so as to cover this particular time; that he thereupon went with his friend to the county seat, some 17 miles distant, applied to the sheriff

for such deputyship, wanting it in writing and dated back as shown, not stating to the sheriff anything about the row and trouble of the day before. The sheriff declined to appoint him, but told him that if he found any Mexicans stealing hogs or cattle to arrest them, and he would protect him in making such arrests. Later in the day Mr. Hess, having been telephoned about the row of the previous day, immediately wrote appellant, even countermanding what he had told him the day before, that he would protect him in making arrests. At no time and in no way did Sheriff Hess or his predecessor give appellant any authority whatever to carry a pistol on any occasion, as shown by the testimony of this sheriff and ex-sheriff, and appellant, too, on this trial.

Appellant also claimed and testified that various persons had, some time before this row with Mr. Crawford, told him (appellant) that Mexicans in his neighborhood had made some serious threats against appellant, not stating what they were and in no way identifying any Mexican or Mexicans. All this is shown to have occurred long prior to carrying a pistol on this occasion. The court permitted him to testify to this, and to prove by other witnesses that they had so heard and told appellant prior to this occurrence; but they all, as well as appellant, stated that they could not identify any Mexican or Mexicans who had made any such threats, nor what such threats were, nor the occasion for them. Appellant, however, claimed that the cause of such matters was his activity, long prior thereto, in prosecuting Mexicans for theft of hogs and cattle. As stated above, neither appellant nor any of his witnesses could tell what Mexican or Mexicans had made any threats, nor what the threats were; and none of them attempted to show that appellant was in any immediate or other danger, on the occasion on which he carried the pistol, from any Mexican or Mexicans, except the general statement above.

The court, in a correct charge, submitted all these questions to the jury as favorably, if not more so, to appellant as the law authorized. In his charge he required the jury to believe all the necessary facts to show appellant's violation of the law before they could find him guilty, and submitted to them, in substance and in effect, that if appellant, on the occasion on which he carried the pistol, had reasonable grounds for fearing an unlawful attack upon his person, and that the danger therefrom was so threatening and imminent as not to admit of the arrest of the person about to make such attack, to find him not guilty. Again, that if any of these threats were to take the life of appellant, and were communicated to him at and prior to his carrying a pistol on this occasion, and that there was danger of such threats being carried into execution before he could have the parties arrested, that he would not be guilty, and to

find him not guilty. And, in addition, gave one of appellant's special charges, as requested by him, to the effect that the law permits a person to carry a pistol when his life is threatened by any person or persons, or great bodily harm to him was threatened by any person or persons, and that if he believed honestly that the said threats would be executed that he had a right to carry a pistol to defend himself until he had an opportunity to have such persons arrested, and his right thus existed so long as he was not out of danger from such threats; and if the jury believed that he was threatened by parties unknown to him he would have a perfect right to carry arms on or about his person to protect himself until he could have them arrested; and if the jury so believed, or had a reasonable doubt on that point, to give him the benefit of it and acquit him.

It is unnecessary to take up and discuss separately any of appellant's claimed errors. We have made above a correct statement substantially embracing the facts and charge of the court.

The court, at the instance of the state, did give one special charge which should not have been given, to the effect that if, on the occasion in which appellant carried this pistol, he had not been called upon by any officer to assist in suppressing an unlawful assembly or disturbance, to convict him. The evidence may not have called for any such charge; but, in view of the evidence and the other charges of the court correctly submitting the questions to the jury, no other verdict than that of guilty was authorized, or could have been found properly by the jury. The lowest penalty having been inflicted, no injury occurred because of the court's giving this charge.

We have considered all of appellant's claimed errors, and find that none of them would justify this court to reverse this case. The judgment is affirmed.

TATE v. STATE.

(Court of Criminal Appeals of Texas. Nov. 27, 1912.)

CRIMINAL LAW (§ 1131*)—APPEAL—DISMISSAL.

Where defendant, after appealing from a conviction and filing the transcript, escapes from custody, the appeal will be dismissed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2971-2979, 2985; Dec. Dig. § 1131.*]

Appeal from District Court, Smith County; R. W. Simpson, Judge.

Tom Tate was convicted of murder in the first degree, and he appeals. Dismissed.

N. A. Gentry and J. S. McIlwaine, both of Tyler, for appellant. W. W. Sanders, Dist. Atty., of Gilmer, and C. E. Lane, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. This case was appealed from a conviction for murder in the first degree, with the death penalty assessed. Since filing the transcript or record in this court, appellant has escaped from custody. Satisfactory proof is made to appear by the affidavits of the officer having him in charge.

On account of said escape, the appeal herein is dismissed.

SERSON v. STATE.

(Court of Criminal Appeals of Texas. Nov. 27, 1912.)

CRIMINAL LAW (§ 1097*)—APPEAL—AFFIRMANCE—NECESSITY OF BILLS OF EXCEPTION—STATEMENT OF FACTS.

Where the motion for a new trial raised questions which could only be considered in connection with bills of exception or statement of facts, the conviction must be affirmed in the absence of such instruments.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2862, 2864, 2926, 2934, 2938, 2939, 2941, 2942, 2947; Dec. Dig. § 1097.*]

Appeal from District Court, Grayson County; J. M. Pearson, Judge.

Marie Serson was convicted of theft from the person, and she appeals. Affirmed.

C. E. Lane, Asst. Atty. Gen., for the State.

PRENDERGAST, J. The appellant was convicted of the offense of theft from the person, and her punishment fixed at three years in the penitentiary. There is no statement of facts nor bill of exception. There is no question raised or attempted to be raised by the motion for new trial which we can consider without a statement of facts.

Therefore the judgment is affirmed.

KINCAID v. STATE.

(Court of Criminal Appeals of Texas. Nov. 27, 1912.)

CRIMINAL LAW (§ 1097*)—APPEAL—STATEMENT OF FACTS—QUESTIONS REVIEWABLE.

Questions presented in the motion for new trial are not reviewable, where there is no statement of facts in the record.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2862, 2864, 2926, 2934, 2938, 2939, 2941, 2942, 2947; Dec. Dig. § 1097.*]

Appeal from Red River County Court; George Morrison, Judge.

Sam Kincaid was convicted of crime, and he appeals. Affirmed.

C. E. Lane, Asst. Atty. Gen., for the State.

HARPER, J. Under an indictment charging him with violating the local option law appellant was tried and convicted. No statement of facts accompany the record, and under such circumstances we are unable to review any question presented in the motion for new trial.

The judgment is affirmed.

WILLIAMS v. STATE.

(Court of Criminal Appeals of Texas. Nov. 27, 1912.)

CRIMINAL LAW (§ 1097*)—APPEAL—REFUSAL OF INSTRUCTIONS—RECORD—REVIEW.

Where there is no statement of facts in the record, refusal of a requested charge is not reviewable; and the presumption is that the court, in submitting the offense charged, properly submitted the case.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2862, 2864, 2926, 2934, 2938, 2939, 2941, 2942, 2947; Dec. Dig. § 1097.*]

Appeal from Harrison County Court; Geo. L. Huffman, Judge.

Roy Williams was convicted of crime, and he appeals. Affirmed.

C. E. Lane, Asst. Atty. Gen., for the State.

HARPER, J. Appellant was prosecuted under an information and complaint charging him with unlawfully carrying a pistol, and his punishment assessed at eight months' confinement in jail.

There are neither a statement of facts nor any bill of exceptions accompanying the record. The information charges an offense, and the charge of the court submits this offense to the jury. A number of special charges were requested, but in the absence of a statement of facts we are unable to say whether or not they should have been given; the presumption being that the court properly submitted the case to the jury.

The judgment is affirmed.

BELLEW v. STATE.

(Court of Criminal Appeals of Texas. Nov. 27, 1912.)

1. BURGLARY (§ 41*)—EVIDENCE—SUFFICIENCY.

Evidence held to support a conviction of burglary.

[Ed. Note.—For other cases, see Burglary, Cent. Dig. §§ 94-103, 109; Dec. Dig. § 41.*]

2. CRIMINAL LAW (§ 956*)—NEW TRIAL—GROUNDS.

Where the record did not show the affidavit of accused, or of a witness, that the latter would testify as claimed by accused in his motion for new trial, and accused, trying the case without the assistance of an attorney, did not account for his failure to have the witness so testify at the trial, otherwise than by the unsworn statement in the motion that he did not know how to bring out his defense, a new trial was properly denied, in the absence of any showing why he was not represented on the trial by an attorney.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2373-2391; Dec. Dig. § 956.*]

Appeal from District Court, Briscoe County; R. C. Joiner, Special Judge.

Halleck Bellew, alias Blue Boy, was convicted of burglary, and he appeals. Affirmed.

J. E. Daniel, of Silverton, for appellant.
C. E. Lane, Asst. Atty. Gen., for the State.

PRENDERGAST, J. The appellant was indicted, convicted, and given the lowest penalty for nighttime burglary of a store belonging to one Fawcett.

It seems he had no attorney to represent him on the trial of the case in the court below until after his conviction. Why this was is not disclosed by the record. It does not show that he requested or desired an attorney to be appointed by the court to represent him on the trial. After his conviction it seems he succeeded in procuring attorneys to file a motion for new trial for him. The attorneys who filed this motion are different from his attorney who now represents him on this appeal. The motion for new trial sets up only three grounds: First, that the paragraph of the court's charge on the law of accomplice is error, in that it authorized his conviction if the testimony tended to prove the commission of an offense and his connection therewith; second, because the evidence is insufficient to show he had any knowledge that an offense was about to be committed on the night of the burglary, or that one had been committed until some time thereafter, and was not told by any of the guilty parties that an offense had been or was about to be committed, and it does not show that he participated in the commission of the offense; third, that he was not represented by counsel, and did not know how to bring out his defense, and he now tenders proof from the accomplice Tal Watkins that he knew nothing whatever about the commission of the offense, and that said Watkins would have so testified if he had been asked to do so. The record shows that said Watkins testified on the trial. The court specifically charged that he was an accomplice. The charge is in almost literal compliance with that in the case of Tucker v. State, 58 Tex. Cr. R. 271, 124 S. W. 904, which was specifically held correct in that case. We think the charge of the court on the subject is not fatally defective as claimed by appellant, and is in substantial compliance with the statute and the decisions on the subject.

[1] The evidence is not very strong. The case seems, for some reason, not to have been fully developed. We have gone over it several times carefully, and in our opinion it was sufficient to justify the verdict, and this court would not be justified in holding otherwise. It sufficiently shows that on the night charged the storehouse of said Fawcett was burglarized, and several pairs of gloves stolen out of it by the burglars at the time; that the house was by force actually entered by said Watkins and Dave Miller, they taking the gloves out of the house at the time, and immediately taking them and putting them in appellant's buggy. He (appellant) had driven with these two persons up close to the back of this store, and waited there in his buggy until they went, broke into the store,

stole from and brought and put in his buggy the stolen gloves; that those two persons then got in the buggy with him, and he drove away from the store and the little town; that other boys on horseback, with whom these three persons had been more or less during that night, also rode off following the buggy; that, when they got about half a mile from the town, they all stopped, one of the party took the gloves out of the buggy, distributed to each of them, including appellant, one pair thereof, and that one of them then took all the remainder of the gloves, and hid them in the trunk of one of the boys along with them that night. The next day, when the offense was being investigated, he took the gloves out of this trunk and hid them under cotton seed hulls in a feed pen, where they were afterwards, together with those gloves that had been distributed to the various parties, including appellant, recovered. The owner of the store and his wife both testified that the property which was taken out of their store was without their knowledge and consent, and they specifically testified that they did not give the appellant or either of the persons who actually entered the house permission or authority to do so. The evidence further shows that for some time that night prior to the actual burglary several other boys besides appellant and his two companions who went around back and forth and away with him in his buggy were back and forth over the town to a church, some of them going in, others not, but, upon the whole, the evidence sufficiently shows that appellant's immediate companions during all this time were the two persons who were shown to have gone with him in his buggy to the back of the burglarized store and remained therein until they committed the burglary and the theft, and brought the goods back and placed them in his buggy, and immediately, upon their doing so, the three in the buggy drove off together, and stayed together until after the distribution of the gloves as shown above. This is also shown to have occurred on a bright moonlight night, and we take it the jury was justified in concluding that he saw and knew all that was done and being done, and was a party thereto at the time of the burglary and theft and distribution of the stolen goods. The evidence was further sufficient to justify the jury to believe and find that the gloves that were distributed, and the pair that appellant himself received and got, were identified by the Fawcetts as the goods that were stolen out of their house the night of the burglary.

[2] The record shows that said accomplice, Tal Watkins, was the first witness introduced by the state. Of course, appellant was present, and heard his testimony. He had the right to cross-examine him if he so desired. It seems he did cross-examine another

witness, and that he himself introduced still another in his own behalf after the state had rested. Nowhere in the record is it shown or attempted to be shown by either the affidavit of the appellant, or of said witness Watkins, that he would have testified as claimed by appellant in his motion for new trial, and he in no way accounts for his failure to have him so testify, if he would, otherwise than the unsworn statement in the motion, that he was not represented by counsel, and did not know how to bring out his defense.

In our opinion no reversible error is shown, and the judgment will be affirmed.

STAHA v. STATE.

(Court of Criminal Appeals of Texas. Nov. 27, 1912.)

LARCENY (§ 32*)—PROSECUTION—OWNERSHIP—CUSTODY.

Although the keeper of an automobile garage had the care of a machine which was left there when not in use by the owner, his care or custody of the machine did not constitute ownership for the purpose of the allegation of ownership and taking without consent in a prosecution for theft of a part of a machine.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. §§ 81-92, 99; Dec. Dig. § 32.*]

Appeal from Lavaca County Court; P. H. Green, Judge.

Vall Staha was convicted of theft, and he appeals. Affirmed.

C. E. Lane, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted of theft; his punishment being assessed at a fine of \$5 and 20 days' imprisonment in the county jail.

There are two theories in the case, one showing criminality, and the other showing innocent possession of the property appellant was charged with taking. We deem it unnecessary to go into the statement of facts to collate the evidence pro and con on this question.

It is contended that the evidence does not support the allegation in the information that Ragsdale was the owner of the property. The property taken was a generator from an automobile. It was in the garage belonging to a man whose name was Drozd, and appellant had an automobile in the same garage, which seems to have been in a bad condition, and was sold to him as a worn-out vehicle. It did not have a generator. Appellant went in the garage at night after his auto, which he had a right to do, and hauled it out. When in there he says he picked up the generator lying on the ground, thinking it belonged to his machine. The evidence for the state, on the contrary, is that it belonged to Ragsdale's machine and was lying over on his machine, and not where appellant claimed it

was. There it testimony also that appellant sold the generator to another party. Drozd was in charge of the garage, and it belonged to him, and the Ragsdale machine was in this garage. It seems that when Ragsdale was not using the machine he kept it there. The contention is that this made Drozd the owner of it, having care, custody, and control. We do not believe this position is sound under the authorities. Mere custody as this was does not constitute that character of control, care, and management that constitutes ownership or authorizes the allegation of ownership for want of consent, etc. See Branch's Crim. Laws of Texas, § 785. Mere custody is not possession. *Thomas v. State*, 1 Tex. App. 289; *Garling v. State*, 2 Tex. App. 44; *Bailey v. State*, 18 Tex. App. 426; *Clark v. State*, 23 Tex. App. 614, 5 S. W. 178; *Hawkins v. State*, 20 S. W. 830; *Graves v. State*, 42 S. W. 300; *Willis v. State*, 44 S. W. 826; *Odell v. State*, 44 Tex. Cr. R. 310, 70 S. W. 964; *Byrd v. State*, 49 Tex. Cr. R. 279, 93 S. W. 114; *King v. State*, 100 S. W. 387; *Bryan v. State*, 54 Tex. Cr. R. 59, 111 S. W. 1035; *Russell v. State*, 55 Tex. Cr. R. 330, 116 S. W. 573.

The most that can be said, we think, of the possession of the owner of the garage, was that he was the custodian of the machine; that he in no sense had any care, control, or management of it such as to constitute him the owner of it in law in theft cases. Neither he nor Mr. Ragsdale testified to any such ownership. It seems from Ragsdale's testimony that when he was not using the machine he kept it in this garage as protection against the weather, etc. There is no fact indicating that he ever turned over this machine to be handled, used, and controlled by the owner of the garage. It was just there on account of the convenience and protection of it for Mr. Ragsdale, the owner.

We are of opinion there is no such error in this record as requires a reversal of the judgment. Therefore it is ordered to be affirmed.

FISHER v. STATE.

(Court of Criminal Appeals of Texas. Nov. 27, 1912.)

ASSAULT AND BATTERY (§ 56*) — "ASSAULT WITH DEADLY WEAPON"—WHAT CONSTITUTES.

In a prosecution for assault, where the weapon used was not a deadly one in itself, the question whether the assault was one with a deadly weapon depends on its use; and an assault with an ordinary saw was not an "assault with a deadly weapon," where the injuries inflicted were very slight.

[Ed. Note.—For other cases, see *Assault and Battery*, Cent. Dig. §§ 80, 81; Dec. Dig. § 56.*

For other definitions, see *Words and Phrases*, vol. 1, p. 540.]

Appeal from Collin County Court; H. L. Davis, Judge.

R. C. Fisher was convicted of aggravated assault and battery, and he appeals. Reversed and remanded.

F. E. Wilcox and W. R. Abernathy, both of McKinney, for appellant. Q. E. Lane, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted of aggravated assault and battery; his punishment being assessed at a fine of \$50.

The record is rather extensive in detailing the facts; but it discloses, in substance, that appellant had made a purchase of some hogs and carried them to the depot for the purpose of shipping them. The alleged assaulted party was J. D. Killough, the depot agent. Appellant approached him with reference to obtaining transportation for his hogs. Killough was somewhat discourteous, and appellant went away. Later the same evening appellant returned, and Killough did not give him any satisfaction about the matter, and some hot words ensued. Appellant claims that Killough went to the drawer in the agent's office to get a pistol, and did, in fact, get the pistol, and he (appellant) left. The state's evidence denies that Killough got the pistol, but states that he went to the drawer and pulled it out, but did not secure a pistol. The matter went on in this way from Monday until Wednesday, when appellant went to the stock pens at the depot and began preparations to ship his hogs. At the time Killough came upon him, or went to where he was, appellant was sawing some planks about the pens, with a view of making a chute by which he could get his hogs into a car. Killough came upon him and began to upbraid him about sawing the lumber. Appellant and Killough both testified in the case. Their statements are at variance. Killough says he did not know that appellant was at the pen at the time he went there to look after his cow and calf, which were also about the pen, but he came upon appellant sawing the planks with which the pen was made and upbraided him for it, and appellant, after some wordy altercation, struck him on the head with a handsaw which he was using. He denied taking hold of appellant. Appellant's contention is—and he sustains it with evidence of his own and that of another witness—that he was preparing a chute by which to convey his hogs into a car, when Killough left the depot and came down and raised trouble with him, and as he approached him he caught him (appellant) by the throat or collar with his left hand, running his right hand in his pocket; whereupon he struck back and hit Killough, and the blow fell upon Killough's head. He claims he only struck twice. The evidence is in conflict, however, at this point as to whether there

were two or three licks struck. When the combat ended, Killough had a cut on his head something like five inches long, a scalp wound, the bones not being in any way injured or hurt; also had a wound on his left hand and a slight one on his right arm. The doctor says the wound on the right arm amounted to nothing. The other wounds were not serious. The physician, Dr. Mathers, who attended Killough, stated that he was up in a couple of days and about his business. The saw appellant was using sawing plank was what is termed by the witness an ordinary No. 8 saw. There is some evidence going to show that one lick from the saw produced the wound on the head and the one on the left hand. There is also evidence showing that the teeth or that part of the saw used in sawing was the part of the instrument that came in contact with Killough's head and hand.

There were two counts in the indictment. The court submitted that which charged the assault was committed with a deadly weapon. Under the authorities, with the proof in this record, this saw did not constitute a deadly weapon. Where a weapon is not a deadly one per se, that it would depend upon its use, etc., as to whether it was a deadly weapon or not. The wounds were not serious, and there is no evidence from any witness that the saw was a deadly weapon; and it is not a deadly weapon per se. For collation of authorities sustaining this contention, see Branch's *Crim. Law*, § 82. Many cases are collated by Mr. Branch, and we deem it unnecessary to recite them in the opinion.

The judgment is reversed, and the cause is remanded.

YARBROUGH v. STATE.

(Court of Criminal Appeals of Texas. Nov. 27, 1912.)

1. CRIMINAL LAW (§ 552*)—EVIDENCE—CIRCUMSTANTIAL EVIDENCE.

To support a conviction on circumstantial evidence, each fact necessary to establish guilt must be proven, and the facts and circumstances must not only be consistent with guilt but inconsistent with any other reasonable hypothesis.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1257, 1259-1262; Dec. Dig. § 552.*]

2. LARCENY (§ 55*)—EVIDENCE—SUFFICIENCY.

In a prosecution for theft, evidence held insufficient to support the conviction.

[Ed. Note.—For other cases, see *Larceny*, Cent. Dig. §§ 152, 164, 165, 167-169; Dec. Dig. § 55.*]

3. CRIMINAL LAW (§ 552*)—EVIDENCE—SUSPICIOUS CIRCUMSTANCES.

Suspicious circumstances alone are not sufficient upon which to base a conviction.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1257, 1259-1262; Dec. Dig. § 552.*]

Appeal from District Court, Camp County; R. W. Simpson, Judge.

Wilson Yarbrough was convicted of theft, and he appeals. Reversed and remanded.

King & Engledow, of Pittsburg, for appellant. C. E. Lane, Asst. Atty. Gen., for the State.

HARPER, J. Appellant was prosecuted and convicted of theft, and his punishment assessed at two years' confinement in the penitentiary.

[1] There is but one serious question in the case—the sufficiency of the evidence. It is a case of circumstantial evidence, and the rule of law is in that character of case each fact necessary to establish guilt must be proven, and the facts and circumstances not only consistent with his guilt but inconsistent with any other reasonable hypothesis.

[2] In this case the facts show that Will Thomas had his money stolen. He went into a tailor shop, pulled out his purse, and laid it on the counter. He and his cousin and the proprietor went to the rear of the store. While in the rear department, appellant entered the store, passed by the counter on which the purse had been placed, and subsequently went out of the store. Another man also entered the store and passed the counter where the money had been laid down. All the witnesses describe this man as a stranger, no witness knowing his name; but the state's witnesses all place him in the store as well as defendant's. Thus an opportunity was offered for either appellant or the stranger to take the purse. When its loss was discovered, both appellant and the stranger were searched; but the money and purse were not found, and had not been found when this case was tried. Appellant's cousin, who also had an opportunity to take the purse, was not searched, as he was not suspected. This cousin testified on the trial and says he did not get the money; appellant also testified and swears he did not get the money. But the stranger who entered the store building is not located and does not testify. Applying the "rule of exclusion," does the evidence meet the requirement of the law? It is true appellant had ample opportunity to take the purse and money, but so did the stranger and the cousin of appellant. Many suspicious circumstances are also introduced in evidence, showing that appellant lied about his whereabouts from the time he entered the store until he was searched; but he was in no way connected with the money and the purse further than to show he had an opportunity to take it as did the others. We think, to render sufficient the evidence in the absence of finding any stolen property, in a case depending entirely on circumstances, it would have been necessary to show that appellant, and appellant alone, was in such juxtaposition

tion to the property as that he, and he alone, could have stolen it, or positively to have shown the others did not do so.

[3] Suspicious circumstances alone are not sufficient upon which to base a conviction. The circumstances must unerringly point out the defendant as the guilty person, when circumstantial evidence is relied on. *Brooks v. State*, 56 Tex. Cr. R. 513, 120 S. W. 878; *Johnson v. State*, 52 Tex. Cr. R. 510, 107 S. W. 845; *Green v. State*, 59 Tex. Cr. R. 6, 127 S. W. 549; *Hogan v. State*, 13 Tex. App. 319; section 206, Branch's Criminal Law.

The judgment is reversed, and the cause remanded.

PUGH v. STATE.

(Court of Criminal Appeals of Texas. Nov. 27, 1912.)

1. HOMICIDE (§ 254*)—SECOND-DEGREE MURDER—EVIDENCE.

Evidence held to sustain a conviction of murder in the second degree.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. §§ 533-538; Dec. Dig. § 254.*]

2. CRIMINAL LAW (§ 1090*)—MOTION TO STRIKE TESTIMONY—BILL OF EXCEPTIONS.

Denial of a motion to strike out all the testimony adduced down to the close of the state's case could not be reviewed, in the absence of a bill of exceptions reserved thereto.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 2653, 2789, 2803-2827, 2927, 2928, 2948, 3204; Dec. Dig. § 1090.*]

3. CRIMINAL LAW (§ 666*)—RECEPTION OF EVIDENCE—WITNESSES—DUTY TO CALL.

Where defendant relied on certain eyewitnesses to prove that he acted in self-defense in killing deceased, the state was not required to introduce and vouch for such testimony, but it was proper for the court to call the witnesses, and tender them both to the state and to defendant.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1567-1575, 1577-1579; Dec. Dig. § 666.*]

4. CRIMINAL LAW (§ 829*)—INSTRUCTIONS—REQUEST TO CHARGE—INSTRUCTIONS GIVEN.

It is not error to refuse requested charge, the substance of which is covered by instructions given.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 2011; Dec. Dig. § 829.*]

5. CRIMINAL LAW (§ 785*)—TRIAL—INSTRUCTIONS—IMPEACHING TESTIMONY.

Where the state in cross-examining several witnesses asked them if they had not testified directly on a former trial, but did not follow up the evidence by offering any testimony to impeach them, the court was not required to charge that such testimony could only be considered as bearing on the credibility of witnesses.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1774, 1776-1781, 1889-1894; Dec. Dig. § 785.*]

Appeal from District Court, Houston County; B. H. Gardner, Judge.

John Pugh was convicted of murder in the second degree, and he appeals. Affirmed.

J. W. Madden and C. M. Ellis, both of Crockett, for appellant. O. E. Lane, Asst. Atty. Gen., for the State.

HARPER, J. Appellant was indicted, charged with murder, and convicted of murder in the second degree, and his punishment assessed at five years' confinement in the state penitentiary. In appellant's first, second, third, fourth, fifth, sixth, twenty-first, twenty-second, and twenty-third assignments of error is presented the question of the sufficiency of the evidence to sustain the verdict, in some of them it being alleged that the evidence is insufficient to sustain the verdict, and in others that the verdict is contrary to the law as given in charge to the jury. Appellant groups them in his brief, and we do so, for, if either present grounds of reversal, the whole case must fall.

[1] That appellant killed the deceased is not denied, but it is earnestly insisted that the killing was done under such circumstances that he was justifiable as a matter of law. It appears that deceased was a constable of a precinct in Houston county, and had detected appellant, with others, gambling, and reported them. On this occasion appellant refused to submit to arrest. Later, when tried, appellant had a fight with the deputy sheriff about his fine. Between the time of appellant's detection in the gambling game and this killing appellant was heard to remark that he had two shells in his gun, one for deceased and the other for the deputy sheriff. On the day of the killing appellant used very abusive language, and made threats about what he was going to do to deceased. This, of course, is all from the state's evidence, and the truth of which was passed on by the jury, and we mention it solely on the ground of whether or not the testimony was sufficient to sustain the verdict, and whether the verdict was contrary to the charge of the court.

After making these threats, it is shown by John Bobbitt that he was present at the time of the shooting, and he says: "This shooting was done in Jake Gregg's storehouse in Weeches, Houston county, Tex. I don't know what time of day it was, but it was late in the evening, after the noon hour and before dark. I do not know what caused the trouble, and the first I do know about it I was sitting on a counter in Jake Gregg's storehouse, and I heard Jim Bobbitt, my brother, tell Luther Shaw to turn him loose, and I looked up that way, and John Pugh was coming down the aisle, and I started up there to where Jim Bobbitt was, and I passed John Pugh, and John Pugh went in behind the counter, and I taken hold of Jim, and me and him started on to the front door, and just as we got a little passed the counter I heard a gun cock, and I looked back that way, and seen the gun coming up over the

counter in that position, and I just spoke to Jim and said, 'Jim, look out,' or 'Look there,' or something to that effect, and Jim kind o' turned his head that way, and, as he did so the gun come on up, and, as it did, I thought he was going to shoot him, and I turned my head away and made a step, but he didn't shoot him, and I turned back, and, as I turned back, the gun shot and Jim was falling."

Harvey Smith testified: "He [John Bobbitt] wasn't standing when I saw him, and he wasn't sitting either. He was walking right behind Jim Bobbitt, going towards the front door. I reckon they had passed what you would call the middle of the house; and they were going towards the front door. Both of them were facing me, and I was on the inside of the door. They were coming, facing me, both of them. Jim Bobbitt was ahead and John Bobbitt was behind. They were on the left-hand side of the house as you went in at the front door, coming up the aisle next to the counter on the left-hand side of the house as you go in the front door. Then Jim Bobbitt was killed. John Bobbitt was right behind Jim Bobbitt. Jim Bobbitt was kind o' facing the door when he was shot, but he looked around towards the gun just as he was shot. I saw him when he looked around. I saw the gun when it fired. I don't know just how far he was from the gun, but I would guess two or three feet. I don't know how far he was from the front door, but he was something about 12 feet, I suppose." If the jury believed the theory of the state, based on the testimony of these two witnesses and other facts and circumstances in the case, appellant was not justifiable in the shooting, and the testimony would amply support the verdict of the jury.

The state introduced in its original testimony only John Bobbitt as to the facts and circumstances at the time of and immediately preceding the killing. When the state rested, the defendant filed a motion asking that the state be required to introduce all the eyewitnesses to the transaction. This motion was by the court overruled, and of this ruling of the court appellant complains in his eighth, ninth, tenth, eleventh, twelfth, thirteenth, fourteenth, and fifteenth assignments of error. Under the common law, as the defendant could not introduce any testimony, a rule of law was sanctioned where by motion filed the defendant could require the state to introduce all eyewitnesses to the transaction. In this state there has never been any reason for such rule, and it has never prevailed. When the state has closed its testimony; a defendant can introduce such testimony as he desires, and such of the eyewitnesses as the state does not introduce he can call if he desires to do so.

In his sixteenth, seventeenth, and eighteenth assignments of error appellant complains of the action of the court in overrul-

ing his motion to strike out all the testimony adduced down to the time the state closed its case.

[2] If such motion was made, no bill of exceptions was reserved to the action of the court in refusing to do so, consequently the matter is not presented in a way we can review it. However, if it was properly presented, under article 698 of the Code of Criminal Procedure, this court has held that the trial court has a wide discretion in the order of admitting testimony.

[3] The testimony of the other eyewitnesses was relied on by appellant to prove that he acted in self-defense, and it would not have been proper for the court to have required the state to introduce this testimony and vouch for it. The court in this instance stated to appellant he would not require the state to place the witnesses on the stand, but, if it was desired, the court would place the eyewitnesses on the stand, thus relieving the defendant of the burden of vouching for them, and the court did place Shaw on the stand, and tendered him to both the state and defendant, and this witness did testify, being rigidly examined both by the state and defendant. The court in so doing evinced a spirit of fairness, and his action is not subject to criticism in this respect. Appellant cites us to the cases of Hunnicutt v. State, 20 Tex. App. 634, and Thompson v. State, 30 Tex. App. 325, 17 S. W. 448. In the Thompson Case it was held that, if the state undertook to make its case wholly by circumstantial evidence, it would be proper to require the state to introduce some of the eyewitnesses. In this case the state did not rely wholly on circumstantial evidence, and did introduce one eyewitness, and the way he detailed events at the time of the killing is wholly at variance with the testimony of the other eyewitnesses, and yet the jury seems to have accepted his version. In the Hunnicutt Case Judge White is expressing his individual opinion and so states, and was not speaking for the court, and the views thus expressed never became the law of this state; the reason for the contrary rule being well expressed by Presiding Judge Davidson in the case of *Reynolds v. State*, 33 Tex. Cr. R. 144, 25 S. W. 786, 47 Am. St. Rep. 25. See, also, *McCandless v. State*, 42 Tex. Cr. R. 655, 62 S. W. 746; *Mayer v. State*, 33 Tex. Cr. R. 33, 24 S. W. 421; *Kidwell v. State*, 35 Tex. Cr. R. 264, 33 S. W. 342; *Darter v. State*, 39 Tex. Cr. R. 40, 44 S. W. 850; *Wheells v. State*, 23 Tex. App. 245, 5 S. W. 224.

If the evidence offered on behalf of appellant had been believed by the jury, it would have presented a case of self-defense. However, the court in his charge presents that question to the jury very favorably to defendant, and, in addition thereto, gave at appellant's instance the two following special charges:

"You are instructed that if you believe from the evidence in this case that the defendant and the deceased, Jim Bobbitt, had settled their troubles and differences by mutual agreement before the said Bobbitt was shot, and that the defendant had put his gun away in pursuance of said agreement, believing in, and acting upon, the good faith of the said Bobbitt in making the said agreement, and that thereafter the said Bobbitt violated his said agreement, and brought on further trouble between himself and the defendant by attacking the defendant and challenging him to further trouble by telling him to 'get his gun,' and that he pursued the defendant to where the defendant had put his gun, with his pistol in his hand, and that the defendant then shot the said Bobbitt under the belief that the said Bobbitt intended to kill him, or inflict upon him serious bodily injury, then and in that case you will find the defendant not guilty. And in determining this question you will pass on the same from the standpoint of the defendant as the appearance of danger may have reasonably appeared to him at the time of the shooting, although you may believe there was no real danger of such injury.

"You are instructed that if you believe from the evidence in this case that at the time of the killing the deceased was the aggressor, and that he brought on the trouble between himself and the defendant in the house where he was killed, and conducted himself in such way as to lead the defendant to believe that he meant to kill the defendant, or to inflict upon him serious bodily injury, and that, under such belief, the defendant shot and killed the deceased, then and in that case you will find the defendant not guilty, and you will so find whether you believe there was any real danger or not, and whether any previous agreement to settle their troubles was made or not, and whether you believe the defendant had previously threatened the life of the deceased or not."

Thus in two special charges the court directed the attention of the jury to the real issue in the case as made by the testimony offered in behalf of defendant. If, as the state's witnesses testify, deceased was walking away from appellant at the time he was shot, defendant was not justified in killing him. On the other hand, the defendant's witnesses would have deceased raising the trouble at this particular time and pursuing appellant, and these charges tell the jury, if they found these facts to be true, or had reasonable doubt thereof, to acquit him.

[4] There was no error in refusing special charge No. 3, as it was covered in special charges Nos. 1 and 2, given at appellant's instance. There was no evidence calling for or upon which to base special charge No. 4. The court had told the jury, if deceased was advancing on appellant with a pistol, to acquit him, and this was the theory of appel-

lant on the trial, and there was no reason to instruct the jury whether or not deceased was acting in his official capacity.

[5] In cross-examining several witnesses the state's attorney asked them if they had not testified differently on a former trial in this case, apparently laying a predicate to impeach them, but did not follow it up by offering any testimony to impeach them. Appellant complains that the court in his charge failed to limit the purposes for which such questions were asked, and testimony would have been admissible. As no testimony was offered, we fail to see the necessity for the court to charge thereon. Where certain testimony was admitted for impeaching purposes, the court instructed the jury: "Certain witnesses for the state have been permitted to testify that certain witnesses for the defendant made certain statements at times and places other than on this trial. Now, you are instructed that such testimony cannot be considered by you as proof of any fact against defendant, but same has been admitted in evidence on the issue as to the credibility of said witnesses for the defense and the weight to be given their evidence, respectively, and cannot be considered for any other purpose." It is thus seen that the court fully instructed the jury when any testimony was admitted.

The appellant earnestly insists that the verdict is contrary to the law as given in charge by the court; that, if the evidence did not conclusively show he acted in self-defense, then the evidence would show no higher degree of offense than manslaughter. It appears that deceased was an officer, and as such officer had detected appellant gambling, and appellant was compelled to pay a fine. This angered him, and on several occasions thereafter he had used very abusive language in regard to deceased, and at all times carried a shotgun, saying he had as much right to carry it as the officers did a pistol. It is nowhere suggested or shown that the officer nurtured any animosity towards appellant, but the animosity was wholly on his side. On the day of the killing appellant had become unruly on the baseball ground, and, when requested to desist, used very offensive language, and threatened to take the life of deceased. From his standpoint, later when the officer went in the store and asked him if he had his gun, and he answered, "No," the officer telling him to get it, he made for his gun, and shot the officer. He exhibited a disposition and willingness to enter into a deadly combat. The testimony offered by him would suggest mutual combat. If his theory is true, it is remarkable that the officer followed him, firing no shot, and under such circumstances we can readily see how the jury accepted the state's theory of the homicide—that, when the trouble arose and appellant made for his gun, deceased and his brother, instead of follow-

ing defendant, started out of the store, and deceased was killed when there was no necessity or apparent necessity viewed from any standpoint.

The judgment is affirmed.

BROOKS v. STATE.

(Court of Criminal Appeals of Texas. Nov. 27, 1912.)

1. LARCENY (§ 55*)—PROSECUTION—EVIDENCE—SUFFICIENCY.

In a prosecution for theft from the person, evidence *held* sufficient to support the conviction.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. §§ 152, 164, 165, 167-169; Dec. Dig. § 55.*]

2. LARCENY (§ 71*)—TRIAL—INSTRUCTIONS—APPLICABILITY TO EVIDENCE.

In a prosecution for theft from the person, where accused claimed that he had taken a watch from the prosecuting witness to compel him to reimburse him for whisky which the prosecuting witness had destroyed, a charge that if accused took the watch with the knowledge of the prosecuting witness or took it merely to hold until he was paid for the whisky, or if the jury had reasonable doubt on either of these issues, the verdict should be not guilty sufficiently submitted accused's contention.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. §§ 191-194; Dec. Dig. § 71.*]

Appeal from District Court, Anderson County; B. H. Gardner, Judge.

George Brooks was convicted of theft from the person, and he appeals. Affirmed.

J. E. Rose, of Palestine, for appellant. O. E. Lane, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted of theft from the person; his punishment being assessed at three years' confinement in the penitentiary.

[1] The main contention is that the evidence does not sustain the conviction. Briefly stated, the statement of facts discloses that the alleged injured party, Robinson, had gone from his home in Houston county, 15 miles distant, to the town of Palestine, and there became intoxicated. During the evening, or rather at night, while in this intoxicated condition, he was in a saloon. There were negroes in there, and among them a negro who worked on Robinson's place, and who had accompanied him to Palestine. There was also another negro in there named Brooks (appellant in this case). Robinson, following the usual custom of intoxicated men, was generously treating those who drink, among them appellant and one or more other negroes. Appellant bought a bottle of whisky and had offered to treat Robinson, inasmuch as the barkeeper had refused to let appellant drink because he had reached the limit, whereupon appellant offered, perhaps at the request of Robinson, to open his bottle of whisky and give Rob-

inson a drink of it. Appellant declined to do so in the saloon proper because it would interfere with the business of the saloon, and invited Robinson into a rear room to take a drink. Robinson accompanied him. The bottle was opened, Robinson took a drink, and let it drop on the floor, breaking it. Appellant insisted that Robinson should buy him another bottle, which Robinson agreed to do. He went to the bar, and Robinson ordered the barkeeper to let appellant have a bottle of whisky. There arose a discussion about the price of it; appellant claiming he had paid \$1.25 for the broken bottle, and Robinson did not think he had paid but \$1. While discussing the matter, the negro friend of Robinson, whom he brought with him from his farm, reminded Robinson of the fact that it was about train time, and asked him to give him the money so he might purchase tickets. Robinson put his hand in his pocket to get the money and did get it, and gave it to his negro friend to purchase tickets. He then missed his watch, and stated that somebody had gotten his watch, and tried to ascertain what had become of it. His testimony indicates that the watch was taken before he and appellant returned from the rear room into the bar. After missing the watch he turned to Will Fisher, his negro friend he brought with him from the farm, and asked him if he had his watch, and he said, "No, sir; I haven't got it," and he then turned to the crowd and said, "Have any of you all got my watch," and all of them said "No." Appellant was in that crowd. This was immediately after returning into the bar from the rear room where he had taken a drink. Robinson went away to hunt an officer, and finally informed the officers that his watch had been taken. Appellant followed along after Robinson, and, when he reached the officers shortly after Robinson did, one of the officers asked him if he knew anything about the watch, and he replied that he did not. The officer then asked appellant if he got the watch, and he said "No." He then asked him if he knew who did get it, and he said he did not, but he knew Robinson had the watch in the saloon, and about that time another negro came up and motioned to the officer, and he went to where he was, and he told the officer that he believed George (appellant) got the watch; that he had gone back in the rear end of the saloon with Mr. Robinson. The officer then walked back and began questioning appellant, and about that time Mr. Reagan walked up, but Robinson had then gone back to the saloon. The officers began searching the parties, and among others they searched appellant and found the watch on his person. Officer Dublin testified in this connection that: "Mr. Reagan searched him on one side and I searched him on the other, and I run

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

my hand in his pocket and pulled the watch out, and I asked him whose was it, and he said, 'That is it; I was just fixing to take it back to him'; and so I took him and locked him up and gave the watch to Mr. Robinson." The account given by appellant at the time as to his possession of the watch and why he took it is thus reported in the statement of facts: "Yes, sir; after I taken it out of his pocket he said that he was keeping it to make the fellow pay him for a quart of whisky." Appellant's theory of the matter, after stating that he and Robinson had been back in the saloon and had taken a drink out of his bottle of whisky, and broke it, and the trouble arising afterwards as to the value of the bottle of whisky, was, speaking of Robinson: "He asked me what kind was it, and I told him that it was Cascade and that it cost \$1.25, and he said, 'Aw, away with Cascade,' just that way, and I said, 'You won't pay for it?' and he said, 'Aw, that is all right,' and I said, 'What time have you got?' and he pulled his watch out and said, 'It is a little after eight,' or something like that, and I said, 'All right, let me see,' and he handed me the watch and I said, 'I will keep this until you replace my whisky; when you replace my whisky I will replace your watch,' and he said, 'Give me that watch,' and I said, 'No, I will replace your watch when you replace my whisky,' and he said, 'That watch cost \$25,' and I said, 'That isn't anything if it cost \$125; my whisky cost \$1.25, and if you will replace it I will replace your watch, and, if not, I will know the reason why,' and that was all he said to me right there." He then narrates a conversation that occurred between himself and Will Fisher, the other negro mentioned as being Robinson's hired man. Appellant's theory was introduced by his own testimony and his statement to the officers at the time they took the watch from him, and the two accounts are substantially the same.

We are of opinion, so far as the facts are concerned, that the jury was authorized to take the view of it they did and find appellant guilty of theft from the person. Robinson says that appellant got the watch without his knowledge or consent; he was drinking, and indicates appellant got the watch in the rear room while they were taking a drink of whisky. Appellant's theory of it was he got it, as he stated, by inducing Robinson to hand it to him, and then holding it in order to make Robinson replace the broken bottle of whisky. If Robinson and the officers are correct in their statements, then appellant took the watch from Robinson privately and surreptitiously without his knowledge, and when the officers asked him about it denied having it several times, although immediately afterwards it was found upon his person. He then said he took it

in order to force Robinson to pay for the broken bottle of whisky. Now these two theories were submitted to the jury by the court in his charge. The jury was authorized to find the evidence for the state correct and truthful.

[2] There is another contention to the effect that the court failed to charge appellant's theory of the case as made by his explanation. The court thus charged the jury in this respect: "If defendant took the watch from the hand of said Robinson with the knowledge of said Robinson, or if defendant took it merely for the purpose of holding it till he was paid for the quart of whisky that had been broken, or if you have a reasonable doubt on either of these issues, you will return a verdict of not guilty." We are of opinion this does submit appellant's side of the case fully and in accord with his testimony and his explanation both. We have commended heretofore this manner of charging a jury with reference to explanation of stolen property instead of giving the lengthier charge with reference to reasonable doubt and the consideration of that and all other phases, etc. The charge given by the trial judge herein is simple, straight, unequivocal, and intelligible. We do not believe any jury could possibly misunderstand this charge, and, if they believed the testimony and the theory of appellant that he got the watch from Robinson as indicated in his testimony and in his explanation, they would have acquitted under this charge. They were plainly told that if he got the watch from Robinson with his knowledge, or if he took it merely for the purpose of holding it until he was paid for the quart of whisky that had been broken, he would not be guilty under the charge of stealing from the person of Robinson, and that the jury should acquit him.

Finding no reversible error in the record, the judgment is affirmed.

SCOTT v. STATE.

(Court of Criminal Appeals of Texas. Nov. 27, 1912.)

1. INTOXICATING LIQUORS (§ 146*)—OFFENSES—SALE.

Where the state's witness gave defendant 50 cents to get some whisky, and when defendant returned with alcohol refused to take it, but afterwards followed defendant and took the alcohol from him without his consent, there was no sale; but if he took it in payment of the 50 cents, with defendant's consent, it would be a sale.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 159, 160, 163; Dec. Dig. § 146.*]

2. INTOXICATING LIQUORS (§ 238*)—PROSECUTION—INSTRUCTIONS—ISSUE OF SALE.

Where the evidence, in a prosecution for the sale of liquor, was that the state's witness gave defendant 50 cents to buy whisky, and on defendant's return with alcohol refused it, and

then followed defendant and took it from him, and was conflicting as to whether defendant consented to the taking, the failure to submit the question of defendant's consent was reversible error.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. §§ 324-330; Dec. Dig. § 238.*]

Appeal from Red River County Court; George Morrison, Judge.

Jim Scott was convicted of violating the local option law, and he appeals. Reversed and remanded.

C. E. Lane, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted of violating the local option law; his punishment being assessed at a fine of \$25 and 20 days' imprisonment in the county jail.

The evidence for the state discloses, through the witness Baker, about as follows: On the morning of February 20, 1911, appellant approached the witness, where he was working in the store for George McCulloch in Clarksville, Tex., and asked witness to let him have 50 cents. Witness replied, "What would that be to me?" and appellant answered, "Well, let me have the 50 cents," to which witness again replied, "What will that be to me?" Appellant then replied that he was going to get some whisky, and that he would let witness have some of it for the 50 cents. Witness then let appellant have the 50 cents. Appellant took it and went away, and later during the day, about 12 o'clock noon, appellant came back with a quart bottle half full of alcohol. Witness examined it and knew it was alcohol. Witness then told appellant that he wanted whisky. Appellant told the witness he had no whisky; that the alcohol was all he had; and that witness could have it if he wanted it. Witness asked appellant for his 50 cents. Appellant replied that he did not have 50 cents, but that witness could have the alcohol in place of the 50 cents if he wanted it. Witness then told appellant to go ahead, and that he would see appellant later. Appellant then went off down the street and into a negro pool hall. Witness further testified that he saw those negroes were going to get all of defendant's alcohol, and that he (witness) would get nothing for his 50 cents; that he immediately followed appellant and found him in a little store in the rear of the negro pool hall, in company with some other negroes; that he walked up to defendant and took the bottle of alcohol out of defendant's pocket; that the defendant made no resistance, but stood still and grinned; that one of the negroes, Arnett Jones, grabbed for the alcohol and tried to take it away from witness, and witness and Jones had a scuffle over the alcohol, but witness finally got away with it and carried it to Mr. McCulloch's barn, and during that

evening and night witness drank all of it. On cross-examination he stated the facts above are true; that there was no understanding between witness and defendant that the defendant should bring him back any particular quantity of whisky; that defendant had never paid witness back the 50 cents; that witness did not expect him to do so.

The state next introduced Bud Totten, who testified that he did not see Henry Baker get any liquor from the defendant, and knew nothing about the transaction. The state here closed its case, except to prove that local option was in effect.

Arnett Jones was then introduced by the defendant, who stated that on the morning of February 20, 1911, he was in the negro pool hall at Clarksville, in company with some other negroes, and that this negro (the defendant) came in and gave witness Arnett a pint bottle full of alcohol, and that witness and the other negroes drank it; that there were present, besides himself, Ben Johnson, Babe Johnson, and the defendant; that while they were all in the pool hall the negro Henry Baker ran in from the front of the house and grabbed a quart bottle, which was about half full of alcohol, out of defendant's pocket; that he (witness) also grabbed at it, but Baker's hold on the bottle was the best, and he got away with it and ran out of the back door, and witness did not see any more of Baker that day; that he heard nothing said about any sale of liquor by the witness Baker and the defendant; and that he saw no money pass between them.

Ben and Babe Johnson testified as did Arnett Jones, except Ben Johnson testified, in addition, that defendant made a grab for the bottle of alcohol while Jones and Baker were scuffling over it.

Appellant took the stand in his own behalf, and testified that it was not true that on February 20, 1911, the date set out in the information and stated by Baker, that he got 50 cents from Baker and told him that later on in the day he would bring him back some whisky for it; that Baker's whole testimony in this respect is false; that on the day mentioned he was in the pool hall with Arnett Jones, Ben Johnson, and Babe Johnson, and that he had a quart bottle, about one-half full of alcohol, in his overcoat pocket, and while he was in there Henry Baker ran in from the front door, and back to where he and the other negroes were standing, and grabbed the alcohol out of his pocket, and at about the same time Arnett Jones grabbed at it, and that he (defendant) also grabbed at it, and that there was a short scuffle over it, but Henry Baker's hold on it was the best, and he got away with it and ran out of the back door. He also testified: That about 6 o'clock that afternoon, while defendant was going to the passenger train to meet his boss, who was coming in

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

on the train, Baker stepped out and went to a trash barrel in front of Mr. McCulloch's store and got the bottle of alcohol out of the trash barrel, where it was hidden, and returned it to him, and said: "Here is your alcohol. I have kept it for you to keep them niggers from drinking it all up from you." It was still in the bottle, and looked like none of it "had been drunk up." That if any of it had been taken from the bottle from the time Baker got away from him (defendant), until he returned it, it was very little. He further testified that he did not sell any alcohol to Henry Baker, or to any one else, and that he had never at any time sold any liquor to any one, and that this is the first time he had ever been accused of so doing.

While there are some very decided contradictions in the testimony, we may take the state's evidence to the exclusion of appellant's testimony; and we are of opinion that the state has not proved a sale. Baker's testimony excludes such transaction. Take it in its strongest light, he let appellant have 50 cents with the understanding he was to get that amount of whisky in return. Appellant brought him some alcohol, which he declined to have, and appellant went away, taking the alcohol with him. That Baker subsequently went to the pool hall where the negroes were and took the alcohol out of appellant's pocket does not constitute a sale. Baker does not intimate that appellant let him have the alcohol on his visit to the pool hall; but the testimony expressly excludes that idea. Baker testifies that he had a scuffle with Jones over it, who tried to take it away from him; and it is also shown appellant tried to get it after Baker grabbed it and started away with it. This testimony excludes the idea of a sale.

The judgment is reversed, and the cause is remanded.

HARPER, J. [1, 2] I agree to the reversal of this case, but not on the ground on which it is placed. The question of whether or not the defendant consented to the taking of the alcohol should have been submitted to the jury, and on this issue charges Nos. 1 or 2 requested should have been given. Of course, if defendant did not consent to prosecuting witness taking the alcohol, it would not be a sale; but if, after tendering it in payment of the 50 cents, and prosecuting witness refusing it, prosecuting witness subsequently changed his mind, as he says he did, and decided to take the alcohol, and he did take it in payment of the 50 cents, with the knowledge and consent of defendant, it would be a sale; and I agree to the reversal of this case solely on the ground that this issue was not submitted, after the court was requested so to do.

PRENDERGAST, J., concurs.

HARRISON v. STATE.

(Court of Criminal Appeals of Texas. Nov. 27, 1912.)

1. OBSTRUCTING JUSTICE (§ 9*) — BRIBING WITNESS—ELEMENTS OF OFFENSE—PRINCIPAL.

A party is not guilty of bribery as principal, because he pays a witness in a criminal case to take his daughter, who is also a witness, away from the county.

[Ed. Note.—For other cases, see Obstructing Justice, Cent. Dig. § 18; Dec. Dig. § 9.*]

2. OBSTRUCTING JUSTICE (§ 11*)—INDICTMENT—SUFFICIENCY.

Where the indictment for bribing a witness to avoid process of the court, in a case under consideration by the grand jury, failed to state the character of the process, it was fatally defective.

[Ed. Note.—For other cases, see Obstructing Justice, Cent. Dig. §§ 19-28; Dec. Dig. § 11.*]

3. OBSTRUCTING JUSTICE (§ 4*) — "BRIBING WITNESS TO AVOID PROCESS"—ELEMENTS OF OFFENSE—PROCESS.

To constitute the offense of bribing a witness to avoid a process, there must have been a process either issued or served.

[Ed. Note.—For other cases, see Obstructing Justice, Cent. Dig. § 13; Dec. Dig. § 4.*]

4. CRIMINAL LAW (§ 589*)—FORMER JEOPARDY—MOTION FOR POSTPONEMENT.

Where, in a trial for bribing a witness, it appeared that defendant had been convicted as an accessory and sentenced upon the same facts and that he had appealed therefrom, his motion for a postponement until the final disposition of such case, in order that he might plead either former conviction or former acquittal, should have been granted.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1315, 1319; Dec. Dig. § 589.*]

5. CRIMINAL LAW (§ 1169*)—ADMISSION OF EVIDENCE.

In a trial for bribing a witness to leave the county and take with him his daughter who was also a witness, in order that they might not appear against third parties under investigation before the grand jury in connection with a seduction and an abortion with which it was not claimed that defendant had any connection, the admission of evidence of the details of such crimes was prejudicial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3088, 3137-3143; Dec. Dig. § 1169.*]

Appeal from District Court, Comanche County; J. H. Arnold, Judge.

J. H. Harrison was convicted of bribing a witness, and he appeals. Reversed and remanded.

Smith & Palmer and Goodson & Goodson, all of Comanche, for appellant. C. E. Lane, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was charged with bribing a witness. Omitting the formal part of the indictment, it charged that appellant corruptly offered to and paid T. G. Waldrip the sum of \$150 in money, T. G. Waldrip being a witness in cases then and there in the district court of Comanche county, said cases being then and there under consideration and investigation by the grand jury of the said district court of Comanche county, said court being then and

there in session, and said cases being certain cases, wherein the state of Texas was plaintiff and Sam Wimberly, Sol Ingram, and J. G. Daniel were defendants, and the said J. H. Harrison did then and there give to said witness T. G. Waldrip, "who was then and there a material and important witness for the state in said cases, the sum of \$150 in money to leave the county of Comanche, and take with him his daughter, Mattie Waldrip, who was also an important witness for the state in said cases, and to keep out of the way and not appear at said term of the district court of Comanche county, Tex., against the said Sam Wimberly, Sol Ingram, and J. G. Daniel, and to also keep the said Mattie Waldrip from appearing and testifying in said cases at said term of the district court of Comanche county, Tex., against the said Sol Ingram, Sam Wimberly, and J. G. Daniel, the said J. H. Harrison intending thereby to bribe the said T. G. Waldrip to avoid the process of the said district court requiring him to appear as a witness in said causes."

[1] A motion was made to quash this indictment on several grounds. Among others, that it was no violation of the law to pay Waldrip \$150 to take his daughter Mattie with him and leave the county; that the statute denouncing and punishing for bribing a witness means that the bribe must be offered to and for the purpose of bribing the witness, and not to take another out of a county or away from the court. The bribery denounced by the statute applies to the witness, and not to somebody else to be affected by that witness. If it was intended to charge Waldrip with bribing his daughter and appellant had furnished the money for that purpose, then, if that was an offense, this indictment would be against appellant as an accomplice and Waldrip as principal. This part of the indictment should not have been inserted.

[2] Possibly, if this was the only question arising out of this allegation, it might be treated as surplusage; but the remainder of the indictment should state the case by its averments against appellant in regard to T. G. Waldrip. Again, it will be noticed that this indictment charges that appellant intended to bribe Waldrip to avoid the process of the court. Passing upon this, we desire to state that this matter is brought up in different forms. Of course, appellant could be guilty if he bribed Waldrip to avoid the process of the court, but he could not be guilty, under the indictment as charged, of bribing Waldrip to take his daughter away from the court. The indictment is, we think, deficient in that it does not allege what character of process from the grand jury appellant sought to induce Waldrip to avoid. The statute provides several ways by which a witness may be bribed and for various things.

[3] Appellant to be guilty must be shown to have bribed Waldrip to disobey process if it had been served on Waldrip, or, if process had been issued but not served, then he must be bribed to avoid service of said process. The indictment should allege, we think, specifically, under the rulings of the Supreme Court and of this court, what that process was. If it was a subpoena, the grand jury knew it was a subpoena, because they issued it; they could not therefore allege that the character of process was unknown to them, or that they could not ascertain the character of process by diligent inquiry. If a subpoena or other process had been issued by the grand jury, that body knew what character of process it was. See *State v. Hughes*, 43 Tex. 518; *Brown v. State*, 13 Tex. App. 358. In the *Hughes* Case the court held that the indictment is defective if it fails to allege that the offer was made to either bribe a witness to disobey a subpoena or other legal process, or to avoid the service of the same. In *Brown's Case* it is said, if indictment charges that offer to bribe was made to induce a witness to disobey subpoena, it must allege the existence of a subpoena, and that the same was issued by legal authority. Tested by these decisions and the statute, we are of opinion that this indictment is not sufficient.

[4] 2. Appellant was indicted as an accessory and convicted on the identical facts which form a predicate for this prosecution. It is deemed unnecessary to go into a statement of the evidence and the recitations in the bills of exceptions; but it was agreed by counsel and ratified by the court in his approval of the bills of exceptions that the facts introduced in both cases were identical and the prosecution relied upon the identical facts to sustain both indictments. The bills of exceptions are quite lengthy. The appellant's first motion was to postpone the trial of this case until the final disposition of the other case, reciting that appellant had been convicted as an accessory and allotted a term in the penitentiary upon the identical facts relied upon in this case; that his motion for new trial had been overruled, sentence pronounced, and notice of appeal given to the Court of Criminal Appeals. Upon this motion he asked a postponement of this case until the other case was finally disposed of in order that he might plead either former conviction or former acquittal, as the facts and the condition of the record would then indicate. He then filed his plea of former conviction setting up practically the same facts as in the other, to wit, that he had been convicted in the other case, motion for new trial overruled, and notice of appeal given. This seems to have been done out of an abundance of caution so as to be certain to have the questions properly presented to the court, in order that he might not be twice convicted on the same facts

and for the same act. Without discussing the second motion, to wit, the plea of former conviction, we say there is no question under our law that the first motion should have been granted and the case should have been postponed. Under the constitutional provision that no man shall be twice convicted of the same offense, and the showing made, approved by the court, two convictions occurred on the same transactions and on identically the same facts. This plea should have been sustained. See *Maines v. State*, 37 Tex. Cr. R. 617, 40 S. W. 490; *Powell v. State*, 42 Tex. Cr. R. 11, 57 S. W. 94; *Murray v. State*, 56 Tex. Cr. R. 438, 120 S. W. 437.

[5] 3. The theory of the state was that appellant had bribed Waldrip to take his daughter out of the country and himself leave the country in order to avoid testifying in a case against Wimberly for seducing Mattie Waldrip. There is also an indication that another case was being investigated, to wit, against Wimberly, Ingram, and Daniels for producing an abortion upon Mattie Waldrip. There was testimony, and among others the testimony of Mattie Waldrip, that Sam Wimberly had seduced her, and that Ingram, Wimberly, and Dr. Daniels produced an abortion upon her. The fact that there was such a case being examined, and that Waldrip was a witness in it, was legitimate; but the state introduced, over appellant's objections, all the details of the seduction and all the facts bearing upon it, as well as all the details of the abortion, the same as if appellant was on trial for each or both of those offenses. This was clearly inadmissible. Appellant was not present and had nothing to do with either the seduction or the abortion, and there is no contention anywhere in the record that he was. The only connection that he is alleged to have had with these matters, or sought to be proved, was the fact that, while the grand jury was investigating these matters against the parties named above, he induced Waldrip to leave the country and carry his daughter Mattie with him. It would make no difference, so far as defendant was concerned in this case, what the facts were in regard to the seduction or abortion. He was charged with bribery, and the facts in regard to the seduction were totally immaterial. The fact that he sought to induce a witness to leave to prevent the investigation of the grand jury was sufficient. All the facts on the part of Wimberly in seducing the woman or the act on the part of Wimberly, Dr. Daniel, and Ingram in bringing about an abortion, were not only irrelevant, but highly prejudicial to defendant and clearly inadmissible. These questions are presented to the court, first, in objections to testimony; second, in motion to exclude, and, third, in charges to the jury

—all of which are timely and properly preserved in the record.

There are some other matters that arose during the trial and presented here for review, some of which would be reversible; but in the light of this opinion we deem it hardly necessary to review them. The trial court will understand from what has been said how the case should subsequently be tried. The judgment is reversed, and the cause is remanded.

BUSH v. STATE.

(Court of Criminal Appeals of Texas. May 29, 1912. On Rehearing, Nov. 27, 1912.)

1. BAIL (§ 65*)—APPEAL—RECOGNIZANCE—SUFFICIENCY.

A recognizance on appeal which fails to recite the amount of punishment assessed against accused is fatally defective, and the court on appeal does not acquire jurisdiction.

[Ed. Note.—For other cases, see *Bail*, Cent. Dig. § 285; *Dec. Dig.* § 65.*]

On Rehearing.

2. CRIMINAL LAW (§ 507*)—"ACCOMPLICE"—WHO IS—CORROBORATION.

Where one receives money from an officer to bring about violations of the law, and in accordance with the agreement he brings about such violations, he is an "accomplice," and when used as a witness must be corroborated to support a conviction; but, where one who, believing that a crime is in contemplation, takes steps to detect it, or to procure evidence by which the guilty person may be punished, he is not an accomplice because his connection with the crime is after its inception.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1082-1093, 1098; *Dec. Dig.* § 507.*]

For other definitions, see *Words and Phrases*, vol. 1, pp. 75-79; vol. 8, p. 7561.]

Appeal from Dallas County Court, at Law; W. F. Whitehurst, Judge.

Jacob Bush was convicted of crime, and he appeals. Reversed and remanded.

Lively, Nelms & Adams, of Dallas, for appellant. C. E. Lane, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. [1] The appeal must be dismissed because of the insufficiency of the recognizance. That instrument fails to recite the amount of punishment assessed against appellant. This, under the statute and decisions, renders that instrument so defective that it cannot attach the jurisdiction of this court.

The appeal is dismissed.

PRENDERGAST, J., not sitting.

On Rehearing.

DAVIDSON, P. J. The appeal was heretofore dismissed for want of sufficient recognizance. This has been supplied, wherefore the appeal is reinstated.

The affidavit and information contain quite

*For other cases see same topic and section NUMBER in *Dec. Dig.* & *Am. Dig. Key-No. Series* & *Rep'r Indexes*

a number of counts alleging violations of the liquor laws in different ways.

The court charged the jury that if appellant did sell directly or indirectly spirituous and vinous liquors capable of producing intoxication in quantities of one gallon and less, to wit, one bottle of whisky to J. W. Gilmore, without having first applied for and obtained a license under the laws of the state of Texas as a retail liquor dealer, and did then and there unlawfully, in a certain locality in said county and state where local option was not then and there in force, sell directly or indirectly spirituous and vinous liquors capable of producing intoxication, etc., they would assess his punishment at a fine not less than \$500 and not more than \$1,000, and by imprisonment in the county jail for a term not to exceed six months. The court further instructed the jury that one sale would not constitute a liquor dealer; that they must find and believe from the evidence that there was more than one sale before they could convict the defendant.

[2] Appellant requested a special charge instructing the jury that if they find two of the state's witnesses, Gilmore and Hopkins, were accomplices, they could not convict upon their testimony unless corroborated, etc. Gilmore testified that he lived in Dallas county at Lisbon, and saw appellant on the 6th of July at his place of business, which is on the corner of Dexter avenue and Cockrell street, about 4 o'clock in the afternoon, and bought from him a half pint of whisky, paying him 35 cents for it, and recognized a bottle then handed him by the county attorney as the one he bought. He says he also bought another half-pint bottle of whisky from appellant, which was also handed him by the county attorney, and that he paid for this bottle personally at the time L. H. Hopkins was with him. He also states that Peck was with him when he bought the bottle of whisky from the defendant on the 8th of July, but Peck was not with him when he bought the other bottle, but that Hopkins was with him both times; that Hopkins bought a bottle of beer from the defendant at the same time. On cross-examination he says: "I am a country boy, and live out in the country in Mr. Miller's neighborhood. Mr. Barry Miller represented me in a case once. I had no printed commission from Mr. Brandenburg, and I never took an oath as deputy sheriff. Mr. Brandenburg just asked me if I would do what he asked me to do, and he paid me \$2 per day for my services, and I was to go where he told me to go. I was to go out in prohibited territory and not to work downtown in the saloon district. I bought liquor with the dollar a day expense money, and paid street car fare with it. Mr. Brandenburg did not say what he gave it to me for, only said it was for expense money. He said he would allow me a dollar per day for expense money. I did not pay hotel bills

with it, but used the dollar a day expense money to buy this whisky and street car fare, and such things. In addition to the one dollar a day expense money, I got \$2 per day for my work. I don't remember just how many days I worked, as I was at home part of the time; but Mr. Brandenburg paid me \$26 one time and \$7 another time, not expense money, but wages for work." He says: "At the time I bought the whisky I saw defendant in the store on the corner of Dexter and Cockrell streets. It was a small store, and I think maybe there were a few canned goods and tobacco in it. I did not notice any name or any sign on the store. Defendant was in there at the time, but I don't know whether he was proprietor of that store or not. I just heard he was working there."

Hopkins testified that he knew Gilmore, Peck, and defendant. Saw defendant sell Gilmore a bottle of whisky on the 6th of July, and saw Gilmore pay defendant for it. "I also saw defendant sell to Gilmore a bottle of whisky on the 8th of July, 1911, which was a half pint of whisky, and Gilmore paid defendant 35 cents for it." Witness says he bought two bottles of beer, one on each date. He says when Gilmore bought that whisky it was to be put aside and kept; that they did not intend to drink it. The beer they bought to drink. This witness also testified he was paid \$2 a day for his work, and knew that the people who sold them the liquor were violating the law. "I knew he would be violating the law to sell it to me when I asked for it. Both of us knew that. Gilmore and I were each getting \$2 per day for our work, and each of us were getting a dollar per day for expense money. I do not know who was the proprietor of the place where we bought the liquors from defendant. Don't know whether he was the proprietor of that place or not." It is unnecessary to state Peck's testimony. He testified he was with Gilmore and Hopkins on the 8th of July when they made the purchases, but was not with them on the 6th.

It seems from this testimony that Hopkins and Gilmore were working for Mr. Brandenburg, the sheriff, at the rate of \$3 per day, two of which they were to retain, and the other he gave them for expense money. With the expense money these witnesses purchased the liquor. They knew when they went into it this would bring about violations of the law and agreed with the sheriff so to do. Under this testimony we are of opinion the charge asked by appellant should have been given the jury in regard to the law of accomplices testifying as witnesses and submitting that question for the decision of the jury. The statute in regard to purchasers in local option territory provides that such purchaser shall not be an accomplice. That statute, however, only applies to local option territory, and it is unnecessary here to discuss its provisions and effect. There is no stat-

ute that we have been able to find which relieves these parties from being accomplices. We are of opinion that where a party receives money for the purpose of inaugurating and bringing about violations of the law, and in accordance with the agreement brings about such violations, he is and would be an accomplice. Wherever a party deliberately or intentionally originates or succeeds in bringing about a violation of the law, he becomes a particeps criminis of that violation, and therefore when used as a witness must be corroborated. There is a line of cases which holds that where an officer or other parties understand or are led to believe that a violation of the law is in contemplation, and take steps to detect that crime, or get evidence by which the guilty parties may be punished, he would not be an accomplice, but in such cases he is not an original party to the bringing about the crime and is not guilty of originating or initiating it. In that character of case his connection with it is after the inception of the crime and after it has been determined upon, and he only then gets into it as a detective or for the purpose of arresting the party and bringing him to punishment. There is another line of cases which holds that, where the party originates the crime or is instrumental in its initiation and brings it about, he then becomes a particeps criminis and when testifying as a witness in the case is an accomplice. The leading cases in this state are *Dever v. State*, 37 Tex. Cr. R. 396, 30 S. W. 1071; *Steele v. State*, 19 Tex. App. 425. The opinion was by Judge Hurt and draws the distinction above mentioned between parties who were playing the rôle of detective for the arrest and punishment of parties, and those who originate the crime or assist in originating it in the first instance.

We are of opinion therefore the charge requested by appellant's counsel in regard to accomplice testimony should have been given. Because it was not, the judgment is reversed, and the cause is remanded.

PINSON v. STATE.

(Court of Criminal Appeals of Texas. Nov. 27, 1912.)

1. HOMICIDE (§ 254*)—SECOND-DEGREE MURDER—EVIDENCE.

Evidence held to sustain a conviction of murder in the second degree.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. §§ 533-538; Dec. Dig. § 254.*]

2. CRIMINAL LAW (§ 954*)—NEW TRIAL—OBJECTIONS TO INSTRUCTIONS.

Objections, in a motion for new trial, to paragraphs of charge are unavailable, where they do not point out the specific defect objected to.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 2363-2367; Dec. Dig. § 954.*]

3. CRIMINAL LAW (§ 958*)—NEW TRIAL—NEWLY DISCOVERED EVIDENCE.

A new trial for newly discovered evidence was properly denied, where the affidavits accompanying it indicated a lack of diligence.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 2396-2403; Dec. Dig. § 958.*]

4. CRIMINAL LAW (§ 942*)—NEW TRIAL—NEWLY DISCOVERED EVIDENCE—IMPEACHING EVIDENCE.

A new trial will not be granted for newly discovered evidence which is solely impeaching in character.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 2331, 2332; Dec. Dig. § 942.*]

5. CRIMINAL LAW (§ 1090*)—APPEAL—BILL OF EXCEPTIONS—NECESSITY.

That the court required accused in a homicide case to go to trial without a special venire could not be reviewed, in the absence of a bill of exceptions.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 2653, 2789, 2803-2827, 2927, 2928, 2948, 3204; Dec. Dig. § 1090.*]

6. HOMICIDE (§ 308*)—INSTRUCTIONS—EVIDENCE.

Where, in a prosecution for homicide, the state's evidence indicated that defendant shot and killed deceased without provocation, the court properly charged that if the jury believed, beyond a reasonable doubt, that defendant intentionally shot and killed deceased, and at the time of the killing deceased was doing nothing, and had done nothing by word or act, which justified a reasonable apprehension or fear of death or serious bodily injury at his hands toward defendant, and if deceased had given defendant no provocation sufficient to rouse passion in the mind of a man of ordinary temper, sufficient to render his mind incapable of cool reflection, then the law implied malice, and the jury should find defendant guilty of murder in the second degree, no matter what amount of provocation had been given toward defendant by some other person or persons, and what degree of passion defendant may have labored under arising from such provocation, if any, given by others than deceased.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. §§ 642-648; Dec. Dig. § 308.*]

7. CRIMINAL LAW (§ 822*)—INSTRUCTIONS—CONSTRUCTION.

It is not necessary for the court, in charging in a criminal case, to give all the law of the case in a single paragraph; but objections to separate paragraphs of the charge are to be considered in the light of the charge as a whole.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1990, 1991, 1994, 1995, 3158; Dec. Dig. § 822.*]

Appeal from District Court, Angelina County; James I. Perkins, Judge.

J. V. Pinson was convicted of murder in the second degree, and he appeals. Affirmed.

I. D. Fairchild, of Lufkin, for appellant. C. E. Lane, Asst. Atty. Gen., for the State.

PRENDERGAST, J. Appellant was indicted for the murder of Isaac Polk on January 21, 1911. Before the trial the state conceded that murder in the first degree was not in the case, and it was tried only on the theory of murder in the second degree or manslaughter. The appellant was convicted

of murder in the second degree and his penalty fixed at seven years in the penitentiary.

While the statement of facts is rather lengthy, the questions raised and submitted were few, and the testimony on those issues largely repetitions. The killing occurred at a negro dance, at night, about the date charged. At this dance there was a mixed crowd of men and women, and much drinking of intoxicating liquors by the men; a considerable number of them being under the influence of liquor, if not drunk. More than one row and fight was had during the night. It is unnecessary to state all of these, because none of them had anything to do with the facts of this case.

It seems that some time (the testimony ranging from a few minutes to, perhaps, 2 hours, but the more reasonable theory from all the evidence, we conclude, is that some 10 or 15 minutes, or a few minutes) before the killing one Spence Bradford had a fight with a negro by the name of McElwee, in which said Bradford knocked McElwee down, or knocked him to his knees, about the door, and he then crawled or got out at the door and then went off. It seems that Alex Pinson, a brother of appellant, took up the said difficulty with Spence Bradford, taking McElwee's part, and proceeded to draw his knife upon and strike said Bradford. They then separated. It appears that this Pinson, appellant's brother, then went back into the dance hall.

From this point the evidence between the state's witnesses and the defendant's is directly and pointedly contradictory. The state's witnesses, and among them said Spence Bradford, all testified that Spence Bradford immediately left the assembly, and went across the street to an old house where he had left his gun; that when he came to the dance that night he came from a hunt with his gun, and brought it and placed it in this old house; that immediately after getting the gun he went straight on from there to his home, and did not at any time after he left the dance hall go back to or near it. The state's witnesses, in substance, testify: That soon after this some one—not Spence Bradford—appeared at the door of the dance hall and pointed a gun therein, and that some one of the crowd exclaimed: "Look out, Alex! You will get shot." By "Alex" is meant the said brother of appellant. That thereupon there was a rush made for the door, and a great many came out; some leaving and others lingering. It was about time for the dance to break up, and it did immediately afterwards break up. That then, for the first time, appellant appeared on the scene with a loaded pistol. That right at the door four persons were standing practically in a row; the deceased being one of them. That these four persons had been standing there for some little while. That appellant approached these per-

sons, and when within a few feet of them asked who it was that tried to shoot his brother, and that John Bradford, a brother of said Spence Bradford, replied, "It was not me." Appellant then asked the deceased, and deceased said, "It was not me, Mr." Appellant replied: "Yes, it was, you damn son of a bitch," and immediately shot him in the stomach, from which wounds he died the next day. That appellant was so close to deceased when he shot him that it set his clothes on fire. The evidence from all sources shows that deceased had not been in any of the fusses, and had had nothing to do in any way with the fight between Spence Bradford and McElwee, nor between Spence Bradford and appellant's brother; in fact, was an entirely innocent bystander, and had had nothing whatever to do or say to appellant, or in his presence or hearing, other than to tell him, upon his inquiry, as stated above, that it was not he who had been trying to shoot appellant's brother.

The appellant and his witnesses, by their testimony, show that after the fight between appellant's brother and Spence Bradford, above shown, Spence Bradford left and went somewhere and got a gun, and that he did come back to the door of the dance hall and poke a gun therein, and when the warning was given for Alex, appellant's brother, to look out, he would get shot, that said Spence Bradford then got back with the three other persons who were standing close to the door, and that it was Spence Bradford, and not his brother, John Bradford, who was one of the four standing in a row at the time appellant killed deceased; that when appellant appeared on the scene, facing these four persons, and demanded to know who it was that had been trying to shoot his brother, Spence Bradford replied, in effect, "What is that to you?" that appellant replied, "Alex is my brother," and that thereupon Spence Bradford attempted to draw or throw his gun down on appellant, and that appellant shot with the intention of shooting said Spence Bradford in self-protection; and that he did not intend to shoot the deceased.

The evidence further discloses, on behalf of the state, that when appellant shot deceased that two of the four persons who were standing at the time then caught appellant and attempted to hold him, and that one of the Bradford boys ran in the hall, and appellant said to those holding him, or attempting to hold him: "Wait. I want to shoot that damn son of a bitch." It is unnecessary to give any further detail of the evidence at this point to discuss appellant's complaints.

[1] He contends that the evidence is insufficient to sustain the verdict of murder in the second degree. We have carefully gone over it and considered it all, and, in our opinion, the evidence does clearly justify the verdict.

[2] There are some general complaints in the motion for new trial to some paragraphs of the court's charge; but they are so general that they do not point out or specify any special defect therein. Appellant requested no charge at all. The court submitted murder in the second degree, self-defense, and manslaughter.

[3, 4] Among other grounds of appellant's motion, he contends that a new trial should be granted because of newly discovered evidence. The motion itself, and the affidavits accompanying it, in our opinion, do not show that appellant used any diligence to discover it, or that he could not have discovered it by the proper diligence. But, even if that point was met, the affidavits attached of the purported newly discovered evidence shows that it was solely impeaching in its character of the testimony of one or more of the state's witnesses. The court committed no error in not granting a new trial on this ground.

[5] Another complaint of appellant to the action of the court in not having a special venire in the case is not shown by bill of exception. The court refused appellant's bill on that ground, and without a bill we cannot consider the question.

[6] Appellant complains of this paragraph of the court's charge: "In this case, if the evidence satisfies you, beyond a reasonable doubt, that the defendant unlawfully, purposely, and intentionally shot Isaac Polk with a pistol and thereby killed him, and that such killing took place when Polk was doing nothing, and had not done anything by word or act, which justified a reasonable apprehension or fear of death or serious bodily injury at his hands towards defendant, and when Polk had given him no provocation sufficient to arouse passion in the mind of a man of ordinary temper, sufficient to render his mind incapable of cool reflection, then the law implies or infers the existence of malice, and you would find that the offense is murder in the second degree, no matter what amount of provocation had been given towards defendant by some other person or persons, and no matter what degree of passion defendant may have labored under arising from such provocation, if any, given by another or others and not by Polk"—claiming that the evidence did not justify the charge, and that it failed and omitted to distinctly instruct the jury upon all the law applicable to said cause, in that it omitted to instruct the jury that if appellant was attempting to kill Bradford and unintentionally killed deceased, and that he had an adequate cause to kill Bradford, and if he had killed Bradford that appellant could be convicted of no higher degree of offense than manslaughter, and ignored the defendant's theory of an attempt to kill Bradford and of his rights arising out of a cause to kill Bradford.

[7] The evidence of the state, if believed, would specially and clearly call for just such charge as was given on this subject; and it was the duty of the court, under the facts of this case, to have given this charge. Of course, all of the law of a case and of the various issues arising therein cannot be given in one paragraph; but it is elementary that in considering objections to separate paragraphs of the court's charge all of it must be taken and considered together. In other and separate paragraphs the court did properly submit the other theory of the case contended for by appellant in his objection to this paragraph of the charge.

The court fully and correctly submitted manslaughter, and also self-defense by appellant against the assault or contemplated assault upon him, as claimed by him and his witnesses, of Spence Bradford and, in effect, told the jury that if appellant on this occasion acted in self-defense of the attack of Spence Bradford upon him, and that in shooting he intended to kill Bradford and not deceased, and killed deceased accidentally, to acquit him. There is no complaint anywhere of the court's charge on self-defense. The court also, in his charge, properly submitted the question of manslaughter, and if appellant would not have been guilty of any higher offense than manslaughter if he had killed Spence Bradford, instead of deceased, that he would be guilty of manslaughter, and in such event only find him guilty of manslaughter. The court also charged that if the jury had any doubt as to whether the killing was manslaughter or murder in the second degree to give appellant the benefit of the doubt and find him guilty only of manslaughter. Taking the charge as a whole, it clearly and properly submitted the state's theory, the defendant's theory, his claimed self-defense, and manslaughter, and no reversible error is presented.

The judgment will therefore be affirmed.

BARRETT et al. v. STATE.

(Court of Criminal Appeals of Texas. Nov. 13, 1912. Rehearing Denied Dec. 11, 1912.)

1. BAIL (§ 93*)—CRIMINAL PROSECUTION—ACTIONS THEREON—CORRESPONDENCE OF BOND WITH JUDGMENT.

Under Code Cr. Proc. 1911, art. 321, which provides that a bail bond must state that the defendant is charged with a felony, if he is charged with such an offense, there was no variance between a bond reciting that defendant was charged "with a felony" and a judgment reciting that he was "charged with a felony, to wit, burglary."

[Ed. Note.—For other cases, see Bail, Cent. Dig. §§ 409, 410, 413-417; Dec. Dig. § 93.*]

2. BAIL (§ 59*)—CRIMINAL PROSECUTIONS—TIME OF APPEARANCE.

Code Cr. Proc. 1911, art. 321, subd. 5, requires a bail bond to "state the time and place when and where the accused binds him-

self to appear, and the court before whom he is to appear." Article 962 provides that, in cases of final judgments or forfeited bail bonds, the proceedings shall be regulated by the proceedings that govern in civil actions. A bail bond bound the defendant to appear at "the next term of court on the 11th day of September, 1911," and the 11th of September fell during the same term of court in which the bond was issued. Held that, as the bond fixed a definite time for the appearance at a time when the court was legally in session, the specific time fixed will control, and render the bond certain and sufficient in spite of the inconsistent matter therein.

[Ed. Note.—For other cases, see Bail, Cent. Dig. §§ 256½-262; Dec. Dig. § 59.*]

Appeal from District Court, Fannin County; Ben. H. Denton, Judge.

Bob Barrett was indicted for burglary, and gave bond for his appearance. From a judgment in a proceeding to forfeit the bond, his sureties appeal. Affirmed.

Cunningham & McMahon, of Bonham, for appellants. C. E. Lane, Asst. Atty. Gen., for the State.

HARPER, J. [1] Bob Barrett on the 30th day of August, 1911, court then being in session, entered into bond for his appearance before the district court of Fannin county on the 11th day of September, 1911, the condition of the bond reading: "That whereas the above-named principal, Bob Barrett, stands charged by indictment duly presented in the district court of Fannin county, Tex., with the offense of a felony, now if the said Bob Barrett shall well and truly make his personal appearance before said court at its next regular term to be begun and holden at the court house of said county in the city of Bonham, Texas, on the 11th day of September, 1911," etc. Said defendant failed to appear, and the bond was forfeited, and judgment nisi entered, it reading that the indictment charged him "with the offense of a felony, to wit, burglary." Upon the final trial, the sureties appeared and objected to the introduction of the nisi judgment in evidence on the ground that a variance existed between it and the bond, in that the bond only stated he was charged with a felony, while the judgment recited that he was "charged with a felony, to wit, burglary," and the further ground that burglary is not an offense *eo nomine*. Since the amendment of the Code of Criminal Procedure in 1899 the law provides it is only necessary that the bond state he is charged with a felony; it now being wholly unnecessary to state therein the elements of the offense, and adding the words, "to wit, burglary," did not render the judgment void. When it stated that he was charged "with a felony," that was in compliance with the law. Article 321, Code of Criminal Procedure; Nichols v. State, 47 Tex. Cr. R. 406, 83 S. W. 1113; Hannon v. State, 48 Tex. Cr. R. 199, 87 S.

W. 152; Davis v. State, 56 Tex. Cr. R. 131, 119 S. W. 95.

[2] The sureties also objected to the introduction of the bail bond in evidence, on the ground that it bound him to appear at an impossible date; the contention being that as the court was in session at the date of the execution of the bond, and the 11th day of September, 1911, was a day of that term, it was impossible for him to appear at the next term of the court on the 11th day of September, 1911, as the next term of the court would not begin until the first Monday in February, 1912, and could continue in session only nine weeks. Subdivision 5 of article 321 gives as one of the requisites of a bond "that it must state the time and place, when and where the accused binds himself to appear, and the court before whom he is to appear"; and provides that in stating the time it is sufficient to specify the term of court. There is no question in this case but the bond correctly states the place, and the court before whom the accused was to appear, but it is insisted that the time is not made plain in one instance stating the *next term of court*, which it is contended would bind him to appear at the February term, and in another place stating the time of appearance as the 11th day of September, 1911, a term in session at the time the bond was taken, and that the variance or duplicity is fatal to the validity of the bond. The statute, it will be noticed, requires only that the time and place be stated in the bond, and does not require that the term of court be named; it only stating that, if the term is specified, that will be a sufficient compliance with the requirement of stating time, in the absence of a specific date being stated. As the bond named a specific date for the appearance of defendant, and at a time when the district court of Fannin county was in session, we think the bond a valid one. No one could be deceived or misled as to the date defendant was required to appear—September 11, 1911. Article 962 of the Procedure provides that, in cases of final judgment or forfeited bail bonds, the proceedings shall be regulated by the proceedings that govern in civil actions, and in no civil action on a contract would such stipulations be held to render the obligation void. It is true that in statutory bonds they must in all essential particulars be drawn in conformity with the requirements of the statute, but, to render a bond of this character absolutely void, some of the essential requirements must have been omitted therefrom, or it must have been so worded as to mislead or deceive. None of the essentials are lacking, and no one we think could have been or were deceived as to the date the accused was required to appear and answer the charge against him. In support of their contention appellants cite us to several cases: Thomas v. State, 12 Tex.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

App. 416; *Burnett v. State*, 18 Tex. App. 283; *Heath v. State*, 14 Tex. App. 213; *Wegner v. State*, 28 Tex. App. 419, 13 S. W. 608. In the *Thomas Case* it was held that as the bond bound the accused to appear on the 9th day of May, and the term of court could not begin until the 16th day of May, and there was nothing in the bond by which this error as to time was pointed out and corrected, the bond was void. In this case if it could be said that the words "next term of court" and the words "September 11, 1911," one or the other was an error, yet the terms and conditions and stipulations of the bond and time fixed pointed out the error, and fixed a specific day when the court was in session, and the defendant could not have been misled.

In the *Burnett Case* it was held the bond required the accused to appear on the date named in the bond, and this governed, and not the words "next term of court," and because at the date fixed no term of court could be held the bond was void for that reason. This case supports the judgment of the trial court in this case, he holding that the date fixed was the time of appearance and governed, and it being during a term of court, the bond was valid, and this is in accordance with the decision of the court in the *Burnett Case*. The *Heath Case* is not in point, for in that case the issue was, had the time of appearance been changed in the bond after being signed from July to October; and the court held that this issue should have been submitted to the jury. In this case there is no contention that the bond has been changed or altered in any respect since its execution and delivery. In the *Wegner Case* it was also held that the bond was void because it was changed after being executed, and because it named a past date. In the case of *Brite v. State*, 24 Tex. 223, when the Supreme Court was composed of Judges Wheeler, Roberts, and Bell, and when it had criminal jurisdiction, that court held: "If a recognizance is defective, its defects cannot be supplied by parol, but only by such intendments as the court can reasonably make by the help of its judicial knowledge of facts. But where the recognizance contains words of certainty, which sufficiently inform the party where and when he is required to appear, other erroneous or contradictory words used in the recognizance may be rejected as surplusage. If, for instance, in the present case, the party had entered into recognizance, to appear at the next term of the district court for Hays county, to be holden on the fourth Monday after the first Monday in September, the same being the 10th day of December, the latter words would have been plainly erroneous. But the party in such case would not be heard to say that the recognizance was void. There would be two truthful recitals in the recognizance, and

one false one. It would inform the party that he was required to make his appearance at the next term of the district court of Hays county, and that the next term would be holden on the fourth Monday after the first Monday in September; and the party could not treat the recognizance as a nullity, because it further stated that the fourth Monday after the first Monday in September was the 10th day of December." It is true this case has been criticised and modified to some extent by some of our decisions on account of a change in the verbiage of our procedure, yet the decisions so holding say that the Code now provides that the time must be stated, and are authority for holding the bail bond in this case valid. If you treat the date named as surplusage, it would then read "at the next term of court," which, under the *Brite* decision, would render it valid. If you treat the words "next term of court" as surplusage, the date as fixed was at a time when a term of court could be legally held, and the later decisions hold the bond valid. Neither stipulation can be construed to fix a time when the district court would not be legally in session, and those cases cited which hold a bond void because the time fixed was a date when the court could not be legally held are not applicable to this case. The bond, when read and construed as a whole, fixed a definite time for the appearance of defendant, and a time when the district court was legally in session in Fannin county, Tex., and it is not void, and the court did not err in admitting it in evidence. The date fixed in the bond governed.

No other questions are presented, and the judgment is affirmed.

BAGGETT v. STATE.

(Court of Criminal Appeals of Texas. Nov. 27, 1912.)

1. CRIMINAL LAW (§ 595*)—CONTINUANCE—MATERIAL EVIDENCE.

Where, in a prosecution for being an accomplice to arson, the defendant had a subpoena issued for a witness immediately after his arrest, but the sheriff had not succeeded in summoning such witness at the time of trial, a continuance should have been granted upon an application showing that the absent witness would have testified that he was in the defendant's store for 45 minutes before 6 on a certain day and accompanied the defendant when he left, and that the person who committed the arson did not come into the store at 5 minutes to 6 and arrange with the defendant for its commission, as testified to by such principal.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1311, 1323-1327; Dec. Dig. § 595.*]

2. CRIMINAL LAW (§ 829*)—TRIAL—INSTRUCTION—ACCOMPLICE TESTIMONY.

Where, in a prosecution for being an accomplice to arson, the state offered evidence corroborative only of the fact that the alleged

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

principal burned the house, and the court charged generally as to accomplice testimony and the necessity for corroboration, a refusal of a requested charge that by corroboration, as used in the general charge, was meant that the evidence must connect the defendant with the procuring and hiring of the principal to burn the building, as charged in the indictment, and that it was not sufficient if it merely showed that such principal burned the building, was improper, as such a charge made clear the real issue.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. § 829.*]

Appeal from District Court, Johnson County; O. L. Lockett, Judge.

Otis Baggett was convicted of being an accomplice to arson, and appeals. Reversed and remanded.

Odell & Johnson, of Cleburne, for appellant. C. E. Lane, Asst. Atty. Gen., for the State.

HARPER, J. Appellant was prosecuted and convicted of the crime of being an accomplice to arson, and his punishment assessed at five years' confinement in the penitentiary.

[1] When this cause was called for trial on June 5th, defendant moved to continue the case on account of the absence of the witness J. L. Harris; it being made to appear that defendant was indicted on the 13th of May and arrested thereafter, and on the 17th day of May he had a subpoena issued for the absent witness, but the sheriff had not succeeded in summoning him at the time of trial. Brock, the state's witness, admitted he burned the house, and says that defendant employed him to do so, that he might collect his insurance on the stock in the house. He further says that this conversation took place in defendant's place of business about 5 minutes before the store was closed, and but a short time before the fire. Defendant, in his application for a continuance, says that Harris will testify that he (Harris) was in defendant's place of business for about 45 minutes before the store was closed, and was there when Brock came in; that he heard all the conversation that took place between Brock and appellant, and no such conversation took place as Brock details; that he (Harris) remained until the store was closed, and went with defendant to a Christmas tree, where they were when the fire occurred. Thus it is seen that this testimony, if the witness Harris would so swear, is very material; for the allegation is that he will swear that he was present when Brock came to the store, and remained there until the store closed. Brock, of course, testifies Harris was not in the store when the trade was made with him to burn the building, but he says the trade was made only about 5 minutes before the store closed; while it is stated Harris will testify that he was at the store for 45 minutes before it closed, and was there when

Brock came and left. It is upon this employment of Brock upon which it is sought to convict appellant as an accomplice of Brock. Their testimony would be in direct conflict; and if Harris so testified, and the jury believed him, it would necessarily follow that defendant would be acquitted. The alleged testimony is so material we think the court erred in overruling the application and in not granting a new trial.

[2] The court charged the jury as to accomplice testimony and the necessity for corroboration in a form frequently approved by this court; but, as it is not contended that appellant aided in burning the house, or was present when it was burned, appellant insists that a more direct application of the law than a general charge should have been given, directing the attention of the jury to the fact that the corroboration should be as to whether defendant employed Brock to burn the house. The state offered evidence corroborative of the testimony that he (Brock) burned the house, and appellant insists that under this general charge the jury was misled, and complains because the court failed to give his special charge, which reads: "You are instructed that by corroboration, as used in the general charge, is meant that the evidence must connect the defendant with the procuring and hiring of Dick Brock to burn the building, alleged in the indictment. It is not sufficient if it merely shows that Dick Brock burned the building." Where a special charge is requested, directing the attention of the jury to the real issue in the case, it should be given, if the charge of the court does not aptly do so.

We do not deem it necessary to discuss the alleged newly discovered testimony, as it will not be newly discovered on another trial; nor is it necessary to discuss the other questions raised.

The judgment is reversed, and the cause is remanded.

BROWN v. STATE.

(Court of Criminal Appeals of Texas. Nov. 20, 1912.)

1. BANKS AND BANKING (§ 85*)—DEPOSITS—OFFENSES.

The indictment alleged that accused received and assented to the reception of a deposit of money in the bank of E., "unincorporated," accused then and there being president of said bank and the bank being insolvent, and that accused then knew that such bank and the owner and owners of said bank was and were insolvent, etc. Pen. Code 1911, art. 532 (Acts 25th Leg. c. 100), provides that if any president or other officer of any banking institution, or "the owner, agent, or manager of any private bank," or the president, etc., of any trust company, shall receive or assent to the reception of any deposit of money in such bank or trust company after he shall have had knowledge of the fact that such bank or trust company, "or the owner or owners of any such private bank," is insolvent, he shall be guilty

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes 151 S.W.—36

of a felony. *Held*, that the indictment charged that the E. bank was a private bank, and was bad for not alleging that accused was its owner, agent, or manager, and the names of the owners, and that they were insolvent when the money was received.

[Ed. Note.—For other cases, see *Banks and Banking*, Cent. Dig. §§ 212-217; Dec. Dig. § 85.*]

2. BANKS AND BANKING (§ 84*)—RECEIVING DEPOSITS WHILE INSOLVENT—ACCOMPLICES.

One who was the manager of the bank of which accused was president, and had personal charge of its business, receiving all moneys and paying all checks, and knew that the bank was insolvent, was an accomplice to the crime of receiving money on deposit during the bank's insolvency, charged against accused.

[Ed. Note.—For other cases, see *Banks and Banking*, Cent. Dig. §§ 210, 211; Dec. Dig. § 84.*]

3. BANKS AND BANKING (§ 85*)—DEPOSITS—DEFENSES — INSTRUCTIONS DEFINING SOLVENCY.

In a prosecution of the president of a private bank for receiving money on deposit with knowledge of its insolvency, the court should charge the proper rule for determining the question of solvency.

[Ed. Note.—For other cases, see *Banks and Banking*, Cent. Dig. §§ 212-217; Dec. Dig. § 85.*]

4. BANKS AND BANKING (§ 85*)—DEPOSITS—INSOLVENT BANKS — PROSECUTION — ADMISSION OF EVIDENCE.

In a prosecution of a bank president for receiving deposits on a certain Monday with knowledge of the bank's insolvency, evidence that on Saturday before such Monday, other persons had made deposits, was not admissible, especially where accused was not in personal charge of the bank.

[Ed. Note.—For other cases, see *Banks and Banking*, Cent. Dig. §§ 212-217; Dec. Dig. § 85.*]

Appeal from District Court, Fayette County; Frank S. Roberts, Judge.

E. F. Brown was convicted of unlawfully receiving money on deposit in a bank known to be insolvent, while acting as president, and he appeals. Reversed, and prosecution dismissed.

W. G. Love, of Houston, and John T. Duncan, of La Grange, for appellant. C. E. Lane, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. The charging part of the indictment is as follows: "That E. F. Brown," etc., "did then and there unlawfully receive and assent to the reception of a deposit of money into the bank of the Ellinger Banking Company, unincorporated, of Ellinger, Fayette county, Texas, the said E. F. Brown then and there being the president of said Ellinger Banking Company, and the said Ellinger Banking Company then and there being and was then and there insolvent and in failing circumstances, and the said E. F. Brown then and there knew and had knowledge of the fact that such bank and the owner and owners of said bank was and were insolvent and in failing circumstances. And the said E. F. Brown did then and there

receive and assent to the receiving of a deposit of money in the sum of fifty (\$50.00) dollars from and by Joe Hubenak, which said money was deposited to the open deposit account subject to check of the said Joe Hubenak in and upon the books of the Ellinger Banking Company as aforesaid, against the peace and dignity of the state."

The first attack on the indictment is that it charges no offense against the laws of the state; second, that it fails to allege that the Ellinger Banking Company was a private bank or partnership, and fails to allege the name or names of the owner or owners or persons composing said private bank or partnership; third, there is no allegation in said indictment that said defendant E. F. Brown was the owner of the said Ellinger Banking Company; fourth, it does not allege that the defendant was the agent of said Ellinger Banking Company; fifth, it fails to set out and allege that defendant was then and there the manager of said Banking Company; sixth, it does not allege that defendant, in receiving and assenting to the reception of a deposit of money in the sum of \$50, was acting as agent or manager for the owner or owners of said Ellinger Banking Company; seventh, there is not only no allegation in said indictment as to who was the owner or owners of said Banking Company, but there is no direct allegation that said Banking Company had any owner or owners; eighth, there is no allegation in said indictment that said Banking Company had owners, naming them, and that said owners were then and there insolvent, whereas a private bank can only be insolvent by and through its owner or owners; ninth, there is no allegation to the effect that, at the time said defendant received or assented to the reception of \$50 in money, he (defendant) knew or had knowledge that said bank was then and there insolvent.

[1] Appellant was indicted under article 532 of the Revised Penal Code. This statute was passed by the Twenty-Fifth Legislature, found on page 130 of the Acts of that body, and is as follows: "If any president, director, manager, cashier, or other officer, of any banking institution, or the owner, agent, or manager, of any private bank or banking institution, or the president, vice president, secretary, treasurer, director, or agent, of any trust company or institution doing business in this state, shall receive or assent to the reception of any deposit of money or other valuable thing into such bank or banking institution, or trust company or institution, or if any such officer, owner, or agent, of such bank or banking institution, or if any president, vice president, secretary, treasurer, director, or agent, of such trust company, or institution, shall create or assent to the creation of any debt, debts, or indebtedness, in consideration of

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

or by reason of which indebtedness any money or valuable property shall be received into such bank or banking institution, or trust company or institution, after he shall have had knowledge of the fact that such bank, banking institution, or trust company or institution, or the owner or owners of any such private bank, is insolvent or in failing circumstances, he shall be deemed guilty of a felony, and, upon conviction thereof, shall be punished by confinement in the penitentiary for a term of not less than two nor more than ten years; provided, that the failure of any such bank or banking institution, or trust company or institution, shall be prima facie evidence of knowledge on the part of any such officer or person that the same was insolvent or in failing circumstances when the money or property was received on deposit."

Under this statute there are three characters of banking institutions: First, incorporated or chartered banks; second, private banks or banking institutions; and, third, trust companies or institutions. Appellant was indicted under the second clause; that is, that clause of the statute which relates to private banking institutions, which denounces punishment against the owner, agent, or manager of such private bank or private banking institution. However, the other two clauses of the statute would not refer to or include this indictment. It rests solely and alone upon the second clause, which relates to private banks. Under the statutory provisions of that clause the punishment is denounced only against the owner, agent, or manager of a private bank or banking institution. This indictment charges that appellant was the president of an "unincorporated" bank. It does not undertake to charge that it was an incorporated institution, but expressly excludes that idea. It also excludes the idea that it was a trust company. In fact, the whole record shows that it was, if any bank at all, a private bank; and the indictment so charges it to be. In order to charge appellant with an offense under that clause of the statute, it was necessary to charge him as being the owner, agent, or manager of a private bank. This is the statutory requirement. It was by this means that the Legislature sought to hold responsible for criminal violation parties who committed fraud upon its depositors. This statute does not recognize the president of the institution as being responsible for receiving deposits. It was not charged that appellant was the agent or the manager of the institution, nor was he charged as being owner. It was said in *Roby v. State*, 41 Tex. Cr. R. at page 154, 51 S. W. at page 1115: "This is an attempt at combining two classes, the first and second, because that which relates to the private bank does not set forth a 'president' among those against whom the punishment is denounced. In or-

der to constitute a good indictment under the first class, it should have alleged that the Tyler Banking Company was a corporation; under the second, that it was a private bank or banking institution, and, if a private bank or partnership, the names of the owners or persons composing the partnership must be alleged. Wherever a partnership is sued, it is necessary to set out the names of the persons composing that partnership. Such has been the uniform ruling in Texas, since *Bank v. Simonton*, 2 Tex. 531. This rule is expressly recognized in the late decision of *Frank v. Tatum*, 87 Tex. 204, 25 S. W. 409. In this latter decision this language is used: "The familiar rule that all partners who are jointly bound upon a copartnership contract must be joined as defendants in a suit upon it is not affected by the foregoing articles of our statutes [referring to articles 1224, 1347, Revised Civil Statutes]. Partnerships are not thereby invested with any of the characteristics of corporations, nor are they expressly or impliedly authorized to sue or be sued in their firm names, independently of their members." Such has been the ruling, as well, in criminal cases in this state, so far as we are aware. *Nasets v. State*, 32 S. W. 698; *White v. State*, 24 Tex. App. 231, 5 S. W. 857, 5 Am. St. Rep. 879; *Thurmond v. State*, 30 Tex. App. 539, 17 S. W. 1098; *Carder v. State*, 35 Tex. Cr. R. 105, 31 S. W. 678; *Colter v. State*, 40 Tex. Cr. R. 165, 49 S. W. 379; *Crawford v. State*, 40 Tex. Cr. R. 344, 50 S. W. 378. The fact that the statute in question uses the expression 'private bank or banking institution' does not change this rule; nor does the fact that the 'Tyler Banking Company' did its business under the name of the 'Tyler Banking Company' make that mere name a legal entity; nor does it endow it with a personal existence distinct from or independent of the individuals who compose that banking company. In fact, it was simply a firm name, under which the individuals composing it did their banking business. If the individuals were solvent, the Tyler Banking Company was solvent; if they were insolvent, the Tyler Banking Company was insolvent; and, in order to have a good indictment under the peculiar wording of this statute, it was necessary to allege the names of the persons composing the Tyler Banking Company."

It will be noticed from an inspection of the indictment that it does not allege that appellant was either the owner, agent, or manager; nor does it allege the names of any owner of the bank. The indictment evidently undertook to charge that the Ellinger Banking Company was a private bank. If this is not correct, then the indictment charges nothing and is useless. It does not allege any of the facts which would constitute it an incorporated bank, but expressly alleges it to be "unincorporated," nor does it allege that it

was a trust institution. Therefore the conclusion is irresistible that it was intended to charge that the Ellinger Banking Company was a private bank. It will readily be perceived that a president of a private bank may not be one of the owners of the bank; he may not have a dollar's interest in the bank. The statute does not hold him responsible as president for receiving money on deposit, where the bank is insolvent or in failing circumstances. No such officer is mentioned in connection with private banks. In order to so hold him, it must allege and prove that he was either the owner, the agent, or the manager. The indictment should have alleged that appellant was either the owner, agent, or manager, and, in addition, it should have alleged the owners of the bank, and, further, that these owners were insolvent or in failing circumstances at the time the money was received on deposit, and that the accused knew those facts. In a private bank all parties are partners, and the bank could not be insolvent, under the terms of this law, unless the owners were insolvent. A different rule obtains in chartered institutions. Rules with reference to the responsibility of partners on one hand, and corporators of chartered institutions on the other, are widely variant. In a partnership all parties are responsible for the debts of the concern, unless it be a limited partnership under the statute. The Ellinger Bank was not a limited partnership. The evidence is to the effect that there were several partners in this particular institution, whose names are set out in the statement of facts. These should have been stated in the indictment, and the allegation made that these owners were insolvent or in failing circumstances at the time of the deposit, etc. As was said in the Roby Case, supra: "If the individuals were solvent, the Tyler Banking Company was solvent; if they were insolvent, the Tyler Banking Company was insolvent; and, in order to have a good indictment under the peculiar wording of this statute, it was necessary to allege the names of the persons composing the Tyler Banking Company." These names, as shown by the statement of facts, were readily ascertainable. The manager of the concern, Mr. Broesche, mentions the names of these partners in his testimony. There is nothing to indicate in the indictment that the grand jury did not know the names of the owners, nor does it charge that they used any diligence to ascertain the names of these parties, or that they were unknown to that body.

We have disposed of this indictment in a general way, without going more specifically into a review of the many grounds urged against its validity. It is clearly not in accordance with the statute, and does not charge the offense therein denounced. The indictment should have been quashed and

the judgment arrested, as urged by appellant.

[2] There are several other grounds urged for reversal of the judgment, which we think are well taken. One of these will be noticed. Mr. Broesche was used as a witness. His testimony, as does the testimony of all the witnesses, shows beyond question that he was the manager of the Ellinger Banking Company, that he attended to its business matters, and had personal direction and charge. He received all the money and paid all checks, and in fact had personal supervision of the concern. Appellant was not at Ellinger, and had not been for three years. He lived in Houston, Harris county. Another one of the partners in the concern, Mr. N. K. Freeman, lived at another and different point. The residences of the other partners in the concern are not stated, but there were several of those. The evidence of Mr. Broesche further demonstrates that he knew the business and was intimate with it, and if it was insolvent or in failing circumstances at the time of receiving the deposit no one knew that better than Mr. Broesche. Its indebtedness, under his statement, was something in the neighborhood of \$25,000 at the time of the reception of this money, and it had something like \$1,300 in cash on hand. In fact, his testimony indicates that the concern was anything but a solvent one. Under these circumstances, we are of opinion that appellant was correct in his contention that the court should have charged that Mr. Broesche was an accomplice, and appropriately given the law in regard to this question to the jury.

[3] There is another question it may be well enough to notice. The court failed to give the jury any rule in regard to the question of solvency by which they might determine that question. The jury were not informed when a banking institution was insolvent or in failing circumstances. This question is urged in various ways in the trial court. This court, in *Fleming v. State*, 62 Tex. Cr. R. 653, 139 S. W. 598, laid down the rule that should govern the trial courts in charging this phase of the law.

[4] There are other questions in regard to the admission and rejection of testimony, which we think are well taken, but not necessary to be discussed. But one phase of these matters will be noticed. Several witnesses were permitted to testify that on Saturday, before the bank closed its doors on the following Tuesday, over appellant's objection, they had made deposits in this bank. Appellant is charged with having received the deposits set out in the indictment on Monday following the Saturday in question. Upon another trial we are of opinion the evidence of the deposits received on Saturday should not be received or permitted to go to the jury. It could shed no light upon the question, had no tendency to show that

the bank was insolvent, or in failing circumstances, and did not undertake to connect the defendant with this in any manner; for the evidence shows positively he was not there, and had not been for three years, and Mr. Broesche was not on trial, and so far as the record is concerned seems not to have been indicted. He, and not appellant, received the deposits and entered them to the general account.

Without going further into a discussion of the questions set out for reversal, we dispose of the case as above indicated, and for the reasons stated the judgment will be reversed, and because the indictment is insufficient the prosecution will be dismissed.

GAGE v. STATE.

(Court of Criminal Appeals of Texas. Nov. 27, 1912.)

1. CRIMINAL LAW (§ 954*) — MOTIONS FOR NEW TRIAL—OBJECTIONS TO CHARGE.

Objections to the charge, in a motion for new trial, which do not set out the specific error, are insufficient.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2363-2367; Dec. Dig. § 954.*]

2. RAPE (§ 16*)—"ASSAULT WITH INTENT TO COMMIT RAPE"—FORCE—"ASSAULT."

Under Pen. Code 1911, art. 1063, defining "rape" as the carnal knowledge of a female person under the age of 15 years other than the wife of the person, with or without her consent, and article 1008, defining "assault" as any unlawful violence on the person of another with intent to injure him and that any attempt to commit a battery or any threatening gesture showing an immediate intention coupled with an ability to commit a battery, an assault to rape a child under 15 may be committed without force, and proof that accused lay in wait for prosecutrix, a child under 15, as she was going to school, and after making an indecent proposal to her chased her until she outran him, was sufficient to sustain a conviction of assault with intent to rape.

[Ed. Note.—For other cases, see Rape, Cent. Dig. §§ 15-19; Dec. Dig. § 16.*]

For other definitions, see Words and Phrases, vol. 1, pp. 542-544; vol. 8, p. 7583; vol. 1, pp. 532-538; vol. 8, p. 7582; vol. 7, pp. 5919-5925; vol. 8, p. 7778.]

Davidson, P. J., dissenting.

Appeal from District Court, Hood County; W. J. Oxford, Judge.

Sam Gage was convicted of assault with intent to rape, and he appeals. Affirmed.

Estes & Estes, Payne & Davenport, and Levi Herring, all of Granbury, for appellant. John J. Hiner, of Granbury, and C. E. Lane, Asst. Atty. Gen., for the State.

PRENDERGAST, J. Appellant was indicted, convicted, and given the lowest penalty, two years, for an assault upon a little girl, Pearl Martin, 12 years of age with the intent to have carnal knowledge of her, she not being his wife, alleged to have occurred on or about March 20, 1912.

Appellant did not testify. The testimony is uncontradicted. It shows this state of fact: That appellant, whose age was not given, but the circumstances show was a young man, living with his father in the community where the assault occurred, knew this little girl and had known her for some time, and went to the same school which she did the year before. That the little girl lived with her uncle, her mother being dead and her father away, and had since she was two years old, and lived about one mile from the school-house where she was then attending school. That in going back and forth to and from school she went alone generally and most of the way along a public road, but that when she got to the place of a Mr. West she went into his pasture, thence along a trail about a quarter of a mile therein, to the school-house, it being situated in Mr. West's pasture. That in thus passing along through this pasture she was about 200 yards from the West residence, which fronted the opposite direction from where she was when this assault occurred, and that between the residence and where she was the barn, lots, stables, and other outhouses of Mr. West were located, and that also between where she was and the West premises were scattering trees and perhaps some undergrowth; that at the point where she would enter and did enter this pasture of Mr. West on her way back and forth to school was a skirt of timber and undergrowth. On one side of the trail she traveled, this timber was thick or heavy, and on the other side between there and the West house the timber was more open and scattered. That some few weeks before this assault, one Pendergrast, a state's witness in this case, who showed that he was a rural mail carrier and that he was in the habit of going along this trail through this skirt of timber to reach the boxes to take up and deliver mail matter, stated that he knew both the appellant and said little girl, and knew that the little girl was in the habit of going back and forth along this trail to and from school; that he had seen her repeatedly do so. This witness then testified, as shown by the statement of facts, this: "Something like a month before the date of the matter in controversy I was returning from my rural mail box to my home, and, having crossed the trail along this bunch of timber, I saw the defendant lying on the ground in a thicket and near the trail or pathway used by Pearl Martin. At the time I saw defendant he was about middle ways of the timber, and some 15 or 20 steps from the trail. He got up from the ground as I came up to him, and we stood there talking for a few minutes, when the girl, Pearl Martin, came along the trail on her way from school. Just as the girl passed by us, defendant said to me, 'I would like to have a piece of that.' I made no reply or comment on his remark, and he then said again, 'Do you reckon I could get it in her?'

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes.

I told defendant I did not know, and he then said, 'I am going to ask her for a piece some day, and if she don't give it to me I am going to take it away from her.' I then said to defendant that he had better not do anything like that, and that he was liable 'to get his foot in it.' Defendant and I then talked there for a few minutes, and I started on my way home, and defendant started back and went in the direction of his home."

We think it best, under the circumstances, to here give in full a copy of the testimony of this little girl, Pearl Martin, as it is contained in the statement of facts before us: "I live with my uncle, A. J. Robertson, close to the town of Tolar. My mother is dead. I do not know where my father is. I am now 12 years old and have lived with my uncle since I was 2 years old. I attend school near Tolar, and have to go something like a mile from my home to the schoolhouse, located on the Owen West farm, first going the road through the Gage farm, and then through the fence into Mr. West's pasture, and along a trailway by a bunch of timber adjoining the West farm, and by a fence inclosing the West field and pasture. It was my custom to go this way, as the distance by the public road was longer. Along this trailway the timber was on my right and the fence on my left as I went south to the schoolhouse, through Mr. West's pasture. On the day of the trouble with the defendant, I had gone in the usual way towards the schoolhouse, and had got into the pasture, and through the fence and into the trail by the timber, when I saw the defendant coming through the timber. I do not know the direction he came from, as I just happened to look up and see him coming towards me through the timber walking as though he was coming to the trail where I was, and I then walked on pretty fast. When he got up to where I was, he asked me if I had seen the calves. He was then near the trail where I was. I told defendant I had not seen them." The witness was then interrogated and answered as follows: "Q. Then what did he say to you? A. He said, 'Give me a piece.' Q. Then what did you say to him? A. I didn't say anything; I just went on. Q. How did you go? A. I run. Q. What did you run for? A. I was afraid of him. Q. When you ran, what did he do? A. He ran too. He ran after me a distance of about 60 yards. We were running in the direction of Mr. Owen West's house, and defendant stopped just before we got to the edge of the timber. As we got there, I told him I was going to tell Mr. West on him, and he stopped and went back towards his home or off into the woods. Q. Did he try to catch you? A. Yes, sir; it looked like he was. Q. What kept him from catching you? A. I was running down the path, and he had to go around the bushes, and he was trying to head me off, and I outran him. After I had run through the timber, or after I had got to the edge of it, I ran to Mr. West's house, where

my teacher, Miss Beulah Woodward, lived, and told her what had happened. I also saw Mrs. West, and my teacher told her what I had said, and I then went on back home and did not go to school that day until some time later in the day. I told my folks at home about what the defendant had done. All this occurred in Hood county, Tex. I was not the wife of the defendant."

Cross-examined, the witness said: "I am in the fourth grade in school, and study arithmetic, geography, grammar, physiology, etc. Defendant has also attended the same school where I was, and was there a portion of the time last winter and also last summer. He did not attend the last term of the school. I have been at the defendant's home a number of times, but do not recall that he has ever been at my home. He had never offered me any insult before the occasion referred to, but always treated me nicely, and I was never afraid of him before this occasion as I was then. I usually went from home through this trail by the timber in going to my school, but in returning home I generally went another route, unless defendant's sister was at school, when I would go back the same trailway with her. I have no recollection of seeing defendant and Mr. Pendergrast in the timber before the occasion in question. When the defendant was running after me, and we had got to the edge of the timber, I could not see anybody at Mr. West's home. I could see the house, or where the house was; but there was nobody that I could see. The barn was between his house and where we were at the time. I don't know which way defendant had come from when I first saw him in the woods; he was just coming to where I was walking towards the trail and first asked me if I had seen his calves. I don't know what he had been doing. I just happened to look up and saw him coming towards me. After we had run some distance towards the edge of the timber, I could see some other children going to school along the road the other side of Mr. West's barn. I was then running in their direction. After I began to run defendant told me to stop, and I told him I wouldn't stop, and that I would go and tell Mr. West on him. He did not then intimate to me not to tell what had happened or what had been said, but turned back into the woods and went off. He did not put his hands on me because he didn't have the chance to do so." The witness, interrogated, answered as follows: "Q. How close did he get to you? A. About a yard. Q. Let's have the distance now, as near as you can, call out some object in this room—some distance across this room? A. About as far as from me to you (estimated to be eight to ten feet). Q. When you went to running, he never did get any closer to you? A. No, sir. Q. Were there any obstructions between you and him? A. Yes, sir; the bushes were between us. Q. When he went to running after you, did he get in the trail

where you were, or did he run out away from the trail? A. No, sir; he never got in the trail; he just run around the trees; he jumped over some bushes, and said, 'I want to tell you something.' Q. You told him you wouldn't wait, and for him to go away, and he then turned and left you? A. Yes, sir. I have only guessed at the distance I ran as 60 yards. Defendant didn't run as far as I did, as I ran until I got away from the woods. I just estimate the distance the defendant and I ran together as 60 yards. I suppose the defendant can outrun me, but he couldn't catch me on account of the bushes he was running in. I would gain on him when he was going around the bushes. I don't know whether he could have caught me or not, but I was running my best." Re-examined by the district attorney: "Defendant did not stop running after me until I told him I was going to tell Mr. West, and when I did so tell him he stopped and turned back into the woods. I was running as best I could, and defendant seemed to be trying to head me off. I only guess at the distance from that place to the home of Mr. West and do not really know the distance, but after I got out of this bunch of timber Mr. West's house was in plain view of me."

Her teacher, Miss Woodward, testified that she first saw this little girl on that morning about 8 o'clock when she (the witness) was preparing to go to school; that the girl on this occasion first came to the West house in Mrs. West's room and then to her room, and, upon being asked how she was, she stated that she was scared most to death. "As she told me that she broke down and commenced to cry, and fell over on my arm. I was standing in front of the dresser at the time, and pulled her up to me and told her to sit down and calm herself and tell me what was the matter." The state then introduced Mr. West, and Mr. Bowman, the deputy sheriff, who, having heard of this matter, investigated it for tracks along this trail. The effect of their testimony is that they describe the location substantially as stated above; that they hunted for tracks where the little girl claimed to have been chased by the appellant, and found, on the ground where she had indicated appellant had run her, her tracks showing that she had run as claimed by her, and the tracks of a man showing where he had jumped over and run around undergrowth and brush substantially as detailed by her; and that those tracks showed that the person was running and jumping in the direction and for the distance testified to by the little girl—in fact, in every way confirming and corroborating her testimony.

[1] There is no bill of exception in the record. In the motion for new trial there are some very general complaints of the charge of the court. They point out no specific error whatever and are too general to be considered by this court under the

uniform holding and ruling thereof. *Byrd v. State*, 151 S. W. 1068, recently decided; *Berg v. State*, 142 S. W. 884; *Ryan v. State*, 142 S. W. 878. However, the appellant's contention on these complaints seems to be that the court did not in its charge require that force and an actual battery should be committed upon this child before a conviction was authorized. The court's charge, as a whole, is an admirable one and properly submits the questions to the jury.

[2] It cannot longer be doubted that the law of this state is that in an assault to rape a child under 15 years of age, or in committing the act of rape upon such child, the statute means what it says, that the offense is complete and is constituted whether it is "with or without force." In other words, that neither the indictment has to charge, nor the proof to show, that force was used to commit such an act upon such child, even though it is when such force is charged upon a woman over the age of 15 years. *Hightower v. State*, 143 S. W. 1168, and cases there cited. Even if it was necessary to show force in such an assault upon a girl under 15 years of age, the evidence in this case abundantly and without contradiction shows that all the force that would be necessary in such a case was used by the appellant, conceding that he did not actually touch her person. He was doing everything possible within his power to do so and was prevented only by the fact that she outran him and he could not and did not catch her before she came in sight and hearing of other persons.

The evidence in this case did not call for a charge on either aggravated or simple assault, and none such whatever was requested by appellant on the trial. The evidence, without question, shows an assault with intent to rape, or nothing. The indictment strictly follows the statute and is in accordance therewith and the approved forms, held many times to be sufficient by this court. None of the matters above mentioned require any discussion or further statement. The fact is, the appellant's sole contention in his brief and argument is that the evidence is insufficient to sustain the verdict, and for that reason insists that this court should reverse and remand.

Our law defines "rape" on a child under 15 years of age, not the wife of the person committing the rape, as: "Rape is the carnal knowledge of a female under the age of fifteen years, other than the wife of the person, with or without her consent, and with or without the use of force, threats or fraud." Article 1063, P. C. In other words, the mere act of carnal knowledge by a man with any child under 15 years of age is *ipso facto* rape. Also, by our law an "assault" with intent to rape is: "If any person shall assault a woman with intent to commit the offense of rape, he shall be punished," etc. Article 1029, P. C. ▲ "woman," in this stat-

ute, means any female, and includes a child under 15 years of age. Under all the authorities, in cases charging an assault with intent to rape it is necessary for the court to define an "assault" as that is defined by our law. Our law in defining an "assault" also, at the same time, defines an "assault and battery." Both of these offenses, "assault" and "assault and battery," being defined by the same statute: "The use of any unlawful violence upon the person of another with intent to injure him, whatever be the means or the degree of violence used, is an assault and battery. Any attempt to commit a battery, or any threatening gesture showing, in itself or by words accompanying it, an immediate intention, coupled with an ability to commit a battery, is an assault." Article 1008, P. C. Then article 1012, P. C. says: "Any means used by the person assaulting, as by spitting in the face, or otherwise, which is capable of inflicting an injury, comes within the definition of an assault." Then follows the next, article 1013, defining what is meant by "coupled with ability to commit," saying: "(1) That the person making the assault must be in such a position that, if not prevented, he may inflict a battery upon the person assailed. (2) That he must be within such distance of the person so assailed as to make it within his power to commit the battery by the use of the means with which he attempts it. (3) It follows that one who is, at the time of making an attempt to commit a battery, under such restraint as to deprive him of the power to act, or who is at so great a distance from the person assailed as that he cannot reach his person by the use of the means with which he makes the attempt, is not guilty of an assault. But the use of any dangerous weapon, or the semblance thereof, in an angry or threatening manner, with intent to alarm another, and under circumstances calculated to effect that object, comes within the meaning of an assault."

From these statutory enactments it is clearly shown that an assault with intent to rape is committed when an assault is shown, and the intent in committing it is to have carnal knowledge. That it was appellant's intention on this occasion to have carnal knowledge of this child we think cannot be questioned. As stated by him to the witness previously, he intended to ask her for it, and, if she refused, he was by force going to take it away from her. Just what he had recently said he was going to do he attempted with all the power within him to execute on this occasion. The law does not require that he shall commit a battery upon the child, but simply and solely an assault. He attempted an assault and battery upon her with all the means within his power at the time and was prevented from doing so by the party herself outrunning him and thereby succeeding in escaping from him. That he could and would

have at this time committed a battery on this child, *if he had not been prevented*, is without doubt, and it cannot be doubted, from the testimony. That he also alarmed her in this assault cannot be doubted from the testimony. What was said by this court, through Judge Henderson, in *Gann v. State*, 40 S. W. 726, is peculiarly applicable and pertinent here. It is: "Prosecutor, in fact, may not have been alarmed at the drawn knife, but this would not detract from the intent with which appellant may have drawn the knife and advanced towards him. Nor is the contention of appellant to the effect that he did not make an assault at all, because he was restrained before he made a battery, any more tenable. The fact that A. and B. have a quarrel, and that A. draws his knife, and starts towards B., but before he gets to him C. catches and restrains him, so it is impossible for him to get to B., would not constitute an assault under the statute, would be a monstrous doctrine. That is not what subdivision 3 under article 592, Pen. Code 1895, means. In this case the assault was made when it was entirely possible for defendant to get to the prosecutor and commit a battery upon him. There was no insuperable difficulty in this matter; but, after the assault was made, and while he was attempting to consummate his purpose and commit a battery, he was arrested by a bystander and restrained. His assault, however, was complete when he had the ability to commit the battery. The fact that he was prevented from making a battery did not do away with the offense of an assault already committed by him." So it may be well said in this case that appellant was in position at the time he made the assault upon this child to have committed a battery upon her and would have done so unquestionably if he had not been prevented. *That he was prevented there can be no question.* It does not require the intervention of some third party to prevent the battery. The statute clearly contemplates that *anything* which, or any person who, prevents him is embraced, meant and included. What prevented him on this occasion from committing the battery when he began the assault? Nothing but the fact that the child became alarmed and that she outran him. That he would have committed the battery, if not thus prevented, cannot be doubted. His assault was complete. The fact that he was prevented from making the battery, as said by Judge Henderson above, did not do away with the offense of an assault already committed by him. It would also, as said by Judge Henderson, be a monstrous doctrine to hold that under the circumstances in this case appellant did not commit an assault upon this child, simply and solely because he was prevented from consummating that assault into a battery, and it cannot relieve him of the penalty for the offense he committed. In our

opinion, the evidence clearly justifies, if it does not imperatively require, a finding that he was guilty and proven so, beyond a reasonable doubt, by the testimony in this case.

The judgment is affirmed.

DAVIDSON, P. J. The Gann Case has absolutely no relevancy to the facts of this case. The statute provides that the party must be within reach of the party alleged to be assaulted so as to be able to carry out his intent. The state's evidence positively places appellant where he could not either make an assault or take hold of the person of the little girl. No one prevented him from doing so. He did not get within reaching distance. This case will stand alone, *sui generis* and in violation of the statute.

I cannot concur. I dissent. A party ought at least be brought within some shadow of the law.

PASCHAL v. INMAN.

(Court of Civil Appeals of Texas. Dallas.
Nov. 2, 1912. Rehearing Denied Nov.
23, 1912.)

WEIGHTS AND MEASURES (§ 8*)—PRIVATE WEIGHMASTERS.

The statutes creating the office of official weigher do not prohibit private persons from weighing produce, but only forbid factors, commission merchants, etc., from weighing the cotton of others consigned to them for sale; nor is such private weighing forbidden by the amendment of 1905 (Acts 1905, c. 84, Rev. Civ. St. 1911, art. 7834), requiring private weighers, doing business where there are no public weighers, to give bond for faithful performance of their duties in lesser amount than required of public weighers.

[Ed. Note.—For other cases, see *Weights and Measures*, Cent. Dig. § 10; Dec. Dig. § 8.*]

Appeal from Wood County Court; R. W. Simpson, Judge.

Suit by Sam Paschal against Hugh Inman. From a judgment dissolving a temporary injunction, plaintiff appeals. Affirmed.

J. H. Beavers, of Winnsboro, for appellant. Wilkerson & Wilkerson, of Mt. Vernon, for appellee.

RASBURY, J. Appellant, Sam Paschal, the duly elected and qualified public weigher of justice precinct No. 4, of Wood county, filed this suit against appellee, Hugh Inman, to enjoin him from conducting the business of private weigher in that precinct, and to recover damages in the sum of \$1,000. The agreed facts show the election and qualification of Paschal; that Inman is engaged in same precinct as a private weigher; that he is not a factor or commission merchant, or engaged in a like occupation, nor engaged in buying or selling cotton or other produce; that appellant, Paschal, has been

damaged, as claimed, if appellee was unlawfully conducting the business of private weigher. The trial judge issued a temporary restraining order; but upon motion by appellee, and upon a hearing of the evidence, the same was dissolved.

As indicated, the proceeding assails the right of appellee to conduct the business of private weigher in a precinct where there is a duly elected and qualified official weigher. The several legislative acts by which the office of official weigher was established have been often construed, and the decisions of our appellate courts have been uniform, with one exception. The cases all hold that owners of produce may engage others than official weighers to weigh same, which is held to include the right of private persons to perform such services for the owners. As construed, the statutes forbid only factors, commission merchants, and persons pursuing similar occupations from weighing the cotton of others consigned to them for sale, the inhibition against that class of persons being made to protect owners against false and fraudulent accounts, and decline to go further on the ground that to do so would interfere with the owner's complete domain over his property. *Watts v. State*, 61 Tex. 184; *Johnson v. Martin*, 75 Tex. 33, 12 S. W. 321; *Martin v. Johnson*, 11 Tex. Civ. App. 628, 33 S. W. 306; *Ex parte Hunter*, 34 Tex. Cr. R. 114, 29 S. W. 482; *Smith v. Wilson*, 18 Tex. Civ. App. 24, 44 S. W. 556; *Whitfield v. Terrell Compress Co.*, 28 Tex. Civ. App. 235, 62 S. W. 117; *Galt v. Holder*, 32 Tex. Civ. App. 564, 75 S. W. 569; *Davis v. McInnis*, 35 Tex. Civ. App. 594, 81 S. W. 75; *Gray v. Eleazer*, 43 Tex. Civ. App. 417, 94 S. W. 911; *Hedgpeth v. Hamilton*, 128 S. W. 709; *Hedgpeth v. Hamilton* (Sup.) 140 S. W. 1084.

The amendment of 1905 (Acts 1905, p. 117; article 7834, R. S. 1911) contains nothing indicating any intention on the part of the Legislature to depart from the rule announced by the courts. The amendment provides, in substance, that in future all private weighers, doing business in places where there are no public weighers, shall in effect give the bond in lesser amount now required by public weighers, conditioned that he will faithfully perform his duties and turn over all produce weighed, etc. This amendment, as we construe it, means nothing more than to afford owners of produce a bonded weigher in those places where there is no appointed or elected official weigher, and in no sense intended to deprive the owner of employing the private weigher to weigh his produce, if he chose to do so.

The pleading and evidence discloses no material difference between this case and those above cited, and hence we feel it our duty to follow the settled rule.

The judgment is affirmed.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

ROBBIE v. UPSON.

(Court of Civil Appeals of Texas. San Antonio. Oct. 23, 1912. On Motion for Rehearing, Dec. 11, 1912.)

APPEAL AND ERROR (§ 76*)—APPEALABLE ORDERS—FINALITY OF DETERMINATION—APPEAL TAKEN DURING TERM—"FINAL JUDGMENT."

Although an appeal was taken from a judgment pending in term, and at a time when the court still had control thereover, and might have granted a new trial, or amended or changed the same, it was none the less a "final judgment," and the appeal was perfected by the ending of the term without a change therein or the granting of a new trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 426-428, 430, 431, 435-442; Dec. Dig. § 76.*]

For other definitions, see Words and Phrases, vol. 3, pp. 2774-2798; vol. 8, p. 7763.]

Appeal from Bexar County Court; Geo. W. Huntress, Judge.

Action between W. Robbie and James V. Upson. From a judgment for Upson, Robbie appeals. On motion to dismiss appeal. Overruled.

FLY, J. This case was tried at the May term of the county court of Bexar county for civil cases, which term began on May 6, 1912, and could have held until the first Monday in July, which in this instance was July 1st, a period of exactly 8 weeks. The cause was tried on May 11, 1912, by the court, without a jury, and judgment rendered in favor of appellee. Appellant gave notice of appeal, and on May 23d filed his appeal bond, which was approved by the clerk. County court did not close until May 28th.

It is the contention of appellee that the bond was prematurely filed, because the court had full control over its judgment until the end of the term, and the judgment was not final, and could not be appealed from. It is true that the county court had control over the judgment, and might have granted a new trial therein, or amended or changed the same, and the jurisdiction of the appellate court might not attach until final adjournment of the trial court. Still, when that adjournment took place, and the court had not in any way exercised its power and authority over the judgment, the jurisdiction of this court at once attached under the bond. That is what is decided in the cases of *Blum v. Wettermark*, 58 Tex. 125, and *Garza v. Baker*, 58 Tex. 483, cited by appellee to sustain a totally antagonistic proposition to the one asserted by the Supreme Court. In the case first cited appellant filed his appeal bond during the term of court at which the judgment was rendered, and afterwards, before the court adjourned, the court set aside its judgment. The parties in whose favor the

judgment was rendered objected to the action of the court in granting the new trial because the appeal had been perfected. The Supreme Court overruled that contention, holding that the jurisdiction of the Supreme Court would have attached after adjournment if the new trial had not been granted. The same ruling was made in the last case cited.

In the case of *Churchill v. Martin*, 65 Tex. 367, it was held that: "After the approval of such a bond the district court, during the term, still has jurisdiction to modify or set aside the judgment appealed from, but not to enforce such judgment. When the bond has been filed and approved, the complaining party has done, substantially, all required of him to give this court jurisdiction of the case, and this court may then, under the Constitution, to protect or enforce its jurisdiction, issue writs of injunction," etc. This was said in regard to an appeal perfected during the term of the court at which the judgment was rendered, and the appeal was declared perfected.

The law requires the filing of an appeal bond within 20 days after notice of appeal is given, which would often cause it to be filed during the term of the court in cases tried in a court whose term may continue more than 8 weeks, and such procedure would not be required if the judgment were not such a one as could be appealed from. The term of the court at which this cause was tried could not continue more than 8 weeks and the filing of the appeal bond during the term is not sustained on that ground, but on the ground that an appeal bond can properly be filed in any case during the term at which the judgment was rendered, no matter what the length of the term may be and if the judgment is not set aside before the end of the term by the trial judge the appeal will be perfected. *Ellis v. Harrison*, 24 Tex. Civ. App. 13, 56 S. W. 592, 57 S. W. 984.

The motion to dismiss the appeal is overruled.

On Motion for Rehearing.

In the petition filed by appellee he set up his defenses very fully, pleading the merits, and the same were denied, "each and every one of them," and this placed the case on its merits before the court. In the judgment it is recited that "the matters in controversy as well of fact as of law were submitted to the court" and under the pleadings the whole case must have been considered. The petition for an injunction taken with the motion to dissolve placed the case on its merits before the court. The second order granting the motion to dismiss is set aside and the first order overruling it is adhered to.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

LANZA v. ROE et al.

(Court of Civil Appeals of Texas. Dallas.
Nov. 16, 1912.)

1. PLEADING (§ 214*)—DEMURRER—ADMISSIONS.

A demurrer to a pleading admits the facts well pleaded.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 525-534; Dec. Dig. § 214.*]

2. EXECUTORS AND ADMINISTRATORS (§ 55*)—SEPARATE PROPERTY.

A wife's administrator was entitled to the management and control of separate property left by her to administer it under the supervision of the probate court.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 306; Dec. Dig. § 55.*]

3. HUSBAND AND WIFE (§ 276*)—COMMUNITY PROPERTY—ADMINISTRATION—ACTIONS—INTERVENTION.

The general creditors of the husband of one of two deceased married women, claimed to have been partners in a business in their own right, could not intervene in a suit by the administrator of one of them against the administrator of the husband of the other, claiming that defendant had wrongfully taken possession of the property as belonging to the community, when it was separate property; there being no showing that the debts cannot be paid out of the husband's estate or that his administrator is not properly defending the suit against him.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 1032-1045; Dec. Dig. § 276.*]

Appeal from District Court, Dallas County; E. B. Muse, Judge.

Action by Luke Lanza, administrator, against J. M. Roe, administrator, and another, in which McDougal, Cameron & Webster intervened. From a judgment dismissing petition, plaintiff appealed. Reversed and remanded.

Lawther & Worsham, of Dallas, for appellant. A. B. Flanary and Short & Field, all of Dallas, for appellees.

RAINEY, C. J. This suit was instituted by Luke Lanza, administrator of the estate of Mary Lanza, deceased, against J. M. Roe, administrator of the estate of W. M. McMasters, deceased, and Manuel Depuma, administrator of the estate of Lena McMasters, deceased. McDougal, Cameron & Webster, claiming to be creditors of the estate of W. M. McMasters, deceased, intervened.

Appellant alleged in his petition that Mary Lanza and Lena McMasters, with the knowledge and consent of her husband, at the time of their death, were engaged in the conduct of a grocery store and saloon in the city of Dallas as a copartnership; that they contributed equally of their means to the purchase of the original stock in trade, and of their labor in the management and conduct of said business; that the moneys advanced by the said Lena McMasters was her separate property, and that the deceased, W. M. Mc-

Masters, had in no wise contributed thereto; that under the agreement existing between them Lena McMasters and Mary Lanza were to share equally the profits and losses accruing from said business, and that on their death they and their administrators were, and became, the joint owners of the goods and fixtures in said store and saloon. Appellant further alleged that on, to wit, the 15th day of August, 1910, W. M. McMasters willfully and maliciously killed Lena McMasters and Mary Lanza, and then died from violence willfully inflicted by his own hand; that on his death the defendant J. M. Roe qualified as his administrator, and as such took charge and control of said store, together with the fixtures and stock in trade, and proceeded to administer upon it as property belonging to his estate; that he sold the goods and fixtures belonging to said store, and appropriated the proceeds of said sale to his own use and benefit, and to the benefit of the estate of W. M. McMasters, deceased; that appellant qualified as the administrator of the estate of Mary Lanza, deceased, and the defendant Manuel Depuma qualified as the administrator of the estate of Lena McMasters, deceased, and as such administrators demanded of the defendant the delivery of said property and the proceeds of said sale, which he declined to do, whereupon this suit was filed. The defendant Manuel Depuma answered, setting up substantially the matters and things alleged in appellant's petition, and prayed for a distribution of the proceeds of the sale of said property as between him and the administrator of the estate of Mary Lanza as appeared to be just and equitable in the premises. Defendant Roe answered by general demurrer and specially, in effect, that the property held by him was the community property of W. M. McMasters, deceased, and his wife, Lena McMasters, deceased, and was held and controlled by him as administrator, duly appointed by the probate court of Dallas county. He further pleaded that he took possession of same as a stakeholder for the benefit of the true parties at interest, and same is subject to the orders of the court.

Interveners' plea, after a general demurrer and general denial, charged as follows: "For further special answer herein intervenor denies that the said Mary Lanza and Lena McMasters were engaged in the conduct and operation of a grocery store and saloon, situated on Elm street, in the city of Dallas, equally interested as copartners, and that the said W. M. McMasters was in no wise interested in said business, and that he contributed nothing to its establishment or maintenance, but say that the said W. M. McMasters was interested in said business, and that he had the sole charge and man-

agement of the same, and that he contracted debts for goods purchased and placed on sale therein, and that he paid said debts, and that all parties held him out to be the manager and owner of said business, and intervenor further says that the business conducted by W. M. McMasters was the community property of himself and wife, Lena McMasters, and that the said W. M. McMasters purchased of intervenor groceries and goods from time to time for the purpose of replenishing his stock in trade, and that at the time of his death he was indebted to intervenor in the sum of \$190.71, and that said account has been duly sworn to, presented to the administrator for allowance, has been allowed by him, and filed in the probate court as a claim against W. M. McMasters' estate; and that the moneys which are now shown to be in the hands of J. M. Roe, administrator of the estate of W. M. McMasters, are in part the proceeds of the sale of the groceries and goods which the said W. M. McMasters purchased of intervenor for the purpose of sale to customers of his grocery store. Wherefore, intervenor prays that plaintiff take nothing by his said suit, and that the defendant J. M. Roe go hence without day with his costs, etc., and that intervenor have judgment for its costs, and for all such other and further relief, general and special, in law and in equity, as to the court may seem just and proper in the premises; and as in duty bound intervenor will ever pray." Appellant excepted to the plea of intervention of McDougal, Cameron & Webster on the ground of misjoinder of parties, in that they had no such interest in the subject-matter of the suit as gave them the right to intervene, and on the further ground that the estate of W. M. McMasters was in process of administration in the county court, and that that court had exclusive jurisdiction of any claim that intervenors had against said estate; and, likewise, of any claim that they had, or might have, against the estate of Lena McMasters and Mary Lanza, whose estates were also undergoing administration in the county court. These exceptions were by the court overruled. The court then sustained the general demurrers of defendant Roe and the intervenors to the petition of plaintiff, and upon plaintiff's refusal to amend entered a judgment of dismissal, from which this appeal is taken.

We are of opinion that the court erred in sustaining the general demurrers of defendant Roe and the intervenors, McDougal, Cameron & Webster, and dismissing plaintiff's petition.

[1, 2] The petition of Luke Lanza and the answer of Manuel Depuma stated a good cause of action, in that, if the property was the separate property of Lena McMasters,

and in which Mary Lanza had an interest, as stated by the petition of Luke Lanza, and answer of Manuel Depuma, and the demurrers admitted such to be the case, they were entitled to have the matter tested by the court in a trial of the matter, and, if found true, they, as administrators, were entitled to the management and control of the property under the supervision of the probate court.

[3] We are also of the opinion that the court erred in overruling the exceptions to the plea of intervention. While the plea, if true, shows a right of recovery against the estate of W. M. McMasters, and also against the estates of Lena McMasters and Mary Lanza, still it does not show any right in intervenors to intervene in this suit. There is no allegation that there is no other property of W. M. McMasters' estate out of which this debt can be paid, nor that Roe, McMasters' administrator, is colluding with the other administrators and failing to do his duty as such administrator in not making the proper defense to establish his right to said property as such administrator. Intervenors' claim has never been established against the estates of Lena McMasters and Mary Lanza, which are being administered by the probate court, which would be necessary to subject the property to its payment, if it was decreed to be the property of Lena McMasters and Mary Lanza. Under the pleading in this case the district court has no jurisdiction to establish appellant's claim against either estate.

The judgment is reversed, and cause remanded.

BOUND v. SIMKINS.

(Court of Civil Appeals of Texas. San Antonio. Nov. 6, 1912. On Motion for Rehearing, Dec. 4, 1912.)

1. BROKERS (§ 39*)—COMMISSION—LIABILITY OF PRINCIPAL—PURCHASER PROCURED BY SUBAGENT.

Where an owner employed a real estate broker to sell his land at a certain price for an agreed commission, and the broker listed the same with another broker, who procured a purchaser whom he caused to inspect the land and enter into negotiations with the owner, the owner was liable to his agent for the agreed commission upon a sale being made to the purchaser, where he knew at the time of the sale that such subagent had written the purchaser about the land.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. §§ 37, 42, 64; Dec. Dig. § 39;* Judgment, Cent. Dig. § 1234.]

2. BROKERS (§ 56*)—COMMISSION—LIABILITY OF PRINCIPAL.

An owner is liable for the commission on a sale of land to a purchaser procured by his broker, though he does not know that the purchaser was so procured, and makes the sale himself.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. §§ 85-89; Dec. Dig. § 56.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

3. PRINCIPAL AND AGENT (§ 17*) — AGENT'S AUTHORITY—EMPLOYMENT OF SUBAGENTS.

The rule that an agent cannot employ a subagent since the trust committed to him is personal, and cannot be delegated, does not prohibit an agent from employing others to perform a service involving no discretion or exercise of judgment.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 35; Dec. Dig. § 17.*]

4. BROKERS (§ 57*)—RIGHT TO COMMISSION—DEED.

The fact that the deed was made jointly to the purchaser procured and to a third party did not deprive the broker of his right to a commission where the original written contract of sale was between the principal and the purchaser procured by the broker.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 66, 67, 72; Dec. Dig. § 57.*]

Appeal from District Court, Dallas County; J. C. Roberts, Judge.

Action by B. B. Simkins against Ed G. Bound. From a judgment for plaintiff, defendant appeals. Affirmed, and rehearing denied.

Read & Lowrance, of Dallas, for appellant. Simkins & Simkins, of Corsicana, and Geo. Sargeant, of Dallas, for appellee.

FLY, J. Appellee sued appellant for \$700, alleged to be due him as commissions on the sale of a certain tract of land to Dr. J. A. Green. The defense pleaded was that appellant asked Green, when he was about to enter into a contract of sale with him, if any agent or B. B. Simkins had shown him the land, and Green replied in the negative, and that appellee had never offered to sell the land to him, and that on that representation he had sold the land to Green. It was also alleged that appellee had not secured a purchaser for the land. The cause was tried by jury, and resulted in a verdict and judgment for appellee in the sum of \$545.62, with 6 per cent. interest from January 2, 1911.

[1] It appeared from the evidence that appellee had been employed by appellant to sell the land at \$27.50 an acre, and agreed to pay appellee 5 per cent. commissions. Appellee advertised the land, and by his efforts interested other people in an endeavor to procure a purchaser, and listed the land with Mr. Taylor of Corsicana, and empowered him to get a purchaser for it. The land was afterwards sold to Dr. J. A. Green by appellant. Taylor testified that he wrote Dr. J. A. Green at Blooming Grove about the land, and stated it could be bought at \$30 an acre, and that appellee was the agent for it. The letter caused Green to inspect the land and to enter into negotiations with appellant to buy the land. He knew nothing of the land until he received the letter, and, when he went to see it, he knew that appellee was the agent for the sale of the land. At the time that appellant sold the land, he knew that Taylor had written about

the land. The contract for the sale of the land was made between appellant and Green, although the deed was afterward made to Green and Hitt.

[2] Where a broker procures a person to buy the land of his principal, and the latter sells to the purchaser procured by the broker, not knowing that he had been procured by the broker, he is liable for commissions on the sale. *McDonald v. Cabiness*, 98 S. W. 943; same case affirmed, 100 Tex. 615, 102 S. W. 721. This court, through Chief Justice James, held in that case: "While the owner has such an agent at work, and himself sells to some person that comes along, he does so at the risk of that person having been procured by the agent." So in *Graves v. Bains*, 78 Tex. 92, 14 S. W. 256, it was held: "If the agent be authorized to make the sale and a purchaser is procured by him, it is of no consequence that the owner did not know the fact and made the sale himself." To the same effect: *West v. Thompson*, 48 Tex. Civ. App. 362, 106 S. W. 1134; *Pierce v. Nichols*, 50 Tex. Civ. App. 443, 110 S. W. 206; *Ross v. Moskowitz*, 95 S. W. 86, affirmed in 100 Tex. 434, 100 S. W. 768.

[3] It is a general rule that, in the absence of any authority expressed or implied, an agent has no right to employ a subagent, the trust committed to him being personal, and he cannot delegate it to another so as to affect the rights of the principal. *Eastland v. Maney*, 36 Tex. Civ. App. 147, 81 S. W. 574. But there is nothing in that rule that would prohibit an agent from employing others to perform a service involving no discretion or exercise of judgment. If appellee had sent Taylor to Green to tell him about the land, without any authority to sell the land, it would not be contended that the rule as to subagents would apply, and neither would it apply when Taylor merely wrote a letter to Green calling his attention to the land and informing him of appellee's agency. No skill, judgment, or discretion was to be exercised, or was exercised, by Taylor, and in such cases the rule as to subagents does not apply. "The subagent may be employed where the duties are of a lower order and of a mechanical or ministerial type, in which there is no scope for independent judgment or discretion." *Tynan v. Dullnig*, 25 S. W. 465, 818. There can be no doubt that a land agent can employ persons to find some one to purchase the land and to show it to him. *Williams v. Moore*, 24 Tex. Civ. App. 402, 58 S. W. 953; *Renwick v. Bancroft*, 56 Iowa, 527, 9 N. W. 367; *McKinnon v. Vollmar*, 75 Wis. 82, 43 N. W. 800, 6 L. R. A. 121, 17 Am. St. Rep. 178; *Mechem on Agency*, § 193; *Clark & Skyles, Law of Agency*, § 345 (d), p. 377.

The charge complained of in the first assignment is not open to the criticisms made by appellant. It does not assume any fact that was controverted. All of the testimony

showed that Green was the purchaser, and that he was found by appellee.

The second, third, and fourth assignments of error are overruled. The evidence complained of was admissible. Appellee was fully authorized to employ Taylor to obtain a purchaser under his contract with appellant. The authorities cited do not sustain the assignments. Taylor did not attempt to sell the real estate, but merely to secure a purchaser to whom appellant or appellee could sell it.

[4] The fifth and sixth assignments of error are without merit. The uncontradicted testimony showed that the land was sold to J. A. Green, and that he may have afterwards associated some one with him in the purchase of the property did not alter the fact that he was induced to approach appellant through the efforts of appellee and that he bought the land. The name of Hitt did not appear in the written contract of sale. The payment of the just commission in this case cannot be evaded on such an attempted defense.

The verdict is sustained by the evidence, and the judgment is affirmed.

On Motion for Rehearing.

Dr. Green, a witness for appellant, testified, in regard to the sale: "I bought this land from Mr. Bound about the 1st of December, 1910." He stated that Hitt was present when he was negotiating for the purchase over the telephone, but that Bound did not know that fact. He made all the arrangements for the purchase. When the contract was drawn up by the attorneys of appellant, the name of Hitt was not mentioned therein, and appellant never heard of Hitt being a party to the contract until it was returned with his name appended. While he states that Green mentioned something about a partner, he did not consider him in the transaction. He swore he knew nothing about the partner, and did not name him in the contract. He sold the land to Green. The name of Hitt was not mentioned in the contract, although he may have signed it, without the knowledge or consent of appellant.

There is no merit in the motion for rehearing, and it is overruled.

EXPRESS PUB. CO. v. ORSBORN.

(Court of Civil Appeals of Texas. San Antonio. Nov. 6, 1912. Rehearing Denied Dec. 4, 1912.)

1. LIBEL AND SLANDER (§ 123*)—QUESTIONS FOR JURY—IDENTITY OF PERSON DEFAMED.

Defendant published in its newspaper that a negro returned to his home at 117 Eda avenue to find his sister chloroformed, gagged, and the house robbed. In a subsequent issue it published that plaintiff was gagged and beaten into unconsciousness at the home of her brother-in-

law at 117 N. Eda street. Plaintiff was a white woman. Eda street was sometimes called Eda avenue; and it did not appear that there was any such avenue as Eda avenue, or that any similar attack had been made on a negress in a negro home on such avenue. *Held* that, considering the two articles together, it was a question for the jury whether the first article referred to plaintiff, although it mentioned no names.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 356-364; Dec. Dig. § 123.*]

2. LIBEL AND SLANDER (§ 21*)—PERSONS ENTITLED TO SUE.

To justify a recovery for libel, it is not necessary that plaintiff should be named, if pointed out by circumstances, or ascertainable from the words used.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. § 103; Dec. Dig. § 21.*]

3. LIBEL AND SLANDER (§ 21*)—PERSONS ENTITLED TO SUE.

To justify a recovery for libel, it is not necessary that all the world should understand who the person defamed was, if those knowing plaintiff can discern that she was meant.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. § 103; Dec. Dig. § 21.*]

4. LIBEL AND SLANDER (§ 101*)—EVIDENCE—BURDEN OF PROOF.

The burden is on a party suing for libel to prove that the libel was directed at him.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 273-280; Dec. Dig. § 101.*]

5. LIBEL AND SLANDER (§ 123*)—QUESTIONS FOR JURY—IDENTITY OF PERSON DEFAMED.

Whether a libel was directed at plaintiff is a question of fact to be determined by the jury.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 356-364; Dec. Dig. § 123.*]

Appeal from District Court, Dallas County; Kenneth Foree, Judge.

Action by Ida Mae Orsborn against the Express Publishing Company. Judgment for plaintiff, and defendant appeals. Affirmed.

A. S. Coke, of Dallas, and Templeton, Brooks, Napier & Ogden, of San Antonio, for appellant. E. G. Seuter and Carden, Starling, Carden & Hemphill, all of Dallas, for appellee.

FLY, J. This is a suit for damages, alleged to have resulted from the publication of certain articles by appellant, instituted by N. G. Orsborn, as next friend of Ida Mae Orsborn, who, after the suit was begun, married R. T. Donaldson, who by amendment joined his wife in the suit. A trial by jury resulted in a verdict and judgment in favor of appellee for \$500.

In the issue of the Daily Express, a newspaper published in the city of San Antonio, of date July 7, 1910, appeared the following article:

"Girl is Gagged and Robbed.

"Negress Claims Two Mexicans Entered Her Home and Stole a Ring.

"A hurry call came to police headquarters last night at 11 o'clock from 117 Eda avenue,

the home of a negro, who returned home, as he said, to find his sister chloroformed, gagged and the house robbed.

"Patrolmen Henderson and Harrison were sent to the place. They found the girl had been gagged with a towel, but there was no evidence of the use of chloroform, and the only thing missing was a finger ring, which she asserts two Mexicans, her assailants, took from her finger.

"Detectives will be put upon the case this morning."

Following that publication, the succeeding article was published in the Daily Express of July 9, 1910, and also in the semiweekly of the same paper:

"Robbers Very Bold.

Enter House, Gag Woman and Beat Her to Insensibility.

"They Strike a Child to Silence Its Ories But It Cries Louder and Awakens Other Members of the Household. Men Escape.

"Gagged with a pillow and beaten into unconsciousness with the butt end of a revolver by two men, said to be Mexicans, who later ransacked her room, was the experience of Miss Ida Mae Orsborn at the home of her brother-in-law, J. L. Clapp, 117 North Eda street, early Thursday morning. The police are at work on the case but have made no arrests. Mr. Clapp gives the following account of the assault:

"My sister-in-law was awakened about midnight just as two men entered her room by the front window. Before she could give the alarm the men caught and gagged her. Then one of the men dragged her by her hair from the bed and attempted to throw her out of the window, but she resisted so vigorously that the man struck her over the head with a pistol, rendering her unconscious, and left her lying right in the open window.

"My little child about one year old, who was sleeping with my sister, was awakened by the confusion and began to cry. One of the men hit the little child to quiet it and made it cry louder, which awakened my wife and me. We were sleeping in a hallway not far away. The men evidently heard us moving and jumped out of the window. I saw them leap over the front fence as I entered the room. Miss Orsborn was lying unconscious with her body across the window sill. I at once summoned Dr. Edward Calvin and notified the police."

"Examination showed that the robbers had taken nothing but a finger ring, which was taken off Miss Orsborn's finger. The police have a good description of the men, given them by Miss Orsborn, who is positive she can identify her assailants.

"Miss Orsborn was so overcome by the shock and the blow on her head that she was

unable to give a coherent account of the assault until the next day. The physicians say that she is now out of danger. The baby has several bruises where it was struck."

The evidence showed that appellee was attacked in the manner mentioned in the publications, on the night of July 6, 1910, while sleeping in the home of her sister and brother-in-law at 117 North Eda street, in San Antonio, Tex. Appellee and her family are whites, and she was greatly mortified and humiliated by the publication that she was a negress. There was evidence tending to show that Eda street was also called Eda avenue.

[1] The only contention by appellant is that the court should have instructed a verdict for appellant, because it was not shown that the libelous article applied to appellee, and could not so have been construed by the readers of the paper. The two articles were properly considered together; and it then became a question of fact, to be determined by the jury, as to whether the person spoken of in the first publication was the one more minutely and accurately described in the second. That issue was clearly presented to the jury, and was answered in favor of appellee. There was evidence to sustain that finding. It was testified that Eda street was known as Eda avenue; that appellee was attacked and gagged at 117 North Eda street under similar circumstances mentioned in the first publication. There was no evidence of a similar attack having been made on a negress in a negro home on Eda avenue, nor that there was such an avenue in San Antonio. The two articles, when read together, lead inevitably and surely to the conclusion that both refer to the same person. *Houston Printing Co. v. Moulden*, 15 Tex. Civ. App. 574, 41 S. W. 381.

[2, 3] As is well said in the case cited: "It was not necessary to make the article published libelous that plaintiff should have been named, if he was pointed out by circumstances. * * * It is only necessary that the words refer to some person ascertainable from the words used." It was not necessary that all the world should understand who the person defamed was. It is sufficient if those who know the plaintiff can discern that she was the person meant. *Newell on Slander and Libel*, p. 767.

[4, 5] The case of *Boone v. Herald News Co.*, 27 Tex. Civ. App. 548, 66 S. W. 313, decided by this court and cited by appellant, holds that the burden was on the plaintiff in a libel suit to prove that the libel was directed at him, and that it was a question of fact to be determined by a jury. So we hold in this case; and, as in that, we hold that there is evidence to sustain the verdict of the jury, and it will not be disturbed.

The judgment is affirmed.

ARMSTRONG PACKING CO. v. CLEM.

(Court of Civil Appeals of Texas. Dallas.
Nov. 9, 1912. Rehearing Denied
Nov. 30, 1912.)

1. NEGLIGENCE (§ 27*)—DANGEROUS SUBSTANCES—LIABILITY OF MANUFACTURER.

The liability of a manufacturer of soap for injuries to a consumer from poisonous substances therein does not rest upon contract or privity, but arises from its duty to avoid acts dangerous to the lives and persons of others, and hence a person injured may recover, although there is no contract or privity between him and the manufacturer.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 25; Dec. Dig. § 27.*]

2. NEGLIGENCE (§ 27*)—ACTIONS—SUFFICIENCY OF EVIDENCE.

Where a manufacturer of soap knowing that poisonous and injurious substances were necessary in its preparation, and that, if not neutralized in manufacturing, injury was liable to result from its use, placed it upon the market and injury resulted from its use, these facts sufficiently showed failure to use care in its manufacture to render it liable.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 25; Dec. Dig. § 27.*]

3. NEGLIGENCE (§ 66*)—CONTRIBUTORY NEGLIGENCE—ANTICIPATED DANGERS.

A purchaser of soap is not required to test it for poisonous substances, but, where he is ignorant of defects therein, may assume that it is fit for use.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 86-89; Dec. Dig. § 66.*]

4. TRIAL (§ 41*)—SEPARATION AND EXCLUSION OF WITNESSES.

It is within the trial court's discretion to permit particular witnesses to remain in the courtroom where the rule is invoked.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 101-105; Dec. Dig. § 41.*]

5. TRIAL (§ 41*)—SEPARATION AND EXCLUSION OF WITNESSES.

In a husband's action for injuries to his wife in which the rule was invoked, the court did not abuse its discretion in permitting both the husband and wife to remain in the courtroom; the husband being a party, and his wife having a substantial interest in the action.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 101-105; Dec. Dig. § 41.*]

6. TRIAL (§ 263*)—INSTRUCTIONS—FORM.

It was not error for the court, after stating the case, and giving some principles of law applicable thereto, to give such special charges prepared by the parties as were applicable.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 662, 663; Dec. Dig. § 263.*]

7. EVIDENCE (§ 199*)—DEMONSTRATIVE EVIDENCE—EXPERIMENTS AND TESTS.

In an action against a manufacturer of soap for injuries, where there was testimony that a poisonous substance was discovered therein causing it to effervesce when vinegar was poured thereon, it was not error to permit plaintiff to test the soap by pouring vinegar over it in the presence of the jury.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 683; Dec. Dig. § 199.*]

8. APPEAL AND ERROR (§ 1033*)—HARMLESS ERROR—ERROR FAVORABLE TO APPELLANT.

If it was error to permit such experiment it was not prejudicial to defendant where no effervescence was produced by such test.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4052-4062; Dec. Dig. § 1033.*]

9. NEW TRIAL (§ 52*)—CONDUCT AND DELIBERATIONS OF JURY—MANNER OF ARRIVING AT VERDICT.

A new trial because the jurors set down the amount of damages each thought proper and divided the aggregate by twelve, was properly denied where it appeared that there was no prior agreement that the quotient should constitute their verdict and it did not appear that such quotient was the amount finally returned.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 101-105; Dec. Dig. § 52.*]

10. APPEAL AND ERROR (§ 757*)—BRIEFS—CONTENTS.

Assignments of error complaining of the refusal of special charges will not be considered, where the charges are not copied in appellant's brief, nor reference made to the page of the record where they can be found.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3092; Dec. Dig. § 757.*]

Appeal from District Court, Dallas County; E. B. Muse, Judge.

Action by A. Clem against the Armstrong Packing Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Flippen, McCormick, Gresham & Freeman, of Dallas, for appellant. Gibson & Calloway, of Dallas, for appellee.

RAINEY, C. J. This is an action to recover damages for personal injuries to appellee's wife, Emma Clem, brought by appellee against appellant, Armstrong Packing Company, alleging, in effect, that appellant was a manufacturing company, manufacturing, among other things, a certain brand of soap labeled "B. & B.," or "Biggest and Best," which was placed on the market and sold, through retailers to ultimate consumers, the public generally; that some of this soap was purchased by appellee from a retailer for use, carried home, and used in the laundry of their family clothes, from the use of which said soap appellee's wife became poisoned and injured; that her hands, arms, and other parts of her body that came in contact with the soap, or came in contact with her hands and arms after the use of the soap, became poisoned and inflamed, causing her great pain and suffering, rendering her unable to perform her household duties, and she has become an invalid and will so remain the rest of her life; that appellant was negligent in the manufacture of said soap and placing it upon the market. Appellant answered by general and special exceptions and general denial, and specially that the soap was manufactured by it exclusively for sale to jobbers, never sold to retail dealers, nor did it warrant same to them. "The soap was not represented to be for bathing purposes, but only for laundry and ordinary cleaning purposes; that the ingredients of same are purely vegetable products, and that the soap does not contain any oils or animal greases, and that the same is free from all excessive poisonous, injurious, or deleterious ingredients and substances; that the defend-

ant has used and uses the greatest care and caution in seeing that the soap was made only from harmless substances, and that there was excluded from it any injurious, poisonous, or deleterious substances whatever in the finished product; that it would have been impossible for such injuries as are claimed by plaintiff to have been sustained by his wife from using the brand of soap known as Armstrong's B. & B. soap, but that such injuries, if they occurred at all, were not caused by said soap, but were caused by some other agency to the defendant unknown. The defendant on the trial filed a supplemental answer alleging contributory negligence on the part of the plaintiff and his wife; that Mrs. Clem was performing her labor while in a delicate condition, which caused or aggravated her injuries; that she was guilty of negligence in not immediately ceasing when she began to discover that something was injuring her hands; that the plaintiff and his wife were guilty of negligence in not at once seeking the advice of a physician; that the plaintiff and his wife were both guilty of contributory negligence in using unsterilized scissors to open the blisters on the different parts of her body, and that the plaintiff and Mrs. Clem were guilty of contributory negligence in permitting the watery substances from the blisters to come in contact with other portions of her body." A trial resulted in a verdict and judgment for appellee for \$1,500, from which the packing company appeals.

The assignments that the court erred in overruling the general exception to plaintiff's petition, and the assignment that the evidence is insufficient to sustain the verdict and judgment, raise practically the same issues, and therefore they will be considered in the same connection. The evidence, in substance, substantially supports the allegations of plaintiff's petition, in that it shows that the appellant was manufacturing washing soap for the market, selling same to jobbers, the jobbers selling to retailers, and they, in turn, selling to consumers. A retailer sold some of this soap to the appellee, whose wife used it in washing the clothes of the family, and she was injured by the use of the same in the manner alleged by plaintiff. The formula used by appellant for making the soap necessarily contained poisonous ingredients, which become harmless in the proper preparation of the soap. In the batch of soap sold to plaintiff the poison used was not neutralized, but it contained a sufficient quantity to injure plaintiff's wife in the use thereof, for which it was intended. The evidence is sufficient to show that appellant was negligent in preparing the particular batch of soap sold to plaintiff. This case, as shown by the record, was tried on the theory and supported by the facts that appellant negligently manufactured and placed upon the market the soap in question, which con-

tained injurious and poisonous substances, from the use of which the injuries sustained by plaintiff's wife proximately resulted.

Appellant contends "that, under well-settled authorities, there was no question of warranty as between Armstrong Packing Company and the plaintiff in this case, but only that Armstrong Packing Company rested under the duty imposed upon a manufacturer not to put upon the market a commodity that was unsuitable for use by the public, and which the public could not use without injury. Even in regard to this duty, the manufacturer is not an insurer, and is held to ordinary care."

[1] The liability of appellant in this action does not rest upon any contract or privity between appellant and appellee, but from the duty which the law imposes upon the manufacturer to avoid acts in their nature dangerous to the lives and persons of others. Though no contract or privity existed between appellant and appellee, yet, as appellant was manufacturing and placing the soap upon the market, it is liable primarily to any one buying and using it for the want of care in the preparation of the soap.

[2] That appellant failed to use care in its preparation is sufficiently shown by the evidence. It knew that poisonous and injurious substances were necessary in its preparation. It knew if too much of the poisonous ingredients were used, and not neutralized in manufacturing it, that injury was liable to result from the use thereof. It knew by the proper saponification the poison would become harmless. The soap was placed upon the market and injury resulted from the use thereof, which shows to our minds that appellant failed to use care in the manufacture of this particular soap, or the injury would not have happened, which fixes the liability of appellant. *Thomas v. Winchester*, 6 N. Y. 397, 57 Am. Dec. 456; *Tomlinson v. Armour Co.*, 75 N. J. Law, 748, 70 Atl. 314, 19 L. R. A. (N. S.) 923. In the case of *Thomas v. Winchester*, supra, it is held that a dealer in drugs and medicines who carelessly labels a deadly drug as a harmless medicine, and places it upon the market, is liable to all persons who, without fault on their part, are injured by using it by reason of such label. Such liability does not arise by reason of contract or privity between the dealer and the person injured, but out of the duty imposed by law upon the former to avoid acts which by their nature are dangerous to the lives of others. In *Tomlinson v. Armour*, supra, a suit for injury to a consumer caused by eating canned meat, the following language is used, viz.: "The fact that the defendant was the manufacturer, presumably having knowledge, or opportunity for knowledge, of the contents of the cans and of the process of manufacture; that it put the goods upon the market for sale by dealers to consumers, under circumstances such that neither dealer nor consum-

er had opportunity for knowledge of the contents; the fact that the goods were thus manufactured and marketed under circumstances that imported a representation to intending purchasers that they were fit for food and beneficial to the human body; that in the ordinary course of business there was a probability (it being, indeed, the very purpose of the defendant) that the goods should be purchased, and used by parties purchasing, in reliance upon the representation; and that the defendant negligently prepared the food so that it was unwholesome and unfit to be eaten, and poisonous to the human body, whereby the plaintiff was injured—make a case that renders the defendant liable for the damages sustained by the plaintiff thereby." The cases cited we think are sustained by the weight of authority and are especially applicable to the case under consideration.

[3] There was no occasion for plaintiff to test the soap for poisonous substances, nor did he do so, and he had a right to rely upon it being fit for use. He nor his wife did not know of its defect, but were ignorant thereof, and its use was without fault on their part.

[4, 5] The court did not err in permitting the plaintiff and his wife to remain in the courtroom during the trial; the rule to sequester the witnesses having been invoked. It is settled law in this state that such a matter is in the discretion of the court, and there was no abuse of such discretion in this instance. Plaintiff was a party, and his wife had a substantial interest therein. *Colbert v. Garrett*, 57 S. W. 853; *Gro. Co. v. Martin*, 57 S. W. 706.

[6] The court in its charge stated the case and gave some principles of law applicable to the case, and then proceeded to give to the jury such special charges prepared by the respective parties which he considered applicable. Appellant complains that the court erred in refusing its request to charge the jury generally and fully as required by law. This manner of charging the jury is not contrary to law, and the assignment is without merit.

[7, 8] The court did not err in allowing the plaintiff to make a test before the jury by pouring vinegar over the soap, especially as no harm resulted to appellant therefrom. There was testimony that a poisonous substance was discovered in the soap used by appellee's wife by pouring vinegar thereon, which caused it to effervesce. In the test made before the jury no effervescence was produced by the vinegar being poured on the soap. There was no error in the court's overruling the eleventh ground of appellant's motion for new trial.

[9] The complaint is that the jury reached their verdict by lot; that they agreed beforehand to set down the amount each thought proper, to divide the aggregate by 12, and

the quotient would constitute their verdict. We do not think this contention is sustained by the record. The court heard all the jurors on this matter, and he was justified from the evidence to find that each juror stated an amount; that the aggregate was divided, but that there was no agreement beforehand that the quotient so ascertained should constitute their verdict, or that the quotient so found was the amount finally returned.

[10] The eleventh and twelfth assignments of error complain of the giving of plaintiff's special charges Nos. 3 and 4. Said special charges are not copied in the brief of appellant, nor is there any reference to the page of the record where same can be found. Under such circumstances, we do not feel called upon to consider said assignments.

All other assignments have been considered, and, finding no error in the record, the judgment is affirmed.

SCOTT v. MISSOURI, O. & G. RY. CO.

(Court of Civil Appeals of Texas. Dallas.
Oct. 26, 1912. Rehearing Denied
Nov. 30, 1912.)

1. RAILROADS (§ 121*)—COMPETING OR PARALLEL LINES.

The Missouri, Oklahoma & Gulf Railway Company, which runs substantially north from Denison, Tex., to Waggoner, Okl., was not a competing or parallel line, within Rev. St. 1895, art. 4529, prohibiting the leasing of one of such lines by the other, to the Denison, Bonham & New Orleans Railway Company.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 381-385; Dec. Dig. § 121.*]

2. RAILROADS (§ 82*)—FORFEITURE OF CHARTER—EMINENT DOMAIN.

The forfeiture of its charter by a railroad for failure to construct its road within the time required by law did not cause the right of way to revert to the original owner, but such easement remained subject to the provisions of Rev. St. 1895, art. 4473, which provides, in case of forfeiture of a railroad charter, its right of way shall remain subject to an extension of the charter, or the grant of a new charter over the same way without a new consideration, and it makes no difference whether the right of way is acquired directly from the owner of the fee or by condemnation.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 213-219; Dec. Dig. § 82.*]

3. RAILROADS (§ 82*)—RIGHT OF WAY—USE BY ABUTTING OWNER—EFFECT.

In the absence of proof of the adverse use of a right of way by the abutting owner, the easement for the road will not be destroyed.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 213-219; Dec. Dig. § 82.*]

4. RAILROADS (§ 82*)—RIGHT OF WAY—ABANDONMENT.

A railroad which obtained a right of way, graded it, paid taxes on it, and never ceased trying to use it for railroad purposes, and finally succeeded in putting it to such use, cannot be held to have abandoned it, although when the way was first graded the company put gates in each fence, and the abutting owners remained in possession.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 213-219; Dec. Dig. § 82.*]

Appeal from District Court, Grayson County; B. L. Jones, Judge.

Action by the Missouri, Oklahoma & Gulf Railway Company against J. H. Scott. Judgment for plaintiff, and defendant appeals. Affirmed.

N. H. L. Decker and R. M. Finley, both of Denison, for appellant. John T. Suggs, of Denison, for appellee.

RAINEY, C. J. Appellee, claiming the right of way over certain land, sued out a writ of injunction against appellant, who threatened, by force and violence, to prevent appellee from entering upon and constructing its railway on and across said land.

Appellant claimed to have purchased the land without notice of appellee's claim, and pleaded the statutes of limitation and abandonment of said right of way by appellee's grantors.

Upon a hearing judgment was rendered perpetuating said injunction, except as to one tract of three acres, over which appellee was awarded the right of way upon the payment of \$100. From this judgment, appellant appeals.

Conclusions of Fact.

In January, 1887, the Denison, Bonham & New Orleans Railway Company was chartered by the state of Texas to construct a railroad from the city of Denison, in Grayson county, Tex., in and through the counties of Grayson, Fannin, Hunt, and Delta, by way of Bonham, in Fannin county. Said railway company, in 1888, graded its roadbed from Denison to Bonham; and it procured the right of easement over the land in controversy, except the three acres from one Turley, who then owned the land. After grading the road, in 1888 the Denison, Bonham & New Orleans Railway Company became insolvent, and did nothing further toward constructing its road until 1901, when its properties, rights, and franchises were sold under execution and bid in by the Denison, Bonham & New Orleans Railroad Company, which had been incorporated for that purpose; and the president, directors and stockholders of said railway company, by deed in writing, conveyed unto the Denison, Bonham & New Orleans Railroad Company all the right, title, and interest of the railway company to said property. This was done March 13, 1901. The Denison, Bonham & New Orleans Railroad Company then constructed its track over the right of way of the old railway company from Bonham to within five miles of Denison, at which point it deflected and connected with the track of the Missouri, Kansas & Texas Railway Company, over which it operated its road into the city of Denison. The right of way in question is located on that part of the line between Denison and where the Denison, Bonham & New Orleans Railroad

Company's track defects from the old line to connect with the Katy Road.

The Denison, Bonham & New Orleans Railroad Company transferred its right to the five-mile strip of right of way to the Missouri, Oklahoma & Gulf Railway Company for a valuable consideration, with an agreement that the Denison, Bonham & New Orleans Railroad Company could use appellee's track into Denison. The appellee's road runs practically north from Denison, Tex., to Waggoner, Okl.

When the Denison, Bonham & New Orleans Railway Company first constructed its grade, gates were placed in each fence where the grade passed through, and the owners of the land remained in possession, using and cultivating the land on either side. When appellant, Scott, bought from Turley, he saw the grade that had been constructed; but he made no inquiry about the easement, although he could have learned thereof by so doing. Turley remained in possession until he sold to Scott, without in any way repudiating the right of the railway company to its easement; and when Scott bought he took possession, held it in the same way, and never did anything indicating that his right was adverse to the claim of easement. There was no intention of abandonment of said easement by the railway company; it being the intention to utilize said right of way as soon as practicable.

Conclusions of Law.

[1] 1. Article 4529, R. S., prohibits the consolidation of competing or parallel railway lines, and prohibits the purchase or leasing of one of such lines by the other. The facts show that the Missouri, Oklahoma & Gulf Railway Company's line was not a competing or parallel line, as contemplated by law, to the Denison, Bonham & New Orleans Railway Company; and therefore it does not come within the prohibition, as stated by statute.

[2] 2. The forfeiture of its charter by the Denison, Bonham & New Orleans Railway Company to construct its road within the time required by law did not cause its right of way to revert to the original owner of the fee; but such easement remained subject to the provisions of article 4473, Revised Statutes, which provides, in case of forfeiture of a railroad charter, its right of way "shall remain subject to an extension of the charter or the grant of a new charter over the same way without a new consideration." In this connection we remark that we see no difference whether the right of way is acquired directly from the owner of the fee, or by condemnation proceedings.

[3] 3. The appellant's plea of limitation is not sustained by the proof. The possession of appellant and of his grantor was not inconsistent with appellee's right of easement; there being no acts of either showing

that they held adversely to the railway company's right of easement.

[4] 4. The facts fail to show an abandonment of said right of way. The evidence shows no intention of abandonment on the part of the railway companies. They graded it, paid taxes on it, and never ceased trying to use it for railroad purposes, and finally succeeded in putting it to the use for which it was originally acquired.

5. We find no material error in the record, and, considering all the circumstances, we think the justness of the case has been reached, and the judgment is affirmed.

FREEMAN v. KENNERLY.

(Court of Civil Appeals of Texas. Austin. Oct. 16, 1912. Rehearing Denied Nov. 27, 1912.)

1. NEGLIGENCE (§ 136*) — EVIDENCE — QUESTION FOR COURT OR JURY.

The question of negligence is one of law only, when from the undisputed facts no inference except that of negligence can reasonably be drawn, or when unprejudiced minds cannot reasonably disagree as to the facts.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 277-353; Dec. Dig. § 136.*]

2. MASTER AND SERVANT (§ 289*)—INJURY TO SERVANT — CONTRIBUTORY NEGLIGENCE — QUESTION FOR JURY.

Whether a brakeman stumbled over a clinker while walking by a moving car, or whether he recklessly placed his foot on the coupler of a car, or of an engine and was thereby injured, *held*, under the evidence, for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1089-1132; Dec. Dig. § 289.*]

3. TRIAL (§ 260*) — INSTRUCTIONS — REFUSAL TO GIVE INSTRUCTIONS COVERED BY CHARGE GIVEN.

Where, in an action for injuries to a brakeman, the issue was whether he stumbled over a clinker while walking by a moving car in railroad yards, or whether he recklessly placed his foot on the coupler of a car or of the engine, and the court charged that if in undertaking to make the coupling he voluntarily placed his foot on the coupling apparatus, and thereby received the injury complained of, or if he received his injury in any manner except as alleged in the petition, the verdict must be against him, the refusal to charge that if he placed his foot on the car, or engine and was injured in so doing, the verdict must be against him, without considering any other issue, was not erroneous.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651-659; Dec. Dig. § 260.*]

4. MASTER AND SERVANT (§ 204*)—INJURY TO SERVANT—ASSUMPTION OF RISK.

Under Acts 29th Leg. c. 163, providing that, in an action against a railroad for injury of an employé, the plea of assumed risk, where the ground of the plea is knowledge of the danger causing the injury, shall not be available where the employer or superior of the employé knew of the defect, or where a person of ordinary care would have continued in the service with knowledge of the defect, etc., a brakeman who knew that clinkers and rocks were scattered over a railroad yard and along the tracks, and that such condition rendered it dangerous to make couplings in the ordinary manner, did not assume the risk of injury by stumbling

over a clinker while walking by a moving car, where the yardmaster, whose duty it was to keep the track clean, knew that rocks and clinkers were scattered over the yard and along the track, and that such condition rendered it dangerous for employes, and where it could reasonably be inferred that a person of ordinary care would have continued in the service, notwithstanding knowledge of the danger.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 544-546; Dec. Dig. § 204.*]

5. MASTER AND SERVANT (§ 240*)—INJURY TO SERVANT—CONTRIBUTORY NEGLIGENCE.

Where a brakeman injured by stumbling over a clinker while walking by a moving car to couple it with an engine attempted to perform his duty in the usual manner, and the car was moving slowly, a recovery could not be defeated on the ground that he chose a dangerous way, though he might have walked in the center space between the tracks, or over on another track.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 751-756; Dec. Dig. § 240.*]

6. TRIAL (§ 295*)—INSTRUCTIONS—PROXIMATE CAUSE.

Where, in an action for injuries to a brakeman stumbling over a clinker while walking by a moving car in a railroad yard to couple the car to an engine, the court defined proximate cause as one which in a natural and continuous sequence produces an event, and that, to warrant a finding that negligence is the proximate cause of an injury, it must appear that the injury was the natural and probable sequence of the negligence, etc., an instruction that if the brakeman while walking struck a clinker, and thereby stumbled and fell, and sustained the injury complained of, he could recover, was not erroneous for failing to state that the negligence of the railroad company must have been the proximate cause of the injury, as all parts of instructions must be considered together in determining their meaning.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 703-717; Dec. Dig. § 295.*]

7. TRIAL (§ 191*)—INSTRUCTIONS—ASSUMPTION OF FACT.

An instruction requested by a party which assumes a fact denied by the adverse party is properly refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 420-431, 435; Dec. Dig. § 191.*]

8. TRIAL (§ 253*)—INJURIES TO SERVANT—INSTRUCTIONS—IGNORING ISSUES.

An instruction in an action for injuries to a railroad employé which ignores Acts 31st Leg. (1st Ex. Sess.) c. 10, providing that the fact that an employé may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to the employé, is properly refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 613-623; Dec. Dig. § 253.*]

9. MASTER AND SERVANT (§ 228*)—CONTRIBUTORY NEGLIGENCE—STATUTORY PROVISIONS.

Acts 31st Leg. (1st Ex. Sess.) c. 10, providing that the fact that the employé suing for a personal injury was guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished in proportion to the amount of negligence attributable to him, makes employers responsible for injuries to their employes incurred by reason of the negligence of the employers, and sufficiently punishes an employé for his negligence by diminishing the amount of damages which he would

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Index

otherwise be entitled to recover, and, so construed, the statute is valid.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 670, 671; Dec. Dig. § 223.*]

Appeal from District Court, Williamson County; Chas. A. Wilcox, Judge.

Action by Charles R. Kennerly against T. J. Freeman, receiver. From a judgment for plaintiff, defendant appeals. Affirmed.

Fisher & Fisher, of Austin, and Wilson & Dabney, of Houston, for appellant. T. J. Lawhon, of Taylor, and A. G. Greenwood and Thos. B. Greenwood, both of Palestine, for appellee.

The Issues of Fact.

JENKINS, J. 1. Plaintiff alleged, in substance, that on September 9, 1909, he was a switchman in the employ of defendant in the yards at Taylor, Tex.; that defendant and his agents and representatives, whose duty it was to exercise ordinary care to keep said yards reasonably safe for the performance of plaintiff's duties, negligently failed to discharge such duty, but permitted said yard and roadbed to be and continue in a dangerous condition by reason of the accumulation of clinkers and rocks thereon, and that plaintiff on said date, in the performance of his duties, was walking by a moving car, for the purpose of coupling same onto a dead engine, when he stumbled over a rock or clinker, and was thereby caused to fall, and his right leg was caught under a moving wheel and crushed, necessitating the amputation of the same. Defendant alleged that said injury was caused, not by plaintiff's stumbling and falling, but by his recklessly placing his foot on the coupler of the car or of the engine; in other words, that he went between the moving car and the dead engine, and attempted to kick the knuckles of the coupler either on the car or on the engine into place, so that the coupling would be made by the impact. The couplers were automatic, but sometimes the knuckles got out of place, and in such event they had to be put in place before the coupling could be made. This might be done by a bar from the outside, or by the brakeman signaling the train to stop, and going in and arranging the knuckles with his hands, either of which ways would have been safe, and would have been an ordinary way to make such coupling, or the switchman might have kicked the knuckle into place, which would not have been the ordinary way, nor one of the methods provided by the defendant, but would have been a dangerous way, not justified by ordinary prudence. Upon this issue the court instructed the jury as follows: "(9) If you find that in undertaking to make a coupling between the moving car and the dead engine the plaintiff voluntarily placed his foot on the coupler or coupling apparatus

of the car or engine, and that he thereby received the injury complained of, or if you believe that he received his injury in any manner except in the manner substantially as alleged by him in his petition, then you will find for the defendant." The jury returned a verdict in favor of plaintiff, and assessed his damage at \$8,000. It is not assigned that the verdict is excessive.

[1, 2] 2. Appellant's first assignment of error is upon the refusal of the court to instruct a verdict for the appellant. This is based upon the assumptions, first, that appellee was injured by reason of his attempting to kick the knuckle of the coupler into place; and, second, that he was guilty of contributory negligence. The question of negligence becomes one of law when from the undisputed facts no inference, except that of negligence, can reasonably be drawn, or when unprejudiced minds could not reasonably disagree as to such facts. Such is not the case here as to the manner in which appellee was injured. He testified that the train was backing in on track No. 2 for the purpose of coupling onto a dead engine; that he was the rear switchman, and was walking by the side of the moving car near the end of the same, and just before said car reached the engine that he fell over a rock or clinker, and his right leg was caught under the moving wheel and crushed; that he was on the outside of the track when he fell; that he did not go in between the cars at all, and that he did not kick or attempt to kick the knuckle, or put his foot upon the same. The appellant's testimony tended strongly to refute this evidence, but it was the peculiar province of the jury to decide upon the contradictory evidence. This issue was clearly submitted to them, as we have seen from the excerpt of the charge given by the court and above set out. *Threadgill v. Wells*, 143 S. W. 343; *Railway Co. v. Krenek*, 138 S. W. 1155; *Avant v. Watson*, 57 Tex. Civ. App. 304, 122 S. W. 587; *Brokerage Company v. Barkley*, 128 S. W. 432; *Railway Co. v. Holland*, 27 Tex. Civ. App. 397, 66 S. W. 69; *Williams v. Hennefeld*, 57 Tex. Civ. App. 54, 120 S. W. 568; *Railway Co. v. Sinclair*, 41 Tex. Civ. App. 519, 93 S. W. 703; *Railway Co. v. Hall*, 17 Tex. Civ. App. 45, 43 S. W. 26.

[3] 3. Appellant requested the following charge, which was refused: "If from the evidence you believe that the plaintiff, Charles R. Kennerly, placed his right foot on either the dead engine or moving box car, and was injured in so doing, you will return a verdict for the defendant, without considering any other issue which may be submitted to you." The court did not err in refusing to give this charge, though it correctly embodies the law of the case, for the reason that the same was substantially given as above set out.

[4] 4. Appellant cites authority in support

of his contention that if the employé knew of the danger or the same was so obvious that he might have learned it in the ordinary discharge of his duty, he assumes the risk, and the employer is not liable. The evidence in this case shows that the appellee knew that clinkers and rocks were scattered over the yard and along the track, and that he knew that such condition rendered it dangerous to switchmen in attempting to make couplings in the ordinary manner in which they were made. These authorities will not avail appellant, by reason of Acts 1905, c. 163, p. 386, which is as follows: "Section 1. That in any suit against a person, corporation or receiver operating a railroad or street railway for damages for the death or personal injury of an employé or servant, caused by the wrong or negligence of such person, corporation or receiver, the plea of assumed risk of the deceased or injured person, where the ground of the plea is knowledge or means of knowledge of the defect and danger which caused the injury or death, shall not be available in the following cases: First. Where such employé had an opportunity before being injured or killed to inform the employer or a superior entrusted by the employer with the authority to remedy or cause to be remedied the defect, and does notify or cause to be notified the employer or superior thereof within a reasonable time, provided it shall not be necessary to give such information where the employer or such superior thereof already knows of the defect. Second. Where a person of ordinary care would have continued in the service with the knowledge of the defect and danger and in such case it shall not be necessary that the servant or employé give notice of the defect as provided in subdivision 1 hereof."

The evidence in this case shows that the yardmaster, whose duty it was to keep the track clean, knew that rocks and clinkers were scattered over said yard and along the track, and that such condition of the yard rendered it dangerous for those employed as was the appellee at the time of his injury. It may reasonably be inferred from the evidence in this case that a person of ordinary care would have continued in the service of appellant, notwithstanding his knowledge of such danger; it appearing from the testimony that a great number of switchmen and yardmen had continued in the service of appellant in the yard at Taylor, notwithstanding said condition. *Railway Co. v. Gasscamp*, 69 Tex. 546-548, 7 S. W. 227; *Railway Co. v. Engelhorn*, 24 Tex. Civ. App. 324, 62 S. W. 561, 562; *Railway Co. v. Waller*, 27 Tex. Civ. App. 44, 65 S. W. 212; *Williams v. Hennefeld*, supra. The tenth paragraph of the court's charge is as follows: "If you believe from the evidence that plaintiff's injury was the result of a risk ordinarily incident to the services in which he was engaged, then you will find for the defend-

ant on the issue of assumed risk. Or, if you believe from the evidence that the injury to plaintiff resulted from the negligence, if any there was, of the defendant in the manner as alleged by plaintiff in his petition, but if you further believe that such negligence, if any, and the risk arising therefrom, if any, was known to plaintiff or would have been known to him by the exercise of ordinary care in the discharge of his duties, and that a person of ordinary care would not have continued in the defendant's service with knowledge of such risk, if any, and that no superior, with authority from defendant to cause the defects in said roadbed and yard, if any, to be remedied, had actual knowledge of same, if any, for a reasonable time prior to plaintiff's injuries, then you will find for the defendant on the issue of assumed risk. But if you find that plaintiff's injury was the proximate result of the negligence, if any, of defendant in the manner as alleged by him, and that a person of ordinary care would have continued in the service of the defendant with knowledge of the negligence, if any, and the danger, if any, arising therefrom, or if you find that a superior had been entrusted by defendant with authority to cause the defects in defendant's roadbed and yards, if any, to be remedied, and that such superior, if any there was, had actual knowledge of the defects in said roadbed and yards, if any, for a reasonable time prior to the plaintiff's injury, then the defense of assumed risk would not be available to the defendant."

[5] 5. There is nothing in the contention that appellee cannot recover for the reason that he chose a dangerous way in which to perform his duty, when he might have performed it in a safer way, and thereby assumed the risk. He was attempting to perform his duty in the usual and customary manner; that is to say, he was walking beside the car and near the end of the same where he could see if the cars made the coupling. The cars were moving slowly, at the rate of three or four miles an hour. It is true that he might have walked in the center space between the tracks, or over on another track, and had he done so he would not, in case he fell, have fallen under the cars, but in neither of these positions would he have been discharging his duty in the usual and ordinary manner; and under such conditions, the alternative of choosing a safer way in which to perform his duties was not presented. *Railway Co. v. Keefe*, 37 Tex. Civ. App. 588, 84 S. W. 681.

6. Appellant complains of the fifth paragraph of the charge of the court, which is as follows: "An employé of the receiver of a railroad company is held in law to assume such risks as are ordinarily incident to the service he is employed to perform. But a risk which arises from the negligence of the receiver is not such a risk as is ordi-

narly incident to the service, and is not such a risk as is assumed by the employé, unless the negligence and the risk arising therefrom be known to him, or would be known to him by the exercise of ordinary care in the discharge of the duties of his service. And, where the risk is known to the employé or would be known to him by the exercise of ordinary care, the risk is not assumed by him, and is not available as a defense, where a person of ordinary care would have continued in the service with knowledge of the defect and danger, nor where a superior intrusted by the receiver with authority to cause the defect to be remedied has actual knowledge thereof for a reasonable time prior to an injury caused thereby." This charge presents the law, as we understand it, under the act of 1905 above referred to. The authorities cited by appellant to sustain his contention that this charge is erroneous are cases decided prior to the passage of said act of 1905.

[6] 7. Appellant complains of the eighth paragraph of the charge of the court, for that it does not instruct the jury that appellant's negligence must have been the "proximate cause" of appellee's injury. The part of the charge complained of is as follows: "And that he (appellee) was walking upon the portion of defendant's roadbed and yards provided for that purpose, and that while so engaged his feet, or one of them, struck one of said clinkers or rocks, if any, and that plaintiff was thereby caused to stumble and fall to the ground, and that his right leg was caught and crushed beneath the moving wheels of the car next to the dead engine, and that he thereby sustained the injuries alleged in his petition, then in such case you will find for the plaintiff," etc. We think it immaterial that the words "proximate cause" are omitted from said charge. The words, "that he was thereby caused to stumble and fall" and "that he thereby sustained the injuries alleged in his petition," must have conveyed the same idea to the minds of the jury as would the words "proximate cause." "It is not always essential to a correct charge that the word 'proximate' should be used. It is enough if the instructions convey the idea with sufficient clearness to impress upon the minds of the jurors the fact that the negligence complained of was the responsible cause of the injury." *Railway Co. v. Reames*, 132 S. W. 978. In this case the evidence does not suggest any cause other than the condition of the track, except that the appellee went in front of the moving car and attempted to kick the knuckle; and this issue, as we have seen, was submitted to the jury by another paragraph of the charge. All parts of the charge must be considered together in determining its meaning. The court in the sixth paragraph of its charge defined "proximate cause" as follows: "The

'proximate cause' of an injury, as the term is used in this charge, is a cause which in a natural and continuous sequence, unbroken by any new cause, produces an event and without which the event would not have occurred; but, in order to warrant a finding that negligence is the proximate cause of an injury, it must appear from the evidence that the injury was the natural and probable sequence of the negligence and ought to have been foreseen as likely to occur, by a person of ordinary prudence, in the light of the attending circumstances." And in the seventh paragraph of said charge the court instructed the jury that the receiver would be liable if injury proximately resulted from his negligence, if any. If appellee was injured as he testified, by reason of stumbling on a clinker or rock while in the performance of his duties, and appellant had permitted said rocks or clinkers to accumulate and remain on said road and in doing so was guilty of negligence (which issues were submitted by the court to the jury), there can be no question as to what was the proximate cause of his injury.

[7, 8] 8. Appellant complains of the refusal of the court to give the following special instruction: "If from the evidence you believe the plaintiff sustained the injuries for which he sues by one of the wheels of the train of cars running over or against his right leg, you will nevertheless return a verdict for the defendant if you further find that an ordinarily prudent person in the exercise of ordinary care would not have gotten in front or in the path of the approaching train, but would have remained a sufficient distance out of or from same to avoid being injured by the moving train, and that the plaintiff's failure, if any, in this respect, constituted negligence as that term has been defined, which directly and proximately caused plaintiff's injury." The vice in this requested charge is, first, that it assumes that appellee got in front or in the path of the approaching train, which is denied by appellee; and, second, it ignores Act 1909, p. 279, which provides that "the fact that the employé may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employé." The court on this matter charged the jury that if appellee was guilty of contributory negligence in walking along and near the side of the moving train, and that such negligence contributed to the injury complained of, and the jury should find for the plaintiff under other instructions, they should take into consideration the elements of damages as in said charge directed, but should diminish the damages that they might award appellee, if any, in proportion to the amount of negligence, if any, attributable to him.

[9] 9. Appellant assails the act of 1900

with reference to contributory negligence as being unconstitutional. He contends that this act makes employers insurers of the safety of their employes. We do not so understand it. It makes employers responsible for injuries to their employes incurred by reason of the negligence of such employers. No recovery can be had under said act unless the employer was guilty of negligence, and such negligence is shown to be the proximate cause of the injury. It is true that under the common law employers were relieved from all responsibility for their negligence, however gross, if the employe was also guilty of negligence, and his negligence contributed to the injury; but the statute referred to has, as we think wisely and justly, abolished this harsh rule of the common law. It sufficiently punishes the employe in such case for his negligence by diminishing the amount of damages which he would otherwise be entitled to recover. The constitutionality of this act is not an open question in this state. *Railway Co. v. Foth*, 101 Tex. 143, 100 S. W. 175; *Railway Co. v. Bailey*, 53 Tex. Civ. App. 295, 115 S. W. 607; *Freeman v. Swan*, 143 S. W. 728; *Railway Co. v. Taylor*, 184 S. W. 820; *Railway Co. v. Alexander*, 117 S. W. 932; *Railway Co. v. Matkin*, 142 S. W. 609.

Finding no reversible error in the record, the judgment of the trial court is affirmed.

Affirmed.

JONES et al. v. LAWRENCE

(Court of Civil Appeals of Texas. Austin.
Nov. 6, 1912.)

1. CHATTEL MORTGAGES (§ 284*) — FORECLOSURE—SALE—CLAIM OF THIRD PERSON.

In a proceeding to foreclose a chattel mortgage on a horse sold by the mortgagor to two partners, a partner, not made a party to the action having intervened, is entitled to possession as against the constable levying execution issued on the judgment.

[Ed. Note.—For other cases, see *Chattel Mortgages*, Cent. Dig. § 573; Dec. Dig. § 284.*]

2. EXECUTION (§ 181*)—TRIAL OF RIGHT TO PROPERTY—RIGHT OF POSSESSION.

A claimant in a trial of the right to property should have judgment when he was in the rightful possession thereof, and was disturbed by levy of the writ, or when he was rightfully entitled to possession, and has been deprived of it by such levy.

[Ed. Note.—For other cases, see *Execution*, Cent. Dig. §§ 544-546, 557; Dec. Dig. § 181.*]

Appeal from Coleman County Court; T. J. White, Judge.

Action for trial of right of property by H. E. Jones and others, plaintiffs, against J. A. Lawrence, claimant. From a judgment of the county court for claimant on appeal from a justice court, plaintiffs appeal. Affirmed.

A. G. Walker, of Brady, for appellant. Critz & Woodward, of Coleman, for appellee.

JENKINS, J. 1. This case was a trial of the right of property in the county court on appeal from justice's court. Appellant moved to dismiss said appeal for want of a proper description of the judgment in the appeal bond, and assigns error upon the refusal of the court so to do. We overrule this assignment upon the authority of the following cases: *Warren v. Marberry*, 85 Tex. 196, 19 S. W. 994, and authorities there cited; also, *Kuamierz v. Mahula*, 77 S. W. 966; *Dillard v. Allison*, 40 S. W. 1024; *Perry v. Cullen*, 6 Tex. Civ. App. 178, 25 S. W. 1043; *Ry. Co. v. Lockhart*, 89 S. W. 321; *Ry. Co. v. Vowel*, 34 S. W. 355.

[4, 2] 2. The mortgaged property had been sold to Lawrence & Lee, who were partners in business in Coleman county. The mortgagors were sued in McCulloch county, and Lee was made a party to that suit. Judgment was rendered against the mortgagors for the debt, and against all parties as to the foreclosure of the property. The constable levied upon and took into his actual possession the mortgaged property, a horse. Lawrence filed his claimant's affidavit and bond. Judgment in the county court was rendered in his favor. We deem it unnecessary to discuss the issues raised by the numerous assignments of error further than to say that Lawrence, as one of the members of the mercantile firm, was entitled to the possession of said horse as against any right that could be acquired to same by any judgment against Lee. Lee's interest, if any, in the horse might have been levied upon in the manner pointed out by the statute. Article 2352, R. S. 1895. A claimant in the trial of the right of property is entitled to judgment, when the evidence shows that he was in the rightful possession of property, and that such possession has been disturbed by the levy of the writ, or that he was rightfully entitled to such possession, and that he has been deprived of the exercise of such right by such levy. *White v. Jacobs*, 66 Tex. 463, 464, 1 S. W. 344; *Willis v. Thompson*, 85 Tex. 307, 20 S. W. 155.

Finding no reversible error in the record, the judgment is affirmed.

Affirmed.

RUTLIN v. TRINITY OIL CO.

(Court of Civil Appeals of Texas. San Antonio. Oct. 30, 1912. Rehearing Denied Dec. 4, 1912.)

TRIAL (§ 194*)—INSTRUCTIONS—WEIGHT OF TESTIMONY.

In an action against a master, where the court fully charged on the issues of contributory negligence and assumption of risk, the giving of four special charges on contributory negligence and five on assumption of risk, at the request of the master, was improper as a comment on the weight of the evidence because putting undue stress on those issues, and tending to lead the jury to believe that it

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

was the opinion of the court that they had been proven.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 413, 436, 439-441, 446-454, 456-466; Dec. Dig. § 194.*]

Appeal from District Court, Dallas County; Kenneth Force, Judge.

Action by Alex Rutlin against the Trinity Oil Company. From a judgment for defendant, plaintiff appeals. Reversed and remanded.

Parks & Patton and Thos. S. Plowman, all of Dallas, for appellant. Walter F. Seay, of Dallas, for appellee.

FLY, J. This is a suit instituted by appellant, a former employé of appellee, to recover damages alleged to have accrued by reason of a defective machine, designated a "former," which was used in the manufacture of cotton seed cake, whereby his hands were mashed and lacerated. Appellee pleaded contributory negligence and assumed risk. The cause was tried by jury, and resulted in a verdict and judgment in favor of appellee.

There is a conflict of evidence in the case, the evidence of appellant tending to show that the injury was caused by a defect in the machine and without fault on the part of the appellant, and that of appellee tending to show assumed risk and contributory negligence on the part of appellant. It was shown by appellee that the carriage which mashed appellant's right hand would not move without a lever being pressed, but appellant, and at least one other witness, testified that he did not have his hand on the lever. The evidence was sufficient to take the case to the jury, and the court submitted it to the jury on every issue raised by the evidence, among such issues being assumed risk and contributory negligence. Not satisfied, however, with the charge given by the court, appellee requested four special charges on contributory negligence and five on assumed risk, all of which were given by the court. This was undue repetition, and gave such prominence to the issues named that it was upon the weight of the testimony. *Powell v. Messer*, 18 Tex. 401; *Traylor v. Townsend*, 61 Tex. 144; *Hays v. Hays*, 66 Tex. 607, 1 S. W. 895; *Fore v. Hitson*, 70 Tex. 517, 8 S. W. 292; *Perez v. Everett*, 73 Tex. 431, 11 S. W. 388; *Kroeger v. Railway*, 30 Tex. Civ. App. 87, 69 S. W. 806; *Railway v. Condra*, 36 Tex. Civ. App. 556, 82 S. W. 528. The special charges, together with the charge of the court, undoubtedly put undue stress upon the issues of contributory negligence and assumed risk, and would lead a jury to believe that it was the opinion of the court that those issues had been proved. The issues were fully presented by the court and the numerous charges requested by appellee should have been refused.

The judgment is reversed, and the cause remanded.

SEIBER v. NEWMAN et al.

(Court of Civil Appeals of Texas. Amarillo. Oct. 19, 1912. Rehearing Denied Nov. 30, 1912.)

SPECIFIC PERFORMANCE (§ 127*)—ALTERNATIVE RELIEF.

A party may, in the same suit on a contract, pray for performance and, in the alternative, for rescission without being put to the election of either remedy.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 406-411; Dec. Dig. § 127.*]

Appeal from District Court, Hemphill County; L. S. Kinder, Judge.

Action by C. S. Seiber against A. M. Newman and another. From a judgment in favor of one defendant and for plaintiff against another defendant, plaintiff appeals. Affirmed in part, and reversed and remanded in part.

Willis & Willis, of Canadian, for appellant. Baker & Sanders and H. E. Hoover, all of Canadian, for appellees.

HALL, J. A peremptory instruction was given the jury by the trial court, and in accordance therewith verdict returned in favor of appellee Canadian Long Distance Telephone Company, and in favor of appellant, against A. M. Newman, for the amount of the note in suit. The judgment is affirmed as against A. M. Newman, and is reversed and remanded as to Canadian Long Distance Telephone Company. In view of another trial, it is not proper for us to discuss at length the evidence, but suffice it to say that there was sufficient testimony to have required the trial court to instruct the jury upon the issues, as contended for by appellant under his first, second, third, fourth, and fifth assignments of error. Special exception No. "C," urged by plaintiff as against defendant company's plea of estoppel, should have been sustained, as contended under the sixth assignment. Appellant's seventh assignment is not briefed as required by the rules, and is disregarded. What has been said disposes of the eighth assignment in favor of appellant. The ninth assignment is that the court erred in sustaining defendant telephone company's exception to plaintiff's special pleading in his first supplemental petition, in which plaintiff prayed in the alternative for the return of his property in the event it appeared that the same was acquired by the fraud of A. M. Newman. Since, under our system of pleading, a party may, in the same suit upon a contract, pray for performance, and in the alternative for rescission, without being held to have elected either remedy, it follows that the ninth assignment must be sustained.

Affirmed in part and reversed and remanded in part.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

FT. WORTH & D. C. RY. CO. v. WININGER.
(Court of Civil Appeals of Texas. Amarillo.
Oct. 26, 1912. Rehearing Denied
Nov. 30, 1912.)

1. RAILROADS (§ 350*)—INJURIES TO CHILD ON TRACKS—NEGLIGENCE—EVIDENCE.

In an action for injuries to a child received while she was crossing railway tracks, evidence held sufficient to go to the jury on the question of the defendant's liability.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1152-1192; Dec. Dig. § 350.*]

2. RAILROADS (§ 376*)—INJURIES TO CHILD ON TRACKS—DUTY OF RAILROAD EMPLOYEES—LICENSEES.

Railroad employees in charge of a train standing in a railway yard and cars moving therein, who knew of the presence of a child and her father, who were passing through the yard as licensees, were charged with the duty of using ordinary care to avoid injuring them.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1275-1279; Dec. Dig. § 376.*]

3. TRIAL (§ 252*)—INJURIES TO CHILD ON TRACKS—DUTY OF EMPLOYEES—INSTRUCTIONS—EVIDENCE.

In an action for injuries to a child received while crossing railroad tracks in a railroad yard, a charge that it was the duty of the defendant's employees operating its trains to use ordinary care to discover and avoid injuring persons who might be upon or near its track was properly given, where the evidence disclosed that the yards were constantly used as a passageway to get from one side of the track to the other, and the person injured and her father were so using the yards at the time of the injury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 505, 596-612; Dec. Dig. § 252.*]

4. TRIAL (§ 244*)—INJURIES TO CHILD ON RAILROAD TRACKS—INSTRUCTIONS—UNDUE PROMINENCE TO ONE MATTER.

In an action for injuries to a child received while she was crossing railroad yards, an instruction which included a definition of ordinary care, with the qualification that the rule was not applicable if the injured person was not, at the time of her injury, possessed of sufficient intelligence to know and appreciate the danger of crossing under and between the cars while switching was being done, together with a definition of the issue of contributory negligence containing a similar qualification, and a submission of the issue of contributory negligence as applied to an infant of the years of the person injured, was not improper as giving undue emphasis to the exemption from contributory negligence theory.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 577-581; Dec. Dig. § 244.*]

5. TRIAL (§ 252*)—INJURIES TO CHILD ON TRACKS—CONTRIBUTORY NEGLIGENCE—INSTRUCTIONS—EVIDENCE.

In an action for injuries to a child, instructions defining ordinary care, with a qualification that the rule is inapplicable where the injured person is not possessed of sufficient intelligence to know and appreciate the danger, together with a definition of contributory negligence and a similar qualification, and a submission of the issue of contributory negligence as applied to an infant of the years of the person injured, were properly given, where the evidence showed that the plaintiff was less than six years old, was too small to go to school at the time, and had never more than once or twice made the trip which she was making at the time of her injury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 505, 596-612; Dec. Dig. § 252.*]

6. WITNESSES (§ 236*)—EXAMINATION—RIGHT TO COMPLAIN OF FAILURE TO EXAMINE.

A defendant, in an action for injuries to a child while crossing the defendant's railroad yard, cannot complain of the failure of plaintiff's counsel to interrogate her, when she was on the witness stand, to test her intelligence and ability to appreciate her danger at the time of the accident, as such matters could properly have been brought out by the counsel for the defendant.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 817-826; Dec. Dig. § 236.*]

7. RAILROADS (§ 369*)—INJURIES TO CHILD ON TRACKS—DUTY TO PERSONS IN YARDS.

Where a conductor in charge of a train standing in a railroad yard saw a child and her father walking along the right of way near the cars under his care, and knew that a public crossing near by was blocked, he was charged with the knowledge that such person might attempt to cross said cars at the first opening between the same, and in attempting to do so would be in a position of danger, and it was his duty to keep a lookout in that direction before giving a signal for the movement of such cars.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1259-1262; Dec. Dig. § 369.*]

8. RAILROADS (§ 356*)—OPERATION—DUTY TO PERSONS IN YARDS.

The constant use of railroad yards as a passageway from one side of the track to the other is sufficient to charge the railroad company with notice thereof and to impose upon its employees the duty to use ordinary care to prevent injury to persons so using the yards.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1223-1234; Dec. Dig. § 356.*]

9. APPEAL AND ERROR (§ 742*)—ASSIGNMENTS OF ERROR—PROPOSITIONS CONTAINED—REQUIREMENT FOR SINGLENES.

A reviewing court under rules for the Courts of Civil Appeals (rule No. 32 [142 S. W. xiii]), relating to briefs and providing that propositions, if more than one, under one ground of an assignment, shall refer to it and be stated separately, need not consider an assignment of error containing three separate and distinct propositions of law.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3000; Dec. Dig. § 742.*]

10. DAMAGES (§ 216*)—INJURIES TO CHILD—INSTRUCTIONS—EVIDENCE.

Where, in an action for the loss of a foot while crossing railway tracks, the evidence developed that before the injury the child injured was sound, healthy, and well developed, a charge on her loss of earning capacity after she should arrive at the age of 21 years was proper, though there was no direct and specific proof thereof.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 548-555; Dec. Dig. § 216.*]

11. DAMAGES (§ 216*)—INJURIES TO CHILD—PHYSICAL AND MENTAL SUFFERING—INSTRUCTIONS.

Where the evidence disclosed that plaintiff's leg was badly mangled above the ankle, and the ankle partly crushed, that an amputation between the ankle and knee was necessary, that the leg, from which the foot was amputated, would not develop to the same size as the other, and that the child was forced to take an anæsthetic for the amputation, remained in bed about a week thereafter, and was extremely nervous thereafter, an instruction on physical and mental suffering was properly given.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 548-555; Dec. Dig. § 216.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

12. NEGLIGENCE (§ 141*)—IMPUTED NEGLIGENCE—INJURIES TO CHILD—NEGLIGENCE OF FATHER—INSTRUCTIONS.

In an action for injuries to a child while crossing railway tracks, a charge authorizing a finding for defendant, if the child was induced to go between or under defendant's cars by her father, and the accident would not have occurred but for her father's act, was properly refused for its failure to require a finding that the act of the father was the sole cause of the accident, as otherwise contributory negligence of the father would be imputed to the child.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 382-399; Dec. Dig. § 141.*]

13. NEGLIGENCE (§ 141*)—INJURIES TO CHILD—CONTRIBUTORY NEGLIGENCE—AGE—INSTRUCTIONS.

In an action for injuries to a child while crossing railway yards, a requested instruction that if there was open to the plaintiff, before she and her father started to cross defendant's train, another way which was safe, and if plaintiff voluntarily chose the unsafe way, she was guilty of negligence which, if it contributed to her injury, would preclude a recovery, was properly refused because it would hold such child responsible for contributory negligence notwithstanding her tender years and without inquiry as to her capacity to select between a safe and dangerous way.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 382-399; Dec. Dig. § 141.*]

14. TRIAL (§ 191*)—INJURIES TO CHILD ON TRACK—INSTRUCTIONS ASSUMING FACTS.

The instruction was further erroneous in assuming that the child attempted to cross defendant's train where the evidence shows that she was crossing through an opening between cars standing upon a side track, which were no part of the train which caused her injury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 420-431, 435; Dec. Dig. § 191.*]

15. TRIAL (§ 260*)—REQUESTED INSTRUCTION—INCLUSION IN GENERAL CHARGE.

A special charge requested was properly refused where the proposition presented was fully covered by the general charge of the court.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651-659; Dec. Dig. § 260.*]

16. APPEAL AND ERROR (§ 1060*)—TRIAL (§ 125*)—ARGUMENT OF COUNSEL—IMPROPRIETY—PREJUDICE.

In an action for injuries to a child while crossing railroad tracks, a statement of the plaintiff's counsel that "they (meaning the attorneys for defendant) make me tired in talking about sympathy for this little girl (pointing to the plaintiff). Oh, yes, I wonder how about the bondholders and coupon clippers that own this road"—was improper as relating to matters outside the record, but will not constitute reversible error where called forth by expressions of sympathy for the plaintiff by the opposing counsel, and the verdict was not excessive.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4135; Dec. Dig. § 1060;* Trial, Cent. Dig. §§ 303-307; Dec. Dig. § 125.*]

17. DAMAGES (§ 132*)—EXCESSIVE—LOSS OF FOOT.

Ten thousand dollars is not excessive recovery for the crushing of a foot of a child five years and eight months old, which necessitated amputation about halfway between the foot and the knee.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 372-385, 396; Dec. Dig. § 132.*]

Appeal from District Court, Donley County; J. N. Browning, Judge.

Action by Halys Wininger, by her next friend, E. H. Wininger, against the Fort Worth & Denver City Railway Company. From a judgment for plaintiff, defendant appealed to the Court of Civil Appeals, and, from a judgment of reversal therein, plaintiff brought error to the Supreme Court. Heard on a reversal and remand to the Court of Civil Appeals. Judgment for plaintiff affirmed.

See, also, 141 S. W. 273, and 143 S. W. 1150.

Spoons, Thompson & Barwise, of Ft. Worth, H. B. White, of Clarendon, and Turner & Wharton, of Amarillo, for appellant. A. T. Cole, of Clarendon, and D. W. Odell, of Ft. Worth, for appellee.

PRESLER, J. In this case appellee, Halys Wininger, sues by her next friend, E. H. Wininger, to recover damages on account of injuries sustained by her in the yards of the Ft. Worth & Denver City Railway Company at Clarendon, Tex., on the 25th day of April, 1909, necessitating the amputation of her limb between foot and knee. At the time of the injury, she was about five years and eight months old. A verdict was rendered against appellant for \$10,000, and judgment entered in accordance therewith. From which said judgment appellant has duly appealed, and the case is before this court for revision. At a former day of the last term, this court (141 S. W. 273), by an opinion handed down by Chief Justice Graham, reversed and rendered this cause, holding that the evidence, taken as a whole, failed to show such negligence as is alleged in the petition on the part of appellant or its employees, proximately causing the injury complained of, and that the charge requested by appellant, giving a peremptory instruction to the jury to return a verdict for appellant, should have been given. On error brought by appellee, the Supreme Court (143 S. W. 1150) on February 21, 1912, reversed the judgment of this court, and remanded said cause to this court to be disposed of in accordance with the opinion of the Supreme Court, stating the evidence on the question of appellant's liability, which statement we here adopt, as follows:

[1] "Clarendon is the county seat of Donley county, and the road of the defendant company passes through the town, we will say from east to west, dividing the town so that hotels and some business houses and residences are north of the tracks; but the main business houses, churches, and school-houses are on the south of the railroad tracks. The tracks of the railroad extended from east to west, as before stated, and the side tracks and switches, in fact, the

yards of the railroad, were located on the north side of the track, embracing about 400 feet north and south, and 3,000 feet east and west. Three switch tracks were located on the north side of the main track, numbered 1, 2, and 3, and one switch track on the south. A water tank and coal chute were located in the yards.

"The company's said yards had been inclosed by a post and wire fence for many years, but the fence was not in good repair at the time of the injury, and had not been for some time prior thereto; there being places where the wire was loose from the posts, and in one or two places the top wires had been tied together so as to allow easy passage of pedestrians through the fence, and those who had occasion so to do had been for many years going through and over said fence and across said yards and tracks to such an extent as to make reasonably well-beaten paths along and across said yards, which existed at the time of the occurrence. Children living in the same vicinity with appellee on the north side of the tracks had been habitually going and coming across said yards in attending school on the south side thereof. Garnet street is the first open street east of the yards connecting the north and south sides of the city, and it was generally used by persons in the northeast and southeast portions of the city in passing from north to south over the line of railroad. Appellee resided with her father in the southeast corner of block No. 238, the east boundary line of which forms the west boundary of Garnet street, and it is the second block north from the company's yards; his residence being about 500 or 600 feet a little west of north from where the company's main line crosses Garnet street. The church to which appellee and her father had started when she received her injuries was situated in the northeast corner of block No. 42, being the fourth block and about 700 or 800 feet south of the company's main line, and between Gorst and Kearney streets. It is thus seen that appellee resided northeast of the company's yards, and the church to which she was going was southwest thereof.

"On Sunday morning, about 9 o'clock, about April 25, 1909, appellee, in company with her father, left their home to go to church, intending to cross the railroad on Garnet street; but, as they came out of their residence, they saw that an engine and train attached, headed east, was standing across Garnet street so they took one of the trails or paths mentioned, leading in a southwest direction, and followed it until after they got into the company's yards, passing onto the yards about 1,000 feet east of the water tank, and reached switch track No. 3 at about 950 feet east of the water tank; but, as there was a string of cars on track No. 3, they continued in a west course on the north side of the

track until getting within about 500 or 600 feet of the water tank. They came to the caboose, which had been cut loose from the train, and here they crossed track No. 3 east of the caboose so as to be between it and track No. 2, and continued their journey west. About the time they were passing the caboose, they passed also the conductor, who was on the ground between tracks Nos. 2 and 3 and near the west end of the caboose; he seeing them, and they him. There then being a string of cars on track No. 2, they continued their journey west between tracks 2 and 3 to a point slightly east of the water tank, when they tried to cross track No. 2 by going between cars, which were separated a space of six to eight feet on track No. 2, and in attempting to cross track No. 2 at this point appellee received her injury by a car which was moving west on track No. 2; the father at the time being from one to two steps ahead of her. At the time they passed the conductor and brakeman as hereinbefore mentioned, the father was slightly ahead of the child. While appellee and her father were going west between tracks 2 and 3, after they had passed the conductor, they saw the rear brakeman on top of the train then on track No. 2, and he saw them, and they passed on by. There was a long string of empty box cars standing on track No. 2, extending from about 15 to 20 cars east of the water tank to 20 or 25 cars west of it; this string of cars being uncoupled in two or three places, leaving a short space between where uncoupled. As the crew were backing in on track No. 2 the second time to pick up the first division of their train left there, while moving from two to six miles per hour, they backed against it, causing it to move the string of cars west and on the same track, and appellee was injured about 15 cars west of where the crippled car was, and by one of the cars which was on the track when the freight train pulled into the yards, and one not belonging to the train, being handled by the crew. At the time the injury was inflicted, the east end of the train was pointing south of east, and the west end of it south of west, so as to place the most northerly portion of the train about the middle thereof and about opposite where the caboose stood, making a curve in the south side of the train. The conductor, at the time of the injury, was about 31 to 35 car lengths from the engine, and was on the north side, and could have seen appellee and her father at all times after they passed him until they passed behind a car on track No. 2, which caused the injury. The train and crew were under the control and direction of the conductor; the crew consisting of the conductor, the rear and head brakeman, and the fireman and engineer." "No bell was being rung nor whistle blown during the time."

We add to the foregoing statement the

testimony of the plaintiff, E. H. Wininger, as follows: "That fence (inclosing railroad yards) has been kept temporarily up all the while, but has always had gaps through the wire admitting the passage of persons. 'The wire is lowered and raised so as to go through there, and people cross there all the time. There are four well-defined passageways between Crahart street and Garnet street that have been constantly used up to the time of this accident.' The witness testified to walking between the second and third tracks until he reached the first opening between the cars, and said: "When we got to the open space there between the cars, and it was the first opening we came to, there was no signal of any kind to indicate that the engine was going to move the string of cars. There was no ringing of the bell or blowing of the whistle. There was no signal of any character or kind given to warn any one that the train was about to move. There was no signal given up to the time of the accident. In crossing this track here, she and I started across the track—that is, the little girl, Halys, and myself—and she was possibly a little behind me. I had let her go with me, and had led her along up the track there for a while, and her nature is to want to be free, and she said, 'Papa, let me go,' and I did so. She said, 'Papa, let me go. I can get along all right without you holding my hand.' Just before we started across here—we started across, and I was possibly a step or a step and a half ahead of her. She was on my left, and, expecting nothing to happen, I did not have my eye on her directly all the time; but when this noise came down the string of cars—that is, the noise of the cars being hit by the engine—the noise of the cars being hit together by the engine seemed to excite her, and she stepped quickly about to the south rail of the middle siding and started to spring and slipped back over this south rail of the middle siding. She slipped to the north side of the south rail of the middle siding, and I started to grab her, but before I could get hold of her the wheel had passed over the foot and limb. I grabbed the child, but it was too late. The accident had already occurred, and her leg and foot were cut off. I took the child in my arms and some way got on the north side of the track. There is a space there that I know nothing about. 'There is a little space there from the time I grabbed the child. The next thing I knew I was on the north side of the track, facing towards home, with the child in my arms.' The court then continues as follows: "We have omitted all the facts that are adverse to plaintiff's claim, and have stated, as we believe, the view of the evidence most favorable to the plaintiff."

In *Jee v. Railroad Co.*, 89 Tex. 583, 36 S. W. 83, this court said: "Negligence, whether of the plaintiff or defendant, is

generally a question of fact and becomes a question of law to be decided by the court only when the act done is a violation of some law, or when the facts are undisputed and admit of but one inference regarding the care of the party in doing the act in question; in other words, to authorize the court to take the question from the jury, the evidence must be of such character that there is no room for ordinary minds to differ as to the conclusion to be drawn from it. *Railway v. Kane*, 69 Md. 11, 13 Atl. 387, 9 Am. St. Rep. 395; *Baltimore & O. R. Co. v. Griffith*, 159 U. S. 603, 16 Sup. Ct. 105, 40 L. Ed. 274; *Railway v. Ives*, 144 U. S. 417, 12 Sup. Ct. 679, 36 L. Ed. 485; *Railway v. Gasscamp*, 69 Tex. 547, 7 S. W. 227; *Chatham v. Jones*, 69 Tex. 746, 7 S. W. 600. The test there laid down has been frequently approved and reiterated by this court. That test must be applied in determining whether the Court of Civil Appeals had authority in this case to render this judgment."

The Supreme Court then further holds: "The evidence is amply sufficient to authorize a conclusion that the yards were constantly used by persons to pass from one side of the track and yards to the other, and that the school buildings and churches were on the south side. Such constant use was sufficient to charge the railroad company with notice thereof and to impose on its employees the duty to use ordinary care to prevent injury to such persons as might be passing through the yards. The evidence would justify the conclusion that the father and child were in this instance attempting to cross the track on their way to church or Sunday school. They would have crossed at Garnet street, but that was blocked by a train. That in passing over the third (north) track going south, the purpose to cross the yards was manifested, and at this point the conductor of the train which caused the injury saw them, and must have known, from the direction in which they were going, that they would probably cross the second track at the first opening. He could have seen the man and child from the time they crossed the third track until he caused the cars to move against those standing on the second track. The jury were authorized to conclude that he did see them and knew their purpose, and, without giving notice, he caused the train under his control to move back against the car which caused the injury. The evidence would support a conclusion that the conductor was negligent in failing to see that no one was in position to be injured by the movement of the cars. The evidence would warrant a jury in finding that the failure to give any warning signal of the intended movement of the train constituted negligence on his part, which caused the injury to the child. There is evidence which controverts some of the facts stated, from which a jury might draw different conclusions, and nothing said by us shall be re-

garded as passing upon the evidence as a whole. The evidence showed such use of the yards in question as required of the employes of the railroad company to use ordinary care to discover any persons who might be using the yards, and the conductor, knowing of the presence of the father and child in the yards, was required by the law to give notice of the movement of the cars. *T. & P. Ry. Co. v. Watkins*, 88 Tex. 25, 29 S. W. 232. It would be superfluous to cite other authorities. The case of *Blossom Oil Co. v. Poteet* (Sup.) 136 S. W. 432 [35 L. R. A. (N. S.) 449], rests upon different facts, and was controlled by different principles of law. In that case there was no act of any employé of the oil company that caused the injury; liability was predicated upon the negligence of the employes of the company in permitting the young child to remain in the mill and to get into the place of danger. This court held that the fact that the child was with the father and mother relieved the company from any obligation to care for the child. In this case the father was caring for the child, which was not injured by any act of hers, but the negligent acts of the servants of the railroad company. If the father had been injured instead of the child, he could have recovered. The cases are wholly dissimilar."

Our former opinion is therefore here vacated and held for naught, and appellant's said first assignment, complaining that the trial court erred in not giving appellant's requested peremptory instruction, is here disallowed and overruled.

[2] Appellant, under its second assignment of error, complains of the third paragraph of the charge of the court, wherein the jury is instructed as follows: "It is the duty of the employes of a railway company, operating its trains, to use ordinary care to discover and avoid injuring persons who may be upon or near its track. The degree of such care being such as a person of ordinary prudence and caution would ordinarily exercise under the circumstances, and varying as the known probabilities of danger may vary along the different portions of the route over which such trains are run, and a failure to use such care by its employes, is negligence on the part of such company for which it is liable in damages for an injury resulting from such negligence, unless such liability is defeated by contributory negligence on the part of the person injured"—contending that it was not the duty of appellant's employes operating its train to use any care to discover persons near its tracks on the occasion in question, because the accident did not happen at a place which was public to that extent which would require train operatives to keep a lookout for persons near the track and under the conditions existing at the time of the accident; that it was not the duty of the employes of the defendant to observe the movements of plaintiff and her father while they were near the track, as

they were then in no danger. In this contention we cannot concur, believing it was the duty of appellant's employes, in charge of its train and cars moving upon the yards at the time, to use ordinary care to avoid injuring appellee and her father, whose presence the evidence shows was known to said employes, and that this duty would obtain, even in favor of a trespasser, and much stronger in favor of appellee and her father, whom we hold, as shown by the evidence, to have been licensees on appellant's switchyards and railroad track. We find no error in the charge complained of and the assignment is overruled. *Texas & Pacific Railway Co. v. Phillips*, 37 S. W. 620.

[3] Nor do we think there is any error shown under appellant's third assignment of error, complaining of the third paragraph of the court's charge, in instructing the jury that it was the duty of appellant's employes operating its trains to use ordinary care to discover and avoid injuring persons who might be upon or near its track, contending that no issue was raised by the evidence justifying such a charge. We think, however, it being shown by the evidence that the yards and track were constantly used by persons to pass from one side of the track and yards to the other, that such constant use was sufficient to charge the railroad company with notice thereof, and to impose on its employes the duty to use ordinary care to prevent injury to such persons as might be passing through the yards. The evidence would justify the conclusion that appellee and her father were in this instance attempting to cross the track on their way to church or Sunday school. We therefore conclude that the charge complained of was properly given, and that the assignment should be overruled.

[4] Appellant's fourth assignment of error complains of the fourth, fifth, and seventh sections of the court's charge on the ground that the court gave undue emphasis to the instruction that the jury should not find plaintiff guilty of contributory negligence unless they should find that she was possessed of sufficient intelligence to know and appreciate the danger of crossing under or between the cars while switching was being done, by unduly and unnecessarily repeating said instruction; it appearing from an inspection of the charge that one of the instructions complained of by appellant being a definition of ordinary care, the other a definition of contributory negligence, and the third a charge submitting to the jury the issue of contributory negligence as applied to the facts of this case, we are of the opinion that the court did not err in each of said paragraphs in instructing the jury as complained of in said assignment, and that such instruction was not an unnecessary repetition of the correct legal proposition that the plaintiff could not be guilty of contributory negligence unless the jury should find that

she was possessed of sufficient intelligence to know and appreciate her danger. The said fourth paragraph of the court's charge, which is a definition of ordinary care, and in our opinion is properly qualified, is as follows: "This rule of law, however, cannot be applied to the acts and conduct of plaintiff, Halys Wininger, unless you believe from the evidence that she was, at the time of her injury, possessed of sufficient intelligence to know and appreciate the danger of crossing under or between the cars while switching was being done." In the fifth paragraph the court defines contributory negligence with a similar qualification. In the seventh paragraph the court submits to the jury the issue of contributory negligence on the part of the appellee, and properly submits said issue as applied to an infant of her years. We are further inclined to the opinion that, in view of the tender years of appellee (five years and eight months), the court would have been justified in instructing the jury, as a matter of law, that appellee was not guilty of contributory negligence, and that issue was not raised by the evidence. There is no merit in the assignment, and it is overruled. *G. C. & S. F. Ry. Co. v. Coleman*, 51 Tex. Civ. App. 415, 112 S. W. 693; *Ollis v. H. E. & W. T. Ry. Co.*, 31 Tex. Civ. App. 601, 73 S. W. 30; *Evansich v. G. C. & S. F. Ry. Co.*, 57 Tex. 126, 44 Am. Rep. 586; *H. & T. C. Ry. Co. v. Simpson*, 60 Tex. 103; *Freeman v. Carter*, 81 S. W. 81; *Cook v. Direct Navigation Co.*, 76 Tex. 358, 13 S. W. 475, 18 Am. St. Rep. 52; *T. & P. Ry. Co. v. Phillips*, 91 Tex. 281, 42 S. W. 852; *T. & P. Ry. Co. v. Fletcher*, 6 Tex. Civ. App. 736, 26 S. W. 446; *T. & N. O. Ry. Co. v. Brouillette*, 130 S. W. 886; *M. C. Ry. Co. v. Rodriguez*, 133 S. W. 690; 1 *Thompson on Negligence*, § 310.

[5] Appellant, under its fifth assignment of error, complains of the same portion of the same instruction referred to in the foregoing assignment, and contained in sections 4, 5, and 7 of the court's charge, on the ground that the petition, upon its face, raised the issue of contributory negligence, alleging that appellee was a child of tender years, being only five years of age, without sufficient judgment and discretion to understand the danger and peril of attempting to cross defendant's said track, and that the burden was on her to establish these allegations in support of which she had offered no testimony, and further complains that, although appellee was on the witness stand for the purpose of exhibiting her injured limb to the jury, her counsel did not ask her any questions in order to demonstrate her intelligence and ability to appreciate her danger at the time of the accident. We are of the opinion that the assignment is without merit; the evidence showing, without contradiction, that appellee at the time of her injury was less than six years old; that she had never attended school, and was too small to go to school at the time, and had never more than

once or twice made the trip from her home to town or town to her home alone. In the case of *H. E. & W. T. Ry. Co. v. Adama*, 44 Tex. Civ. App. 293, 98 S. W. 224, where recovery was sought for injuries to a seven year old child, in response to a similar suggestion as here made, the court said: "In the case before us, if it could not be held that Naomi's tender age conclusively placed her in the category of those incapable of contributory negligence, it is certainly true that the issue was in the case, and that the possession of that discretion on her part was a thing to be shown by defendant." Which holding we here commend and hold to be applicable to the facts of this case.

[6] In this connection, we note the statement of appellant, in its assignment, to the effect that appellee was placed on the witness stand, and that her counsel did not ask her any questions in order to test or demonstrate her intelligence and ability to appreciate her danger at the time of the accident, and feel constrained to remark that this omission on the part of appellee's counsel could easily have been remedied by counsel for appellant interrogating the witness, if, notwithstanding her tender years, upon her being offered on the witness stand, he had cause to believe she had such unusual intelligence and ability to appreciate her danger at the time of the accident as would make her capable of contributory negligence. The assignment is overruled.

[7] Under its sixth assignment of error, appellant complains of the sixth paragraph of the court's charge, which is as follows: "Bearing in mind the foregoing definitions and instructions, if you believe, from a preponderance of the evidence, that, before and at the time plaintiff received the injuries complained of in her petition, it was the custom of the people residing in the north-eastern part of the town of Clarendon to cross the tracks of the defendant at or near the point of the accident, and that paths and places of entry had been made for that purpose so as to make the same a common passageway for pedestrians across defendant's right of way, tracks, and yard at said point, and that such custom and such use of said paths and passageways was with the knowledge, consent, and acquiescence of the defendant company, and that, in an attempt to cross over defendant's track at an opening between cars, the said cars were, by defendant's employés, and without the exercise of ordinary care on their part, suddenly moved backwards and towards the plaintiff, without a signal or warning of any kind to her, and that, before she could escape from her then position of peril, she received her injuries in the manner and form complained of in her petition, or if you believe from the evidence that the defendant's conductor and brakeman, or either of them, knew of the presence of plaintiff and her father before

said accident, and knew, or had reason to believe, that they would probably undertake to cross over said track and between the cars, and said employes failed to exercise ordinary care in moving said cars, to prevent the accident, and you further find that such act or omission of defendant's said employes was negligence, as hereinbefore defined, and that such negligence was the proximate cause of plaintiff's injuries, then you will find for the plaintiff, unless you find that she was guilty of contributory negligence under the instructions herein given you." Contending that the language employed by the court indicated to the jury that appellee was in a position of peril at the time defendant's employes started to move the train, and that there is no evidence to sustain such a charge, and no evidence to show that appellant knew of appellee's being in a position of peril any time until after the accident, and because said charge was upon the weight of the evidence, we are of the opinion that the charge complained of was warranted by the evidence.

E. H. Wininger testified, in substance, that, at the time he saw the conductor and brakeman and passed down between the tracks, the cars were not in motion, but were standing still; that when they came to the opening in question, which was six or eight feet in width, they started to cross through it, and that no signal of any kind was given to indicate that the cars were to be moved; that, in going across the track, he was a step or two ahead of the child, and that, as the string of cars started to move, the noise seemed to excite the appellee, and she stepped quickly about to the south rail of the track and started to spring and slipped back over the south rail, and that he started to grab her, but before he could do so her leg and foot had been cut off. And again that at the time he and appellee intended to cross this track, the cars were standing still, and there were no engines attached to them that he knew of.

We are further of the opinion that the evidence conclusively showed that the employes of appellant had knowledge of the presence of appellee and her father on the tracks, and that they were negligent in failing to keep an efficient lookout and in failing to give signals of warning that the cars were about to be moved. The evidence shows that the conductor was standing on the north side of the string of cars in controversy, superintending the movement of the cars. He testified, in part, as follows: "I knew the little girl and her father were on the right of way of the Denver about four or five minutes before the accident. I saw them coming along the track. I was standing near where the coupling was being made at the time of the accident. I probably could have seen them start towards the cars if I had been looking that way, but my duties were

in the opposite direction, and I was looking towards the engine, giving signals to make the coupling. I was on the north side of the train at the time of the accident, and I was on the same side of the train with the girl and her father when I last saw them walking along the track. They walked along the north side of the track, the same side that I was on. I saw Mr. Wininger and his two little girls going in a west or north direction. I saw him and the two little girls in between the passing track and No. 2 track and going south—no, north, I meant to say (west according to the directions adopted by counsel for appellant and ourselves). That was four or five minutes before the accident. I think it took them four minutes to get up to where the accident happened. I was there all the time and after they passed me, and never saw them until I heard the scream. I don't remember turning around before that and looking in their direction. When I turned I saw Mr. Wininger in a stooped position with the little girl in his arms, and the other child was close by them jumping up and down. At the same time (i. e., the time the child screamed), I saw a man come out close to her in a stooped position as though he came out from under the car. I saw a man moving very close to a car in a stooped position with a child in his arms. I first saw the appellee and her father on the right of way close to the caboose between track No. 2 and No. 3. The little girl was four or five or six feet behind her father when I first saw them." The evidence also showed that the public crossing across appellant's track on Garnet street was blocked by the cars in controversy, and that said fact was known to the conductor, who gave the signals for the movement of the train, and who had seen appellee and her father walking along the right of way near said cars. We are therefore of the opinion that he was charged with the knowledge and fact that they might attempt to cross said cars at the first opening between the same, and, in attempting to do so, would be in a position of danger and peril, and that it was his duty to keep a lookout in that direction before giving a signal for the movement of said cars. The assignment is overruled.

[8] Appellant, under its seventh assignment of error, contends that there was no testimony whatever tending to show that the use of defendant's yards by the public was known to any representative of the company who had authority to bind the defendant by reason of such knowledge, and for that reason objects to that portion of section 6 of the court's charge to the effect that, if the jury believed, from a preponderance of the evidence, that, before and at the time the plaintiff received the injuries complained of, it was the custom of the people residing in the northeastern part of the town of Claren-

don to cross the tracks of the defendant at or near the place of the accident, and that paths and places of entry had been made for that purpose so as to make the same a common passageway for pedestrians across defendant's right of way, tracks, and yards at said point, and that such custom and such use of said paths and passageway was, with the knowledge and consent and acquiescence of the defendant company, etc., we are of the opinion, as held by the Supreme Court in this case, that such constant use was sufficient to charge the railroad company with notice thereof, and to impose on its employes the duty to use ordinary care to prevent injury to such persons as might be passing through the yards, and that the evidence amply warranted giving the instruction objected to. Finding no merit in the assignment, it is overruled.

[9] The proposition submitted under appellant's eighth assignment of error contains three separate and distinct propositions of law and is in violation of the rule governing the preparation of briefs, prescribed for the government of this court. The distinct propositions submitted in said assignment are as follows: First. That there was no evidence as to appellee's earning capacity, and the court erred in submitting said issue to the jury. Second. There was no evidence as to appellee's physical or mental suffering, and the court erred in submitting this issue to the jury. Third. That the tenth paragraph of the court's charge did not restrict appellee's recovery for her losses until after she should arrive at the age of 21 years. Rules for the Courts of Civil Appeals, No. 32 (142 S. W. xiii).

[10] If this assignment, however, be considered, we are of the opinion that the same does not require a reversal of this case, the evidence showing the appellee was an infant of tender years, but sound, healthy, and a well developed child, and to have entirely lost her right foot, and we think the jury were entitled to consider the question of her lost earning capacity, without direct and specific proof thereof.

[11] Again we think the testimony was abundantly sufficient to raise the issue of mental and physical suffering. E. H. Wininger testified that the wheel passed over appellee's limb some distance above the ankle, and that it was very badly mangled and the ankle partly crushed; that the leg was not cut squarely off, but there were a few strips of skin, and maybe some ligament, but it was practically cut in two and completely crushed; that her limb was amputated about halfway between her ankle and knee, and that the leg which had been amputated does not develop like the other, and that, as the child grows older, that limb gets smaller than the one which was not injured and on which she walks mainly, and that there was, at the time of the trial, a considerable dif-

ference in their size—a difference at least of one-fourth as to their comparative development; that she remained in bed something like a week after the amputation, and that the limb has caused her considerable trouble after the amputation, and that he knew from her actions and demeanor that she suffered. Dr. E. F. Ham, one of the surgeons by whom the foot was amputated, testified that he found her foot crushed to a mass, and that it was bleeding and simply crushed to a pulp, and that the child was suffering and cried, and that he administered an anæsthetic to relieve the pain of the amputated foot, and that, after the amputation, the child was nervous, and that he had noticed since she was nervous; that the amputation would retard the developments of the injured limb, and that there is always more or less inconvenience in having to care for a limb where a part of it was gone. He also testified that all persons with an amputated limb felt sensations of pain in the amputated member. The paragraph of the charge complained of expressly limits appellee's recovery for diminished earning capacity to losses after she should arrive at 21 years of age. The assignment is without merit and is therefore overruled.

[12] Under its ninth assignment, appellant complains of the refusal of the court to give the following charge: "Gentlemen of the jury, if you believe from the evidence that the act of the plaintiff, Halys Wininger, in going between or under the cars of defendant in the manner shown by the evidence, was induced and caused by her father, and that, but for such act of her father in causing her to do so, the accident would not have occurred, then you will find in favor of the defendant." It is to be noted that the charge requested does not require the jury to find that the act of her father should be the sole cause of her injury, and we are of the opinion that the charge refused was in effect an attempt to impute to the appellee such contributory negligence as the jury might find occurred on the part of her father, which the law does not permit. The charge was properly refused.

[13] Appellant, under its tenth assignment, complains of the action of the court in refusing to give its special charge No. 5, wherein the jury were instructed that, if they believed from the evidence that there was open to appellee, leading on in the direction she and her father were going just before they started to cross defendant's train, another way, and that such other way was a safe way, and that appellee voluntarily chose the unsafe way, she would be guilty of negligence, and that, if such negligence contributed to her injury, she could not recover. The vice in the charge in question, in our opinion, is that it would have the effect to hold appellee responsible for contributory negligence, notwithstanding her tender years and without inquiry as to her discretion and

mental capacity to select between a safe and a dangerous way.

[14] We think the charge further erroneous in that it assumes that appellee attempted to cross defendant's train, when the evidence shows that she was crossing through an opening between cars standing upon the side track, which were no part of the train which caused her injury. The assignment is therefore overruled.

[15] Appellant, under its eleventh assignment of error, complains of the action of the court in refusing to give its requested special charge to the effect that there was no evidence of knowledge on the part of appellant of its yards and switch grounds, in particular the place where the accident occurred, being used by the public so as to make the same a public way by habitual use. We are of the opinion that this assignment is without merit, and that the evidence is amply sufficient to authorize the conclusion that the yards were constantly used by persons passing over the same within the observation and knowledge of appellant, through its agents and employes, and that it was the duty of appellant to take notice of such customary and continued use of its property by the public. We are of the opinion that the proposition requested to be submitted in appellant's eleventh special charge, the refusal of which is complained of under its twelfth assignment, was fully covered by the general charge of the court, and that there was no error on the part of the court, in refusing to give the same.

[16] Appellant, under its thirteenth and fourteenth assignments of error, insists that this case should be reversed because of certain language used by counsel for appellee in making the closing argument to the jury. The language complained of, as shown by the bill of exceptions, is as follows: "Gentlemen of the jury, they (meaning the attorneys for defendant) make me tired in talking about sympathy for this little girl (pointing to the plaintiff). Oh, yes, I wonder how about the bondholders and coupon clippers that own this road." While the language thus used by appellee's counsel was improper in that it related to matters outside of the record, it may find some extenuation in the fact that, as disclosed in the oral argument of this phase of the case, and by the bill of exception, the matter of sympathy appears to have been introduced into the discussion of the case by counsel for appellant, who may have thought it incumbent upon him as a kind-hearted man to express to the jury his feelings of sympathy for an unfortunate little girl (and the same were no doubt creditable to him), but their expression did not relate to any matter in the record, and may have been viewed by opposing counsel as in a way intended to conciliate favor with the jury for counsel's client, to which he was at liberty and in a manner invited to reply,

which he appears to have done by first stating that such expressions, coming from opposing counsel, made him tired, and then by indulging the inquiry as to the owners of the road. His description of these gentlemen as "coupon clippers" and "bondholders" may have been unfortunate and calculated to inflame the minds of some jurors in some localities, but as stated by Judge Stayton in the case of *I. & G. N. Railway Co. v. Irvine*, 64 Tex. 535: "The use of improper language or course of argument by adverse counsel within itself furnishes no sufficient reason for reversing a judgment, and it is only in cases in which a preponderance of the evidence seems to be against the verdict, or in cases in which the verdict seems excessive, and there is reason to believe that the verdict may have been affected by such course of conduct, that it becomes a ground for reversal."

[17] And in this instance we are unable to hold that the verdict rendered is either excessive or against the preponderance of the evidence to the extent that it can only be accounted for by assuming that the minds of the jury were inflamed and prejudiced against appellant by the language complained of, as in our opinion the verdict is warranted by the evidence, and is not excessive in amount. Much larger verdicts have been sustained by the courts of this state for similar injuries. *I. & G. N. Railway Co. v. Sandlin*, 57 Tex. Civ. App. 151, 122 S. W. 60; *Houston B. & T. Ry. Co. v. O'Leary*, 136 S. W. 601; *M., K. & T. Ry. Co. v. Nesbit*, 43 Tex. Civ. App. 630, 97 S. W. 825.

Appellant's fifteenth assignment of error presents no new matter for our consideration. The questions presented thereunder having been heretofore considered, the assignment is overruled.

Finding no reversible error presented under appellant's assignments, or either of them, we conclude that there is no error in the judgment rendered below, and that the same should be in all things affirmed, and it is accordingly so ordered.

LEVERETTE v. RICE.

(Court of Civil Appeals of Texas. Dallas.
Nov. 23, 1912.)

DISMISSAL AND NONSUIT (§ 19*)—INVOLUNTARY DISMISSAL—CONDITION OF CAUSE.

Under Rev. Civ. St. 1911, art. 1955, which permits a plaintiff to take a nonsuit as to his cause of action, if not to the prejudice of the defendant to be heard on his claim for affirmative relief, the dismissal of an action for the price of land, in which defendant filed a plea in reconvention for the cancellation of the contract on the ground of fraud, and for damages for false representations, was prejudicial error.

[Ed. Note.—For other cases, see *Dismissal and Nonsuit*, Cent. Dig. §§ 33-36; Dec. Dig. § 19.*]

Appeal from District Court, Hill County; C. M. Smithdeal, Judge.

Action by E. J. Rice against J. C. Leverette, with cross-action by defendant. From a judgment dismissing the entire action, defendant appeals. Reversed and remanded.

Luther Nickels, of Hillsboro, for appellant.

RAINEY, C. J. E. J. Rice instituted this suit against J. C. Leverette, alleging substantially that on or about April 23, 1911, J. C. Leverette purchased 100 acres of land in Henderson county, Tex., from E. J. Rice, and promised to pay E. J. Rice \$1,000 in cash and one horse of the estimated value of \$700, and to assume three notes, for \$268.66 $\frac{2}{3}$ each, signed by H. A. Johnson, and payable to R. C. Bristow, given as original purchase-money notes for said land; that it was agreed between Leverette and Rice that H. A. Johnson was to execute a deed to Leverette, and that Rice was to have as his profit the difference between whatever sum he would have to pay said H. A. Johnson for said land and the sum of \$2,500, as stated above, and that Leverette was to pay this difference to Rice upon the presentation of a deed duly executed by said Johnson to said Leverette; that Rice did purchase said land from said Johnson, and agreed to pay said Johnson the sum of \$1,600 therefor, and that thereupon said Johnson executed a deed to said land to said Leverette, which deed was tendered to said Leverette; and that said Leverette failed and refused to accept the deed and to pay all the consideration, as stated above, to Rice's damage in the sum of \$900, for judgment of which amount he prayed.

Leverette answered, among other things, with a general denial and with special answers, in substance as follows: "That at the time the contract sued upon was made, and prior to and thereafter, the plaintiff had no authority to sell said land, and was unable and unauthorized to carry out such sale and contract. That said contract, if any, and sale, was procured in fraud in the following respects: The defendant desired to purchase land upon which marketable timber was standing, for the purpose of removing the timber therefrom and transporting the same by rail to market, and to market the same for profit, and this fact was well known to and stated to the plaintiff by the defendant prior to and at the time of the making of such contract. Defendant further desired, and it was necessary for his purpose, that such land should be located near to, and not more than 1 $\frac{1}{2}$ miles from a switch upon the line of railway of the St. Louis & Southwestern Railway Company of Texas, and this fact was known to and stated to the plaintiff by the defendant. That the country along the line of said railway in the vicinity in question is a country whose soil is deep sand, and that by reason thereof, as well as the general topography of the country, it

is very difficult to travel or to haul loads on wagons or other vehicles, and for the purpose for which defendant desired the land, under the circumstances, the land would be worthless, if located further away from such switch or railroad than 1 $\frac{1}{2}$ miles, and it would be impossible for the timber located on such land to be marketed at any profit whatever, if such land were located further away from such railroad or switch than 1 $\frac{1}{2}$ miles; but that, if such land were located within distance of railroad, such timber could be marketed at a great profit, which fact the defendant knew, and the facts were known to and stated to the plaintiff by the defendant. That the plaintiff was well acquainted with said land and its location, and the defendant had never seen said land, and was totally unacquainted with its location, etc., and this fact was known to and stated to the plaintiff by the defendant, and by reason of the limited time at the command of the defendant, and by reason of the facts herein stated, the defendant did not examine said land and its location, and the defendant stated such facts to the plaintiff, and told the plaintiff that he (defendant) would be compelled to and would rely entirely upon the truth of the representation relative to said land and its location made by the plaintiff, to which the plaintiff replied that the defendant might rely upon such representations and that he (plaintiff) would guarantee the truthfulness of the same. That the plaintiff represented said land as being land upon which marketable timber suitable for the purpose for which defendant desired said land was standing, and that said land was located within 1 $\frac{1}{2}$ miles of a switch on the line of said railroad, and not further away therefrom, and that by reason of its location said switch was easy of access from said land; and upon the strength and because of such representations and descriptions relative to said land and its location, and the statements made by plaintiff, the contract was made, and at the time the defendant stated to the plaintiff that such was his reason and the consideration for his entering into such contract. That each and all of the representations as made by the plaintiff with reference to the land were untrue and false, in that the land is located more than 3 miles away from any switch or any railroad, and that by reason of this distance that would have to be traversed to reach a railroad or switch, and by reason of the permanent conditions of the roads leading from such land to the railroad and switch, and the character of the soil and the general topography of the country, the timber upon the land cannot be marketed at any profit at all, but that such timber cannot be transported over such roads and marketed, except at a positive loss, and the land therefore is worthless upon the market, and is worthless for the purpose for which the

defendant desired the same, all of which facts were known to the plaintiff prior to and at the time of the making of the contract. That if said land had been located as represented the defendant could and would easily have made a profit out of the marketing of such timber to the amount of \$10 per acre, which fact was well known to plaintiff, and this fact was the material consideration of the contract, and it was the only inducement to lead defendant to enter into such contract, and this fact was known to the plaintiff. That all of the actual facts as to the location and surroundings of the land, and of the condition of the same and of the roads, were actually known to the plaintiff at the time he made such representations, and that he (plaintiff) made such representations willfully, intentionally, deliberately, and maliciously, for the purpose of inducing defendant to make such contract, and for the purpose of defrauding the defendant, and he did thereby defraud the defendant. Defendant alleged all of the facts stated by way of cross-action against the plaintiff, as well as affirmative differences, and prayed that the contract entered into with plaintiff be canceled and held for naught, and that the defendant be held free for any responsibility thereunder, and alleged his actual damage at \$1,600, and prayed for judgment against the plaintiff in said amount by reason thereof. In addition the defendant asked for judgment against the plaintiff in the sum of \$1,000 as vindictive, punitive, and exemplary damages, and asked for such other relief to which he might be entitled."

On the 23d day of November, 1911, the case was called for trial upon the pleadings as stated above. The plaintiff presented his application for continuance, which was overruled, and the defendant announced ready for trial. The plaintiff thereupon moved the court for nonsuit, and asked the court to dismiss the case, which motion to dismiss was contested and objected to by the defendant. The motion was granted, and the entire case was dismissed, to all of which the defendant duly excepted, and gave notice of appeal therefrom to this court.

Complaint is made by appellant that the court erred in allowing plaintiff to take a nonsuit and in dismissing the cause of action, when he (appellant) had filed a plea in reconvention for the cancellation of the contract sued on, and for recovery of damages for false representations, etc. The statute permits a plaintiff to take a nonsuit as to his cause of action; but such action cannot be taken to the prejudice of the defendant to be heard on his claim for affirmative relief. R. S. 1911, art. 1955. The court erred in dismissing the cause to the prejudice of defendant, and preventing a hearing on defendant's plea in reconvention. *State v. Loan & Trust Co.*, 81 Tex. 530, 17 S. W.

60; *Long v. Behan*, 19 Tex. Civ. App. 325, 48 S. W. 555.

The judgment is reversed, and the cause remanded.

JAYNES et ux. v. BURCH et al.

(Court of Civil Appeals of Texas. Dallas. Nov. 30, 1912.)

1. APPEAL AND ERROR (§ 100*)—APPEALABLE ORDERS—REFUSAL TO DISSOLVE TEMPORARY INJUNCTION.

Under Acts 31st Leg. c. 34, amending Acts 30th Leg. c. 107, authorizing an appeal from an order granting, refusing, or dissolving a temporary injunction, no right of appeal lies from an order refusing to dissolve such an injunction.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 670-680; Dec. Dig. § 100.*]

2. APPEAL AND ERROR (§ 621*)—RESERVATION OF GROUNDS—CERTIFICATION—TIME.

An appeal from an order granting a temporary injunction cannot be considered, where the transcript was not filed in the Court of Civil Appeals within 15 days from the entry of record.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 2724-2731; Dec. Dig. § 621.*]

Appeal from District Court, Dallas County; J. C. Roberts, Judge.

Petition by Mrs. Quincy Hamilton Burch and another against J. F. Jaynes and wife for a restraining order. From an order overruling a motion to dissolve, and continuing in force, a temporary injunction, respondents appeal. Appeal dismissed.

I. C. Underwood and C. F. Greenwood, both of Dallas, for appellants. Brooks & Worsham, of Dallas, for appellees.

TALBOT, J. This is an appeal from an order of the district court overruling a motion to dissolve, and continuing in force, a temporary injunction. The record discloses that the appellee, Mrs. Quincy Hamilton Burch, joined by her husband, T. C. Burch, filed in the district court of Dallas county, on the 21st day of September, 1912, a petition with the following fiat of the judge of said court indorsed thereon: "When the plaintiffs shall have filed a properly conditioned bond in the sum of \$250, the clerk will issue a temporary restraining order, prohibiting the transfer and negotiation of the notes described in this petition, and will issue notice to the defendants to appear at 9 a. m. September 28, 1912, and show why said restraining order should not be continued in force. [Signed] Kenneth Foree, Judge 14th Dist. Tex." On September 28, 1912, the defendants, appellants here, filed a lengthy answer, which they claimed denied all the material allegations of the plaintiffs' petition, and prayed that the injunction theretofore granted be dissolved and the cause dismissed. On

the 5th day of October, 1912, a judgment was entered overruling the motion to dissolve and continuing the temporary injunction in force. This judgment recites that, the cause "coming on to be heard * * * upon defendants' motion to dissolve the temporary restraining order heretofore granted, * * * came the plaintiffs in person and by attorneys, and also came the defendants in person and by attorneys, and both sides announced ready for trial upon the injunction feature of the case. * * * The petition of plaintiffs being read, and the exceptions, motion, and answer of defendants being read, * * * and the court, after having heard all the pleadings, evidence, and argument of counsel, is of opinion that the defendants' motion to dissolve said restraining order should be overruled and refused." The judgment then expressly continues in force the temporary injunction granted on September 21, 1912, and concludes as follows: "To the action, rulings, order, judgment, and decree of court the defendants then and there in open court excepted, and in open court the defendants and each of them gave notice of appeal to the Court of Civil Appeals, Fifth Supreme Judicial District of the state of Texas, at Dallas, Texas."

[1] This is, in substance, the record sent to this court, and the question arises: Has this court jurisdiction to consider the appeal? That this question should be answered in the negative seems to be well settled by the statute and decisions of the appellate courts of this state. As affecting the question before us, there is no material difference in the statute of the Thirtieth Legislature (Acts 1907, c. 107), which has been several times construed by our courts, and the statute of the Thirty-First Legislature (Acts 1909, c. 34) amendatory thereof. Neither of these statutes gives the right of appeal from an order refusing to dissolve an injunction, and the continuing of an injunction previously granted in force by express language to that effect in the order refusing to dissolve until the further order of the court is not, in contemplation of the statute, the granting of a writ of injunction. *Baumberger v. Allen*, 101 Tex. 352, 107 S. W. 526.

[2] The record, we think, very clearly shows that the appeal is prosecuted from the order entered refusing to dissolve the temporary injunction; but if under any sort of construction it could be said the appellants' purpose was to, and that they did, appeal from the order of Judge Foree granting said temporary injunction, then the transcript was not filed in this court within the time prescribed by the statute, and the appeal cannot be entertained by this court. As has been seen, the temporary injunction was granted on the 21st day of September, 1912, and the transcript was not filed in this court until October 20, 1912. The statute requires that the transcript in appeals from an inter-

locutory order granting a temporary injunction shall be filed in the Court of Civil Appeals not later than 15 days after the entry of record of such order, and the filing of the petition with the order indorsed thereon constitutes the "entry of record of such order." *Walstein v. Nicholson*, 47 Tex. Civ. App. 358, 105 S. W. 207; *Baumberger v. Allen*, supra. Not having filed the transcript in this court within the time prescribed by the statute, the appellants' right of appeal from the order of September 21, 1912, granting the temporary injunction, was lost. It was necessary, in order to confer jurisdiction on an appeal from the order granting the temporary injunction in this case upon this court, for the appellants to have filed the transcript within 15 days from September 21, 1912. *Baumberger v. Allen*, supra; *Powdrill v. Powdrill*, 134 S. W. 272. For other cases holding that no appeal lies from an order overruling a motion to dissolve an injunction, see *Dodson v. Boger*, 130 S. W. 1021; *Bledsoe et al. v. United Brothers of Friendship and Sisters of Mysterious Ten*, 131 S. W. 256.

This court not having jurisdiction of the appeal, it is dismissed.

McSHAN v. JOHNSON.

(Court of Civil Appeals of Texas. San Antonio. Nov. 20, 1912.)

1. PARTITION (§ 78*)—PROCEEDINGS TO MAKE ACTUAL PARTITION—DIVISION BY VALUE.

Under Rev. Civ. St. 1911, art. 6108, requiring the court, before entering a decree of partition, to determine whether the property or any part is susceptible of partition, and, if so, to appoint commissioners to make such partition, the duty of dividing the land as to value is confided to the commissioners, and they may divide it according to value, although the court determines that each of the parties is entitled to one-half.

[Ed. Note.—For other cases, see *Partition*, Cent. Dig. §§ 265-273; Dec. Dig. § 78.*]

2. PARTITION (§ 91*)—PROCEEDINGS TO MAKE ACTUAL PARTITION—DIVISION BY VALUE.

In a partition suit, the court did not err in appointing new commissioners and surveyor to make partition, when those first appointed failed or refused to act.

[Ed. Note.—For other cases, see *Partition*, Cent. Dig. §§ 225-264; Dec. Dig. § 91.*]

3. PARTITION (§ 91*)—PROCEEDINGS TO MAKE ACTUAL PARTITION—DIVISION BY VALUE.

A motion in a partition suit for the appointment of a surveyor and commissioners to make partition, alleging that the court awarded a writ of partition, and that the commissioners and surveyor appointed had failed and refused to carry out their duties, was sufficient, although it did not state that a writ of partition, accompanied by a certified copy of the decree, was ever issued to the sheriff.

[Ed. Note.—For other cases, see *Partition*, Cent. Dig. §§ 225-264; Dec. Dig. § 91.*]

Appeal from District Court, Dallas County; E. B. Muse, Judge.

Action by L. W. Johnson against L. F. McShan. From the judgment, defendant appeals. Affirmed.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Short & Feild and Walter Seay, all of Dallas, for appellant. Etheridge & McCormick, and H. L. Bromberg, all of Dallas, for appellee.

FLY, C. J. Appellee instituted a suit against L. F. McShan to partition a tract of 160 acres of land, being a part of the William Crabtree 320-acre survey, in Dallas county, claiming that each party owned an undivided one-half interest in the premises. Appellee claimed to have placed improvements on the south one-half of the tract, and that appellant had improved the north half of the land. Appellant answered that under an adjustment of the business affairs of appellant and appellee, who had been partners, it was ascertained that appellee was indebted to appellant, and that in order to have an adjustment of their business affairs they agreed that the land should be divided, so that appellant should have all the land lying south of a certain line, and appellee all lying north therefrom, and a division fence was constructed on said agreed line. The court instructed the jury to return a verdict in favor of appellee for one-half the land described in the petition, and in favor of appellant for the other half, and the court rendered judgment on such verdict, partitioning the land, one-half in value to each of the parties, without considering the value of the respective improvements, and commissioners were appointed to make the partition. Afterwards, at the instance of appellee, new commissioners were appointed; the others having failed to act. The last commissioners reported, setting apart to appellee 81.9 acres of land, of the value of \$5,767.50, exclusive of improvements which had been made thereon by appellee, and to appellant 71.9 acres, of the value of \$5,767.50, exclusive of improvements made by him, and the report was confirmed by the court, and judgment rendered accordingly.

The statement of facts contains nothing but the evidence heard on the confirmation of the report of the commissioners. That statement shows that the 71.9 acres of land awarded to appellant was equal in value to the 81.9 acres awarded to appellee, and that each got all of his improvements. The tract awarded to appellant was much nearer the railroad, on which is a siding and a little settlement. The only objections to the judgment are that the verdict was for one-half of the land to each party, and the court decreed to each one-half in value, instead of quantity. The law as embodied in title 101, c. 1, Rev. Civ. Stat. 1911, was followed in the proceedings of the court below. It was determined that each of the parties was entitled to one-half the land, that it was capable of partition, that it should be partitioned in accordance with the respective shares or interests of each party, specifying the share or interest of each party, and three

disinterested persons were appointed to make the partition. A surveyor was appointed, and the commissioners partitioned the land, "having due regard in the division to the situation, quantity, and advantages of each share, so that the shares may be equal in value as nearly as may be, in proportion to the respective interests of the parties entitled." Rev. Civ. Stat. 1911, art. 6108 (old article 3618). The report of the commissioners was made in strict compliance with law.

[1] The amendment of 1905 gave to the court the power of determining whether the land was susceptible of division and to decree a partition in accordance with the respective shares found by the court. *Gorman v. Campbell*, 135 S. W. 177. The duty of dividing the land as to value, however, is confided to the commissioners, for the plain reason that they alone are in a position to make a fair and equitable division; and although the court may determine that each of two claimants is entitled to one-half the land the commissioners have the authority, and it is their duty, to divide the land according to value of the respective shares. Any other manner of procedure would be unjust and inequitable, as in this case, where appellant is not contending that he has not received as much in value as appellee, but that he should have a certain half of the land, regardless of value. Such a contention is not sustained by law, and will not be tolerated in a court of equity.

[2, 3] There is no merit in the sixth assignment of error. The court did not err in appointing new commissioners and surveyor, when the first failed and refused to act. The only objection urged to such appointment is the insufficiency of the motion asking for the appointment, in that it did not state that a writ of partition, accompanied by a certified copy of the decree, was ever issued to the sheriff. No objection was urged to the motion in the lower court, when it was presented. The motion alleged that the court had awarded a writ of partition, and had appointed commissioners and surveyor, and that they "have failed and refused to carry out their duties under said writ of partition." The motion was sufficient.

The judgment is affirmed.

ROBINSON v. BELT.

(Court of Civil Appeals of Texas. Amarillo. Oct. 26, 1912. Rehearing Denied Nov. 30, 1912.)

VENDOR AND PURCHASER (§ 277*)—VENDOR'S LIEN—FORECLOSURE—JURISDICTION.

Rev. St. 1895, art. 304, provides that the holder of a note may fix the liability of any indorser, without protest or notice, by suit against the maker at the first term of the district or county court after the right of action accrues, etc.; and article 315 provides that the indorser's liability may be fixed, without suit, by protest and notice. *Held*, that a suit on a

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep't Indexes

negotiable vendor's lien note against the payee and indorser, which also sought to foreclose the vendor's lien, was properly brought in the district court, which had exclusive jurisdiction to render judgment, both for the debt and foreclosing the lien, under Const. 1876, art. 5, § 8 (Sayles' Ann. Civ. St. 1897, art. 1098, subd. 4), giving the district court original jurisdiction of all suits for the enforcement of liens on land.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 774, 775; Dec. Dig. § 277.*]

Appeal from District Court, Lubbock County; W. R. Spencer, Judge.

Action by O. C. Belt against Jim Robinson, Jr., and another. From a judgment for plaintiff, defendant named appeals. Affirmed.

Jas. R. Robinson, of Lubbock, for appellant. W. D. Benson, of Lubbock, for appellee.

PRESLER, J. This suit was filed in the district court of Lubbock county, Tex., on the 2d day of November, 1910, by O. C. Belt, as owner, against A. L. Reed, the maker, and appellant, the payee and indorser, of a certain vendor's lien note, dated February 12, 1910, due six months after date, for the sum of \$330, interest and attorney's fees. Appellant answered by demurrer and exception, raising the question of his liability by reason of the fact that the note was not protested or suit brought at the first term after maturity at which it could be brought; and, said demurrer and exception having been overruled, the court rendered judgment in favor of appellee for the amount of the debt, as shown by said note, and for foreclosure of the vendor's lien against both defendants, from which judgment appellant duly appeals and here, by proper assignment, contends that the court erred in rendering judgment against him, upon the ground that he was only an indorser, and that the note had not been protested, nor suit brought at the first term after its maturity.

From the findings of fact of the trial court, we find that the note in question matured on the 15th day of August, 1910, and that the first term of the district court of Lubbock county held thereafter met on the 21st day of November, 1910, to which this suit was brought. Also that a regular term of the county court of Lubbock county for civil business was held on the second Monday in October, 1910, which was the first term of said court held after the maturity of said note; and appellant contends that to hold him as indorser on said note the same should have either been protested for nonpayment, or suit brought thereon at the first term of the county court, and in support of said contention cites us to articles 315 and 304, Revised Statutes, and Smith et al. v. Ojerholm et al., 51 S. W. 37, and Cruger v. Lindheim,

16 S. W. 420, which authorities do not, in our opinion, support his contention.

It appears that appellee brought his suit to the first term of the district court of Lubbock county, which court had, under the Constitution and Statutes of this state, exclusive jurisdiction to give appellee the full redress provided by law; that is, both judgment for his debt and foreclosure of his vendor's lien on the land. Article 5, § 8, of the Constitution of 1876; article 1098, subd. 4, Sayles' Texas Civil Statutes; Handel v. Elliott, 60 Tex. 147. While the county court could only have rendered personal judgment for the debt sued on, and had no authority to foreclose the vendor's lien on the land, and as it is the policy of the law to avoid multiplicity of suits, we are of the opinion that the district court is, within the contemplation of article 304, R. S., the proper court in which this character of suit should be brought, and that the judgment appealed from should be in all things affirmed; and it is accordingly so ordered.

GRAHAM, C. J., not sitting.

PORTER et al. v. JOHNSON et al.

(Court of Civil Appeals of Texas. Dallas. Nov. 23, 1912.)

1. HIGHWAYS (§ 7*)—PRESCRIPTIVE RIGHT.

The public may by adverse use for the prescriptive period acquire right of highway in a road, though the county authorities have not recognized it as a public road.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 10, 12-14, 16, 18; Dec. Dig. § 7.*]

2. HIGHWAYS (§ 77*)—CLOSING—INJUNCTION—PLEADING.

Though the road, the closing of which was sought to be enjoined, was not a part of the E. road as actually laid out by the county authorities, yet it being part of "what is known" as the E. road, and this being the allegation of the petition, there is no variance.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 263-276; Dec. Dig. § 77.*]

Appeal from District Court, Hill County; C. M. Smithdeal, Judge.

Action by J. T. Johnson and others against Horton B. Porter and others. Judgment for plaintiffs, and defendants appeal. Affirmed. See, also, 140 S. W. 469.

Wear & Frazier and Morrow & Morrow, both of Hillsboro, for appellants. W. E. Spell, of Waco, and Luther Nickels and R. M. Vaughan, both of Hillsboro, for appellees.

TALBOT, J. This is an action brought by the appellees against Horton B. Porter, county judge of Hill county, Tex., J. I. Edens, W. E. Farquhar, J. F. Griffith, and G. W. Taylor, county commissioners of said county, and Eugene Edens, Mrs. Maggie Taylor, Mrs.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

E. Parker, and Ernest Parker, husband of the said Mrs. E. Parker, to restrain the said county judge and commissioners, as members of and composing the commissioners' court of Hill county, from having an order, made by said court on February 17, 1911, discontinuing a public road in commissioners' precinct No. 4 of said county, alleged to be known as part of the Eureka Tap road, executed and enforced, and to enjoin the other named defendants from obstructing or closing up said road. The injunction as prayed for was granted, and by an amended petition sworn to, upon which the case was tried, the plaintiffs alleged, among other things, that they resided in Hill county, Tex., and in commissioners' precinct No. 4, and, in substance (1) that the road in question had been, upon petition and the report of a jury of view, established as a public road; (2) that if it had been used by the people of Hill county and by plaintiffs as a thoroughfare and recognized by the county as such for a period of more than 30 years; (3) that said road had been opened and dedicated to public use as a public road; (4) that the same had become a public highway and the right of the public to use it as such had been acquired by prescription; that the community public free school, known as the Eureka district school, is situated on said road, and the said road affords the nearest and most convenient way for the children of plaintiffs to reach the public schoolhouse; that to discontinue said road would, in the judgment of plaintiffs, necessitate the dividing of the Eureka school district, thereby rendering it impossible to have and maintain as good a school as now exists, and be destructive of the school interest of said community; that said road is used by the people residing in said Eureka school district in going to and from church, Sunday school, and all religious gatherings, and in going to and from their respective market towns; that the portion of said road sought to be discontinued runs through farms owned by the said Mrs. Parker, Mrs. Taylor, and Eugene Edens; that the petition filed, requesting the discontinuance, did not comply with the law, in that only six of the signers of said petition were freeholders in the precinct through which that portion of the road sought to be discontinued runs; that the order abolishing said road is void, because no notice was given of the application to discontinue the same as required by statute; that the commissioners' court in attempting to discontinue and abolish said road further failed to comply with the statute, in that said court failed to open a new road connecting that part of the road not discontinued; that plaintiffs, by proper motion, since the making of the order discontinuing said road, and filed during the term of the court at which said order was entered, stated the facts to the commissioners' court, and re-

quested that said order be set aside and a hearing of the matter granted to plaintiffs, to the end that they have an opportunity to show why said road should not be discontinued, but that said court arbitrarily refused to pass upon said motion, and arbitrarily and fraudulently refused to hear any evidence which would lead to a disclosure of the true facts in connection with the discontinuance of said road, and which would have shown that it was not to the interest of the public to have said road discontinued; that the action of the commissioners' court in making the order discontinuing the road was a gross abuse of the authority and discretion lodged in it by the Constitution and laws of the state, was arbitrary, and in total disregard of the property rights of the plaintiffs.

The plaintiffs further alleged "that the discontinuance of the road in question had and would cause each and all of the plaintiffs to suffer special injury thereby, as distinguished from the injury suffered by the public in general, in this: That they were all property owners in the neighborhood of said road, and in the school district through which said road runs; that the abolition of the road would decrease the rental value of their land 50 cents per acre, and would affect its market value 50 cents per acre or more; that it would preclude them from securing good tenants to cultivate their land, and would make the route to market, church, school, post office, etc., much longer and more difficult, and would affect materially the market value of their land, at least to the extent alleged." They also alleged the number of acres owned by each plaintiff. They did not allege specifically that either of them lived upon or owned land abutting on that portion of the road discontinued by the order of the commissioners' court.

The defendants answered by a general demurrer and a general denial.

The case was tried with the aid of a jury, and in response to questions propounded by the court the jury found (1) that the strip of land across the tract of land owned by the appellants Edens, Taylor, and Parker, which was by an order of the commissioners' court of Hill county discontinued as a part of the Eureka Tap road, had been used by the public of that community continuously, uninterruptedly, and adversely as a roadway for a period of 10 years consecutively since 1889, and prior to the date of said order closing the same, and that the road in question was a public highway by prescription; (2) that the permanent closing of said road would cause a depreciation in the market value of the lands owned by plaintiffs, and that it would depreciate the value of the lands of certain named plaintiffs more than it would the value of the lands owned by other plaintiffs, and cause them to suffer damages not suffered by the public generally; (3) that notice of the application to discontinue the

road was posted at the courthouse door of Hill county for about 20 days and in two public places in the vicinity of the road for about 10 days; (4) that the distance between the point of beginning and the point of destination of the road in question was not shortened by the discontinuance of that portion of the road involved in this suit by the order of the commissioners' court; (5) that the commissioners' court did not make a full investigation of the proposed change of the road before ordering the change, but acted arbitrarily and without substantial cause or reason for changing the road; (6) that the public interest would not be better served by the discontinuance of the road; (7) that seven of the signers of the application filed with the commissioners' court for the discontinuance of the road were residents of commissioners' precinct No. 4 and twelve of them owned land lying in that precinct. The evidence, it seems, was insufficient to authorize a finding that the road in question had been dedicated to public use, or that the same had been established as a public road by action of the commissioners' court, and these issues tendered by the plaintiffs' pleadings were eliminated by the court's charge. Upon the findings of the jury, however, upon the issues submitted, judgment was entered perpetuating the injunction theretofore granted and enjoining the members of the commissioners' court of Hill county from executing and enforcing the order discontinuing the road in question, and enjoining and restraining the defendants Edens, Taylor, and Parker from obstructing or closing up said road. From the judgment thus entered the defendants appealed.

[1] The first assignment of error complains of the court's refusal to submit the following issue requested by appellants: "Has the county, or any one acting for it, ever asserted any right to the use of the land in question for a public road adverse to the rights and title of the owner of said land? If such right referred to in the foregoing question was ever asserted, then answer when it was so asserted." The propositions contended for under this assignment, in substance, are (1) that, unless Hill county or some one acting for it asserted the right to use the land in question for a public road adverse to the rights and title of the owner, said land could not be impressed with the character of a public road; (2) that the court having submitted the case on special issues, and having failed to submit to the jury the question as to whether or not the public authorities of Hill county had adopted the road involved and the submission of such issue having been requested, it was error for the court to refuse to submit it; (3) that the appellees, being private parties, could not force upon the public authorities a road with the incidental burdens of repair and maintenance without the assent of the

properly constituted authorities, and such assent could not be inferred from long continued use by the public. The correctness of the second and third of the propositions clearly depends upon the correctness of the first, and, if the first does not state the law correctly, it follows as a matter of course that the second and third are without merit. The question for decision then is, Was it essential to the right of the plaintiffs to maintain this suit and obtain the relief sought, that it be made to appear that the commissioners' court of Hill county had laid out and established the road in question as a public road, or had in some manner recognized it as a public highway? This question has been answered in the negative by this court in the case of *Evans v. Scott*, 37 Tex. Civ. App. 373, 83 S. W. 874. In that case it is said: "The public's right of prescription to a highway is not dependent upon the recognition of that right by the municipal authorities of the county, but is acquired by adverse use for the time and in the manner prescribed by the rules of law." This we think is the correct view of the law. It is well settled that a public highway may be created in three separate and distinct ways, namely, by dedication by the owners of the fee, either express or implied, "by long use by the public, carried on in such a manner and persisted in for such a length of time as to give a right by prescription or limitation," by being laid out and established by the municipal authorities in the manner prescribed by statute. An implied dedication arises by operation of law from the acts of the owner, and is founded on the doctrine of equitable estoppel, and it is essential in such case that the owner intended to set the land apart to the use and benefit of the public. A right by prescription rests upon the presumption that the owner of the land has granted the easement, and that the grant has been lost. It is not necessary in the latter case to show intent on the part of the owner of the land to set apart the road to public use, and the element of acceptance is not involved. Adverse use of the road for the length of time required by the public is the foundation upon which the claim rests. This use must have continued uninterrupted under adverse claim of right for the full prescriptive period, which in this state is 10 years. *Evans v. Scott*, supra, and authorities cited. Again: "If the public by a prescriptive use, has acquired the right, which may ripen into control by the county, it inures to all who may have had an interest in maintaining the road." *Hall v. City of Austin*, 20 Tex. Civ. App. 59, 48 S. W. 53. Under appropriate instructions, the jury found that the road in question had become a public road by prescription, and had the issue requested by appellants been submitted, and, had the jury found that the road had not been recognized by the commissioners' court of Hill county in any way as a public road, still the plaintiffs, if

otherwise entitled to recover, would have been entitled to the judgment rendered. It follows that neither of appellants' propositions can be maintained, and that the assignment under consideration should be overruled.

[2] The second assignment of error complains of the court's refusal to give the following special charge requested by the defendants: "Plaintiffs by their pleading claim that the road in question is a part of the Eureka Tap road. Unless you believe from a preponderance of the evidence that the road in question is a part of the Eureka Tap road, you cannot under any circumstances find it to be a public road." This charge was properly refused. The proof was not materially variant from the allegations. The road is described in plaintiffs' petition as "what is known as the Eureka Tap road situated in commissioners' precinct No. 4, * * * and especially that part extending from the Grandview and Hillsboro road to the Itasca and Hillsboro road running through the farms of Mrs. E. Parker and Ernest Parker, Mrs. Maggie Taylor, and Eugene Edens." The evidence, as we understand it, without conflict shows that the road directed to be closed by the order of the commissioners' court is a part of what is known as the Eureka Tap road. It was so described by appellant Edens in both his testimony and in the notice to close the road which he says he posted before applying to the commissioners for an order to close the road. Thus the road in question was both in the pleadings and in the evidence described to be "what is known as a part of the Eureka Tap road," running through the farms of Mrs. E. Parker and Ernest Parker, Mrs. Maggie Taylor, and Eugene Edens, and, even though it was not in fact a part of the Eureka Tap road as actually laid out by the commissioners' court of Hill county, yet it was as alleged, known as a part of that road, and its identity was by both the pleadings and evidence sufficiently established. *Echols v. Jacobs Mfg. Co.*, 38 Tex. Civ. App. 65, 84 S. W. 1082. It was not essential, as we have held, to plaintiffs' right to recover upon the theory that the road had become a public road by prescription, that the commissioners' court had recognized it as such.

It is assigned that the trial court erred in refusing to instruct the jury at defendants' request to return a verdict in their favor. The propositions advanced under this assignment are (1) "appellees having alleged that the discontinued road was a part of the 'Eureka Tap road,' and it appearing from the evidence that the 'Eureka Tap road' was a second-class road, and that it did not extend to nor cover the part of the road, the discontinuance of which is complained of, but that the east end of the said Eureka Tap road was at a point about one-fourth of a mile west of the land through which the

road in controversy ran and the proof failing to sustain the allegations, a peremptory instruction should have been given"; (2) "that it appearing that the Eureka Tap road was a second-class road, and that the road in question by reason of the obstructions thereon, gates, and fences across it, could not have been a second-class road, and, it appearing without dispute that it had never been adopted by the county authorities as a part of the Eureka Tap road or otherwise, the evidence failed to sustain the allegations, and peremptory instructions should have been given." Both of the questions raised under this assignment have been decided adversely to appellants' contention in disposing of the assignments already discussed, and need not be further considered. What has been said disposes also of appellants' fourth assignment.

Appellants' fifth assignment of error will also be overruled. The evidence was amply sufficient to authorize and sustain the findings of the jury, which have been stated in a former part of this opinion, and the judgment based thereon is not contrary to law.

The judgment of the district court is therefore affirmed.

MAY v. ANTHONY.

(Court of Civil Appeals of Texas. Dallas.
Nov. 23, 1912.)

1. TRIAL (§ 191*)—INSTRUCTIONS—INSTRUCTIONS ASSUMING FACTS.

Rev. St. 1911, art. 1971, directs that the trial court shall submit all issues of fact to the jury. In an action for conversion, where the evidence was conflicting whether plaintiff tendered the proper amount due under an agreement by which defendant had possession of the property, a special instruction that if, when plaintiff tendered defendant \$40, the defendant had already converted the property, so that he could not return it, plaintiff was entitled to recover, was erroneous as withdrawing from the jury the issue whether plaintiff had tendered the amount required by the agreement.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 420-431, 435; Dec. Dig. § 191.*]

2. TRIAL (§ 191*)—INSTRUCTIONS—ASSUMING FACTS.

In an action of conversion, where the evidence whether defendant, prior to plaintiff's tender, had sold all or some of the property was conflicting, a charge that if defendant, at the time of such tender, had sold or converted the property and could not by reason of his acts return it, plaintiff was entitled to damages, was erroneous in that it assumed that defendant "by reason of his acts" was liable for all the property in the event he had sold any part of it, although the amount tendered was insufficient.

[Ed. Note.—For other case, see Trial, Cent. Dig. §§ 420-431, 435; Dec. Dig. § 191.*]

3. BAILMENT (§ 16*)—CONVERSION BY BAILEE.

Where defendant was in lawful possession of property and entitled to hold it until a certain payment was made by plaintiff, there

could be no conversion until the correct amount was tendered and paid.

[Ed. Note.—For other cases, see Bailment, Cent. Dig. §§ 67-74; Dec. Dig. § 16.*]

4. TROVER AND CONVERSION (§ 34*)—PLEADING—ISSUES, PROOF, AND VARIANCE.

Where the petition in an action for conversion charged that plaintiff was the owner of the property, and that the defendant on or about May 10, 1909, unlawfully converted it to his own use, proof of conversion in June, 1910, or August, 1910, was a fatal variance.

[Ed. Note.—For other cases, see Trover and Conversion, Cent. Dig. §§ 207-214; Dec. Dig. § 34.*]

5. PLEADING (§ 162*)—SUPPLEMENTAL PETITION—PURPOSE.

The only purpose of a supplemental petition is to allege new facts in reply to those alleged by the defendant in his pleading.

[Ed. Note.—For other case, see Pleading, Dec. Dig. § 162.*]

6. PLEADING (§ 162*)—AMENDED PETITION—PURPOSE.

The purpose of an amendment to a petition is to add something or to withdraw something from what has been properly pleaded, so as to remedy a defect or correct an erroneous statement; and, where plaintiff intended to correct the date of an alleged conversion, it should have been done by amendment of his original petition and not by supplemental petition.

[Ed. Note.—For other cases, see Pleading, Dec. Dig. § 162.*]

Appeal from Hill County Court; J. C. Lumpkins, Judge.

Action by F. Anthony against John May. Judgment for plaintiff, and defendant appeals. Reversed and remanded for new trial.

W. H. Brown, of Ennis, and Supple & Harding, of Waxahachie, for appellant. T. H. Collier, of Ennis, and Will Hancock and Tom Whipple, both of Waxahachie, for appellee.

RASBURY, J. Appellee sued appellant in the trial court for the conversion of certain butcher's tools and fixtures, alleged to have been converted by appellant on or about May 10, 1909, and claimed to be of the reasonable fair cash market value of \$587.50. For answer the appellant, in effect, pleaded that appellee rented from him a storehouse in Ennis for the year 1909, agreeing to pay therefor \$25 per month in advance, to be used by appellee as a butcher's shop, who went in possession of the storehouse under said agreement and remained there until April 10, 1909, at which time he abandoned the premises and commenced removing the property alleged to be converted therefrom, notwithstanding he was then due appellant one month's rent and was bound as well for the balance of the term, whereupon appellant procured the issuance of a distress warrant and levied same upon said property, but that a few days thereafter the parties agreed that appellant should withdraw the proceedings and appellee should pay the rent then due and appellant should retain

the property levied upon until appellee had adjusted all rents due under the lease, including all costs and expenses incident to the distress proceedings, appellant to re-rent the premises to the best advantage until final adjustment for the benefit of appellee. Appellant further alleged that he observed said agreement in good faith, and that at the time he was sued for conversion after allowing appellee for all sums collected by him as rents and charging him with all expenses and costs, appellee was due appellant \$110, and until said sum was paid he was entitled to possession of said property and had a contract lien thereon as well as the landlord's lien. The appellee in response to appellant's answer by supplemental petition admitted, in effect, the agreement alleged by appellant, except as to payment of costs and expenses incurred by appellant, and charged that on August 1, 1910, he was due appellant only \$40, which amount was on said date tendered to appellant and possession of his property demanded, which sum of money appellant declined, and at the same time refused to deliver to appellee his said property. The foregoing, in our view of the case, is a sufficient statement of the pleading, although other incidental matters were raised by the pleading. The case was tried before a jury and verdict was for appellee.

From an inspection of the record it appears to be undisputed that appellee leased from appellant for the year 1909 a storehouse in the town of Ennis, and after moving therein was preparing to abandon same and remove his property therefrom, when the appellant, on April 10, 1909, levied a distress warrant upon the property, asserting against same the landlord's lien as security for the payment of his rent for the unexpired term; that a few days subsequent thereto appellant and appellee agreed upon an adjustment of their affairs, whereby appellee delivered the property so levied upon to appellant to be held by him until he had received the full amount of rent agreed to be paid by appellee for the year 1909, either at the hands of appellee or from money derived from re-renting same to other persons.

The main issue in the case on the trial was the fact of conversion and incidentally, the time of the same, if any there was. As to whether there was a conversion of the property by appellant or a mere holding of the same under the agreement with appellee depended wholly upon the amount actually due appellant by appellee upon his rent contract at the time he claims he tendered appellant all the rent due him and demanded his property and at which time appellant refused the amount tendered, claiming the amount was insufficient, and refused to deliver appellee his said property.

The material testimony bearing upon those

issues is as follows: Arch Busby testified that on June 6, 1910, appellee tendered appellant \$40, claiming same was all he owed him, which was refused by appellant, who claimed there was due him \$125 for rent, costs, and attorney's fees, and refused to deliver possession of the property unless said amount was paid. Charley Jeffers testified that appellant told him on June 18, 1910, to tell appellee that unless he removed the ice box from his storehouse he would throw same into the street, etc.; that he went with appellee for said purpose, and they were prevented from doing so by appellant after having loaded a portion of the same. Appellee, Anthony, testified that he expected appellant to hold his property until all the rent for 1909 was paid; admitted removing a portion of the property in January, 1910. Also testified that in company with the witness Jeffers he tendered appellant \$40, being all he owed, which was declined and possession of his property refused him. He does not testify when the tender was made, unless it may be inferred that he did so on the date testified to by Jeffers. Appellant, May, testified that under the agreement appellee was to pay all rent, expenses, and costs of suit, and that at the time of the tender appellee was due him \$110, of which amount \$85 was for rent and the balance represented costs and attorney's fees incurred in the distress proceeding. Appellant based his conclusions as to what was due largely upon his books. Appellee based his conclusions upon what he had paid and information secured as to moneys collected by appellant from tenants.

[1] The pleading and the testimony standing as we have indicated, the court by its main charge, after reciting the agreement under which appellant held the property, told the jury: "And (if) you further believe * * * that at any time subsequent thereto plaintiff paid such amounts, if any, as were agreed between them was due to defendant, or if you believe that plaintiff tendered \$40 to defendant on August 10, 1910, and that same, if accepted, would have satisfied the indebtedness then due by plaintiff to defendant under their former agreements, if any, * * * and defendant failed and refused to deliver the property of plaintiff held by him, then he would be guilty of converting such property so held, if any, and you will find for plaintiff such damages, if any, as he may have suffered thereby," etc.

At the request of the appellee the trial court supplemented its main charge and further told the jury: "If you believe from the evidence that defendant, John May, at the time plaintiff made to him a tender of \$40, if he did, had already sold all or some of the property or converted the same * * * and could not by reason of his acts return the property, * * * then you will find for the plaintiff his damages as shown by the evidence, and, if such damages exceed the

amount due as rents, you will find for the plaintiff such excess. * * *

The giving of this special charge is assigned as error. In our opinion the charge was probably misleading in that it assumed the correctness of the appellee's version of a sharply controverted fact, to wit, the amount of rent due by appellee. A fair analysis of the special charge is that the jury were told that, if the appellant had converted some or all of the property at the time appellee offered to pay \$40, then a judgment should follow for the appellee, while under the pleading and evidence the jury were not entitled to allow any sum in damages until it had first determined if appellee had tendered the correct amount of rent, and that question was in sharp conflict; the appellee contending that he only owed \$40, and the appellant maintaining he owed \$110. The effect of the special charge was to destroy the force and effect of that portion of the main charge that told the jury there could be no conversion of the property unless the sum tendered by appellee "would have satisfied the indebtedness then due by plaintiff under their former agreement." Article 1971, R. S. 1911, is mandatory, and, among other matters, directs that the trial judge "shall submit all controverted questions of fact solely to the decision of the jury." *Orange Lumber Co. v. Thompson*, 113 S. W. 565.

[2] We are further of opinion that the second objection to said special charge is correct. One of the incidental questions in the case was whether or not appellant had prior to the tender of the \$40 sold all or some of the property; the testimony in that connection being sharply conflicting and tending to show from the appellant's standpoint that the property was intact, except that claimed to have been removed by the appellee. As applied to this feature of the suit, the charge clearly assumes that appellant "by reason of his acts" is liable for all said property in the event he has sold any one of the articles and makes him liable, even though the amount tendered was insufficient.

[3] Appellant was in lawful possession of the property and entitled to hold same until his rent was paid, and it seems to us there could not be a conversion until the correct amount of rent was tendered. In truth, it would seem that appellee could never be in a position to sue for conversion under the facts in the record until the rent was paid, and any instruction from the court permitting a recovery otherwise would be error; and the jury should have been told that they must first find the correct amount had been tendered before considering other matters which might under a different state of facts alone constitute conversion.

[4] We are also of opinion that the court erred in instructing the jury to find for appellee if in their opinion the appellant converted said property at any time subsequent

to the agreement made between the parties, or at any time appellee might be able to show he had tendered the amount of rent due. While our rules of pleading and practice are almost as broad as any occasion may demand at the same time for reasons that are elementary, there must be at least certainty and definiteness. The petition charged that appellant was the owner of the property, etc., and "that the defendant on or about the 10th day of May, 1909, unlawfully and willfully took possession of said property" and converted same to his own use. It seems to us that proof of conversion in June, 1910, the time when Arch Busby testified the tender was made, or in August, 1910, when the pleading alleged the tender was actually made, are both too far removed from "on or about the 10th day of May, 1909," to afford a basis for the entry of a judgment upon the pleading in this case.

[5, 6] The most we care to say in reference to the appellant's first assignment of error is that appellant is, of course, correct in asserting that the only purpose of a supplemental petition is the allegation of new facts not before alleged in reply to those alleged by the defendant in his pleading. And in that connection it is not improper for us to pursue the subject and say that the purpose of an amendment to the petition is to add something to or withdraw something from that which has been previously pleaded, so as to perfect that which is or may be deficient or to correct that which has been incorrectly stated. And it would follow, under these rules, that, if appellee intended to correct the date of the alleged conversion, it should have been done by an amendment of his original petition and would have been improper in a supplemental petition.

We have carefully examined the other assignments of error, and we find nothing complained of therein that will not probably be corrected on another trial.

Because of the errors indicated, the judgment of the trial court is reversed, and the cause remanded for another trial.

A. A. FIELDER LUMBER CO. et al. v.
SMITH et al.

(Court of Civil Appeals of Texas, Dallas.
Oct. 26, 1912. On Rehearing, Nov.
23, 1912.)

1. SCHOOLS AND SCHOOL DISTRICTS (§ 86*)—PUBLIC BUILDINGS.

Const. art. 16, § 37, declaring that materialmen shall have a lien upon the buildings for material furnished, and the statutes enacted in pursuance of it, fix the lien only on the land and buildings, and not upon any money in the hands of the owner; the giving of notice by a materialman to the trustees of a school district of a claim for materials for a school building gives no lien on or priority of rights

in the building fund remaining in the hands of the trustees.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. §§ 203-205; Dec. Dig. § 86.*]

2. ASSIGNMENTS (§ 50*)—EQUITABLE ASSIGNMENTS—SUFFICIENCY—FUNDS.

An order by a contractor to the supervising architect of a school building, upon whose certificate estimates under the contract were to be paid, to pay a materialman and charge to the contractor's "account" was good as between the contractor and the school trustees as an equitable assignment of a part of the fund then in the trustees' hands; it being clear what account was referred to, and being immaterial to whom the order was addressed.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. §§ 99-105; Dec. Dig. § 50.*]

3. LOST INSTRUMENTS (§ 1*)—EVIDENCE.

The fact that a written transfer of a portion of a fund was lost does not affect its validity or sufficiency, being only the evidence thereof.

[Ed. Note.—For other cases, see Lost Instruments, Cent. Dig. §§ 1-5; Dec. Dig. § 1.*]

4. ASSIGNMENTS (§ 85*)—PRIORITIES—TRANSFER OF FUND.

Transfers of portions of a certain fund will be satisfied in the order of their respective dates.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. §§ 149-151; Dec. Dig. § 85.*]

5. ASSIGNMENTS (§ 34*)—ORAL TRANSFERS—EQUITABLE ASSIGNMENT.

An oral transfer is as effective an equitable assignment as a written transfer.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. §§ 67-71; Dec. Dig. § 34.*]

6. HUSBAND AND WIFE (§ 23*)—AGENCY—CONTRACTS—ASSIGNMENTS.

The wife of a contractor, who, with his consent, was in active charge of the erection of a building, was his agent in all things pertaining thereto, and authorized to execute transfers of money to materialmen from the funds due.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 142-144; Dec. Dig. § 23.*]

7. CHATTEL MORTGAGES (§ 5*)—ASSIGNMENTS—CONSTRUCTION.

An instrument which clearly shows a transfer of money that will be due, the last clause of which states the purpose to be to secure payment of a note, it not appearing otherwise what the consideration is, will be construed to intend only to describe the debt intended to be paid, and will not be held a mortgage.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 4-13, 16; Dec. Dig. § 5.*]

On Rehearing.

8. APPEAL AND ERROR (§ 907*)—PRESUMPTIONS TO SUPPORT JUDGMENT—PRIORITIES.

Where the court, in determining the priorities between two transfers from a fund of the same date, in its judgment states that one of them should be paid in full before the other, but made no affirmative finding as to actual priority, there being no statement of facts in the record, the judgment will be sustained; it being presumed that the court had facts before it to support the priority adjudged.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2911-2915, 2916, 3673, 3674, 3676, 3678; Dec. Dig. § 907.*]

Appeal from District Court, Grayson County; B. L. Jones, Judge.

Action by the A. A. Fielder Lumber Company against Nelle Snyder Smith and others. From a judgment against Nelle Smith and her husband declaring priorities against a certain fund, the Fielder Lumber Company and others appeal. Affirmed in part, and reversed and rendered in part.

Head, Smith, Hare & Head, J. H. Wood, and J. T. Cunningham, all of Sherman, and Holloway & Holloway, of Dallas, for appellants. McReynolds & Hay and Abney & Hassell, all of Sherman, and Edward P. Dougherty, of Dallas, for appellees.

RASBURY, J. Nelle Snyder Smith and her husband, B. L. Smith, contracted with the school trustees of Van Alstyne independent school district of Grayson county to furnish all material and labor necessary to build and complete a public school building in the town of Van Alstyne according to certain plans and specifications prepared by John Tulloch, architect, and under his supervision. The consideration to be paid the contractors was \$11,000, payments upon which amount were to be made every two weeks upon estimates of the architect, as the work progressed. During the progress of the work the appellant Fielder Lumber Company filed suit in the district court against Nelle S. Smith and B. L. Smith, and against Messrs. McKinney, Howle, Henderson, Umphress, Cartwright, Sheridan, and McDonough, trustees of the public schools of Van Alstyne. The Van Alstyne Lumber Company, W. F. Barnett, Mosher Manufacturing Company, Continental State Bank, and Palmer Pressed Brick Works were also made defendants. J. G. Knapple and M. F. Dougherty & Son intervened in the suit. Appellant Fielder Lumber Company alleged that it sold and delivered to Nelle S. Smith and B. L. Smith certain lumber and building material upon which there was a balance due of \$2,335.08, which was used by them in constructing a school building owned by the trustees of the public schools of the town of Van Alstyne; also alleged that, within the time and manner provided by law, it fixed and secured the statutory materialman's lien on said school building and the lot of land upon which it stood, at which time there was in the hands of the trustees \$2,200 to be used in the construction of said building, and sought appropriate relief by foreclosure and sale or a direction by the court to the school trustees to pay the debt from the funds in their possession belonging to said Smiths, and asserted that, if not entitled to the materialman's lien, it was in equity entitled to payment from the funds because of the notice given and the material furnished. The school trustees answered admitting the contract with the Smiths, disputed the legal right of Fielder Lumber Company to fix a lien on the school building since by law such lien was void as

against public policy, claimed that all money due on the contract had been paid to the contractors except \$2,138, which was by the contract reserved until final completion and acceptance of the building by the architect; that the other defendants and the interveners were claiming prior and superior rights to the fund, and that they were unable to determine to whom payment should be made; they tendered the money in their possession into court, and asked that it be paid to whomever was entitled thereto. Appellant Palmer Pressed Brick Works, in like manner with appellant Fielder Lumber Company, established, within the time and manner provided by law, the statutory materialman's lien on the school building and land, and asserted as well a superior equitable lien upon the funds in the hands of the trustees independent of the statutory lien based upon notice to the trustees of the furnishing of material with which to construct said building.

We shall not attempt to give in detail the pleadings of the other defendants and interveners for the reason that no issue is made upon the sufficiency thereof. Their claims to the fund in the hands of the trustees rest upon assignments from the contractors properly urged in their pleading. The case was tried without the intervention of a jury, and the case is here upon findings of fact and conclusions of law prepared by the trial judge. By its decree the trial court entered judgment in favor of all parties to this appeal against B. L. Smith for the amounts of their respective claims. The school trustees were directed to retain from the fund in their hands \$202 with which to complete the building, and to pay the balance of \$1,936 into the registry of the court. The court further decreed that appellants Fielder Lumber Company and Palmer Pressed Brick Works acquired no lien either upon the school building and land or the fund in the hands of the trustees, and that the assignment given Mosher Manufacturing Company was insufficient in law to constitute a transfer or assignment of part of the fund due the contractors or create any interest therein. The money tendered into court was directed to be paid as hereafter shown and to the exclusion of any participation therein by appellants, Fielder Lumber Company, Palmer Pressed Brick Works, and Mosher Manufacturing Company. From that judgment, the last three named have appealed.

It would consume too much time to consider separately the counter propositions of each appellee to the propositions of appellants, Fielder Lumber Company, Palmer Pressed Brick Works, and Mosher Manufacturing Company, and we shall not attempt to do so, but content ourselves by a careful consideration of each. This brings us to a consideration of the proposition asserted by appellant Fielder Lumber Company under

its first assignment of error; and that of the Palmer Pressed Brick Works asserted, under its second assignment of error, that giving notice of their accounts to the school trustees and filing same for record with the county clerk as required by article 5623, Rev. Civ. St. 1911 (being the notice provided to be given as a preliminary to fixing the statutory materialman's lien), had the effect to garnish the unincumbered and unexpended funds in the hands of the school trustees, and subjected same to the payment of appellant's debts. In the well-prepared and excellent brief of counsel for appellant Fielder Lumber Company, it is conceded that, by statute and decision, liens for material, labor, etc., are not permitted to be established against the state's public buildings. The reason and policy of this rule is too well known to require a discussion of the same by us, and we content ourselves by reference to the authorities quoted by counsel for appellant. Article 2845, R. S. 1911; Atascosa County v. Angus, 83 Tex. 202, 18 S. W. 563, 29 Am. St. Rep. 637; Dallas v. Loonie, 83 Tex. 291, 18 S. W. 726.

[1] But it is contended by counsel that section 37, art. 16, of the Constitution, which declares that " * * * materialmen of every class shall have a lien upon the buildings and articles made or repaired by them for * * * material furnished," evidences the intention of the framers of the Constitution to favor those creditors whose material goes into the actual construction of a building, and that hence, while the notice and subsequent proceedings were ineffectual to establish the statutory lien, in equity such notice was a garnishment of the fund and would give appellant's claim precedence over subsequent assignments by the contractors in the same manner that service of a statutory writ of garnishment would when such writs are available. We do not believe the statutes and decisions of our courts are susceptible of such a construction. It is true that the courts, in discussing and construing the statutory provisions enacted under article 16, § 37, of the Constitution, providing for the speedy and efficient enforcement of the lien provided for by the Constitution, have used the expression that such liens, when established in the manner provided by law, operate to garnish any money in the hands of the owner of the land and building. Nothing more, however, could be meant by such expression than that the owner of the building, in the event he paid out the money to some subsequent claimant, would be in a similar attitude that a defendant in statutory garnishment would be who paid out money to a subsequent claimant after service of the writ. We are confirmed in this conclusion by the fact that the mechanic's lien law fixes a lien, not upon any money in the hands of the owner of the building and land, but upon the land

and building, and he may do with the fund as he pleases, subject to the right of the lienholder to be reimbursed by the owner to the amount of his claim or the extent of the fund in the hands of the owner on a foreclosure of his lien and a sale of the property. Texas Builders' Supply Co. v. National Loan & Inv. Co., 22 Tex. Civ. App. 349, 54 S. W. 1059; Fullenwider v. Longmoor, 73 Tex. 480, 11 S. W. 500. We think the most that can be claimed under the steps taken by appellants Fielder Lumber Company and Palmer Pressed Brick Works, since a lien cannot be established against the school land and buildings, is that the trustees of the school had actual notice that the contractors owed them for material which went into the building at a time when the trustees had funds in their possession due the contractors. But in our opinion such facts do not establish any right in appellants whatever to the fund, legal or equitable. We agree that in this case the situation is difficult and unequal for appellants, but the correction lies with the Legislature rather than with the courts. Herring-Hall-Marvin Co. v. Kroeger et al., 23 Tex. Civ. App. 672, 57 S. W. 980. What we have said above disposes of the right of appellants Fielder Lumber Company and Palmer Pressed Brick Company to any priority of right to the fund in the hands of the trustees. We will discuss the other propositions raised by these parties in discussing the appeal of Mosher Manufacturing Company.

[2] The trial court, after adversely disposing of the claims of the appellants Fielder Lumber Company and Palmer Pressed Brick Company, found as a fact that the contractors had executed the following assignments against the funds in the hands of the trustees:

"In consideration of the sum of one dollar, the receipt of which is hereby acknowledged, and the further consideration herein-after mentioned, we have hereby assigned, transferred and set over, and by these presents do assign, transfer and set over unto the Continental State Bank of Van Alstyne, Texas, all moneys due or to grow due under and by virtue of a certain contract or contracts or agreements heretofore made and entered into on the sixteenth day of September, 1909, by and between Nellie Snyder Smith and B. L. Smith of Dallas, Texas, of the first part, and the board of school trustees of the Van Alstyne independent schools, parties of the second part, for the erection and completion of a school building in the town of Van Alstyne, Texas, under the supervision of John Tulloch of Sherman, Texas, by the said party of the first part for the sum of eleven thousand dollars, on original contract and subsequent contracts for additional work and changes at a cost of sixteen hundred and ninety-five dollars,

making a total of \$12,695.00, to be paid out by the board of trustees upon order of John Tulloch according to the terms of said contracts or agreements. Provided that this assignment shall be constructed to convey our final estimate or payment which according to the terms of said contract shall be paid upon completion of the building according to the terms thereof and shall be 20 per cent. of the total sum of \$12,695.00, or \$2,539.00. And we hereby make, constitute and appoint the said Continental State Bank, or the president or cashier thereof, our true and lawful attorney, irrevocable in our name, place and stead, but for its own use to ask, demand, sue, attach, levy, compromise, recover and receive all such sum or sums of money that are now or may hereafter become due, owing or payable for or on account of the debt and demands above assigned, and due receipts thereof to be given in our name or otherwise. The foregoing assignment is intended however to secure the Continental State Bank for money advanced to Nellie Snyder Smith, to meet pay-roll expenses, in the sum of eight hundred (\$800.00) dollars, as evidenced by one certain note bearing even date herewith for said amount and due in thirty days from date and for any renewals or extensions of said note, or other moneys advanced, whether evidenced by note, overdraft or otherwise, though not herein particularly mentioned. In witness whereof we have hereto set our hands and seal this 29th day of January, 1910. Nellie Snyder Smith. B. L. Smith."

Mrs. Nellie Snyder Smith in Account with Mosher Manufacturing Company.

1906.
Oct. 29. Mdse. \$250 00
Nov. 23. Mdse. 4 00
————— \$254.

"Dallas, Texas, Feb. 4, 1910. Mr. John Tulloch, Arch't. Sherman, Texas—Please pay to Mosher Manufacturing Co. the sum of two hundred and fifty-four dollars (\$254.00) account iron in Van Alstyne school buildings and charge same to my account, and oblige, Yours truly, Mrs. Nellie Snyder Smith."

On February 21, 1910, said document was filed with G. T. McDonough, secretary of said school board, who executed a receipt therefor in words as follows: "Van Alstyne, Texas, Feb. 21, 1910. Received of Mosher Manufacturing Company an order for the sum of \$254.00 to be paid out of any funds belonging to Nellie Snyder Smith in the hands of the school board of the Van Alstyne independent school district. G. T. McDonough, Secy. School Board."

As bearing on the Mosher order, the court also found as facts that the school building was being constructed under supervision of John Tulloch, architect, upon plans and specifications prepared by him; that the contract price was to be paid every two weeks during progress of the work for labor and

material acceptable to the architect and upon his estimates; that Nellie Snyder Smith, acting for herself and her husband, incurred the Mosher debt; and that it was for material used in the construction of the school building. The trial judge also found from the testimony in reference to the claim of J. G. Knapple as follows: "On February 12, 1910, said Nellie Snyder Smith executed and delivered to J. G. Knapple an order, addressed to G. T. McDonough, directing and requesting him to pay said Knapple the sum of \$275 out of the amounts due or to become due the contractors in connection with said contract, which order was left on the desk of G. T. McDonough by said J. G. Knapple on February 12, 1910, but has been lost. Said McDonough did not accept or agree to pay said amount, and had no authority to do so, and never saw it, and had no knowledge of it. The defendant B. L. Smith did not sign said order or have actual knowledge of its execution." The findings of fact of the trial judge as to the claim of W. F. Barnett is as follows: "On February 12, 1910, the defendants Nellie Snyder Smith and B. L. Smith were without funds and unable to meet their pay roll and pay laborers employed in the erection of said building, and on said date, after the attempt of the said Fielder Lumber Company to establish a lien thereon, the defendant Nellie Snyder Smith entered into an agreement with the defendant W. F. Barnett, whereby he agreed to advance and furnish money from time to time to pay for labor employed on said building and to meet the weekly pay roll of said contractors, and to induce said Barnett to make such advancements. The said Nellie Snyder Smith expressly agreed that he should be repaid and reimbursed for the amount so advanced out of the amount due and to become due said contractors by said school trustees for the erection of said school building; and the defendant Nellie Snyder Smith then and there verbally agreed that the amounts so advanced and to be advanced by said Barnett should be repaid out of said fund. That B. L. Smith and Nellie S. Smith are both insolvent, and were at the time."

In relation to the sufficiency and priority of the transfers and orders herein set out, the court by its judgment allowed, first, the claim of the Continental State Bank and directed it should be paid in full out of the fund; second, the claim of J. G. Knapple, and ordered it paid in full after the claim of the bank; third, the claim of Barnett and ordered it paid in full after payment of claim of Knapple. The Mosher claim was not allowed for the reasons stated. If allowed, however, it would have been the second order given in point of time. The payment of these claims, as allowed, exhausted the fund. In discussing the issues between those holding assignments of the fund and the issues raised by appellants in that re-

spect, it is impracticable to discuss each assignment, since many similar assignments are contained in the five or six briefs on file. It may be said, however, that the issue is made (1) that the assignment to Continental State Bank is ineffectual because it shows that it was given to secure payment of a debt and is not a transfer of part of a particular fund, but in the nature of a chattel mortgage, and without force unless registered as such; (2) that Nellie Snyder Smith, being a married woman, was without authority to make the assignments to Knapple and Mosher Manufacturing Company; (3) that the alleged oral assignment to Barnett was but a promise to assign, and hence ineffectual; (4) that the assignment to Mosher Manufacturing Company did in law constitute an equitable assignment and was enforceable as such.

Discussing the issues above outlined in reverse order, we come to the claim of appellant Mosher Manufacturing Company, which was disallowed by the court for the reason that the same was insufficient in law; meaning, of course, that the Mosher transfer or order did not contain all the elements or the elements necessary to constitute, in law, an equitable assignment of any interest the contractors had in the fund due them by the school trustees. The law of equitable assignment is no longer an open question in this state, the question having been reviewed repeatedly by our Courts of Civil Appeals and Supreme Court; but as a result of varying facts in nearly every case involving the doctrine, due to the impossibility of observing in the hurry of business affairs the niceties and formalities of contracts drawn by those trained in legal matters, the question continues to arise, and the difficulty lies rather in the true construction to be put upon the order than the legal principle applicable in a given case. In the leading case of *Harris County v. Campbell*, 68 Tex. 27, 3 S. W. 246, 2 Am. St. Rep. 467, it is said: "It now seems to be held, by the great weight of authority, that an assignment of a part of a chose in action for a valuable consideration is good in equity, and that it may be made either by direct transfer or by an order drawn upon the particular fund." As to what will constitute a sufficient designation of the particular fund, coupled with the intention to appropriate part thereof to the use of another, is necessarily susceptible of no general rule, and in this respect each case must be determined on the particular facts developed. In the case at bar, it is maintained that the Mosher order is insufficient because not payable out of any particular fund, and because not addressed to the proper custodian of the fund. We are unable to see, as between the parties, and while the fund is yet in the hands of the holder, that it is material to whom the order may be directed, if it clearly shows, as we have just said, an intention to appropriate a

part of the particular fund to the use of another. Undoubtedly a valid and enforceable transfer could be made of the fund or a portion thereof, without the necessity of directing the order to any person. While good reason can be seen in the case at bar from addressing the order to Tulloch, who was the supervising architect of the building, and in a general sense the agent of the school trustees, and upon whose certificate alone estimates for the work done upon the building were paid, yet conceding, for the sake of the argument, that he was not the holder of the fund, and that the order was improperly addressed, it nevertheless seems to us that such facts in no sense invalidated the order, if in other respects sufficient; that is to say, if, from the body of the order and the proven circumstances surrounding its execution, it can be definitely said that the contractors expressly or impliedly intended to appropriate to Mosher's use \$254 of the money due them from the school trustees. And in this connection it is to be remembered that the question of notice is not involved, nor is any attempt made to hold the trustees for any greater amount than is admittedly due by them, leaving it a bare question of intention between Mosher and the contractors to be gathered from the order and the other testimony. The order is directed to John Tulloch, supervising architect for the trustees of the Van Alstyne school building, employed by the trustees as such and to prepare plans and specifications, and upon whose certificate estimates due under the contract were to be paid to the contractors. It directed him to pay to Mosher \$254 "account iron in Van Alstyne school building," and the court found in its conclusions that the Mosher debt was for material used in constructing the school building. The order concludes with the request that same be charged "to my account." The account could hardly be construed to mean anything else than a reference to the account between the contractors and the school board, and meaning, of course, to charge the amount thereof up against the sum due the contractors; for while the record does show the contract between the school trustees and the contractors to construct the school building, and does show that Tulloch was the architect to supervise the work of the contractors and certify estimates, and does show, also that the iron for which the debt was due was used by the contractors in the school building, yet we are unable to find a single circumstance in the record or in the wording of the order indicating a contrary intention. In view of the facts and circumstances related above, and in deference to and approval of the decided tendency of our appellate court to sustain this character of transfer when it can be done without violence to the settled rules of evidence, we cannot escape the conclusion that it was the intention of the con-

tractors, in giving said order, to appropriate to the use of Mosher the sum named therein out of any funds due the contractors by the school trustees, and that, as between the parties to this suit, it had that effect. *Harris County v. Campbell*, 68 Tex. 22, 3 S. W. 243, 2 Am. St. Rep. 467; *Clark v. Gillespie*, 70 Tex. 513, 8 S. W. 121; *McBride v. Am. R. & L. Co.*, 127 S. W. 233; *Stillson v. Stevens*, 23 S. W. 322; *Bellharz v. Illingsworth*, 132 S. W. 106.

[3] What we have said in reference to the Mosher order meets the objection to the allowance of the Knapple order, which we understand is attacked because improperly directed to McDonough, secretary of the school board. In other respects the findings of the trial judge quoted herein establish the giving of a sufficient transfer by the contractors to Knapple and its subsequent loss by Knapple. The loss of the transfer could in no manner affect the validity or sufficiency of same, since it was but the evidence thereof.

[4] In connection with our conclusions in reference to the sufficiency of the Mosher transfer, it has been uniformly held in this state, all questions of notice and the legal sufficiency of the transfer aside, that such transfers shall rank in the order of their respective dates, and be satisfied in full accordingly, by which process the Mosher order displaces all the other orders other than the transfer to Continental State Bank. *Olive v. San Antonio, B. S. Co.*, 27 S. W. 789; *Henke & Pillott v. Keller et al.*, 50 Tex. Civ. App. 533, 110 S. W. 783; *Harris County v. Campbell*, supra.

As indicated in another place in this opinion, and as found by the court, the contractors, during the progress of the work, were without money with which to pay their labor. They secured sufficient money from Barnett to meet the expense of the laborers on the work, and in consideration thereof agreed orally that Barnett should be reimbursed for same out of the money they were to receive for constructing the school building. In evidence of such oral agreement, they subsequently executed a written transfer covering the original transaction. The claim is made that the oral agreement between Barnett and the contractors was in law no more than a promise to assign a part of the fund, and similar to the attempted assignment in *Henke & Pillott v. Keller*, supra.

[5] By the findings of the trial judge, the contractors agreed that Barnett should be repaid and reimbursed for the money he advanced out of the amount due, and to become due, from the school trustees, and then and there assigned to him orally sufficient of said fund to reimburse him for such advances. It does seem to us that the language of the court establishes and finds as clear cut an oral assignment as could be expected. When all essentials necessary to constitute an equitable assignment are prov-

en to have been agreed to by the parties orally, such agreement is quite as effective as a written agreement, and it has been accordingly determined. *Clark v. Gillespie*, supra; *Rollison v. Hope*, 18 Tex. 446; *Johnson v. Amarillo Imp. Co.*, 88 Tex. 510, 31 S. W. 503; *Campbell v. Grant*, 36 Tex. Civ. App. 641, 82 S. W. 794.

[6] Nellie Snyder Smith, wife of B. L. Smith, with the knowledge and consent of her husband, was in active charge of the work according to the findings of the trial judge; the legal effect of which was to constitute her his agent in all things pertaining thereto. Hence we overrule all the assignments of error raising her lack of authority to execute the transfers of the moneys due under the contract. *Richburg v. Sherwood*, 101 Tex. 10, 102 S. W. 906; *Wetzel v. Simon*, 87 Tex. 403, 28 S. W. 274, 942.

[7] The claim urged by appellant Palmer Pressed Brick Works that the assignment to Continental State Bank is a mortgage rather than an assignment is not, in our opinion, a fair construction of the instrument. The first and second clauses of the instrument clearly show a transfer of the money that will be due the contractors on their last estimate for work on the school building. The only language in the transfer that could be held to create a mortgage is the last clause, wherein it states the purpose of the transfer to be to secure payment of a note for \$800; and, since the transfer at no other place states the actual consideration or purpose of same, we conclude the last clause was intended only to describe the debt the contractors intended to pay.

The case as to the appellants Fielder Lumber Company and Palmer Pressed Brick Works will be affirmed, and reversed and rendered as to appellant Mosher Manufacturing Company, with instructions to the lower court to reform its judgment so as to satisfy in full, out of the fund deposited in court by the school trustees, each of the transfers given by the contractors in the order of their dates, which is first the claim of Continental State Bank, second, the claim of Mosher Manufacturing Company. The claims of Knapple and Barnett, so far as the record discloses, being given simultaneously, the balance of said fund, after paying the bank and Mosher, shall be apportioned between them; each to receive that portion or percentage of the remaining part of the fund that his judgment bears to the whole thereof, based upon the amount found to be due by the trial court. In all other respects the judgment of the court is affirmed.

Affirmed in part; reversed and rendered in part.

On Rehearing.

Appellee Knapple in his motion for rehearing urges that we erred in directing that, after payment in full of the claims of Continental State Bank and Mosher Manufactur-

ing Company, the balance of the fund in controversy should be apportioned between him and appellee Barnett, and in this contention we concede he is correct. The trial court found as a fact that the transfers to Knapple and Barnett were both executed February 12, 1910, as stated in our opinion, but made no affirmative finding as to actual priority.

[8] The trial court did, however, direct in the judgment below that Knapple should be first paid in full before any sum should be paid to Barnett. There is no statement of facts in the record, and it is the well-settled rule in such cases that, in order to sustain the judgment of the trial court, we shall presume the court had before it facts sufficient to support its judgment, or, in the case at bar, the priority of the Knapple claim, although omitted from the court's finding. *Ellis v. National Exchange Bank*, 38 Tex. Civ. App. 619, 86 S. W. 776; *Jarrell v. Sproles*, 20 Tex. Civ. App. 387, 49 S. W. 904; *Malone v. Fisher*, 71 S. W. 996; *Drake v. Davidson*, 28 Tex. Civ. App. 184, 66 S. W. 889; *Maes v. Thomas*, 140 S. W. 846.

It is accordingly ordered that the judgment be reformed, and the court below, in accordance with the view here expressed, be directed that, after payment in full of the claims of Continental State Bank and Mosher Manufacturing Company, the claim of appellee Knapple be next paid in full, if there be sufficient funds; any balance to be applied to the claim of said Barnett.

COMMONWEALTH FIRE INS. CO. v. OBENCHAIN et al.

(Court of Civil Appeals of Texas. San Antonio. Nov. 6, 1912. Rehearing Denied Dec. 4, 1912.)

1. MORTGAGES (§ 480*)—FORECLOSURE—SUFFICIENCY OF EVIDENCE—PAYMENT.

In an action to foreclose a deed of trust, in which defendant counterclaimed for insurance due him on account of loss by fire, evidence *held* to present a question for the jury whether the mortgagee, a fire insurance company, undertook and agreed to attend to the insurance, and did attend to it for a time in such manner as to give the mortgagor the right to believe it would continue to do so.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. § 1399; Dec. Dig. § 480.*]

2. INSURANCE (§ 328*)—FORFEITURE—CHANGE OF TITLE OF INTEREST.

A mortgagee, a fire insurance company, agreed to attend to the insurance on the premises and did for a time, justifying the mortgagor in believing that it would continue to do so. The policies while kept in force were made for only one year at a time. The form of policy customarily used by the company contained a provision that it would be void if any change in the title or possession of the premises took place. The mortgagor conveyed as security for a debt, but the premises were reconveyed, and more than two years thereafter a loss occurred. *Held*, that the conveyance did not affect the company's liability, since it was fair to assume that, if it had continued to have

policies issued, they would have been for only one year, and an act avoiding one policy would not avoid subsequent policies.

[Ed. Note.—For other cases, see *Insurance*, Cent. Dig. §§ 794-822, 825; Dec. Dig. § 328.*]

3. INSURANCE (§ 113*)—PROVISIONS OF POLICY—NOTICE TO INSURED.

Where a mortgagee agreed to attend to the insurance on the mortgaged premises, and procured policies of insurance thereon and retained them in its possession, the mortgagor was chargeable with notice of their provisions.

[Ed. Note.—For other cases, see *Insurance*, Cent. Dig. § 135; Dec. Dig. § 113.*]

4. INSURANCE (§ 362*)—NONPAYMENT OF PREMIUMS—EXCUSE.

A mortgagee, a fire insurance company, whose mortgage required the premises to be kept insured, and authorized the mortgagee to pay insurance premiums and recover them from the mortgagor with interest, agreed to attend to the insurance, and for some time did so. There was no evidence that the mortgagor had paid any premiums to the local agents, and the president of the company testified that the insurance was dropped, not because of the nonpayment of premiums, but because by a payment on the loan the premises constituted sufficient security without insurance. The mortgagor was never notified that the company would no longer attend to the insurance. *Held*, that the mortgagor's failure to pay a premium when notified by a local agent that it was due did not relieve the company from liability.

[Ed. Note.—For other cases, see *Insurance*, Cent. Dig. §§ 925-930; Dec. Dig. § 362.*]

5. TRIAL (§ 192*)—INSTRUCTIONS—ASSUMPTION OF FACTS.

Where it appeared that the president of an insurance company, also named as the trustee in a deed of trust given to the company, in negotiating the loan, insisted that the insurance should be carried in his company, the court did not err in treating it as undisputed that the company selected itself to carry the insurance.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 432-434; Dec. Dig. § 192.*]

6. APPEAL AND ERROR (§ 1066*)—REVIEW—HARMLESS ERROR—INSTRUCTIONS.

Where it was claimed that an insurance company had agreed to attend to keeping the premises insured, an instruction requiring notice to, or knowledge by, "defendants" that it would no longer attend to the matter in order to relieve it of liability was not prejudicial to the company, although it required notice to, or knowledge by, insured's wife as well as insured, where there was no contention that either one had notice or knowledge.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 4220; Dec. Dig. § 1066.*]

7. EVIDENCE (§ 139*)—ADMISSIBILITY—SIMILAR TRANSACTIONS.

Where defendant gave two deeds of trust on different lots to plaintiff, an insurance company, and a recovery for loss by fire on one of the lots was sought on the theory that the company had agreed to attend to the insurance on the premises, the testimony of a person purchasing the other lot, subject to the deed of trust, that the company without any request from him issued a policy and sent him a bill for the premium, was admissible to show its course of dealing with respect to the property and to show how it construed its transaction with respect to the insurance thereon.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 415; Dec. Dig. § 139.*]

Appeal from District Court, Dallas County; J. C. Roberts, Judge.

Action by the Commonwealth Fire Insurance Company against H. L. Obenchain and others. From a judgment for defendants, plaintiff appeals. Affirmed.

Coke, Miller & Coke, of Dallas, for appellant. W. P. Ellison, W. H. Clark, Ed. Dougherty, and Cockrell, Gray, Thomas & McBride, all of Dallas, for appellees.

MOURSUND, J. This is a suit by appellant against appellees for \$1,500, together with interest and attorneys' fees, balance due on note, dated April 1, 1904, executed by appellees to appellant, and to foreclose lien on a part of block 525 in the city of Dallas, existing by virtue of a deed of trust executed by appellees to I. Jalonick, as trustee for appellant, to secure the payment of said note. Defendants admitted plaintiff's claim, but set up a cross-action alleging that plaintiff was indebted to defendants at the time of the filing of the suit in the sum of \$1,600 on account of fire loss; that on April 1, 1904, plaintiff made defendant H. L. Obenchain a loan of \$7,500, for which Obenchain executed two notes, one for \$5,000, secured by deed of trust on a lot on which was situated a one-story brick house, and the other for \$2,500, secured by deed of trust upon the premises described in plaintiff's petition, on which at that time was situated a two-story frame building; that the debt sued for by plaintiff is the balance due on said \$2,500 note. It was further alleged that, at the time of making said loan, the houses above mentioned were insured in other companies, but that plaintiff company, through its president and the trustee in said deeds of trust, Isaac Jalonick, required defendants to give the insurance upon said buildings to plaintiff company, insisting that said company was in the insurance business as well as in the loan business, and that it must have the insurance, and that the loan would not be consummated unless the insurance was carried by plaintiff company; that plaintiff then and there agreed with defendants that it would carry the insurance on said two buildings for their mutual benefit and Isaac Jalonick, trustee, as his interest might appear; that plaintiff company prepared the deeds of trust given to secure said loan, and the one covering the premises described in plaintiff's petition contained the following clause: "That we will keep the buildings on said premises, or that may hereafter be erected thereon, insured in such company or companies as said trustee (I. Jalonick) may select, to the amount of \$1,600, with loss, if any, payable to the legal holder or holders of said note as its interest may appear; that we will keep all fences, buildings, and other improvements thereon in good repair and will do no act by which the value of said premises may be impaired, and that we will on demand repay the legal holder or holders of said note, or trustee, all sums of money they may advance to satisfy, and pay taxes,

assessments, insurance premiums, and charges of whatever nature chargeable against said premises or against said note or this deed of trust, with 10 per cent, interest per annum from date of advancement, all said advancements to be a lien on the property hereby conveyed and secured by this deed of trust." It was further alleged that the other deed of trust contained the same clause, except that it provided for a different amount of insurance to be carried; that the matter of insurance was thereby taken out of defendants' hands, allowing them no option in the matter, and providing for paying itself all premiums and securing itself therein; that said trustee, who was, and ever since has been, the president of plaintiff company, selected said company to carry the insurance risks, and did insure said houses, and led defendants to believe, and they did believe, that said houses were insured, the brick building as long as defendant H. L. Obenchain owned same, and the frame building on September 17, 1909, when it was destroyed by fire; that, by reason of the premises, plaintiff company is indebted to defendants on its policy to the amount of \$1,600. It was further alleged that if said policy on said frame building had lapsed, as claimed by plaintiff, then that plaintiff undertook and agreed to insure the same and keep it insured to the extent of \$1,600, and to protect itself and the defendants to that extent, and constituted itself the agent of the defendants, protecting and securing itself in the payment of all insurance premiums, and required defendants to agree to same, and that the policies were retained by plaintiff company; that defendants were left no choice, and relied upon said undertaking on the part of plaintiff to insure said property from year to year, and, if it was not insured, then it was through the negligence, wrong, and breach of agreement on the part of plaintiff company, whereby defendants have suffered damage and loss to the amount of \$1,600; that said acts and agreements by plaintiff constituted an insurance by it of these defendants against all loss by fire to the extent of \$1,600, whether any formal policy was issued or not. Defendants further alleged they had paid all premiums on notice that they were due; that, as plaintiff kept the policies, defendants had no record of expiration dates, and relied wholly on plaintiff to insure the property as it had agreed to do, and plaintiff at no time gave defendants any intimation of any change of plans or policy.

Plaintiff filed a supplemental petition containing demurrer, general denial, and plea that on April 1, 1904, and continuously since said date, the form of insurance policy, customarily in use by plaintiff and other companies, contained, in substance, the following provision: "That said policy, unless otherwise provided by an agreement indorsed thereon or added thereto, shall be void, if

the hazard be increased by any means within the control or knowledge of the insured, or if mechanics be employed in building, altering or repairing the insured premises for more than 15 days at any one time, or if the interest of the insured be other than unconditional and sole ownership, or if any change other than by the death of the insured take place in the interest, title, or possession of any part of the subject of insurance, except change of occupants without increase of hazard, whether by legal process, or by judgment, or by voluntary act of the insured or otherwise, or if the building mentioned and described in said policy, whether intended for occupancy by owner or tenant, be or become vacant and unoccupied, and so remain for 10 days." It was further alleged that defendant H. L. Obenchain executed and delivered to W. H. Flippen, as trustee for J. B. Adoue, a deed of trust on the premises described in plaintiff's petition, dated July 26, 1904; that about October 1, 1906, he executed and delivered to J. T. Elliott a general warranty deed to the lot on which said two-story frame house was situated; that plaintiff never received any notice of the execution of either of these two instruments; that the said two-story frame house became vacant and so remained for more than 10 days at a time at various periods; that several times between April 1, 1904, and the date of the fire mechanics were employed in altering and repairing said building for more than 15 days at one time; that plaintiff was never notified of said vacancies or alterations or repairs, and had no knowledge thereof, and, if plaintiff had issued any policies on said house, same would have contained the provision aforesaid. Plaintiff also pleaded the statutes of limitation of two and four years. Defendants filed supplemental answer containing demurrer and special exceptions to the supplemental petition, a general denial, a special plea setting up that at the time of the fire, and for more than two years prior thereto, the defendants were the bona fide owners of said property, and that same was unincumbered except as to plaintiff's lien.

Upon the trial, the jury on June 2, 1911, returned a verdict against plaintiff, and in favor of defendants on their cross-action for \$45, with interest thereon from September 17, 1909, to date. Judgment was entered September 13, 1911, nunc pro tunc as of June 2, 1911, that plaintiff take nothing by its suit, and that defendants recover of plaintiff \$45 with interest from date. Plaintiff appealed.

The first assignment of error complains of the refusal to instruct a verdict for plaintiff as against defendants' cross-action. The propositions, briefly summarized, are that the evidence was insufficient (1) because it fails to show it was plaintiff's legal duty to defendants, or either of them, to have insur-

ance on said building at the time of the fire to the extent of \$1,600, or any other sum; (2) because by conveyance made by defendants to Elliott in October, 1906, the policy then on the property was vitiated, and plaintiff was under no obligation to renew same upon its expiration or upon the reacquisition of title by Obenchain and wife; (3) because, when defendants reacquired the title, plaintiff was under no obligation to reissue policy until advised by defendants of such reacquisition of title by them, with a request for the issuance of another policy.

[1] The execution and delivery of the two deeds of trust and the notes described in defendants' cross-action is admitted. The deeds of trust contained the clause copied in our statement of defendants' cross-action. The loans were made on April 4, 1904. On December 26, 1905, there was paid on the \$2,500 note the sum of \$1,000. At the time of the loan, the houses on the two pieces of property mentioned in said deeds of trust were insured in other companies than plaintiff company. On January 4, 1905, Chas. L. Dexter, local agent for plaintiff, insured the two-story frame building, and upon the expiration of the policy on January 4, 1906, D. M. Craddock, the successor of Dexter as local agent, renewed same for another year; the policy being written in the name of the estate of A. T. Obenchain. Craddock testified the premium was never paid to him, and the insurance was dropped at the expiration of said policy on January 4, 1907, and no subsequent policy issued. That he thought he gave the policy to plaintiff company, and, according to his recollection, the same contained a reservation of plaintiff's interest as the same might appear. He did not get the order for the insurance from defendant H. L. Obenchain nor deliver policy to him. Defendant H. L. Obenchain testified that he was the owner of the premises described in plaintiff's petition, and that the house on same was almost entirely destroyed by fire on September 17, 1909; the damage amounting to over \$2,000. He then testified: "At the time I executed the deed of trust, the property was insured in one of Mr. Addison's companies; I don't know the name of the company, never did know. When I made this loan with Mr. Jalonick, we had a conversation about the insurance, and then, after it was consummated under his instructions, I informed Mr. Addison that Mr. Jalonick had charge of my insurance thereafter, and he would have to give it up to him. The conversation with Mr. Jalonick took place after the loan was all agreed to. He says, 'Mr. Obenchain, we are in the insurance business as well as in the loan business, and we will have to have the insurance on that property,' and I told him I preferred to attend to that myself. He says, 'Don't make any difference; the loan wouldn't be made unless we have the insurance; we are in

the insurance business as well as the loan business,' and I had arranged to use this money here in releasing the estate from the administration, and the court was ready and I had to put loans on it." (This evidence appears to have been limited by the court to be admitted only for the purpose of showing the facts in regard to the selection of the company in which the insurance should be placed.) Again the witness testified: "I agreed that Mr. Jalonick should notify the other company that he was to take the insurance; that is all. He stated, as I said, that they were in the insurance business as well as the loan business, and that they would have to have the insurance on that property. He selected his own company; I understood him to select. He said, 'We will have to have that insurance;' that is, the Commonwealth Insurance Company. * * * Then: "Mr. Jalonick kept the policies, * * * had them issued or attended to the issuing of them, and kept the custody of them. I told him in this conversation that I preferred to attend to my own business, but he told me that they had to have that insurance, and that was all there was to it; I never had anything more to say about it." He also testified to having another conversation over the telephone with I. Jalonick, the president of plaintiff company and trustee in said deeds of trust, after the fire; a portion of his testimony concerning said conversation being as follows: "I says, 'Well, Mr. Jalonick, you remember when you made me the loan that you informed me that you were in the insurance business as well as in the loan business, and that you would have to have the insurance on that property?' He says, 'Yes.' I says, 'Well, is my property insured?' He says, 'Why, yes.' I says; Well, where is my policy?' I says, 'I can't find it, or something. He says, 'Well, I will find it for you.' I says, 'Well, I am very pleased to hear that, Mr. Jalonick.' I says, 'I started to write you.' He then asked if I had had a loss, and I told him 'Yes'; that I moved out of the house on the 1st day of September, and it burned up on the 17th. He asked how long it was vacant. I told him it was not vacant a minute; that I moved out and the other people moved in. He asked if the other people had any insurance. I told him I didn't know; that I heard they did. He asked how much. I told him I understood \$1,000, and he says, 'All right.' I asked him if he would get my policy for me, and he replied he would." That next day Jalonick called for him over the telephone at his residence, in his absence, and, upon his return, being informed of such fact, he rang up Jalonick and told him who he was.

We now quote from Obenchain's testimony in regard to this conversation: "He said, 'Oh, yes,' and hesitated and hummed and hawed a minute, and then says, 'Why, when you

were speaking to me the other day, I thought you were speaking of an investment.' I told him I didn't know what he meant by investment; that I just wanted to know if he had my insurance as he had agreed to carry, and he said that I was not insured. I asked why not, and he replied that they weren't attending to my business for me. I told him that it looked like he undertook to attend to it when he made me take it away from my agents and turn it over to him, and he replied that I wasn't insured, and they weren't going to pay a dollar of it. I told him that it looked to me like he ought to settle up my insurance, and finally remarked that it wasn't any use for us arguing a lot. He said, 'We carried your insurance up until January, 1906, and at that time you made a payment of \$1,000 on your note, and we didn't care for any further security and we just dropped the insurance.' I told him I didn't know anything about that, and he said, 'We will see about that,' or something of the kind, and then I told him my wife had paid him \$1,000, and he wouldn't say that he had ever taken the \$1,000; he wouldn't say that he had ever said anything to my wife about insurance or anything of that kind, and finally wound up and told me that he didn't owe me a dollar, and wasn't going to pay me a dollar."

It appears from the evidence of B. R. Parks, who purchased the premises conveyed in the deed of trust securing the \$5,000 note, that the brick building thereon was insured by plaintiff company in March, 1908, when he bought it. He assumed the payment of said note, and some months after his purchase received a notice from plaintiff that it had rewritten his insurance, and inclosed bill for premium, all without any request from him; that he did not want to carry insurance, because he wanted to tear down the building, and, after receiving the second notice, called on Mr. Jalonick and objected to paying premium. The witness then testified as follows: "Mr. Jalonick said that, under this loan, the contract or deed of trust provided they had the exclusive right to keep this property insured; that I had always had my own way about things, and now they had the exclusive right, and I had to pay the price, and I think, if I remember correctly, I had the policy on that property canceled and tore down the property and rebuilt and paid off the loan in October, 1908, some time."

I. Jalonick testified, in part, as follows: "I will tell you why the policy lapsed. * * * Dexter wrote it and Craddock renewed it. In December, 1905, the policy—that is, the loan—was paid down to \$1,500. * * * The policy was written (I think Craddock wrote it) in 1906, and expired 1907. Well, I remember that policy had expired, the loan had been reduced to \$1,500, and the real estate was ample security for \$1,500; and that is why I was indifferent and didn't

think it was up to me to continue the policy on it, ask for that additional security, in addition to the land. The company was protected by the real estate, and I have something else to do besides write up renewals of 5,000 or 6,000 policies. We took this contract from Harry Obenchain empowering me to select the company for renewals to protect the loan as long as the loan needed protection. * * * It was up to Mr. Obenchain to protect his insurance; that was his affair. I represented the company; I didn't represent Mr. Obenchain."

It appeared from policy register of Mr. Addison, deceased, that he issued policy for \$1,500 on the two-story frame house in favor of estate of A. T. Obenchain for one year, expiring January 4, 1905, with mortgage clause in favor of Guarantee Loan & Investment Company, and on May 30, 1904, after the deed of trust to plaintiff in April, rider was attached showing satisfaction of interest of said Loan & Investment Company, and showing loss payable to I. Jalonick as his interest might appear. The evidence shows that Obenchain on October 1, 1903, executed to J. T. Elliott a warranty deed conveying said premises, reciting a consideration of \$8,000, of which \$6,500 was cash, and the remainder the assumption of the balance of \$1,500 due plaintiff on its note. Jalonick testified he did not know of said instrument until after the fire. Obenchain made this conveyance to Elliott partly for the purpose of getting money to pay his interest, and partly to make a prospective purchaser more eager to buy the place. Elliott let him have \$260, which he paid to Jalonick. Obenchain testified that he considered himself the owner of the property all the time. Jalonick testified the blank form of insurance policy introduced in evidence was the form customarily used by the plaintiff for many years. This form contains the clause copied by us in stating the allegations of plaintiff's supplemental petition. We think the evidence was sufficient to go to the jury, and that, if the jury believed the testimony of defendant H. L. Obenchain, it was authorized to find against appellant on the ground that, through its president, it undertook and agreed to attend to defendants' insurance matters, and did attend to same in such manner as to give him the right to believe they would continue to do so.

[2] Nor do we think the execution of the deed to Elliott, which appears to have been intended as a mortgage, will excuse appellant from liability. If the fire had occurred during the time when this conveyance was in effect, it might be a serious question, but the fire occurred in September, 1909, about two years after the reconveyance by Elliott. Jalonick testified they insured the house only for one year at a time; that it was cheaper to insure for three years, as it would only cost two premiums; and that he supposed it was not insured for three years at a time

"because Mr. Obenchain didn't want it that way—didn't ask for it." Assuming that any policies issued would have been only for one year, as we think, from the testimony, we have a right to do had appellant issued such policies in accordance with the agreement with Obenchain, the one in force on September 17, 1909, would not have been subject to any objection by reason of the condition of the title, and payment thereof could not have been refused because of some act invalidating a prior policy, even though the existence of such prior act was unknown to appellant. Appellant had a lien on the premises to secure the payment to it of all premiums paid by it, together with 10 per cent. interest, which was a greater rate of interest than the loan itself bore, and could have recovered such premiums in this suit by pleading and proving same.

[3] While we think Obenchain was chargeable with notice of the provisions of the policy, even though same was not in his possession, yet we do not think that an act by him which would avoid one policy should be construed to avoid all subsequent policies. For the reasons indicated, we overrule the first assignment.

[4] The second assignment complains of the refusal to give a special charge, reading as follows: "If you believe from the evidence that defendant H. L. Obenchain received notice from D. M. Craddock, local agent of plaintiff, that a premium was due on the policy issued by said Craddock January 4, 1906, and said Obenchain failed to pay said premium to plaintiff or said agent, then you will return a verdict for plaintiff on defendants' cross-bill or counterclaim." Appellee contends the evidence fails to show that notice of accrual of the premium was received by Obenchain, and for that reason the charge was correctly refused. We have read the statement of facts carefully, and conclude that the evidence on such point was sufficient to go to the jury. Appellee also contends the charge was correctly refused because it was immaterial whether such premium was paid or not; that Obenchain, under the facts of this case, had the right to depend upon plaintiff carrying his insurance until it notified him that it would no longer do so.

It is undisputed that Obenchain was never notified that plaintiff would decline to write further insurance on either of his two properties, or that it had declined to do so, and received no notice prior to the fire that the insurance had been dropped. He did nothing with respect to his insurance being changed to plaintiff company from the companies in which he carried it at the time of the loan, except to state to Addison, the agent, that Jalonick would look after his insurance in the future. The policies were issued by plaintiff company evidently by instructions from Jalonick. Jalonick reinsured on the date of its issuance the policy issued by Craddock on January 4, 1906, as

shown by certificate attached thereto. On the next day a change was indorsed on the policy making the name of the insured read H. L. Obenchain instead of estate of A. T. Obenchain. This indorsement is not signed by Craddock, nor did he recollect making same. Craddock had no dealings with Obenchain, and sent out his bills on the first of the succeeding month, so it is evident that Obenchain knew nothing of this mistake until long after it was corrected; and, as Craddock knew nothing about the ownership of the property, it is evident that some one in plaintiff's home office had this change made, and was at that time giving the matter supervision. Neither Dexter nor Craddock testified to ever having received any premiums on the Obenchain policies. Dexter did not know who paid the premium on the policy issued by him on the two-story frame building, nor did he testify it was paid to him. Jalonick testified that Obenchain never paid a cent on any premium on any insurance policy, and then qualifies by adding that he never paid any to the company direct; that all premiums were collected through local agents. Edwards, who was auditor, cashier, and chief clerk, testified that no premiums were paid to him by Obenchain on said property to the best of his recollection. Obenchain testified positively that he paid to plaintiff's home office all premiums of which he received notice. It is admitted that the premium was paid on the first policy issued on the two-story frame building; and, while policies were issued on the brick building as late as 1908, no one of plaintiff's witnesses, who were its officers or agents, admitted that Obenchain ever paid a premium thereon. The \$1,000 was paid on the \$2,500 note in December, 1905, before Craddock issued the policy on January 4, 1906, yet said policy was permitted to remain in force until January 4, 1907, although no necessity existed for doing so for the protection of plaintiff, as shown by the testimony of Jalonick, in explaining why the insurance was not renewed, and although bill was sent out on the first of the following month, and, according to Craddock's testimony, was not paid to him. If Obenchain's testimony is true, Jalonick, speaking for plaintiff company, insisted on having the insurance because they were in the insurance business, and that Jalonick himself thought they had been insuring the property all along, and assured Obenchain over the telephone after the fire that the policy was in force. It appears from Obenchain's testimony that after the fire he went to plaintiff's home office and saw Craddock, and no one could or would give him any information about his insurance, and he told Jalonick, when the latter returned to Dallas, that he had made such inquiry and asked him whether he still had insurance, and then Jalonick assured him the policy was in force. It also appears that Jalonick, again speaking for plaintiff,

insisted upon keeping the policy upon the brick building in force after it had been sold, claiming such right because the deed of trust gave it, and the same was still in force; the indebtedness having been assumed by the purchaser.

We think the evidence shows such a course of dealing in regard to this matter as to make plaintiff liable to Obenchain, even if the latter failed to pay the premium on the 1906 policy, and that plaintiff could only have relieved itself of further liability by notifying him that it would no longer undertake to write his insurance. Aside from Jalonick's testimony giving his reason for dropping the insurance, the evidence fails to show that it was dropped for nonpayment of premium. His testimony makes it certain that it was not the act of a local agent refusing to renew because of such nonpayment, but, speaking for the company of which he was head, he gives an entirely different reason, and that was that, after the payment of the \$1,000, they were secure enough without the insurance, and were not looking after Obenchain's business. After such payment, plaintiff was better secured than ever in the repayment to it of premiums, together with 10 per cent. interest, and had nothing to lose by keeping same paid, especially as the loan itself only bore 8 per cent. interest. Having selected itself as the company to carry the insurance, and given Obenchain to understand and believe it was carrying the same, good conscience and fair dealing demanded that he be notified whenever plaintiff wished to give up its benefits and be relieved of its liabilities in the matter. For the reasons given, we hold it was not error to refuse said special charge, and the assignment is overruled.

[5] The third assignment complains of the charge of the court because it assumes that plaintiff selected itself as the company in which Obenchain should carry his insurance. Jalonick, the president of plaintiff company, was also the trustee in the deed of trust, and, in negotiating the loan, he insisted the insurance should be carried in plaintiff company as soon as the then existing policy expired, and there was no error in the court treating it as undisputed that plaintiff company selected itself to carry the insurance after the expiration of the policy then outstanding on the property.

[6] The fourth assignment also attacks the charge. The first proposition is that the charge was erroneous because it uses the word "defendants" instead of "defendant," thereby including Josephine Obenchain. The charge was made more burdensome in every respect upon defendants by using the plural, except where it speaks of plaintiff notifying defendants, and of defendants having notice or knowledge that plaintiff had ceased to carry the insurance. It is true notice to H. L. Obenchain alone would have been sufficient, and, if there was any con-

tention that he had notice or knowledge that plaintiff had ceased to carry the insurance, this charge would have been erroneous as placing the burden upon plaintiff of showing notice to both or knowledge by both. However, it is undisputed that no notice was given Obenchain, and no contention is made by plaintiff that either of the defendants had notice or knowledge, so we consider this error in the charge as harmless. The second proposition is that there is no evidence that plaintiff, by its course of dealing, undertook to attend to the insurance and led Obenchain and wife to believe it would continue to do so. We think the evidence was ample to support the submission of this issue. The third proposition is that the charge leaves out of consideration the duty of Obenchain to pay premiums. We have fully discussed this matter under the third assignment. This assignment is overruled.

[7] By the fifth assignment appellant complains of the admission of the evidence of B. R. Parks, which is stated in our discussion of the first assignment of error. We think this evidence was clearly admissible. It showed the course of dealing by plaintiff with respect to property on which they had liens, with insurance clauses, and showed how plaintiff construed its transaction with Obenchain with respect to the insurance upon his property.

Finding no error in the record, the judgment is affirmed.

TEXAS & P. RY. CO. et al. v. GOOD.

(Court of Civil Appeals of Texas. El Paso.
Nov. 7, 1912. On Rehearing, Dec.
11, 1912.)

1. REMOVAL OF CAUSES (§ 75*)—AMOUNT IN DISPUTE.

Though one of the defendants in an action against connecting carriers for injury to a shipment of cattle is a federal corporation, there may not be a removal to the federal court, no joint liability being alleged, but the acts of negligence of each defendant being separately alleged, and the damage claimed of such corporation being less than \$2,000, and nothing in the petition showing the damage occurring on its line exceeded such amount, and that a less amount was claimed to defeat the jurisdiction of the federal court.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 132; Dec. Dig. § 75.*]

2. CARRIERS (§ 228*)—INJURY TO SHIPMENT—NEGLIGENCE—EVIDENCE.

Negligence in transportation of a shipment of cattle injured in transit cannot be shown by evidence of another shipment about the same time having made the trip safely; it not being shown the two shipments were made under the same conditions.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 957-960; Dec. Dig. § 228.*]

3. EVIDENCE (§ 527*)—OPINIONS.

Men of experience in the cattle business, qualified to know the effect of dipping cattle in arsenic solution, may give their opinion as to

the effect of such dipping of cattle after being given certain feed.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2334, 2335; Dec. Dig. § 527.*]

4. WITNESSES (§ 311*)—IMPEACHMENT.

Testimony that persons whose depositions had been admitted were negroes was an attempt at impeachment in an improper way.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1072-1075; Dec. Dig. § 311.*]

5. TRIAL (§ 260*)—INSTRUCTIONS—REPETITION.

Requested charges covered by the charges given may be refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651-659; Dec. Dig. § 260.*]

6. TRIAL (§ 194*)—INSTRUCTIONS—WEIGHT OF EVIDENCE.

An instruction on the weight of evidence is properly refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 413, 439-441, 446-454, 456-466; Dec. Dig. § 194.*]

7. TRIAL (§ 296*)—ERRONEOUS INSTRUCTIONS—CURE BY OTHER INSTRUCTION.

The giving of a confusing and misleading charge is harmless; numerous special charges clearly and directly instructing in the matter being given.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 705-713, 715, 716, 718; Dec. Dig. § 296.*]

8. TRIAL (§ 234*)—INSTRUCTIONS—BURDEN OF PROOF—CONTRIBUTORY NEGLIGENCE.

Instructions that defendants have the burden of proving their respective pleas of contributory negligence by a preponderance of evidence are proper.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 534-538, 566; Dec. Dig. § 234.*]

On Rehearing.

9. APPEAL AND ERROR (§ 1050*)—HARMLESS ERROR—ADMISSION OF EVIDENCE.

Error in admitting evidence is harmless; other evidence to substantially the same effect having been admitted without objection.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4163-4160, 4168; Dec. Dig. § 1050.*]

10. APPEAL AND ERROR (§ 1058*)—HARMLESS ERROR—EXCLUSION OF EVIDENCE.

Refusal to allow a witness to answer a question was harmless; he having elsewhere been permitted to testify to substantially the same facts.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4195, 4200-4206; Dec. Dig. § 1058.*]

Appeal from District Court, Midland County; S. J. Isaacs, Judge.

Action by E. C. Good against the Texas & Pacific Railway Company and others. Judgment for plaintiff against two of defendants, and they appeal. Reversed and remanded.

Douthit & Smith, of Sweetwater, W. L. Hall, of Dallas, John B. Howard, of Midland, R. S. Shapard, of Dallas, and Baker, Botts, Parker & Garwood, of Houston, for appellants. A. S. Hawkins, of Phoenix, Ariz., and W. E. Allen, of Midland, for appellee.

HIGGINS, J. This suit was brought by the appellee against the Texas & Pacific

Railway Company and the Houston & Texas Central Railroad Company, and also against the Houston East & West Texas Railway Company, to recover damages to 848 head of cattle shipped from Humble, Tex., to Houston, over the line of the Houston East & West Texas Railway, thence to Ft. Worth over the Houston & Texas Central Railroad, and thence over the Texas & Pacific Railway to Sweetwater, Tex., where they were unloaded and held for several days for the purpose of being dipped, in accordance with the quarantine regulations of the state and federal governments, then reloaded and shipped over the Texas & Pacific Railway to Monahans, Tex. It was alleged that, by reason of delays in transportation and rough handling, 67 head died between Ft. Worth and Monahans, 59 head after arrival at Monahans, and the rest upon arrival were badly crippled and in bad condition, and that the Texas & Pacific Railway Company had damaged the cattle in the sum of \$1,990, and the Houston & Texas Central Railroad Company and the Houston East & West Texas Railway Company in the sum of \$5,945. Upon trial verdict and judgment were rendered in favor of appellee against the Texas & Pacific Railway Company in the sum of \$1,600, and against the Houston & Texas Central Railroad Company in the sum of \$2,000, and in favor of the Houston East & West Texas Railway Company.

[1] The defendant Texas & Pacific Railway Company being a federal corporation, the defendants filed petition and bond praying for the removal of the cause to the Circuit Court of the United States for the Northern District of Texas, which petition was by the court refused, and to such action error is here assigned. The correctness of the court's action in this matter must be tested by a consideration of the effect of the allegations in the plaintiff's petition. It is well settled that "the matter in dispute," which in cases of this kind is the controlling factor in determining the right to a removal to the federal court, is the amount of damages claimed in plaintiff's petition. The aggregate amount of damages alleged in this case is far in excess of this sum, but there is no joint liability alleged on part of the Texas & Pacific Railway Company with its codefendants, nor is there any prayer for joint recovery against such defendant with the others. The acts of negligence on the part of each company were distinctly and separately alleged, and the damage alleged to have been inflicted by the first two carriers was alleged and claimed jointly, and the damage inflicted by the Texas & Pacific Railway is separately alleged and claimed. After having alleged the manner in which the injuries were sustained, the petition concludes as follows: "Wherefore, by reason of the premises, plaintiff says he has been damaged as follows: By the defendant Texas & Pacific Railway Com-

pany in the sum of \$1,990, and he waives all other and further damages against said Texas & Pacific Railway Company, and by the defendants the Houston East & West Texas Railway Company and the Houston & Texas Central Railroad Company in the sum of \$5,945. Wherefore, plaintiff prays for citation to each of the defendants, and that on trial hereof he have judgment against the defendant the Texas & Pacific Railway Company for the sum of \$1,990 and against the Houston East & West Texas Railway Company and the Houston & Texas Central Railroad Company for the sum of \$5,945 and 6 per cent. interest from September 25, 1910, and costs of suit and relief general and special, in no event the recovery against the Texas & Pacific Railway Company to be more than \$1,990." It is clearly apparent that the amount claimed against the Texas & Pacific Railway Company does not exceed \$2,000, and no judgment could have been rendered against it for more than that sum; and the court therefore did not err in overruling the petition for removal. *Railway Co. v. Cushman*, 64 S. W. 795; *Railway Co. v. Dishman*, 38 Tex. Civ. App. 277, 85 S. W. 319.

In the petition of appellant for removal it was alleged "that the plaintiff for the sole purpose of defeating the jurisdiction of the Circuit Court of the United States for the Northern District of Texas over this cause, and in fraud of the jurisdiction of said court, attempts to waive all damages against the Texas & Pacific Railway Company over the sum of \$1,990 as appears from plaintiff's petition which is referred to for a more particular statement of the cause of action," and it is here contended that the real amount in controversy against the Texas & Pacific Railway exceeds the sum of \$2,000, and that the effect of the allegations of the plaintiff's petition is an attempt to waive a portion of the damage inflicted by the Texas & Pacific so as to fraudulently defeat the jurisdiction of the Circuit Court of the United States. But we do not so construe the petition. It is true that practically all of the cattle which died did so after reaching the line of the Texas & Pacific Railway Company, and, if this were the determining question as to where liability rested, it might be that this contention would be well taken. But it does not necessarily follow that, because they died after reaching the Texas & Pacific, all of their injuries were there sustained, and it is the contention of appellee that the manner in which they were handled by the first two carriers contributed to their death upon the line of the Texas & Pacific; and there is nothing in the petition upon its face to show that the damage occurring upon the line of the Texas & Pacific exceeded the sum of \$2,000.

By its second assignment appellant complains of the refusal of the court to strike out the testimony of the plaintiff Good rela-

tive to the market value of the cattle in controversy at Monahans, because it developed upon cross-examination that his knowledge was not such as to authorize him to testify to such market value. Justice MCKENZIE is of the opinion this position is well taken, and that the assignment should be sustained. The writer also has grave doubts as to the competency of Good to testify to market values, but is not prepared to hold that he was not so qualified.

[2] At about the same time appellee shipped the cattle in controversy in this suit, it appears he also shipped from Navasota, Tex., on the line of the Houston & Texas Central Railway Company to Ft. Worth, and thence to Sweetwater and Monahans over the Texas & Pacific Railway, another herd of cattle of the same kind and grade as those involved here. Navasota is about 80 miles north of Humble, Tex., and upon trial plaintiff Good was asked in what condition the Navasota cattle reached Sweetwater as compared with the condition of the Humble cattle, and he testified they arrived at Sweetwater in fairly good condition and in good shape. To this question and the answer of the witness defendants objected for immateriality and irrelevancy, and because it was an isolated instance of comparison and not admissible, in absence of a showing that the Navasota shipment moved under identically the same conditions. The bill of exception discloses that appellee's counsel at the time stated that he offered the testimony for the purpose of comparison to show the relative condition of the cattle when they reached Sweetwater, and that he would follow it up by showing the relative condition when they reached Monahans. Counsel in their brief concede that negligence in transportation ordinarily cannot be established by comparison, and the fact that one shipment of cattle made the trip safely while another shipment arrived in an injured condition would not be a circumstance showing negligence. They seek to avoid this principle, however, by the contention that the testimony was admissible for the purpose of showing that the condition in which the cattle arrived at Monahans was due to the manner in which they were handled, rather than to the dipping process which they underwent at Sweetwater; the contention of the appellants being that this dipping process and the fact that they were held in Sweetwater without sufficient food was responsible for their condition, rather than any improper handling in transportation. The testimony, we think, was inadmissible, and is not cured by any special instruction in regard to the Navasota shipment, as contended by appellee. It is not contended that the Navasota and Humble shipments were shown to have been under the same conditions so as to render a comparison of the condition of the respective shipments upon arrival admissible, and we cannot see how a

showing that the Navasota shipment arrived in good condition at Sweetwater would have any bearing upon the question or throw any light on the question of whether it was the dipping process or methods of handling which injured the Humble shipment. It was shown that the Navasota shipment was likewise dipped at the same time and went to Monahans, and they did not die in the manner in which the other shipment died, but the authorities hold that negligence in transportation cannot be shown in this way. *Railway Co. v. Galloway*, 140 S. W. 369; *Railway Co. v. Wilson*, 50 S. W. 156; *Railway Co. v. Smith*, 84 Tex. 348, 19 S. W. 509; *Railway Co. v. Boykin*, 99 Tex. 259, 89 S. W. 639; *Railway Co. v. Harlan*, 62 S. W. 971.

The fourth, fifth and sixth assignments, which complain of the exclusion of certain testimony, we think are without merit, and are overruled without comment.

[3] The seventh and eight assignments are sustained. Defendants offered to prove by the witnesses T. L. Hughes and Ben Van Tuyl that in their opinion it would have had a bad effect upon cattle, and was calculated to produce death, to hold the same on pasture without feed for seven or eight days, and then dipping the same in arsenic dip after a feed on maize and Kaffir corn; the objection urged being that it was not a matter calling for expert opinion, and that the witnesses were not qualified. We think that it was a matter peculiarly calling for the testimony of men experienced in the cattle business and who knew the effect upon cattle of dipping in arsenic solution, and both of the witnesses were shown to have been qualified to know what such effect would be.

The testimony of the witness Bryant, the exclusion of which is made the basis of the ninth assignment, was properly rejected, because he was not shown to have been qualified to testify to the matter inquired about.

[4] It appears that upon the trial of the cause appellants offered in evidence the depositions of Mose Gamble and Jack Jones, who testified that they helped to gather these cattle at Humble, and as to the condition of the cattle at that point at the time of shipment, to the effect that the cattle had stampeded just before shipping, and that same were thin and in a bad condition and tired from their drive and stampede; thereupon, in rebuttal, plaintiff Good was placed upon the stand by his counsel, and asked who were the witnesses Gamble and Jones, to which he replied they were negroes. The testimony was admitted over the objection of defendants that same was immaterial, irrelevant, prejudicial, and an attempt to impeach the credibility of the witnesses in a manner not permitted by law. We think this testimony also was inadmissible. We do not deem it such an error as would require the reversal of the cause, but, in view of a retrial of the cause, we deem it proper to say that the testimony

should be excluded; the objections urged being well taken.

[5] The eleventh assignment, complaining of the charge of the court upon proximate cause, is overruled, as well as the twelfth assignment, which complains of refusal of the court to give a special charge upon proximate cause. This special charge was fully covered by the general and special charges given by the court at the request of the appellants, and the refusal of this one was not error.

The objection urged to the sixth paragraph of the court's charge was not well taken, and the thirteenth assignment is overruled.

[6] Special charge No. 12 requested by defendants was upon the weight of the evidence, and was properly refused. Special charge No. 24 was covered by the main charge, and was properly refused. The same is true of the special charge No. 5.

[7] The tenth paragraph of the court's charge reads as follows: "If you find from the evidence that said cattle or any of them were injured by the negligence of the defendants, and if you further find that said cattle, or any of them, were injured by reason of their inherent weakness or by plaintiff's failure to provide sufficient food or pasturage for same at Sweetwater, Tex., or by said cattle being dipped by plaintiff and having loaded said cattle too soon after said dipping process, then you will find for the plaintiff against the defendants guilty of such negligence for whatever damage plaintiff sustained as the proximate cause of the negligence, if any, of said defendant or defendants." We think this paragraph of the charge confusing and misleading, but do not regard the same reversible error, in view of the numerous special charges given at the request of the defendants directly instructing the jury not to allow plaintiff any damage by reason of the inherent weakness of the cattle or by plaintiff's failure to provide sufficient food and pasturage at Sweetwater, or by them being dipped or driven and loaded too soon after the dipping process.

[8] The court did not err in instructing the jury that the burden of proof was upon the defendants to prove their respective pleas of contributory negligence by a preponderance of the evidence, and the eighteenth assignment is therefore overruled.

Special charge No. 13 was properly refused, because the issues here presented were fully covered by the main charge of the court and other special charges given at the request of the defendants. Same is true of special charges No. 14 and No. 17.

There was no error upon the part of the court in giving special charge No. 2 requested by plaintiff, and complained of in twenty-second assignment.

Those assignments which complain of the

insufficiency of the testimony to support the verdict and judgment are all overruled.

This cause was submitted prior to the retirement of Chief Justice PETICOLAS from the bench. The decision, however, was handed down after his retirement, and after Chief Justice HARPER had taken his place, but Judge HARPER did not participate in the decision, and the decision rendered is by the majority of the court only, composed of Justices MCKENZIE and HIGGINS.

Reversed and remanded as to the Texas & Pacific Railway Company and the Houston & Texas Central Railroad Company. As to the Houston East & West Texas Railway Company, the judgment is affirmed.

HARPER, C. J., not sitting.

On Rehearing.

HIGGINS, J. [9] In his motion for rehearing appellee has pointed out testimony of the witness Good with reference to the condition of the Navasota cattle upon their arrival at Sweetwater, which was admitted without objection upon the part of the appellants, and, in substance, is the same as that complained of in their third assignment of error. In the original opinion it was held error to admit testimony showing the relative condition of the Navasota cattle when they reached Sweetwater as compared with the condition of the Humble cattle, but, inasmuch as other testimony to substantially the same effect appears to have been admitted without objection, the error was therefore harmless, and the assignment should have been overruled. *Railway Co. v. Harlan*, 62 S. W. 971; *Railway Co. v. Kennedy*, 51 Tex. Civ. App. 466, 112 S. W. 339. Appellee in his brief filed in the cause did not call our attention to this additional testimony, and it was therefore not discovered by us. As to the testimony of the witness Van Tuij, our attention is also called to the fact that he was permitted elsewhere to testify to substantially the same facts which he would have testified to had he been permitted to answer the question referred to in the bill of exception upon which the eighth assignment is predicated, and this assignment should also have been overruled. *Williamson v. Railway Co.*, 122 S. W. 897; *Lodge v. Rumpy*, 45 S. W. 422. This matter was called to our attention by appellee in his brief, and should have been noted by us.

[10] As to the testimony of the witness Hughes, the exclusion of which was made the basis of the seventh assignment, it is also contended that he was thereafter permitted to testify to the same effect substantially as he would have testified in answer to the question referred to in the bill of exception. However, we do not concur in their contention that he elsewhere testified to substantially the same facts that he would have

testified to had he been permitted to answer the question shown by the bill, and we therefore adhere to the view that the seventh assignment was properly sustained, and therefore overrule the motion for rehearing.

DAIMWOOD v. DRISCOLL et al.

(Court of Civil Appeals of Texas. San Antonio. Oct. 23, 1912. On Motion for Rehearing, Dec. 11, 1912.)

1. EXECUTORS AND ADMINISTRATORS (§ 383*) —JURISDICTION—SALES OF LAND—COLLATERAL ATTACK.

Though, in order to sell lands to pay debts, there must be a citation as directed by Rev. St. 1895, art. 2123, on collateral attack it will be presumed that due service had been obtained.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 1554; Dec. Dig. § 383.*]

2. EXECUTORS AND ADMINISTRATORS (§ 383*) —APPLICATION TO SELL LANDS—COLLATERAL ATTACK.

An application by an executor, in form one to sell lands to pay debts, which alleged that there were no debts against the estate, except that due the executor, that the estate was not capable of partition among the heirs in a manner just and profitable to them, or any of them, and that, in order to partition said estate with any degree of accuracy, a sale was necessary, is not one for partition, but one for the payment of debts; and, although it does not comply with Rev. St. 1895, art. 2123, providing essentials for such application, it is not void, and cannot be attacked collaterally.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 1554; Dec. Dig. § 383.*]

3. EXECUTORS AND ADMINISTRATORS (§ 383*) —SALES OF LAND—NOTICE.

A sale of land by an executor by order of court, without notice, is not void, but voidable.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 1554; Dec. Dig. § 383.*]

4. EXECUTORS AND ADMINISTRATORS (§ 383*) —SALES OF LAND—NOTICE.

Where the court, acting on an application by an executor, made an order of sale and confirmed it, a purchaser could assume that the order was properly made upon notice and facts that authorized it.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1573-1582; Dec. Dig. § 388.*]

5. INFANTS (§ 29*)—SALES OF LAND BY EXECUTOR.

Where an infant solemnly ratified the sale of land of an executor after reaching maturity, he cannot set it aside for irregularities after the land had greatly increased in value.

[Ed. Note.—For other cases, see Infants, Cent. Dig. §§ 37-40; Dec. Dig. § 29.*]

6. INFANTS (§ 30*)—CONTRACTS—AFFIRMANCE—CONTRACTS.

An infant, who did not attempt to disaffirm a sale until three years after his majority, will be held to have affirmed it.

[Ed. Note.—For other cases, see Infants, Cent. Dig. §§ 41-49, 54, 55; Dec. Dig. § 30.*]

On Motion for Rehearing.

7. EXECUTORS AND ADMINISTRATORS (§ 383*) —SALES OF LAND—FORM OF APPLICATION.

The failure to show the expenses and claims of the executor, in an application for sale of

land, as required by Rev. St. 1895, art. 2123, rendered the sale only voidable, even though there were no debts due to any one; and it could not be collaterally attacked.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 1554; Dec. Dig. § 383.*]

8. EXECUTORS AND ADMINISTRATORS (§ 383*) —SALES OF LAND—COLLATERAL ATTACK.

Where the application to sell lands showed that debts were due the executor, it will be presumed, on collateral attack, that the law in regard to claims of an executor was fully complied with.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 1554; Dec. Dig. § 383.*]

Appeal from District Court, Nueces County; W. B. Hopkins, Judge.

Action by W. H. Daimwood against R. Driscoll and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Charles Turner, of Corpus Christi, and L. C. McBride, of Dallas, for appellant. G. R. Scott and Boone & Pope, all of Corpus Christi, and Dougherty & Dougherty, of Beeville, for appellees.

FLY, J. This is an action of trespass to try title to three-fifths of 1,323.89 acres of land in Nueces county out of the Puenticitas grant, instituted by appellant against R. Driscoll, Samuel Althaus, and Jim Jacobson. Appellee Driscoll pleaded not guilty, and three, five, and ten years' limitation, and further pleaded his title to the land through a sale made by the executor of the estate of Mrs. Ursula Daimwood under authority of an order of the probate court of Nueces county, and that each of the heirs of Mrs. Ursula Daimwood, among the number appellant and Ida Magnenat and Amelia Augusta Daimwood, whose interest in the estate appellant claimed, received his or her proportion of the money received from the sale of the land, and each, in all things, fully ratified said sale. The suit was dismissed as to Althaus and Jacobson by appellant, and the cause was tried by the court and judgment rendered in favor of appellee.

On May 14, 1895, Mrs. Ursula Daimwood died in Corpus Christi, Nueces county, leaving a will in which she bequeathed the land in controversy, which she owned in fee simple, to her five children, Lelia Belle Daimwood, now Henderson, born September 18, 1880, Maggie May Daimwood, born February 14, 1882, Ida Gertrude Daimwood, now Magnenat, born November 1, 1883, Amelia Augusta Daimwood, born January 12, 1885, and appellant, William Henry Daimwood, born June 7, 1886. Lelia Belle was married to Fred D. Henderson December 6, 1905, and Ida Gertrude to Fred L. Magnenat October 25, 1906.

It was provided in the will that Charles A. Meuly, the brother of the testatrix, should be the executor of the will, and on March 23,

1896, he duly and legally qualified as such, and, together with appraisers, returned into court an inventory and appraisal of the estate; the land in controversy being included therein. The inventory and appraisal were duly approved, and on May 4, 1899, the executor applied for and obtained from the probate court an order of sale of the land in controversy. The application for an order recited "that there are now no debts against said estate, except what is due your executor, and that said estate is not capable of partition among the heirs of said estate in a manner that would be just and profitable to them, or any of them, and that, in order to partition said estate with any degree of accuracy, a sale will be necessary." The only citation of the heirs indicated by the record was by posting notices.

In order to procure a sale under the provisions of chapter 22 of title 39, Rev. Stats., it is provided that an application for an order of sale shall be in writing, with a description of the real estate sought to be sold, accompanied by an exhibit in writing, verified by the affidavit of the executor or administrator, showing the claims approved and established by suit against the estate and the amount claimed on each, the estimated expenses of administration, and the property remaining on hand liable for the payment of such charges and claims. Article 2123. The citation in that case is a general one to all persons interested in the estate, describing the land to be sold, and requiring such persons to appear at the term named in such citation and show cause, should they so desire, why the sale should not be made. The citation is to be posted in the manner provided for other citations for 30 days, and the return made in the usual manner. That kind of notice was given in this case.

[1] Probate courts are courts of general jurisdiction in matters pertaining to estates of deceased persons. *Murchison v. White*, 54 Tex. 83; *Crawford v. McDonald*, 88 Tex. 626, 33 S. W. 325. But, in order to obtain the power and authority to sell the lands of an estate to pay debts, or to partition them, there must be citation as directed by statute. In a collateral attack, however, as this undoubtedly is, it will be presumed that due service had been obtained. *Bouldin v. Miller*, 87 Tex. 359, 28 S. W. 940; *Hines v. Givens*, 29 Tex. Civ. App. 517, 68 S. W. 295; *Templeton v. Ferguson*, 89 Tex. 57, 33 S. W. 329; *Moore v. Hanscom*, 101 Tex. 293, 106 S. W. 876, 108 S. W. 150.

[2] The citation was issued as provided for in case of a sale of land to pay debts, but the application for the sale does not comply with the law; but it has been held that, even though the application fails to state the grounds given by statute, still that will not render the sale void. *Kleinecke v. Woodward*, 42 Tex. 314; *Gillenwaters v.*

Scott, 62 Tex. 670; *Jackson v. Houston*, 84 Tex. 622, 19 S. W. 799; *Weems v. Masterson*, 80 Tex. 45, 15 S. W. 590; *Taffinder v. Merrell*, 95 Tex. 95, 65 S. W. 177, 93 Am. St. Rep. 814. Not being void, it could not be attacked in a collateral proceeding.

The application for the sale could not have been one for partition, although it so stated therein; for it had none of the essentials of an application for a partition. As an application for the payment of debts, although defective, it would form the basis for an order that could not be attacked in a collateral proceeding.

[3] If there was no notice of the sale given by the executor, it would not follow that the sale was void; for it has been held a number of times in this state that orders of sale of real property, without the notice prescribed, are not void, but merely irregular and voidable. *George v. Watson*, 19 Tex. 369; *Hurley v. Barnard*, 48 Tex. 87; *Heath v. Layne*, 62 Tex. 686; *Lyne v. Sanford*, 82 Tex. 58, 19 S. W. 847, 27 Am. St. Rep. 852; *Kendrick v. Wheeler*, 85 Tex. 247, 20 S. W. 44; *Halbert v. Martin*, 30 S. W. 388; *Hirshfield v. Brown*, 30 S. W. 962.

[4] When the court acted upon the application and made the order of sale and then confirmed it, appellee was not required to look beyond those orders, and could proceed upon the assumption that the order was properly made upon notice and facts that authorized it. *Weems v. Masterson*, herein cited; *Robertson v. Johnson*, 57 Tex. 62; *Edwards v. Halbert*, 64 Tex. 667; *Butler v. Stephens*, 77 Tex. 599, 14 S. W. 202; *Corley v. Goll*, 8 Tex. Civ. App. 184, 27 S. W. 820; *Stroud v. Hawkins*, 28 Tex. Civ. App. 321, 67 S. W. 534. As said by our late Chief Justice James in the case of *Corley v. Goll*: "We are strongly inclined to the opinion that where such a sale is brought into question in a collateral manner the decree of confirmation should protect the purchaser, and be preclusive of all questions, save that of jurisdiction of the court over the estate, which, as we have seen, the court had in this instance." Or, as said in *Heath v. Layne*, cited: "The purchaser is not required to go behind the order of probate sale to see that the administrator has been duly appointed and continued, and that the proceedings have all been regular." The record in this case does not show want of jurisdiction in the probate court. If the record showed a failure to obtain service for a partition, it did not show it as to a sale. Those interested in the estate were properly cited as to a sale of the property.

[5] The money arising from the sale was used for the maintenance and support of the heirs, and all of them, having full knowledge of the sale, ratified and confirmed it when they became qualified so to do. All the facts and circumstances tend to show that they knew about the sale of the land

and settled with the executor and gave him a full receipt for everything for which he was indebted to each of them. He testified to that fact, and none of them denies it. The land brought its market value, and appellant, as well as his sisters, received the benefit of every dollar of it. It has been held that an infant is not permitted, in equity, to enjoy the proceeds of a sale of his property, and then repudiate the sale as irregular or void, any more than an adult, whether the sale is by act of the infant or by authority of law. *Goodman v. Winter*, 64 Ala. 410, 38 Am. Rep. 13; *Commonwealth v. Shuman*, 18 Pa. 346. But if this be not the true doctrine, when he solemnly ratifies the sale of land by accepting the proceeds of the sale after reaching maturity, he should not, in equity and good conscience, be allowed to set it aside on account of irregularities after the land has greatly increased in value. *Ferguson v. Railway*, 73 Tex. 344, 11 S. W. 347; *Nanny v. Allen*, 77 Tex. 240, 13 S. W. 989.

[6] Ordinarily any words or conduct clearly and unequivocally indicating an intention to be bound by the contract is sufficient. *Mechem on Sales*, § 104. In *Bingham v. Barley*, 55 Tex. 281, 40 Am. Rep. 801, it was held that the retention of the purchase money or property may well be considered an affirmative act showing an intention to affirm; and so long silence and acquiescence may furnish conclusive evidence of ratification. In this case, not only did appellant settle with the executor on the basis of the sale of the property, but he waited nearly three years after attaining his majority before he instituted this suit. As said in the last case cited: "The doctrine of reasonable time in which to disaffirm commends itself to our judgment. It is not the policy of the laws of this state to extend favor and indulgence to laches. Boys here become men owning and capable of managing property, precociously, and lands increase in value with surprising rapidity, and the country is fast filling up with new settlers seeking homes. Shorter periods of limitation are more needful to the welfare of the people than in other countries of slower growth. To apply the statute as the limit of time upon the minor's coming of age to avoid his deed would unsettle titles, stimulate cupidity, and work only mischief. * * * The silence or nonclaim of the minor for a considerable length of time, though less than the period of limitation for the recovery of lands, may as effectually prove his affirmance or ratification, in connection with the circumstances of the case, as his express acts or declarations to that effect." It has been held that even one year was not a reasonable time in which to disaffirm a sale made during minority. *Askey v. Williams*, 74 Tex. 294, 11 S. W. 1101, 5 L. R. A. 176.

The application made by the executor, while imperfect as an application for sale

for debts, was treated as one by the court, and all the proceedings were taken as under an application for sale, and not for partition. There was no application for partition; but it is merely stated as an inducement to or reason for the sale that the property was not bringing interest, and was incapable of partition among the heirs. The executor did not ask the court to partition the land, but only sought to sell; and the court did not in terms authorize a partition, but did grant the authority to sell. That a partition was not desired is further apparent from the fact that only a part of the lands of the estate were included in the partition. In his report of sale the executor did not mention a partition, but merely reported a sale and prayed for a confirmation of the same; and in the order of confirmation there is no mention of a partition, but only of a sale which was approved and confirmed by the court. There was no partition of the estate, or any part of it, by the executor until the heirs had reached their majority. The rules relating to the sale of property of an estate, and not of partition, must be applied in this case. The application for sale was undoubtedly defective, but it is not subject to collateral attack. *Taffinder v. Merrell*, herein cited; *Driggs v. Grantham*, 41 S. W. 408.

The judgment is affirmed.

On Motion for Rehearing.

The probate court is one of general jurisdiction in matters pertaining to estates of decedents, and this attack on its judgment is a collateral one, subject to the rules that prevail in regard to such attacks. *Crawford v. McDonald*, 88 Tex. 626, 33 S. W. 325; *Alexander v. Maverick*, 18 Tex. 179, 67 Am. Dec. 693; *Guliford v. Love*, 49 Tex. 735; *Harris County v. Stewart*, 91 Tex. 133, 41 S. W. 650.

[7] The county court of Nueces county undoubtedly had acquired jurisdiction of the estate of Ursula Daimwood; and the court was as certainly within the exercise of its ordinary functions in selling the land to pay the debts of the estate, whether they were due the executor or any one else. The failure to show the expenses and claims of the executor in the application for sale did not render the sale void; and, even though there were no debts due to any one, the sale would be merely voidable, and could not be attacked in a collateral proceeding. *Jackson v. Houston*, 84 Tex. 622, 19 S. W. 799; *Templeton v. Ferguson*, 89 Tex. 47, 33 S. W. 329.

It is earnestly insisted that the court attempted a partition of the land, and yet no partition is mentioned in the report of sale or order of confirmation; and in his final report it is shown that there was no partition of the proceeds arising from the sale of the land. No reference is made to a partition after the mention in the order of sale

that it was made "for the purpose of distribution among the heirs of said estate."

[8] The application for sale represented that debts were due the executor; and it will be presumed that the law in regard to claims of an executor or administrator was fully complied with. *Lyne v. Sanford*, 82 Tex. 58, 19 S. W. 847, 27 Am. St. Rep. 852; *Kendrick v. Wheeler*, 85 Tex. 247, 20 S. W. 44; *Diggs v. Grantham*, 41 S. W. 409.

The order of sale was not void, and was ratified by appellant.

The motion is overruled.

MCWHORTER v. ERIKSEN.

(Court of Civil Appeals of Texas. El Paso.
Nov. 14, 1912. Rehearing Denied Dec.
11, 1912.)

PUBLIC LANDS (§ 173*)—SETTLEMENT—SUFFICIENCY.

Plaintiff purchased school lands from a purchaser from the state before the expiration of the three years' occupancy by such purchaser. Plaintiff's wife immediately went on the land, made her home thereon, but plaintiff did not personally go thereon for over two months, and was not there continuously after that time. *Held*, that there was not a sufficient settlement on the land by plaintiff under Rev. St. 1895, art. 4218k, requiring substitute purchasers to file the conveyance or transfer, together with an affidavit that he desires to purchase the land for a home, and has in good faith settled thereon.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 544-551; Dec. Dig. § 173.*]

Appeal from District Court, Midland County; S. J. Isaacs, Judge.

Trespass to try title by Ed Eriksen against S. D. McWhorter. Judgment for defendant, and plaintiff appeals. Reversed and rendered.

John B. Howard, of Midland, for appellant. A. S. Hawkins, of Phoenix, Ariz., for appellee.

MCKENZIE, J. There have been two former appeals in this cause. See *Erickson v. McWhorter*, 132 S. W. 847; same, 143 S. W. 245. This is a suit in the form of trespass to try title brought by appellee as plaintiff against appellant as defendant for the land in controversy. Upon trial it was agreed that on March 3, 1908, appellee, by regular transfer and applications duly filed and accepted in the general land office became the substitute purchaser from the state of the land in controversy, and that thereafter the Land Commissioner canceled appellee's purchase on the ground of failure on his part to occupy and improve the land, as required by law. The Commissioner thereafter awarded the land to appellant. Upon trial, judgment was rendered in favor of appellee, and the appellant appeals the case to this court. In the trial it was admitted as a fact that appellee was never upon the land until two months after the transfer to him

by Donelson, his grantor, and abandonment by Donelson of said land. It is undisputed that the affidavit of settlement made by the appellee, which accompanied the transfer and applications as filed in the General Land Office, was of the same date as the said transfer and applications, and was made at the same time and two months prior to appellee's going upon the land. Donelson's abandonment of the land occurred on or about the date of the transfer, and appellee's wife, immediately upon the abandonment of the land by Donelson, went upon and took possession thereof and occupied same until said cancellation. The appellee seeks to excuse his failure to go and make settlement in person upon the land for two months after the transfer and abandonment thereof by Donelson upon the ground that settlement and occupancy of the land was made by his wife; that her settlement and occupancy was a fulfillment of the requirements of the law, and such as to render unnecessary his settlement upon said land.

The question then is, Can the wife, for the husband, make the settlement which is required by the law for substitute purchasers of land originally purchased from the state under the act of 1905? Or, to restate the question, Can Eriksen, as substitute purchaser of Donelson, recover the land in controversy, although he did not go upon the land until two months after Donelson had transferred the land to him and had abandoned it? The land in controversy was purchased from the state under the Act of 1905, c. 103, section 3 of which act provides that: "Each application shall contain the affidavit of the applicant to the effect that he desires to purchase the land for a home, or as additional to the home applied for, or as additional to his own land which has been theretofore purchased from the state, or as additional to his own private land, as the case may be, and that he is or will, as the case may be, in good faith become in person an actual bona fide settler on some portion of the land he purchases, or upon his other land, as the case may be, within ninety days from the date his application is accepted, also that he is not acting in collusion with others for the purpose of buying the land for any other person or corporation, and that no other person or corporation is directly or indirectly interested in the purchase thereof; also every application shall be accompanied by the obligation of the applicant in a sum equal to the amount of the deferred payment offered for the land." And section 4 provides that: "All sales shall date from the day the successful applicant's application was filed in the land office. The applicant shall have ninety days from the date of the acceptance of his application within which to actually settle upon the land so purchased, and he shall within thirty days after the expiration of said ninety days given within

which to make settlement, file in the land office his affidavit that he has in good faith actually in person settled upon the land purchased by him. Should the applicant fail to make and file the affidavit and proof of settlement as herein provided within the time specified, the Commissioner of the General Land Office shall indorse that fact upon his application, canceling the same, and immediately place the same upon the market by notice to the clerk, fixing a date not less than thirty days thereafter when application may be filed for the purchase thereof, and any sum which may have been paid upon a former application, canceled as aforesaid, shall be forfeited to the fund to which the same belonged."

In order to arrive at the status of the parties, it becomes necessary for us to construe the meaning of the above language as pertaining to settlement. This language, we think, is definite and intelligible. In plain words the statute requires that the original purchaser of land from the state shall make actual settlement in person thereon, and further requires that such original purchaser shall make affidavit to the fact that he has made actual settlement in person upon said land. The very terms of the statute inhibit any other than actual settlement in person by the purchaser; else the purchaser would be incompetent to make the required statutory affidavit of settlement.

Article 4218k of the Revised Statutes of 1895, being in force at the time when Donelson transferred the land to the appellee, and which controls transfers of school land before the three years' residence has been completed, is as follows: "Purchasers may also sell their lands, or a part of the same, in quantities of forty acres or multiples thereof, at any time after the sale is effected under this chapter, and in such cases the vendee, or any subsequent vendee, or his heirs or legatees, shall file his own obligation with the Commissioner of the General Land Office, together with the duly authenticated conveyance or transfer from the original purchaser and the intermediate vendee's conveyance or transfer, if any there be, duly recorded in the county where the land lies or to which said county may be attached for judicial purposes, together with his affidavit, in case three years' residence has not already been had upon said land and proof made of that fact, stating that he desires to purchase the land for a home, and that he has in good faith settled thereon, and that he has not acted in collusion with others for the purpose of buying the land for any other person or corporation, and that no other person or corporation is interested in the purchase, save himself, and thereupon the original obligation shall be surrendered or canceled or properly credited, as the case may be, and the vendee shall become the purchaser direct from the state, and be subject to all the obligations and penalties prescribed by this

chapter, and the original purchaser shall be absolved in whole or in part, as the case may be, from further liability thereon."

Our Supreme Court, in construing this statute in the case of *Hardman v. Crawford*, 95 Tex. 193, 66 S. W. 206, says: "The statute authorizes the actual settler to convey to another, but requires of the vendee to make the same character of settlement upon the land as was required of the original purchaser. In other words, the state allows an actual settler to be substituted by another with the same qualifications, and performing the same duties, but there is no provision by which land once sold to and occupied by an actual settler can be transferred, before the expiration of three years' occupancy, to another person, unless the state at the same time acquires another actual settler in place of the one that is released. This is a matter of statutory provision, and so plainly expressed as to leave no room for construction."

Following our Supreme Court's construction of article 4218k, supra, Eriksen, as substitute purchaser, was required to make the same character of settlement upon the land as was required of the original purchaser. Eriksen's settlement, then, was required to have been made at the same time that Donelson transferred the land and made abandonment of his settlement so that the continuity of settlement of both Donelson and Eriksen be maintained. It is evident, too, that it was never intended by the Legislature that the substitute purchaser should be relieved in any manner of performing the obligations which were required of the original purchaser. As said in *Busk v. Lowrie*, 86 Tex. 132, 23 S. W. 984: "The language stated was used by the Legislature for a definite purpose, which was to secure real bona fide settlers upon the land. The word 'actual' is used in the sense of being a real, and not a constructive or virtual, settlement." Accordingly it is our opinion that Eriksen's settlement was not such settlement as was required. The settlement as required of Eriksen is not such as can be made for him by his wife, his agent, or his proxy; it must be actual and in person. To hold otherwise would permit the wife, for the husband, to make the settlement and to occupy the land without any necessity of the husband's actual presence thereon at any time. If we should construe the statute as permitting the wife to make the settlement for the husband, should we not construe it as also permitting the wife to make the required affidavit of settlement for the husband? Then would it not follow with truth and reason that the wife, for the husband, may acquire the lands of the state, though applied for by the husband, without the necessity of the husband ever going upon said land? Because of his admission that he did not go upon the land for a period of two months after Donelson had made the transfer of the land to him, and after the land had been abandoned by Donel-

son, we are required to hold that Eriksen failed to make the settlement as required by law.

We have examined with much care the opinion rendered in this case on a former appeal. 143 S. W. 245, supra. It is our opinion that the personal views of the writer as therein expressed are applicable to the occupancy of land by an actual settler only after settlement has been made. The question in the instant case is one of settlement and not of occupancy. The cases cited by the writer of that opinion (143 S. W. 245, supra) dealt with the question of occupancy only, unless it be the case of *Willingham v. Floyd*, 32 Tex. Civ. App. 161, 73 S. W. 831. In the latter case the land involved was purchased under the law then in force, which required a settlement on the land by the applicant before making application to purchase. Floyd, the appellee, testified as follows: "After I returned from having the land surveyed, I hired a dray wagon, purchased a tent, and sent the wagon, the tent, a lot of provisions, and household furniture to be placed on section 14, at the spot I had selected for my home. I also sent my wife out in a separate conveyance, along with E. W. Lee and his family, who went out the same day to take up some land near by. All these went out on the evening of the 29th of July. I did not go out with my wife to the land, because there was a great demand and rush for this land, and I stayed in town for the purpose of making my applications and getting same filed first; and it was my intention to go out to section 14 as soon as I made my application, and this I did. I sent my wife to this section on said day, because I considered it my home at that time, and thought that my wife should be at her home." This testimony shows that the husband went upon and surveyed the land and located the home site, whereas, in the instant case, the husband, as substitute purchaser, never so much as saw the land for two months after his vendor had made transfer and abandonment.

Upon the trial, in due time appellant requested the court to peremptorily instruct the jury to return a verdict for him, which the court refused. This ruling is assigned as error, and we are of opinion it should be sustained. It becomes our duty, therefore, to reverse the judgment of the trial court, and to now render judgment for the appellant.

Reversed and rendered.

HARPER, C. J., did not sit in this cause.

HIGGINS, J. I concur with justice McKENZIE in the view that this cause should be reversed and here rendered for appellant, but I do not fully concur in all of the reasoning of his opinion. I think the facts clearly disclose that Eriksen made a settlement upon the land, but that this settlement was constructive rather than actual, and

that the law requires a settlement of the latter character. It was undisputed that Eriksen himself was never upon the land until two or three months after the same was transferred to him by Donelson; but it is contended that settlement was made by him within the meaning of the law by the fact that his wife at once entered into possession thereof and established their home thereon, and that this was sufficient. The material facts were undisputed upon this issue, and are as follows: Mrs. Eriksen testified: "My husband and I acquired this land from Donelson that we might have a home. My husband and I had not taken up any land from the state at that time. * * * I went out there to examine the land for Mr. Eriksen and myself. Mr. Eriksen was engaged in blacksmithing at the time the trade for the land was finally made. After the trade was made, I went out there and made settlement on the land and moved on it as soon as I could get there. At that time old Father Donelson, his daughter-in-law, Mrs. Donelson, and my little nephew went with me. Old Father Donelson was the man we got the land from. This was immediately after the deal for the land was closed. I moved on the land and built a house. When I went out there the first time, I took horse feed and something to eat and some posts and wire and some lumber. I took some bedding and household effects. I took bedding and clothes for myself and the little boy until I returned. I put the stuff on the land that I carried out there. I sent back for other material and put up a house as quick as I could get it up. It took, of course, a few days. I put up a 10 by 14 boxed house. I put fencing there. We put something over two miles of fencing as quick as we could get it up. I do not remember the exact time it took to put it there. We did not make very much clearing there. We dug out a tank there. There had been some work, and we put in a couple of days with a team and scraper cleaning it out—Son and myself. We did not put in any crop the first year. We did afterwards. Mr. Eriksen furnished the money to buy the improvements. We wanted the improvements to establish our claim to the land and make the title good. We thought the law wanted us to put the improvements there and of course make a home. * * * I think I know why Mr. Eriksen did not go with me when I first went out on the land. It was because his business required his attention—blacksmithing. He stayed in town to provide means to sustain life and improve the home and pay the debts that was on it, etc. He had no other means to pay these notes against the land but his labor and his income from the shop. * * * My husband and I did not have any other home anywhere from the time we made this trade with Donelson up to the time that the land was canceled and until the three years' occupancy was completed."

Eriksen himself testified as follows: "I made a trade with Donelson for this land. I bought the land and paid him a bonus. He partly lived it out, and I bought the four sections and the claim for a certain amount, paid part down, and paid part in small notes along in one, two, and three years, somewhere along there. I got a deed to the land from Donelson. It shows the consideration correctly. * * * I bought this land to have a home. I thought it was good time to begin a start to get a little home of my own. When we talked about making the trade, we agreed for her to go and look at the land as I was busy in the shop, to see whether it was what we wanted or not, and if it was, we would buy it, and when they came back they agreed the land was all right and bought the land for a certain consideration. We put in a home we had in Hillsboro, our homestead, and some little money and the balance in notes—about \$3,000 or \$3,500—something about like that in notes. * * * I do not remember how soon after the deal was closed it was until I went out on the land. It was not long until I went out there and spent a while. I can't get it down. I have been trying to think it up, but I cannot remember. It was not long because I was anxious to see it. When I went out the first time, I stayed somewhere about a couple of weeks. I did not go on the land sooner because I did not feel like I could leave my business and do ourselves justice. It was very busy times, and I tried to pick slack times to go out there whenever I could. I made other trips out there. I cannot remember the time. I was out there three or four times—two or three trips—before the land was canceled. * * * When I was out there I worked, helped build fences, and done some little plowing and whatever I could do. I considered that my home, during the meantime, was in Andrews county on the four sections. I had no means of livelihood but my trade. I never learned any other business."

The cases of *Andrus v. Davis*, 99 Tex. 303, 89 S. W. 773, and *Bustin v. Robison*, 102 Tex. 526, 119 S. W. 1140, to my mind clearly held that the occupancy required must be actual rather than constructive, and it is difficult to read the Acts of 1905 relating to the sale of free school land without reaching the conclusion that the Legislature clearly and definitely intended that actual settlement and occupancy is required rather than constructive. In *Bustin v. Robison*, supra, the court held that a temporary absence from the land did not operate as a break in the actual occupancy required by the law, but there is nothing in that opinion, as I construe it, which militates against the view clearly held in the *Andrus* Case that actual occupancy is required. Personally I regard this provision of the statute requiring a continuous personal occupancy as most unfortu-

nate, and one which has materially retarded and delayed the development of this portion of our state, but I think the legislative intent clear, and the courts must observe it.

In the case at bar, I think it clearly appears, as a matter of law, that Eriksen's settlement upon the land was constructive rather than actual, and as such was insufficient.

STANDARD v. THURMOND.

(Court of Civil Appeals of Texas. Texarkana. Nov. 28, 1912.)

1. **BILLS AND NOTES (§ 445*)—ACCRUAL OF CAUSE OF ACTION.**

Where defendant by a note agreed to pay money October 1st, "waiving grace and protest," the payee's cause of action thereon accrued October 2d, and the limitation ran from that date.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1311-1329; Dec. Dig. § 445.*]

2. **TIME (§ 9*)—DAYS—EXCLUDING FIRST OR LAST DAY.**

Where a cause of action subject to the four-year limitation accrued October 2, 1907, the time to sue expired October 1, 1911; and a suit commenced the following day was barred by limitations.

[Ed. Note.—For other cases, see Time, Cent. Dig. §§ 11-32; Dec. Dig. § 9.*]

3. **TIME (§ 10*)—COMPUTATION OF PERIOD OF LIMITATION—SUNDAY.**

The time within which to commence a suit is not extended because the last day of the period of limitation was Sunday.

[Ed. Note.—For other cases, see Time, Cent. Dig. §§ 34-62; Dec. Dig. § 10.*]

Appeal from Taylor County Court; T. A. Bledsoe, Judge.

Action by W. P. Thurmond against W. J. Standard. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

Cunningham & Oliver, of Abilene, for appellant. Dallas Scarborough, of Abilene, for appellee.

WILLSON, C. J. By his promissory note dated March 28, 1907, appellant undertook to pay to appellee's order October 1, 1907, "waiving grace and protest," \$213, interest and attorney's fees. By his suit commenced October 2, 1911, appellee sought a recovery on the note. As a defense against such a recovery appellant set up the statute requiring a suit based on such a cause of action to be commenced within four years from the time the cause of action accrues. Sayles' Stat. art. 3356. A judgment having been rendered in favor of appellee for the amount of the note, appellant prosecuted this appeal.

[1-3] Appellant by his contract having waived the days of grace he otherwise would have been entitled to (Sayles' Stat. art. 318; 1 Daniel, Neg. Inst. § 633; Perkins v. Bank, 38 Mass. [21 Pick.] 485; Hirschfeld v. Bank, 83 Tex. 452, 18 S. W. 743, 15 L. R. A. 639, 29 Am. St. Rep. 660), it is clear, under the rules

controlling in such cases (*Geistweidt v. Mann*, 37 S. W. 372; *Watkins v. Willis*, 58 Tex. 523; *Smith v. Dickey*, 74 Tex. 61, 11 S. W. 1049), that appellee's cause of action accrued October 2, 1907. To be without the bar of the statute, his suit must have been commenced within four years from that date. As four years from October 2, 1907, expired with October 1, 1911, and the suit was not commenced until the next day, it is plain that it was within the bar of the statute and could not be maintained. That October 1, 1911, was Sunday, did not operate to extend the time within which the suit otherwise must have been commenced. *Insurance Co. v. Shrader*, 89 Tex. 40, 32 S. W. 872, 33 S. W. 112, 30 L. R. A. 498, 59 Am. St. Rep. 25; *Allen v. Elliott*, 67 Ala. 437; *Perkins v. Bank*, 38 Mass. (21 Pick.) 485.

The judgment will be reversed, and a judgment will be here rendered that appellee take nothing by his suit.

HARLAN et al. v. GUITAR.

(Court of Civil Appeals of Texas. Texarkana. Nov. 7, 1912. Rehearing Denied Nov. 28, 1912.)

1. BILLS AND NOTES (§ 363*)—FRAUD—BONA FIDE PURCHASER.

One who purchased a note before maturity, in due course of trade, for a valuable consideration, and without notice of fraud practiced on the maker, could recover thereon.

[Ed. Note.—For other cases, see *Bills and Notes*, Cent. Dig. §§ 790, 791, 960, 962; Dec. Dig. § 363.*]

2. BILLS AND NOTES (§ 525*)—FRAUD—NOTICE—BONA FIDE PURCHASER—EVIDENCE.

In an action on a note, evidence held to warrant a finding that plaintiff purchased the note before maturity, in due course of trade, for value, and without notice of fraud.

[Ed. Note.—For other cases, see *Bills and Notes*, Cent. Dig. §§ 1832-1839; Dec. Dig. § 525.*]

Appeal from District Court, Taylor County; Thomas L. Blanton, Judge.

Action by J. H. Guitar against O. P. Harlan and others. Judgment for plaintiff, and defendants appeal. Affirmed.

H. H. Sagebiel, of Stamford, and D. M. Oldham, Jr., of Abilene, for appellants. Eugene De Bogory, of Abilene, for appellee.

WILLSON, C. J. Appellee, as the holder, sued appellants O. P. Harlan, G. C. Bishop, and one J. W. Kemp, as the makers of a promissory note, dated September 20, 1907, for the sum of \$2,750, interest and attorney's fees, payable October 14, 1907, to the order of the Photo Print Manufacturing Company, incorporated under the laws of the state of Oklahoma. He recovered a judgment against appellants for the sum of \$2,117.50, being one-half of the amount of the note, including interest accrued and attorney's fees. The appeal is by appellants Harlan and Bishop alone.

[1, 2] It appeared that the note was given by appellants and Kemp to cover part of the purchase price of a machine for copying pen-written records, the right to sell similar machines in Texas, and capital stock of the photo company of the face value of \$4,000, sold to appellants and Kemp by the photo company acting by its president, one Gregory. Two or three days after the date of the execution of the note, the photo company, by an indorsement "without recourse," transferred the note to appellee and appellant Harlan for a consideration of \$2,000 paid to it, \$1,000 by Harlan, and the other \$1,000 by appellee. Appellants contended that they were induced to make the note by a fraud practiced on them by Gregory; that the consideration therefor had failed; and that appellee had notice thereof at the time he purchased the note. Appellee contended that if it was true that appellants were so induced to execute the note, and that the consideration therefor had failed, he nevertheless was entitled to recover, because he purchased the note before its maturity, in due course of trade, for a valuable consideration paid, and without notice of any vice in it. The judgment rendered involves a finding in accordance with appellee's contention, and if there was testimony authorizing the finding the judgment should be affirmed; for if appellee was such a purchaser the matters relied upon as a defense against the recovery sought were not available to appellants as against him. There is testimony in the record which, we think, authorized such a finding. Appellee, as a witness, testified that he "knew what the note was given for," but "did not know that the machine was not giving good satisfaction at that time." He further testified that before he bought the note he told appellant Harlan he was "thinking seriously of buying it," and asked Harlan, "How about it?" and that Harlan replied: "It is all right. It is going to be paid." It was after this conversation with Harlan that appellee purchased the note. It seems to us that the testimony referred to tended to show that appellee did not have notice of the vice in the note, and that we should not say that the finding to that effect involved in the judgment was without evidence to support it. It appears from testimony in the record that after appellee agreed with Gregory to purchase the note he agreed that Harlan might have a one-half interest in it if he would pay to Gregory one-half the purchase price. Harlan thereupon paid to Gregory one-half of the \$2,000 appellee had agreed to pay for the note. It is insisted that the effect of the transaction was to make Harlan and appellee partners in the purchase of the note, and that, Harlan having knowledge of the vice in the note, appellee, as his partner in the transaction, was chargeable with such knowledge. It is, perhaps, a sufficient answer to

this contention to say that the judgment involves a finding, supported by testimony, that appellee purchased the note on his own account, and then sold to Harlan a one-half interest in it; but we think it also may be said that the judgment involves a finding, not without support in the testimony, that Harlan himself at that time did not know or have reason to believe that the consideration for the note had failed.

We conclude as the court below did that appellee, as an innocent purchaser, was entitled to protection as against the defenses asserted by appellants. Therefore the judgment is affirmed.

WILLIAMS v. KUYKENDALL.

(Court of Civil Appeals of Texas. Austin.
Nov. 20, 1912.)

1. EASEMENTS (§ 1*)—WAYS—MANNER OF ACQUISITION.

An easement of way can only be acquired by express grant or by implied grant as a way of necessity or by prescription or limitation.

[Ed. Note.—For other cases, see Easements, Cent. Dig. §§ 1, 2, 5-7; Dec. Dig. § 1.*]

2. EASEMENTS (§ 36*)—WAYS—ESTABLISHMENT—BURDEN OF PROOF.

One claiming an easement of way without any express grant must establish all of the necessary facts by which the right may be presumed, such as peaceable possession, exclusive, continued, and adverse to the owner, and a failure of proof of any of such facts is fatal to his rights.

[Ed. Note.—For other cases, see Easements, Cent. Dig. §§ 77, 78, 88-93; Dec. Dig. § 36.*]

3. EASEMENTS (§ 18*)—WAYS—WAYS OF NECESSITY.

A way of necessity arises where a grantor conveys land not having any outlet save over the remaining land of the grantor, and, where land may be reached by roadways, there can be no way of necessity, since there can be no way of necessity unless there is an absolute necessity without which the party claiming it would be wholly deprived of the use of his land.

[Ed. Note.—For other cases, see Easements, Cent. Dig. §§ 50-55; Dec. Dig. § 18.*]

4. EASEMENTS (§ 8*)—WAYS—PRESCRIPTION.

To establish a way by prescription, there must be an adverse user of the same against the owner, and, where the way is also used by the owner, no such adverse possession exists, nor does it exist where the way is merely used by permission, or where it is used over uninclosed and unimproved lands.

[Ed. Note.—For other cases, see Easements, Cent. Dig. §§ 23, 24, 27-33; Dec. Dig. § 8.*]

Appeal from District Court, Hays County; Frank S. Roberts, Judge.

Action by W. M. Kuykendall against H. G. Williams. From a judgment for plaintiff, defendant appeals. Reversed and rendered.

K. E. McKie, of San Marcos, for appellant. Thos. J. Saunders, of San Marcos, for appellee.

RICE, J. Appellant and appellee owned adjoining tracts of land; appellant's tract abutting upon the public road leading from

Kyle to Dripping Springs, and situated between said road and appellee's tract. Appellee brought this suit on the 11th day of January, 1912, for a mandatory injunction, requiring appellant to unlock and leave open a certain gate opening into said public road from his inclosure, alleging that there was, and had been for 30 years prior thereto, a roadway leading from said public road through said gateway over and through appellant's pasture to the stockpens upon his own tract of land. After plea in abatement, setting up the fact that prior to the filing of this suit he had sold the land to C. C. Waller, whom he claimed was a necessary party to said suit, appellant filed a general denial and special answer denying the matters set up in appellee's petition. A temporary writ of injunction was granted which, upon final trial before the court without a jury, was perpetuated, requiring appellant to unlock and keep open the gate leading from his pasture into said public road, and establishing said passway according to appellee's contention, from which judgment appellant has prosecuted this appeal, and has assigned many reasons for a reversal of the judgment, some of which present interesting questions; but, in the view we have taken of this case, we think it is only necessary to discuss the several assignments complaining of the insufficiency of the evidence, to support the judgment. Appellee does not contend, nor does the evidence sustain the theory, that the passway in question was ever a public road; but his insistence is to the effect that it is either a way by necessity or by prescription.

[1] The authorities hold that such an easement can only be acquired by a grant in one of three ways: First, by express grant, as by a deed; second, by implied grant, as a way of necessity; and, third, by prescription or limitation, which presumes a grant. See volume 10, Am. & Eng. Ency. Law, p. 409; Cyc. vol. 14, pp. 1145-1166.

[2] It is also held in *Texas Western Railway v. Wilson*, 83 Tex. 156, 18 S. W. 325, that the burden of proof is upon the party claiming the easement, without any direct or express grant, to establish all of the necessary facts by which the right may be presumed in his favor, such as peaceable possession, exclusive, continued, and adverse to the owner of the land. A failure in proof of any of such facts is fatal to the right asserted. See, also, Cyc. vol. 14, p. 1196. In the present case there is no express grant claimed.

[3] A way of necessity arises where one party has granted land to another not having any outlet save over the land of the grantor, in which the grantor, by implication, grants a right of way. *Sassman v. Collins*, 53 Tex. Civ. App. 71, 115 S. W. 337. In the case at bar the roadway in question is not one of necessity for the reason that the

evidence shows that there are two other roadways by which appellee can reach the same public road. It is true that said routes are shown to be more difficult, and one of them farther, than the one in dispute. In *Hall v. City of Austin*, 20 Tex. Civ. App. 59, 48 S. W. 55, and *Alley v. Carleton*, 29 Tex. 74, 94 Am. Dec. 260, it is held that a way of necessity must be more than a way of convenience, but must be an absolute necessity, without which the party claiming it would be wholly deprived of the use of his land; and that it is not sufficient in establishing a way of necessity to simply show that it would be expensive to obtain another outlet. Besides, in the present case it appears that appellee did not purchase his land from appellant, but from one Rogers, through whose land there is a passway to the public road.

[4] With reference to the claim by prescription, it is shown from the evidence that appellant purchased his tract of land in 1875, and that appellee purchased his from Rogers about eight years prior to the institution of this suit. It seems that for some time prior to appellant's purchase, and before the lands in question were inclosed, there was a dim roadway leading from a point somewhere in appellee's pasture, near his stockpens, across both of said tracts of land into the public road at said gateway, which had been occasionally traveled; but it is shown, however, that appellant inclosed his lands about 25 years prior to the institution of this suit, placing for his own convenience a gate at a point where this old roadway intersected the public road, and that, passing after that time through his inclosure by way of said roadway, was permissive only. Appellee himself testified that the gate was only left unlocked at this point for about six months after his purchase, but, from that time up until the filing of suit, it had been kept locked and the passage closed except for a short time when he and his tenant Blocker enjoyed the privilege of a key, furnished him by appellant. In order to establish a roadway by prescription, there must be an adverse user of same against the owner of the land, without which no such right can be established. Where the way is also used by the owner, no such adverse possession exists; nor does it exist where the roadway is merely used by permission of the owner. See *Cunningham v. San Saba County*, 1 Tex. Civ. App. 480, 20 S. W. 941; *Worthington v. Wade*, 82 Tex. 26, 17 S. W. 520; *Sassman v. Collins*, supra. Prior to the fencing of the land by appellant, no right of way was acquired as against him, because, under the law of this state, merely traveling over uninclosed and unimproved lands is not the adverse holding such as contemplated by law. See *Cunningham v. San Saba County* and *Worthington v. Wade*, supra.

We think the evidence in this case wholly fails to establish appellee's contention in either respect; and, it appearing that the case has been fully developed, it becomes our duty to render such judgment as should have been rendered by the court below, which is to reverse and render the judgment in favor of appellant, and it is accordingly so ordered.

Reversed and rendered.

ST. LOUIS & S. F. R. CO. v. CARTWRIGHT et al.

(Court of Civil Appeals of Texas. Dallas. Nov. 16, 1912. Rehearing Denied Dec. 7, 1912.)

1. NEW TRIAL (§ 71*)—GROUNDS—VERDICT CONTRARY TO EVIDENCE.

Where the evidence was conflicting, but sufficient to sustain the finding of the jury, a new trial, on the ground that the verdict was against the preponderance of the evidence, was properly denied.

[Ed. Note.—For other case, see *New Trial*, Cent. Dig. §§ 144, 145; Dec. Dig. § 71.*]

2. APPEAL AND ERROR (§ 1002*)—REVIEW—QUESTION OF FACT.

Where the evidence was conflicting, but sufficient to sustain the finding of the jury, the verdict will not be disturbed, as against the weight of the evidence, on appeal.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3935-3937; Dec. Dig. § 1002.*]

3. APPEAL AND ERROR (§ 500*)—RECORD—MATTERS TO BE SHOWN BY RECORD.

Where there was no judgment or record entry showing any ruling on an exception to the petition, such ruling cannot be reviewed, although preserved by a bill of exceptions.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 2295-2298; Dec. Dig. § 500.*]

4. CONTINUANCE (§ 31*)—SURPRISE AT TRIAL.

Where the petition in a shipper's action contained general allegations of unnecessary and unreasonable delay and rough handling of the shipment, surprise justifying a continuance cannot be predicated on the admission of evidence of particular acts of delay and rough handling, although defendant had excepted to the petition as too general, especially where defendant had taken depositions to rebut such evidence, thus showing that it was not surprised thereby.

[Ed. Note.—For other cases, see *Continuance*, Cent. Dig. §§ 96-98; Dec. Dig. § 31.*]

5. TRIAL (§ 251*)—INSTRUCTIONS—APPLICATION TO ISSUES.

The refusal of an instruction requested by defendant, relative to an issue not submitted to the jury as a ground of recovery, was not error, since the failure to submit such issue withdrew it from the consideration of the jury.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 587-595; Dec. Dig. § 251.*]

Appeal from District Court, Kaufman County; F. L. Hawkins, Judge.

Action by Matthew Cartwright against the St. Louis & San Francisco Railroad Company and others. From a judgment for plaintiff, the defendant named appeals. Affirmed.

Andrews, Ball & Streetman, of Ft. Worth, and A. H. Dashiell, of Terrell, for appellant. Wynne & Wynne, of Wills Point, for appellee.

TALBOT, J. The appellee Matthew Cartwright sued the appellant, St. Louis & San Francisco Railroad Company, and the Paris & Great Northern Railroad Company and the Texas Midland Railroad for damages to 180 head of beef cattle, shipped on the 5th day of June, 1909, from Kaufman, Tex., to East St. Louis, Ill. The plaintiff alleged four grounds of negligence, namely: (1) "That the cars in which the cattle were loaded were not properly bedded." (2) "That they were negligently delayed on each and all the lines of railway of said defendants over which said cattle were being transported." (3) "That the cars were roughly handled and bumped and jostled together, knocking said cattle down and against each other, and against the sides of the cars, causing them to be bruised, torn, and scratched, and several of them to be crippled; that the employees of each of said defendants were guilty of this kind of handling of said cattle." (4) "That the cattle were unloaded at Newburg in muddy pens, and that the St. Louis & San Francisco Railroad Company was guilty of negligence in not having suitable pens for unloading stock for feed and rest."

It was alleged that the cattle were intended for the St. Louis market of Monday morning, June 7th, and arrived too late for that morning's market, and had to be held over to the market of June 8th; that by reason of the delay the cattle lost in weight 40 pounds per head; that the market declined from the 7th to the 8th 10 cents per hundredweight; that on account of the bruised and muddy appearance of the cattle, etc., they lost 50 cents per hundredweight.

All the defendants answered, specially excepting to plaintiff's petition, because the "allegations of delay and rough handling do not state the time and places, and on what line of road, the delays and rough handling occurred." The St. Louis & San Francisco Railroad Company further answered, after a general denial, (1) that the usual and ordinary time for transportation of cattle from Kaufman, Tex., to East St. Louis, Ill., was from 42 to 48 hours; (2) that the cattle were received from the codefendant, Texas Midland Railroad at Paris, Tex., at 5:15 p. m. the same day, arriving at St. Louis at 9 a. m. on the morning of June 7th, carried through the city of St. Louis and across the river to the National Stockyards, East St. Louis, and there delivered, June 7th, at 11:40 a. m.; (3) that on arrival at Newburg, Mo., on June 6th, at 6:30 p. m., the cattle had been on the cars 31 hours and 15 minutes; that it was impossible to run the cattle from New-

burg to East St. Louis, Ill., in the remaining 4 hours and 45 minutes, and that they were compelled to unload said cattle in Newburg for rest, feed, and water in compliance with the federal statute prohibiting carriers from keeping cattle on board the cars longer than 36 hours without unloading for feed, rest, and water; (4) that if the pens at Newburg, Mo., were muddy it resulted from natural causes; (5) that if any of the steers were crippled en route it was caused by the natural viciousness of the cattle; (6) that the cattle were handled with ordinary care and dispatch, and transported in a reasonable time; and that it is impossible to transport cattle without delay for numerous causes.

During the progress of the trial plaintiff offered testimony of delays and rough handling of his cattle and at certain points on appellant's line of road, after which the defendants moved that said testimony be stricken out, and the court overruled the motion. Then the defendants filed a motion to withdraw their announcement of ready, and to continue the case on the ground of surprise, in order that they might secure testimony to rebut the evidence of specific acts of rough handling and delays offered by plaintiff, and this motion was by the court overruled.

The case was tried before a jury, and a verdict returned for plaintiff against the defendant St. Louis & San Francisco Railroad Company for the sum of \$1,024.05, and against the plaintiff, and in favor of the other defendants, Paris & Great Northern Railroad Company and Texas Midland Railroad. The motion of the defendant St. Louis & San Francisco Railroad Company having been overruled, it appealed.

[1, 2] The first, second, third, and fourth assignments of error complain, respectively, of the court's action in overruling appellant's motion for a new trial, and for grounds of this complaint assert, in effect, that the verdict of the jury is not only against the great preponderance of the evidence on the questions of unreasonable delay in the transportation of the cattle and of rough handling of the same, but that there is no evidence showing either such delay or such handling on appellant's road. In this view of the evidence we do not concur. The evidence was conflicting, but sufficient to sustain the finding of the jury upon both of these issues. This being true, the trial court was justified in overruling the motion for a new trial; and under repeated decisions of the appellate courts of this state we would not be warranted in disturbing the verdict and judgment on the grounds urged in the assignments under consideration. It is the peculiar province of the jury, under our practice, to determine all questions of fact.

[3] The fifth assignment of error is as follows: "The court erred in overruling special exception No. 1, in defendant's first amended answer, excepting to the allegation in plain-

tiff's original petition, upon the ground that the allegations of rough handling and delay did not state the time and place, and on what line of road, the delay and rough handling occurred." We find no judgment or record entry showing any such ruling as that complained of in the assignment; and, in the absence of such a judgment, the ruling, although preserved by a bill of exception, which is contained in the transcript, cannot be reviewed on appeal. For a discussion of the question and citation of authorities sustaining this view, see *Daniel v. Daniel*, 128 S. W. 469, decided by this court, and writ of error denied by the Supreme Court.

[4] The question, however, is incidentally raised by appellant's seventh assignment of error. This assignment is that the "court erred in overruling and not sustaining the defendant's motion to withdraw its announcement of ready, and to continue this case on the ground of surprise in the introduction of the evidence of the delays at Paris, Springfield, and Newburg, and the rough handling at or near Springfield and Newburg, so as to enable the defendant to obtain evidence in rebuttal of the specific acts of the delay and rough handling testified to by the witness." The assignment is submitted as a proposition, and, in addition thereto, the following proposition: "The defendant having used proper diligence to require the plaintiff to disclose the facts constituting his cause of action, and being surprised by the evidence of Harden, and the evidence being material, the application to withdraw the announcement of ready, and to continue the cause, should have been granted." There was no error in this action of the court. The general allegations of unnecessary and unreasonable delay and rough handling of the cattle were sufficient to admit proof thereof, and surprise could not be predicated upon its admission. *Railway Co. v. Jones*, 41 Tex. Civ. App. 327, 91 S. W. 611; *Railway Co. v. Martin et al.*, 49 Tex. Civ. App. 197, 108 S. W. 981; *Railway Co. v. Cunningham*, 51 Tex. Civ. App. 368, 113 S. W. 767. Besides, the record discloses that the appellant, anticipating that testimony would be offered by appellee to show delays and rough handling of the cattle at the points mentioned in the assignment, had prepared itself to introduce rebutting testimony in regard thereto by taking the depositions of the several conductors in charge of the shipment from Paris, Tex., to the point of destination, the deposition of the foreman of the Paris & Great Northern Railroad Company at Paris, Tex., the depositions of its stockyard foreman and its assistant superintendent at Newburg, Mo., and also the depositions of certain of the employees of the Terminal Railroad Association and of the St. Louis National Stockyards. By the testi-

mony of these witnesses, appellant endeavored to meet the issues pleaded and sought to be proved by appellee, and this refutes the idea that appellant was, in fact, surprised at the admission of testimony showing delays and rough handling of appellee's cattle at Paris, Springfield, and Newburg. Under the circumstances disclosed by the record, the court did not err in refusing to allow appellant to withdraw its announcement and continue the case.

[5] Nor did the court err in refusing to instruct the jury, as requested by appellant, that if the cattle were delivered at the stockyards by appellant on June 7, 1909, before the market closed for that day, appellee could not recover any damages by reason of the cattle having been held over until June 8th. The only grounds of negligence submitted, and upon which the jury were authorized by the court's general charge to predicate a verdict in favor of appellee, were delays in transit, rough handling of the cattle, and placing them in muddy pens at Newburg, Mo., resulting in injury to the cattle and causing them to shrink in weight. The issue tendered by the pleadings of the appellee, to the effect that he sustained damages on account of the negligence of appellant in failing to transport the cattle to St. Louis in time to be placed on the market for sale on the 7th of June, 1909, was not submitted to the jury as a ground of recovery; and the failure to submit such issue had the effect to withdraw it from the consideration of the jury altogether. The refusal to give the special charge, therefore, resulted in no injury to appellant, and furnishes no just ground of complaint.

We are further of the opinion that the evidence was sufficient to justify the conclusion that the pens in which the cattle were placed in Newburg, Mo., were muddy and filthy as a result of the failure of appellant to exercise ordinary care to better their condition, and that appellant was guilty of negligence in putting the cattle in these pens and keeping them there for the length of time shown by the evidence, which proximately resulted in a depreciation in their value and loss to appellee. The court did not, therefore, err in overruling appellant's motion for a new trial, based on the alleged insufficiency of the evidence to establish this issue.

There are several assignments of error that have not been discussed. Some of these assignments have been disposed of by what has already been said, and none presents reversible error. The material allegations of the plaintiff's petition were sufficiently established by the evidence to warrant the verdict rendered, and the judgment of the district court based thereon will be affirmed.

Affirmed.

MORRIS et al. v. SHORT.

(Court of Civil Appeals of Texas. Texarkana. Nov. 7, 1912. On Motion for Rehearing, Dec. 5, 1912.)

1. DEEDS (§ 114*)—CONSTRUCTION—DESCRIPTION OF PROPERTY.

A description of land in a deed as 1,000 acres of land undivided and a part of a larger tract, situated in certain counties on the head-right surveys of D. and others, for a more full description of which reference was made to a recorded deed, was sufficient to convey 1,000 acres in whatever portion of such larger tract belonged to the grantor.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 316-322, 326-329; Dec. Dig. § 114.*]

2. APPEAL AND ERROR (§ 842*)—REVIEW—CONCLUSIONS OF LAW.

The trial court's construction of a deed is not binding on appeal, since it is a conclusion of law rather than a finding of fact.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3316-3330; Dec. Dig. § 842.*]

3. DEEDS (§ 95*)—CONSTRUCTION—LANGUAGE OF INSTRUMENT.

A deed which is not attacked for fraud, accident, or mistake should be construed according to its terms.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 233, 241-254; Dec. Dig. § 95.*]

4. DEEDS (§ 120*)—CONSTRUCTION—LANGUAGE OF INSTRUMENT.

A deed, absolute on its face, cannot be construed as a contract for a contingent interest in the land, in the absence of evidence of a contract different from that imported by the terms of the deed.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 375-393, 401, 407-412, 416-454; Dec. Dig. § 120.*]

5. ESTOPPEL (§ 39*)—PROPERTY CONVEYED—AFTER-ACQUIRED TITLE.

Where a deed contained no express warranty nor any language limiting the warranty against incumbrances implied from the use of the words "grant" or "convey" under Rev. St. 1895, art. 633, and the grantor at the time had no title, a title subsequently acquired by him vested immediately in the grantee by force of the implied warranty.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 108, 109; Dec. Dig. § 39.*]

6. COVENANTS (§ 96*)—COVENANT AGAINST INCUMBRANCES—"INCUMBRANCE."

A paramount outstanding title is an "incumbrance" within the meaning of a covenant against incumbrances.

[Ed. Note.—For other cases, see Covenants, Cent. Dig. §§ 111-129; Dec. Dig. § 96.*]

For other definitions, see Words and Phrases, vol. 4, pp. 3519-3527.]

7. ESTOPPEL (§ 38*)—PROPERTY CONVEYED—AFTER-ACQUIRED TITLE.

For an after-acquired title to pass to a grantee under a warranty of title, it is not necessary that the conveyance should have been upon a valuable consideration.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 99-107; Dec. Dig. § 38.*]

8. ESTOPPEL (§ 58*)—ELEMENTS—PREJUDICE TO PERSON SETTING UP.

Attorneys were not estopped from claiming that a deed to them conveyed an absolute title, by an answer, filed by them in a prior action, alleging that their client conveyed such land to take effect as a valid deed only in case he was successful in pending litigation, as against a

subsequent purchaser who did not rely thereon and who paid nothing of value for his conveyance.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 144, 145; Dec. Dig. § 58.*]

On Motion for Rehearing.

9. JUDGMENT (§ 256*)—CONFORMITY TO FINDINGS.

A party to an action conveyed an interest in land, the title to which was in dispute, to his attorneys by a deed absolute on its face. It was claimed that it was intended only as a contract to convey one-half of the land recovered by him in that action. He recovered nothing in that action, but subsequently acquired title to such land. *Held*, that a finding by the trial court, in a subsequent action, that the attorneys were entitled to a part of the land, necessarily involved a finding that the conveyance was not on the contingency claimed, and hence the court erred in limiting their recovery to one-half of the land.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 446-454; Dec. Dig. § 256.*]

Appeal from District Court, Upshur County; R. W. Simpson, Judge.

Trespass to try title by U. F. Short against M. L. Morris and another. From the judgment, defendants appeal, and plaintiff cross-appeals. Reformed and rendered.

John S. Barnwell, of Gilmer, and Morris & Pope and A. U. Puckitt, all of Dallas, for appellants. Warren & Briggs, of Gilmer, and U. F. Short, of Dallas, for appellee.

HODGES, J. This suit was instituted in the court below by U. F. Short, the appellee, in the form of an action of trespass to try title, against Morris and Crow, the appellants, for the recovery of a tract of 621 acres of land situated in Upshur county. The following is a statement of the substantial facts as we gather them from the briefs of counsel and from the record filed in the case:

Jas. B. Simpson is the agreed common source from which all the parties deraign title. In 1891 Jas. B. Simpson became insolvent. He was at the time the owner of 7,630 acres of land situated in Camp and Upshur counties, of which the land in controversy is a part. In order to place this property beyond the reach of his creditors, Simpson, on the 21st day of July, 1891, made a deed purporting to convey all of his land situated in those two counties to one Kennett Cayce. The deed recited a consideration of \$11,500 paid in cash, and was afterwards placed of record in both counties. The facts, however, show that Cayce was a fictitious person and that no consideration in fact passed to Simpson. At the time this scheme was attempted, Simpson was indebted to the following creditors: Sam Thurmond, T. L. Torrans, the Bankers' & Merchants' National Bank of Dallas, and the National Park Bank of New York. None of these claims appear to have been secured by liens at that time.

On January 14, 1892, Thurmond recovered

a judgment against Simpson on his claim in the district court of Marion county for the sum of \$924.96. An abstract of this judgment was filed in the office of the county clerk of Camp county on February 25, 1892, but none was filed in Upshur county. On the same date that Thurmond recovered his judgment Torrains also recovered a judgment against Simpson for the amount of his claim, which was something less than \$1,000. An abstract of this judgment was filed for record in the office of the county clerk of Upshur county on February 28, 1892.

On February 3, 1892, a power of attorney purporting to have been executed by Cayce to M. L. Robertson and acknowledged before Jas. B. Simpson was filed for record in Camp county. Robertson was a son-in-law of Simpson. On May 25, 1892, Robertson, claiming to act by virtue of this power of attorney from Cayce, executed a deed purporting to convey all of the lands described in the deed from Simpson to Cayce to the appellee Short, reciting a consideration of \$5,500. On the same day Short executed a deed conveying all of the same land, except 200 acres, to W. D. Simpson, a son of Jas. B. Simpson. This deed recited a consideration of \$4,250 paid in cash. According to the court's findings, all of these transactions were for the purpose of aiding Jas. B. Simpson to hold his property beyond the reach of his creditors, and no consideration was in fact paid in any of them.

On March 8, 1892, William Kelly sued Kennett Cayce in the district court of Dallas county on an account amounting to \$6,208.92, procured a writ of attachment, and caused it to be levied upon all of the lands described in the deed from Simpson to Cayce. The levies were made March 5, 1892. On October 10, 1893, Kelly recovered a judgment in his suit against Cayce and for the foreclosure of his attachment liens. The lands were subsequently sold under that judgment and purchased by Kelly, to whom the sheriff executed a deed.

In view of the fact that the trial court concluded that an agreement between Kelly, Short, and W. D. Simpson was entered into for the purpose of aiding Jas. B. Simpson to defraud his creditors, it may be proper to say in this connection that the various transactions between Simpson, Short, and Kelly, and the judgment recovered by Kelly against Cayce, and the sale thereunder, are not considered in this case in determining the rightful owner of the title to the land in controversy. They are here referred to simply for the purpose of showing the basis of the claims which gave rise to the litigation that arose thereafter and which is a part of the history of the case.

On February 22, 1892, the Bankers' & Merchants' National Bank of Dallas sued Jas. B. Simpson on its claim and procured a writ of attachment to be issued to Camp county,

which was by the sheriff of that county levied upon the lands in both Camp and Upshur counties. A judgment was thereafter rendered in the bank's favor for \$2,154 with the foreclosure of the attachment lien. An execution was issued on this judgment and placed in the hands of the sheriff of Camp county, who, on the 7th day of February, 1894, sold the lands in both counties; the Dallas bank becoming the purchaser. Previous to that time, on July 5, 1892, the same lands had been sold under the Thurmond judgment and purchased by the Bankers' & Merchants' National Bank of Dallas. Both of the above-mentioned sales are treated in this litigation as affecting only the lands in Camp county, inasmuch as the sheriff who made the sales had no authority to execute process on property in Upshur county. Hence it is not contended that either of the last-mentioned sales affected the title to the lands involved in this suit.

On January 16, 1893, the National Park Bank of New York recovered in the district court of Dallas county a judgment against Jas. B. Simpson for something over \$50,000; but no process was issued thereon to Upshur county till 1897.

Shortly after the sale made on the 2d day of January, 1894, under the judgment procured by Kelly against Cayce, at which Kelly became the purchaser, H. S. Hepburn, who had been appointed receiver for the Bankers' & Merchants' National Bank of Dallas, brought a suit in the district court of Camp county to recover all of the Simpson lands situated in that county; the receiver claiming by virtue of the sales made under the Thurmond judgment as well as that in favor of the Bankers' & Merchants' National Bank. Wm. Kelly, U. F. Short, the appellee, and W. D. Simpson were made parties defendant in that suit. Kelly claimed the lands by virtue of the sheriff's deed under his judgment against Cayce. After that suit was instituted, Wm. Kelly, Jas. B. Simpson, and Short entered into a written agreement in which they undertook to make a common defense. The agreement was dated the 5th day of April, 1894. Jas. B. Simpson contracted in the name of W. D. Simpson, Jr., his son. The writing recited the fact that the above-mentioned suit was pending. The parties agreed to make a common cause, and it was provided that if they were successful Kelly should have the first 2,000 acres. If over 2,000 acres were recovered, then Short should have 200 acres. After Kelly and Short had received their respective portions, the balance, which the parties estimated at 3,000 acres, should belong to W. D. Simpson, and an equitable partition should be made between the parties. It was further stipulated that each of the parties was to furnish his own attorney at his own expense, and that the court costs should

be apportioned between them in proportion to their respective shares.

Shortly afterwards Wm. Kelly entered into a contract with Morris and Crow, the appellants in this cause, by which he engaged them to represent him in the litigation referred to in the written agreement. Kelly executed the following deed to Morris and Crow, dated the 23d day of May, 1894: "Know all men by these presents that I, Wm. Kelly, of Dallas county, Texas, for and in consideration of five thousand dollars to me in hand paid by Morris & Crow in certain services rendered me in recovering a debt due me by Kennett Cayce, have granted, sold and conveyed, and by these presents do grant, sell and convey to Morris & Crow, a firm composed of M. L. Morris and W. M. Crow, residing in Dallas county, Texas, one thousand acres of land, undivided and a part of a tract of land containing 7,630⁸/₁₀ acres situated in the counties of Camp and Upshur, Texas." Then follows more particular description. "To have and to hold all and singular the premises together with all and singular the rights and appurtenances thereto in any wise incident or appertaining, unto the said Morris & Crow, their heirs or assigns, forever in fee simple."

This deed is the beginning and the basis of appellants' claim to an interest in the land in controversy. It appears from the testimony that Morris and Crow had represented Kelly in his suit in which he recovered a judgment against Cayce, and that they thereafter represented him in the future litigation regarding the validity of Kelly's claim to the land in controversy as well as that in Camp county.

The defendants mentioned in the suit instituted by Hepburn, receiver, filed a cross-bill asking for affirmative relief. An ineffective effort was thereafter made by the receiver to dismiss the case and prosecute substantially the same cause of action in the federal court. Hepburn afterwards resigned as receiver, and H. C. Weaver was appointed to succeed him. On the 8th day of December, 1896, Weaver, as receiver, conveyed to Short, the appellee, all of the interest claimed by the Bankers' & Merchants' National Bank of Dallas to the land there in controversy.

On February 12, 1896, W. D. Simpson, Jr., executed a deed to Sheppard & Jones, a firm of attorneys composed of Jno. L. Sheppard and J. F. Jones. That deed is as follows: "Know all men by these presents that I, Wm. D. Simpson, Jr., of the county of Dallas, state of Texas, in consideration of professional services rendered and to be rendered in the cases of H. S. Hepburn, Receiver, v. U. F. Short and Others, pending in the district court of Camp county, Texas, and in the United States Circuit Court at Jefferson, Texas, by Jno. L. Sheppard and J. F. Jones, have granted, bargained, sold and

conveyed, and by these presents do grant, bargain, sell and convey unto the said Jno. L. Sheppard and J. F. Jones of the county of Camp, state of Texas, all that certain lot, tract or parcel of land described as follows: An undivided one-third interest in all lands that this vendor may recover in the suit No. 1293, H. S. Hepburn, Receiver, v. U. F. Short and Others, now pending in the district court of Camp county, Texas, or that this vendor may recover in the suit of H. S. Hepburn v. U. F. Short et al., now pending in the United States Circuit Court at Jefferson; and special reference is here made to the pleadings in said cases for a particular and specific description of said land. It being understood, however, that should the court impose any charge upon this vendor's interest in said lands, that the vendees herein shall bear their one-third proportion thereof. And this vendor further covenants and agrees upon a recovery by him finally in the above litigation, that he will make to said vendees a warranty title to the proportion of lands herein conveyed by special warranty," etc.

After these conveyances the suit pending in the district court of Camp county was prosecuted on a cross-bill, with Kelly and others as the real plaintiffs, against Short as the real defendant. Kelly and his co-complainants abandoned the original form of the action and based their claim for relief upon an oral agreement which they claim was entered into between Short, Kelly, and Simpson, by which Short undertook to purchase from the receiver all rights to the property, for their benefit as well as his own. Upon a trial of that issue before the court a judgment was rendered in favor of Short, and this ended that litigation. It applied, however, only to the lands situated in Camp county, and did not include those in controversy.

On the 28th day of October, 1895, the Simpson lands in Upshur county, and which did include the lands here involved, were sold under an execution issued on the Torrains judgment. They were purchased by R. T. Torrains, and by him afterwards, on the 12th day of February, 1896, sold and conveyed to Thos. Kelly, who later conveyed them to Wm. Kelly. At the time of this transfer the suit in Camp county was pending as well as one involving the same issues in the federal court at Jefferson.

On May 13, 1897, an execution was issued out of the district court of Dallas county on the judgment theretofore recovered by the National Park Bank of New York against Simpson, and levied on the Upshur county lands. A sheriff's sale was afterwards made, and the lands purchased by F. M. Hayes, as receiver of the Ninth National Bank of Dallas. On June 8, 1897, Hayes filed suit in the United States Circuit Court of the Northern District of Texas at Dallas, in which he charged that the transactions and convey-

ances by which Kelly claimed to have obtained the land through Kennett Cayce were fraudulent and void because they were the result of a conspiracy entered into with Jas. B. Simpson to place the property beyond the reach of Simpson's creditors. It was also alleged that Kelly's purchase of the land in Upshur county from R. T. Torrans was made in furtherance of a like conspiracy with Jas. B. Simpson and for the latter's benefit. Upon those grounds the bill prayed for the cancellation of all those deeds. Answers were filed by Kelly and Morris and Crow. Subsequently A. P. Morey purchased from Hayes, the receiver, all of the interest which the bank owned by virtue of the sheriff's deed conveying to it the lands in Upshur county. Morey filed his bill, repeating in substance the previous averments of the receiver, and asked for the same relief. While this suit was pending, and on the 23d day of February, 1898, Kelly executed the following deed to Sheppard & Jones: "Know all men by these presents that I, Wm. Kelly, of the county of Dallas and state of Texas, for and in consideration of the sum of five thousand dollars to me in hand paid by Sheppard & Jones, a law firm composed of Jno. L. Sheppard and J. F. Jones, in legal services, have granted, sold and conveyed, and by these presents do grant, sell and convey unto the said Sheppard & Jones, a firm composed of Jno. L. Sheppard and J. F. Jones, of the county of Camp, state of Texas, all that certain tract of land containing one thousand acres, undivided, and a part of the following described tract of land, to wit: Lying and being situated in the counties of Camp and Upshur," etc. Then follows the usual habendum clause with the general warranty. On February 4, 1898, Kelly executed a deed to W. T. Armistead, by which, in consideration of legal services, he sold and conveyed "all that certain tract of land containing 200 acres, undivided, and a part of the following tract of land," etc. Then follows a description of the lands situated in Upshur county. This deed contained the usual general warranty.

In March, 1902, a judgment was rendered in the suit of F. M. Hayes, Receiver, v. Jas. B. Simpson et al., in the federal court at Dallas, which finally disposed of that litigation. It is conceded that Morey, who purchased from Hayes, the receiver, was the representative of Short, and that Short was the actual complainant in the suit. The court rendered rather a lengthy decree, reciting many of the facts shown by the evidence. He concluded that the transactions upon which Kelly based his defense, and which had been assailed in the bill, were void, and were subject to the charges of fraud which the complainants had made. But he also concluded that inasmuch as Short, who was the real party complaining and to be benefited by the decree sought, had previously himself been connected with

collusive efforts to aid Simpson in concealing his property, and had come into court with "unclean hands," he was not entitled to recover; and upon that ground the court adjudged that all of the costs in the case which had been incurred prior to the sale by the receiver to Morey should be against the defendants, and all of the costs which had been incurred after that time against the complainant, and dismissed the complainant's bill, leaving the parties just where they were before the litigation commenced. This judgment terminated all of the litigation in which Short and Kelly and the appellants Morris and Crow were involved.

On the 30th day of April, 1904, Kelly made a deed to Short, in which he quitclaimed and conveyed all interest he owned in any of the lands involved in the various suits, including the land in controversy. The consideration recited was \$600 in cash paid by Short. By this transaction Short obtained conveyances from all those who had purchased at the sales under the various executions issued and levied upon the lands belonging to Simpson.

The case was tried in the court below without a jury, and a judgment rendered awarding one half of the land to Short and the other half to Morris and Crow. From that judgment all parties have appealed; each side complaining of the judgment rendered awarding one-half of the land to the other.

To summarize: The evidences of title upon which the appellee Short relies are the following: Jas. B. Simpson as the common source; Torrans' judgment recovered January 14, 1892, and the abstract filed in Upshur county February 28, 1892; the execution and sale thereunder, and the sheriff's deed to R. T. Torrans May 6, 1895; deed from Torrans to Thos. Kelly February 12, 1896; deed from Thos. Kelly to Wm. Kelly May 18, 1897; and deed from Wm. Kelly to Short in 1904. Short also relied on the following transfers: Judgment in favor of the National Park Bank of New York against Simpson January 16, 1893; execution and sheriff's sale thereunder July 6, 1897, and sheriff's deed of same date to F. M. Hayes, receiver, of the Ninth National Bank of Dallas; deed from Hayes as receiver to A. P. Morey June 27, 1898; and the agreement that Morey was holding for Short. While these transfers and muniments do not embrace all the evidence offered by Short, they are all that may be considered material to be here considered.

Morris and Crow rely upon the following chain of title in addition to some of those above mentioned: Deed from Kelly to them May 23, 1894; deed from Kelly to Sheppard & Jones February 14, 1896; and the subsequent acquisition of this claim of Sheppard & Jones from their heirs, which appears to be regular. Under the evidence and findings of the court it must be conceded

that at the time the deed from Kelly to Morris and Crow was executed Kelly had no valid title to any portion of the land in controversy. He was then basing his claim of ownership solely upon the validity of the title acquired by virtue of his judgment and sale thereunder against Cayce. On February 12, 1896, nearly two years after Kelly had executed his deed to Morris and Crow, he acquired the Torrains title. Torrains was the first creditor who fixed a lien on the Upshur county lands. This was done by filing an abstract of his judgment in Upshur county on February 25, 1892. The levy and sale thereafter made carried with it a good title to the purchaser, R. T. Torrains. When Kelly afterwards acquired this title from Torrains it passed with his deed to Short in 1904, unless it previously vested by estoppel on account of his deed and implied warranty to Morris and Crow, or his deed to Sheppard & Jones in 1898. Appellants Morris and Crow claim title through both of these sources, while Short claims that both are equally ineffective for that purpose.

The first question that presents itself is: Did the implied warranty contained in the deed from Wm. Kelly to Morris and Crow in 1894 operate to vest in them the title afterwards acquired by Kelly previous to his transfer to Short? The court below held that it did, but also concluded that it vested only a one-half of Kelly's interest in the land. Upon that issue the court found and concluded as follows: "For the purpose of carrying out said agreement (the written agreement between Short, Kelly, and Simpson to make a common defense to the Camp county suit), Wm. Kelly engaged the services of the defendants, M. L. Morris and W. M. Crow, practicing lawyers of Dallas, Tex., under the firm name of Morris & Crow, agreeing to pay them for their services in case the said lands were recovered against the receiver claiming said lands for the creditors of Jas. B. Simpson's one-half of the land, which would fall to the share of Wm. Kelly under the terms of said written agreement in case the title through Kennet Cayce, or otherwise, was successfully established in said litigation; the only contract being a deed of Kelly's to Morris and Crow for 1,000 acres, undivided, of said land, dated May 23, 1894, which the court construed to be a contract for a contingent fee of one-half the land recovered for Kelly. That on the 23d day of May, 1894, Wm. Kelly executed to M. L. Morris and W. M. Crow his said deed, so construed by me to be such contract conveying an undivided interest of 1,000 acres in said lands described in said deed from J. B. Simpson to Kennet Cayce for a consideration, as stated in said deed, of \$5,000 paid in legal service. And the court concludes that said deed was really executed as a contract for a contingent fee as aforesaid and upon the condition that

the said Morris and Crow would be successful in the recovery of said lands for the said Wm. Kelly and his associates, and that the said deed to Morris and Crow was to take effect unless the title claimed by said Kelly under Kennet Cayce or T. L. Torrains was established as the result of such litigation, and the Torrains title acquired by Kelly by the aid of Morris and Crow, his attorneys, inures to their benefit under their said prior deed from Kelly. The court concludes as a matter of law that Morris and Crow having acquired their title from Wm. Kelly by a deed in effect a general warranty deed conveying an after-acquired title, and having thereby contracted with Wm. Kelly to receive for their services one-half of any lands recovered by the said Wm. Kelly, and that the said Wm. Kelly having afterwards acquired the title of R. T. Torrains to the land in controversy in this action by his purchase with the defendant Morris' assistance and at his suggestion and advice as his attorney, defendants' rights attached and vested the title in them to one-half said lands, and, said Wm. Kelly having conveyed said lands to the plaintiff herein by quitclaim deed, the one-half interest not passed to defendants passes to plaintiff, thereby enabling the plaintiff to recover to this extent. Therefore Morris and Crow are entitled under their deed from Kelly, construed as a contract for a contingent fee for one-half the land recovered, to one-half of said lands as against this plaintiff."

Morris and Crow assail that part of the judgment which awarded half of the land in controversy to Short, and Short by cross-assignments attacks that portion which awards a half interest to Morris and Crow. It is manifest from the evidence that Morris and Crow must rely for their right to recover any part of the land upon the strength of their deed from Wm. Kelly executed in 1894 and the subsequent acquisition of the title by Kelly when he purchased the Torrains title in 1896 or 1897. It conclusively appears that, when Torrains recovered his judgment against Jas. B. Simpson and filed an abstract of that judgment in the office of the county clerk of Upshur county, he thereby acquired a lien prior to all other claims upon the lands in controversy which were then the property of Simpson. Hence the sale thereafter made under an execution from that judgment passed to the purchaser, R. T. Torrains, a good title, and this was afterwards passed to Wm. Kelly. We find here the only direct and valid chain of transfers which affected the title to the Upshur county lands at that time. The deed from Wm. Kelly to Short, made in 1904, had the effect to invest Short with that title, unless it had previously vested in Morris and Crow by virtue of the implied warranty contained in their deed of 1894.

[1] Short objects to that deed upon the ground that it is void for uncertainty in the description of the property sought to be conveyed. The language of the description is as follows: "One thousand acres of land undivided and a part of a tract of land containing 7,630 and $\frac{9}{10}$ acres, situated in the counties of Camp and Upshur, Texas, on the headright surveys of E. B. Davis, Matthew Cartwright, Vincent Hamilton, Dexter Watson, and Wm. Berryhill; said entire tract fully described in a deed of Kennett Cayce by sheriff to Wm. Kelly, of date January the 2nd, 1894, and recorded in Book K, on page 97, Records of Deeds of Camp County, Texas, to which deed and record reference is here made for a full description of said land." Descriptions equally as vague and very similar to the above have been held sufficient in a number of cases decided by the courts of this state. *Dohoney v. Womack*, 1 Tex. Civ. App. 354, 19 S. W. 883, 20 S. W. 950; *Slack v. Dawes*, 3 Tex. Civ. App. 520, 22 S. W. 1053; *Peterson v. McCauley*, 25 S. W. 828; *Byrn v. Kleas*, 15 Tex. Civ. App. 205, 39 S. W. 933; *Fontaine v. Bohn*, 40 S. W. 637; *Hinzle v. Robinson*, 21 Tex. Civ. App. 9, 50 S. W. 635. The legal effect of the terms employed in the deed above referred to was to convey an interest equal to 1,000 acres in whatever portion of the lands might belong to Wm. Kelly. *Fontaine v. Bohn* and *Hinzle v. Robinson*, *supra*. The trial court sustained the validity of the deed, but construed it as a contract for a half interest in whatever land might thereafter be allotted to Wm. Kelly. He appears to have considered, in connection with the deed, a contract made before the execution of this deed, between Simpson, Kelly, and Short.

[2] He finds as a fact that no other contract except that evidenced by this deed was made between Kelly and Morris & Crow, and this finding is amply supported by the record. His construction of the deed was a conclusion of law rather than a finding of fact, and for that reason is not binding upon this court in the absence of a specific attack assailing the sufficiency of the evidence to support such finding.

[3] The general rule is that, except when attacked for fraud, accident, or mistake, a deed must be construed according to its terms. *Galveston, etc., Ry. Co. v. Pfeuffer*, 56 Tex. 66; *Caffey v. Caffey*, 12 Tex. Civ. App. 616, 35 S. W. 738; *I. & G. N. Ry. Co. v. Dawson*, 62 Tex. 261; *Railway Co. v. Jones*, 82 Tex. 160, 17 S. W. 534; 9th Ency. of Ev. 437. The deed here involved is not one which properly falls within any of the exceptions to that rule.

[4] A deed absolute upon its face cannot be construed as a contract for a contingent interest, unless there is some evidence of a contract different from that imported by the terms of the instrument. If we must

depend upon the deed in question as the only evidence of the contract between Kelly and Morris and Crow, we have no grounds for holding that it conveys an estate different from that which its terms clearly imply. If that be correct, then the deed of Kelly to Morris and Crow must be construed as an absolute conveyance of the fee to 1,000 acres of land, a part of that which was described and referred to; and it had the legal effect of vesting that interest in the grantees immediately upon its delivery, provided Kelly at that time owned what he thus attempted to convey.

[5] Under the findings of the trial judge, which are supported by the undisputed evidence, it must be admitted that when this deed to Morris and Crow was executed in May, 1894, Kelly in fact had no title to the lands involved in this suit, nor to any other land described in the deed to which reference is there made. His rights at that time depended solely upon the validity of Simpson's attempted transfer to Cayce, a fictitious grantee, and the subsequent acquisition by Kelly of whatever interest this fictitious individual may have held in the property. Kelly never in fact acquired any property in the lands involved in this suit, until he purchased from Torrains in 1896, nearly two years after this conveyance to Morris and Crow. At the time he acquired the Torrains title, he and Short were still litigating over their conflicting claims. The right of Morris and Crow, therefore, must now depend upon whether the after-acquired title which Kelly obtained in 1896, when he purchased from Torrains, vested in them by virtue of the implied warranty contained in their prior deed. It will be observed that the instrument contained no express warranty, nor did it contain any language indicating a purpose to limit the warranty which the statute says shall be implied from the use of certain terms. Article 633 of the Revised Civil Statutes of 1895 is as follows: "From the use of the word 'grant' or 'convey,' in any conveyance by which an estate of inheritance or fee simple is to be passed, the following covenants, and none other, on the part of the grantor for himself and his heirs to the grantee, his heirs and assigns, are implied, unless restrained by express terms contained in such conveyance: (1) That previous to the time of the execution of such conveyance the grantor has not conveyed the same estate, or any right, title or interest therein, to any person other than the grantee. (2) That such estate is at the time of the execution of such conveyance free from incumbrances. Such covenants may be sued upon in the same manner as if they had been expressly inserted in the conveyance."

[6] A paramount outstanding title is an "incumbrance" within the meaning of a covenant against incumbrances. *Boos v. This-*

pen, 140 S. W. 1180; *Lindsay v. Freeman*, 83 Tex. 259, 18 S. W. 727; *Garrett v. McClain*, 18 Tex. Civ. App. 245, 44 S. W. 47; *Warden v. Sabins et al.*, 36 Kan. 165, 12 Pac. 520; 3 Wash. on Real Prop. (3d Ed.) 393. Where the grantor has at the time of his conveyance no title in the property, the effect of his warranty when the title is thereafter acquired is to immediately transfer the same to his grantee. *Baldwin v. Root*, 90 Tex. 550, 40 S. W. 3.

[7] Nor is it material, in order that a warranty may have this effect, that a valuable consideration should have been paid by the grantee. *Robinson v. Douthit*, 64 Tex. 101. If we give this effect to Kelly's deed, then it follows that when he acquired the title from Torrains in 1897 it passed immediately to Morris and Crow, Kelly's grantees in the prior deed. That being true, there was nothing left for him to thereafter convey to Short. The deed from Kelly to Morris and Crow was recorded in Upshur county prior to Kelly's deed to Short in 1904.

[8] The appellee Short contends that Morris and Crow are now estopped from asserting title to this property, because of the answer filed by them in the suit of Hayes, Receiver, v. Kelly et al., in the Circuit Court of the United States for the Northern District of Texas. No particular portion of the answer is indicated in the argument, but we assume that the following is referred to: "Defendants say that on or about May 23, 1894, Wm. Kelly conveyed to M. L. Morris and W. M. Crow 1,000 acres, undivided, of said land, as compensation for their services in representing him as attorneys in the pending litigation in reference to same, and to take effect as a valid deed in the event the said Wm. Kelly was successful in recovering said land." It was after the filing of this answer that Short purchased from Kelly. Conceding that the statement made in the answer referred to was sufficient to constitute the basis of an equitable estoppel had Short relied thereon, still, in order for it to be made available in this instance, other facts must appear. It must be shown that Short relied upon the facts stated in the pleading referred to and was thereby induced to change his position with reference to the property in controversy so that it would not injure him if compelled to yield to a different claim set up by Morris and Crow. *Scoby v. Sweatt*, 28 Tex. 713; *Mayer v. Ramsey*, 46 Tex. 371; *Bynum v. Preston*, 69 Tex. 292, 6 S. W. 430, 5 Am. St. Rep. 49; *Page v. Arnim*, 29 Tex. 69; *Lewis v. Brown*, 39 Tex. Civ. App. 139, 87 S. W. 704. The record contains no evidence that Short relied upon the statements contained in this answer, or

was induced thereby to make the purchase; neither is there any evidence that Short paid anything of value to Kelly for the quitclaim deed which he thereafter procured. Our construction of the deed from Kelly to Morris & Crow is that it conveyed 1,000 acres in whatever lands Kelly owned in the tracts described, to be selected by the grantees. There is nothing in the deed which indicated that it was intended to apply to any less quantity. We have concluded therefore that the court erred in holding that Morris and Crow were only entitled to recover a one-half interest in the property in controversy, and in awarding that half to the appellee Short. According to his construction and findings of fact, the deed from Kelly to Morris and Crow was valid. If he was correct in that conclusion, and we think he was, it follows that the instrument should be given its full force and effect.

The judgment will therefore be reformed and rendered, awarding all of the land in controversy to the appellants Morris and Crow, and taxing all costs, both of this court and the court below, against the appellee Short.

On Motion for Rehearing.

[9] The appellee insists in this motion for a rehearing that Morris and Crow show no legal right to the land in controversy, because the evidence shows that their deed was to take effect only in the event that Kelly succeeded in establishing the validity of his title through the proceedings against Cayce. We may concede that this is correct as a legal proposition, but the record does not support that construction of the evidence. Morris testified that no such understanding as that relied on existed. Even if there was evidence to the contrary, it merely presented a case of conflict in which the court below manifestly accepted the testimony of Morris as true, for the judgment in favor of Morris and Crow for any part of the land necessarily involved a finding that their deed was not subject to those conditions. If the deed upon which Morris and Crow relied was incumbered with the conditions and agreements asserted by the appellee, they were not entitled to any portion of the land. A finding in their favor by the trial court for an undivided one-half interest is necessarily a finding against the appellee as to the existence of all or any of the facts upon which he now bases his argument. We not only think the facts disclosed by the record warranted that conclusion, but that it is sustained by the great preponderance of the evidence adduced upon the trial.

The motion for rehearing is therefore overruled.

TARVIN v. TEXAS & P. RY. CO.

(Court of Civil Appeals of Texas. Texarkana.
Nov. 25, 1912. Rehearing Denied
Dec. 5, 1912.)

CARRIERS (§ 402*)—INJURY TO PASSENGERS—BAGGAGE.

Where trunks belonging to passengers were loaded into a baggage car containing a corpse and absorbed a stench therefrom which caused persons at the place where they were unloaded to become suspicious, and caused them to be unlawfully searched for a dead body, the carrier was not liable for the humiliation suffered therefrom by the owners of the trunks; such injury not being the proximate result of the carrier's act, nor a result which could have been reasonably anticipated by the carrier.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1535; Dec. Dig. § 402.*]

Appeal from District Court, Taylor County; Thomas L. Blanton, Judge.

Action by J. Tarvin against the Texas & Pacific Railway Company. From a judgment dismissing plaintiff's petition, he appeals. Affirmed.

T. A. Bledsoe and Dallas Scarborough, both of Abilene, for appellant. J. M. Wagstaff, of Abilene, for appellee.

WILLSON, C. J. In his petition appellant alleged that on July 1, 1911, he and his wife were passengers on one of appellee's trains, destined to Trent, in Taylor county, and that they delivered to appellee, and it undertook to convey as a part of their baggage and deliver to them at Trent, two trunks. Appellant then alleged as follows: "The defendant, the Texas & Pacific Railway Company, negligently and carelessly and in disregard to the rights of this plaintiff and to this plaintiff's rights placed said baggage and trunks in a car with a human corpse, that was so far advanced or in a state of decomposition, or in close proximity with some other matter that had far advanced in a state of decomposition that gave out obnoxious odors, and that said trunks were contaminated and infected with the obnoxious odors to such an extent that trunks themselves smelled as though they contained a human corpse or other matter far advanced in a state of decomposition, and that when said trunks were unloaded at their destination, to wit, Trent, in Taylor county, Tex., that said trunks gave off a very obnoxious odor that smelled like a human corpse far advanced in a state of decomposition, and that by reason of the fact that said trunks were unloaded in the obnoxious condition above described, that the people at the station at Trent, who had assembled at the station when the train came, smelled said stench and obnoxious odor and believed that it contained a corpse of a human body far advanced in a state of decomposition, and that the conduct of the railway company in infecting said trunk with said obnox-

ious odor was the direct cause of said people believing that said trunk contained a corpse of a human body far advanced in a state of decomposition, and that the people acting upon said obnoxious odor notified the proper authorities of said condition, and that the said officials, believing that said trunks contained the corpse of a human body far advanced in a state of decomposition, authorized and instructed the proper officers to search and examine said trunk to find out whether or not the trunks contained the corpse of a human body. In truth and in fact there was nothing in said trunks that gave off any kind of an obnoxious odor, but that everything in said trunks was in proper form and was clean and sanitary, and there was no stench in said trunks, but that the stench smelled was on the outside of said trunks and was put there by the defendant, the Texas & Pacific Railway Company, and that the actions and conduct of defendant, the Texas & Pacific Railway Company, in unloading said trunks in said condition, were the direct and proximate cause of said trunks being searched, and that the said odor on said trunks created by the conduct and negligence of the defendant, the Texas & Pacific Railway Company, was the direct and proximate cause of the officers searching said trunks and the people in general becoming apprised of the condition of said trunks, and that the fact that said trunks were unloaded at Trent with said stench that the same and the obnoxious odor thereon, all of which facts were known to the neighbors and friends and to himself and wife and to the people of Trent, and the conditions were very humiliating and mortifying to the feelings of the plaintiff and his wife. And the said conduct of the Texas & Pacific Railway Company was the direct and proximate cause of said humiliation and mortification to the feelings of this plaintiff and his wife, and that said mortification and humiliation suffered by the plaintiff and his wife damaged this plaintiff and his wife in the sum of \$1,995, for which he here sues. Wherefore, premises considered, plaintiff prays that defendant be cited in the terms of the law to answer this petition, and that upon final hearing hereof he have his judgment of and from the defendant, the Texas & Pacific Railway Company, in the sum of \$1,995 and for costs of suit and for other and further relief to which he may be entitled to both in law and equity." The court below, being of the opinion the petition did not state a cause of action, sustained a general demurrer to it, and, on the refusal of appellant to amend, dismissed his suit.

It will be noted that the damages claimed were not on account of injury to the trunks or to the person of either appellant or his wife, but solely on account of humiliation they suffered because people at the station

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

suspected that the trunks concealed a dead body and caused same, without authority of law, for that reason (C. C. P. art. 344), to be searched. We think the court below correctly held that the act of appellee complained of was not a proximate cause of the humiliation suffered by appellant and his wife. In *Railway Co. v. Bigham*, 90 Tex. 225, 38 S. W. 163, the Supreme Court "announced the doctrine that, in order to constitute negligence, the act or omission must be the proximate cause of an injury, which, in the light of attending circumstances, ought to have been foreseen as a natural and probable consequence of such act or omission." *Railway Co. v. Hayter*, 93 Tex. 240, 54 S. W. 944, 47 L. R. A. 325, 77 Am. St. Rep. 856. In the *Bigham* Case the court said: "It ought not to be deemed negligent to do or to fail to do an act which it was not anticipated and should not have been anticipated that it would result in injury to any one. To require this is to demand of human nature a degree of care incompatible with the prosecution of the ordinary avocations of life. It would seem that it is neither a legal nor a moral obligation to guard against that which cannot be foreseen." It is clear, we think, that it reasonably cannot be said that appellee should have anticipated that as a result of the trunks absorbing stench from the corpse people at the station where they were unloaded from the car would suspect they contained the corpse of a human being and have same searched in violation of law.

The judgment is affirmed.

GULF, T. & W. RY. CO. v. STARK.

(Court of Civil Appeals of Texas. Texarkana. Nov. 20, 1912. Rehearing Denied Dec. 5, 1912.)

1. BILLS AND NOTES (§ 66*)—ORDER—ACCEPTANCE.

An order drawn by a creditor on his debtor, directing payment to a third person, is not binding on the drawee until presented to and accepted by it; the question of priority as an obligation over other claims against the drawer depending entirely on prior acceptance.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 107; Dec. Dig. § 66.*]

2. SET-OFF AND COUNTERCLAIM (§ 20*)—RIGHT TO SET-OFF—CONTRACT.

Defendant having employed the G. Company to do certain construction work which it procured to be done by F., it was discovered that defendant had overpaid the company \$425.04, whereupon it was agreed that F. had been overpaid that much, and that defendant should furnish F. additional work so as to enable him to repay such overpayment. This having been done defendant claimed it was entitled to set off such overpayment against the amount due F. for such additional work as against his assignees. Held that, in the absence of any assignment of the construction company's claim against F. for overpayment, his liability to defendant therefor depended exclusively on an agreement on his part that it might be charged

against him, and, in the absence of such agreement, defendant was not entitled to set off such amount against F.'s assignees.

[Ed. Note.—For other cases, see Set-Off and Counterclaim, Cent. Dig. § 24; Dec. Dig. § 20.*]

Appeal from Jack County Court; W. E. Fitzgerald, Judge.

Action by Sil Stark against the Gulf, Texas & Western Railway Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

Ben B. Cain, of Dallas, Spenser & McClure, of Jacksboro, for appellant. Sil Stark and E. W. Nicholson, both of Jacksboro, for appellee.

HODGES, J. The appellee, Sil Stark, sued the appellant in the county court of Jack county to recover the sum of \$950 which he claimed was due from the appellant to one T. W. Fletcher, and which Fletcher had assigned to the appellee. The items of the account as set out in the petition consisted of charges for work and labor performed for the appellant by Fletcher in building dams and reservoirs and in moving dirt in some way connected with the construction of its railroad. Appellant answered by a general denial, and specially pleaded payment of sums amounting to as much as that sued for. It also pleaded settlement on September 1, 1909, and the payment of \$311.26 in full of services rendered thereafter. It denied the correctness of several of the items detailed in plaintiff's petition, and the prices charged for the services there specified. It was further pleaded that a number of claims had been paid by appellant at the instance and request of Fletcher prior to the date of the assignment of this account. Among the claims which appellant specially pleaded as having been paid at the instance and request of Fletcher was one for \$142.30 to A. J. Birdsong on an order from Fletcher. To this answer the appellee filed a supplemental petition, denying payment and settlement, and alleging other matters not necessary to here state in detail. Appellant filed a supplemental answer, in which, among other things, it was alleged that prior to September 1, 1909, the Griggsby Construction Company had contracted to erect a grade along its line of railway; that in settlement with the construction company for a portion of this work it had by mistake overpaid that company in the sum of \$425.04; that this was due to an error in an estimate of the amount of work which had been done by Fletcher, who was then working for the Griggsby Construction Company. It further alleged that thereafter, when the mistake was discovered, it was understood by all parties that Fletcher had been paid \$425.04 more than he was entitled to, and that Fletcher agreed with appellant's chief engineer that,

in order to enable Fletcher to repay the same to the Griggsby Construction Company, the appellant would give him work to do in the construction of a dam and reservoir at Jermyn, and such other work as the company should need, until the \$425.04 had been repaid as agreed on; that Fletcher, with the full knowledge of all that was done, and with the honest intention of repaying to the Griggsby Construction Company and to this defendant company what they had overpaid him, agreed to do the work on that reservoir and such other work as appellant might employ him to perform, and to allow appellant credit thereon for the \$425.04. A trial before a jury resulted in a verdict for the appellee for \$585.61. A number of assigned errors are presented, but we will only discuss those which we think are subject to some of the objections urged.

In the fifth paragraph of the main charge the court gave the jury the following instruction: "There is one item of payment by defendant company over which there is a question as to precedence or priority; and that is the \$142.30 payment to A. J. Birdsong. Now, if you find that at the time the A. J. Birdsong account was presented to the company for payment that said defendant at said time accepted said order or claim, and that this was prior to the notice of the plaintiff's assignment, then plaintiff could not recover for same; on the other hand, if you find that the defendant had notice of the assignment by T. W. Fletcher to plaintiff before said defendant accepted or agreed to pay said account of A. J. Birdsong, then you will find for plaintiff on said item." The evidence shows that two days prior to the assignment by Fletcher to appellee of his claim against the appellant Fletcher had given to Birdsong the following order:

Oct 28.

To Bal. a/c..... \$142.30.

Pay A. J. Birdsong the above account.

To Gulf, Texas and Western Ry. Co., Jacksboro, Texas.

O. K. his
T. W. X Fletcher.
mark

[1] If this order is to be treated as merely a draft upon the appellant, drawn by Fletcher in favor of Birdsong, it was not binding upon the appellant until it had been presented to and accepted by it. *House v. Kountze*, 17 Tex. Civ. App. 402, 43 S. W. 561. Its priority as an obligation over that of the appellee's claim would depend upon its previous acceptance, unless appellee had consented that it might be first satisfied out of what appellant owed Fletcher. There was positive testimony tending to show that ap-

pellee had consented that this claim should have preference over his, and had authorized its payment by Witt, the chief engineer of the appellant, whose duty it was to settle such claims. It is unnecessary to refer to this evidence in detail. The charge complained of ignored that defense, and in that respect misdirected the jury to the appellant's prejudice. The sixth paragraph of the court's main charge was calculated to mislead the jury, and we suggest that upon another trial it be omitted entirely, or so modified as to avoid the objections urged.

[2] The seventh paragraph of the court's main charge is as follows: "As to the item of \$425 being the alleged overpayment on mlie 112, you are charged that whether or not this claim is a just claim in the first instance you have no concern and will not so consider; but all the facts about which you are to determine is whether or not T. W. Fletcher agreed to pay this claim out of the amount of money coming to him under his contract with defendant, and, unless you find by a preponderance of the evidence herein that said T. W. Fletcher did agree to pay said claim out of this work, you will find for plaintiff on this item." According to appellant's pleading, the right to this credit arose under circumstances practically the same as those set out in its pleading last above referred to. It is clear, we think, from the statement contained in the appellant's last supplemental answer that Fletcher could only be held responsible for the repayment of the \$425.04 to the appellant upon an agreement to that effect. If he had been overpaid by the Griggsby Construction Company, he was under the duty of reimbursing that company, and not the appellant, in the absence of some special undertaking to do so. Had the appellant pleaded an assignment of that claim to it by the Griggsby Construction Company, then it might have claimed the right to charge it to Fletcher in their general settlement without his consent; but, in the absence of such an assignment, Fletcher's liability to appellant for that claim would depend exclusively upon an agreement upon his part that it might be charged against him. We should not feel inclined to disturb the judgment because of that charge alone.

The court in another portion of his charge selected particular items of the account in dispute and charged with reference to them in such a manner as to give them undue prominence. Upon another trial that should be avoided.

Because of the errors discussed, the judgment of the court is reversed and the cause remanded.

FREEMAN v. QUEBEDEAUX et al.

(Court of Civil Appeals of Texas. Austin.
Nov. 20, 1912.)

CARRIERS (§ 123*)—INJURY TO FREIGHT—LOSS—PROXIMATE CAUSE.

Where defendant carrier improperly added a charge for icing to the expense bill of a car of cabbage, shipped by plaintiffs to G. for sale, but this error was not the cause of the consignee's refusal to accept the car and pay a draft attached to bill of lading, which caused a delay resulting in loss from the deterioration of the cabbage, defendant was not liable for such loss because of the addition of the icing charge.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 506, 507, 539-543; Dec. Dig. § 123.*]

Appeal from Travis County Court; R. E. White, Judge.

Action by W. Quebedeaux and others against T. J. Freeman, as receiver, etc. Judgment for plaintiffs, and defendant appeals. Reversed and rendered.

Fisher & Fisher, of Austin, and Wilson & Dabney, of Houston, for appellant.

JENKINS, J. Appellees brought this suit to recover damages to a car load of cabbage, shipped from Austin, Tex., to St. Louis. The alleged cause of action was that said cabbage were shipped without being iced by appellant, and that when they reached St. Louis an expense bill was rendered to the consignee, including \$55 for icing, and that by reason thereof the consignee refused to pay said charge and accept the cabbage, on account of which there was a delay of some eight days before the cabbage were delivered, in consequence of which it was greatly damaged. The case was tried before the court without a jury, and the court rendered judgment for appellees for \$236.42.

Appellees shipped said cabbage "to shipper's order," with instructions to deliver them to L. Garvy & Co., wholesale produce dealers in St. Louis, and at the same time drew on said Garvy & Co. against said cabbage at the rate of \$1.25 per hundred. Garvy & Co. refused to pay the draft and expense bill, by reason of which the railroad company refused to deliver the cabbage. Appellees drew this draft on the supposition that they had an agreement with Garvy & Co. to pay that amount for the cabbage and sell them for the joint account of said Garvy & Co. and appellees upon the division of the amount realized for said cabbage, over and above said \$1.25 per hundred and the freight. Appellees' theory was based upon the following telegram: "Austin, January 6th, 1909. L. Garvy & Co. St. Louis, Mo. How is the cabbage market? Car of bulk cabbage ready on Saturday. Would you advance \$1.25, handled joint account. [Signed] W. Quebedeaux & Son." To which they received the following reply on the same day: "New cabbage

from \$40 to \$45 a ton here; advise shipping. [Signed] L. Garvy Produce Company." On January 18th, appellees received the following telegram: "Car cabbage here; freight and ice charges \$163. Cannot pay draft. Cabbage worth \$40 ton here. Release bill of lading and will sell the best advantage. [Signed] L. Garvy & Co." To which appellees on the same day replied as follows: "Understand from your telegram you will advance \$1.24. Take care of our draft; if any loss draw on us." To this Garvy & Co. on same day replied: "Wired you cabbage worth \$40 to \$45. Didn't buy; will not protect draft." On the same day Garvy & Co. wrote appellees that they did not buy the cabbage and that they would not pay the draft; in reply to which, on January 15th, appellees wrote Garvy & Co. as follows: "We have your favor 13th, and note contents. We knew you did not buy the car of cabbage, and while you did not say so in so many words that you would advance \$1.25, your telegram led us to think you would do so, and your letter confirms the impression that you intended to do so until you were advised that there was an icing charge. There should not be an icing charge, so we wired you to pay the draft and draw back on us for \$50, and now will ask you to attach expense bill if you have not already drawn, and if so, we will pay the draft, etc." On the same day appellees wrote Garvy & Co. another letter, as follows: "Both your letter and wire indicated that you would advance \$1.25 per hundred pounds on car of cabbage, and the only excuse you offer is that you did not think there would be any icing charges, and there should not have been. We feel that we have been badly treated in the matter, and whatever loss we may sustain we will place in the hands of our attorney, with instructions to make claim on the railroad company and yourselves for it." Garvy & Co. were not made parties to this suit.

On January 18th, appellees sent the following telegram to Hauelsen Bros., wholesale produce dealers at St. Louis: "This will be authority agent Iron Mountain deliver car without bill of lading." In the meantime the railroad company had admitted that the charge for icing was error. Hauelsen Bros. disposed of the cabbage at from \$20 to \$30 per ton.

L. Garvy, of the firm of Garvy & Co., testified by deposition as follows: "I did not buy the cabbage involved in this suit in the first place. I had some correspondence with Quebedeaux & Co., and they shipped this car and notified me, and when it came here I was surprised because I did not buy it. I said I would handle it for their account, because cabbage was in damaged condition. Immediately upon being notified, I examined the car and found the cabbage in a damaged condition, and therefore I sent telegram to

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes.

Quebedeaux & Co. under date of January 15, 1909, which read as follows: 'Didn't buy cabbage, won't pay draft. Release bill of lading; handle for your account only.' My firm did not accept cabbage upon arrival in St. Louis; declined because I did not buy it. The reason I declined the car was not because expense bill called for icing charges, which made the total bill \$163.20 instead of \$108, as I did not get the expense bill until after the car had been examined and found to be defective."

There is no evidence in the record to contradict this statement of Garvy that he did not refuse the shipment on account of the erroneous icing charge. Under the undisputed evidence, appellees' cause of action is not sustained, for which reason the judgment of the trial court is reversed, and judgment here rendered in favor of appellant.

Reversed and rendered.

FREEMAN v. MORALES.

(Court of Civil Appeals of Texas. Austin.
Oct. 23, 1912. Rehearing Denied
Dec. 4, 1912.)

1. DEATH (§ 52*)—DAMAGES—PLEADING—SUFFICIENCY.

An allegation of the petition, in an action for the wrongful death of plaintiff's father, that the deceased would have continued to render pecuniary aid to plaintiff was not objectionable as alleging damages which were remote, argumentative, and speculative.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 69; Dec. Dig. § 52.*]

2. DEATH (§ 52*)—DAMAGES—PLEADING—SUFFICIENCY.

Where the petition, in an action for the wrongful death of plaintiff's father, in addition to alleging that the decedent earned a certain amount per month, of which plaintiff received a large part, also alleged that plaintiff was damaged in a certain total sum by the decedent's death, an objection to the former allegation as too uncertain was properly overruled.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 69; Dec. Dig. § 52.*]

3. DEATH (§ 31*)—RIGHT OF ACTION.

Where plaintiff's father rendered pecuniary assistance to plaintiff's family in aid of plaintiff, and not as a mere gift to some member of the family, and there was a reasonable probability that such aid would have continued, plaintiff may recover damages for the wrongful death of his father, which causes a discontinuance of such aid.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 35-46, 48; Dec. Dig. § 31.*]

4. DEATH (§ 103*)—ACTION FOR DAMAGES—JURY QUESTION.

In an action for the wrongful death of plaintiff's father, which caused a cessation of pecuniary aid rendered to plaintiff's family by his father, the question whether the aid was primarily for plaintiff's assistance, or as a gift to members of his family, was for the jury.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 141; Dec. Dig. § 103.*]

5. APPEAL AND ERROR (§ 750*)—ASSIGNMENTS—VERDICT.

An assignment of error that the verdict, in an action for the wrongful death of plain-

tiff's father, was against the preponderance of the evidence did not present for review the question whether the verdict, if supported by evidence, was excessive.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3074-3083; Dec. Dig. § 750.*]

Appeal from District Court, Comal County; F. J. Maier, Special Judge.

Action by Manuel Morales against Thomas J. Freeman, Receiver. From judgment for plaintiff, defendant appeals. Affirmed.

Fisher & Fisher, of Austin, and Wilson & Dabney, of Houston, for appellant. T. C. Johnson and Will G. Barber, both of San Marcos, for appellee.

KEY, C. J. On the 13th day of July, 1910, Rafael Morales was killed by a car on the International & Great Northern Railroad, operated by T. J. Freeman as receiver, and Manuel Morales, his son, and only person entitled to sue, brought this action against Freeman for damages, and obtained a verdict and judgment for \$1,000, to reverse which Freeman prosecutes this appeal.

The first, ninth, and tenth assignments of error complain because the trial court overruled certain special exceptions to the plaintiff's petition.

[1] One of the exceptions objected to so much of the petition as sought to allege that the deceased, Rafael Morales, would have continued to render pecuniary aid to the plaintiff, and that the aid and assistance alleged was remote, argumentative, and speculative. Tested by the rule announced and applied in *S. A. & A. P. Ry. Co. v. Long*, 87 Tex. 152, 27 S. W. 113, 24 L. R. A. 637, 47 Am. St. Rep. 87, we hold that the petition is not obnoxious to the objection urged.

[2] One of the exceptions was addressed to so much of the petition as sought to allege that Rafael Morales earned not less than \$40 per month, of which plaintiff received the benefit of a large amount; the objection being that the allegation referred to was too vague and uncertain. If that was the only allegation in the petition tending to show liability, the objection urged might be tenable; but there were other allegations, one of which was that as a result of the death of Rafael Morales the plaintiff was damaged in the sum of \$15,000. We hold that no error was committed in overruling the objection referred to.

[3] Another exception complained of a certain paragraph of the petition, which reads as follows: "That this plaintiff, at the date of such death, was a married man with a wife and two small children; that said Rafael Morales made his home with plaintiff's family, and devoted his earnings largely to the support and maintenance of plaintiff and his said family." The action of the court in overruling that exception and in admitting certain testimony hereinafter referred to is made the subject of the first and second as-

signments of error, which are submitted together, and under which assignments appellant submits but two propositions, which are, in effect, first, that the statute authorizing the recovery of damages for injuries resulting in death limit such right to the surviving husband, wife, children, and parents of the person killed, and that such right cannot be extended to any persons other than those specified in the statute; and, second, that where the person suing is not receiving actual pecuniary aid from the deceased, or has no reasonable expectation of receiving such aid, such person has no right of action. The correctness of these propositions may be conceded; but it does not follow from such concession that the plaintiff's petition failed to state a cause of action, or that the court committed reversible error in not striking out the particular allegation referred to and quoted above. It will be noted that the paragraph of the petition excepted to alleged that the deceased devoted his earnings largely to the support and maintenance of the plaintiff and his family, and not exclusively to the support of his family, as the defendant's exception seems to imply. If appellant had any right to have any part of the pleading referred to stricken out, it was only the last four words "and his said family." But we do not hold that appellant had such right, and agree with counsel for appellee that pecuniary aid may be rendered to one who has a family dependent upon him, and for whose support and maintenance he is legally bound, by furnishing part or all of such support, and thereby relieving him from so doing. The true test is whether or not the intention of the donor was to furnish pecuniary aid to the relative suing, or to make a gift to some member of his family. If such aid was rendered with the former intention, and there was reasonable probability that it would have continued in the future, the person suing can maintain the action; but if such aid was furnished and intended as a gift, not to the plaintiff, but to some member of his family, then the action cannot be maintained. Hence we hold that no error was committed in overruling the exception to the plaintiff's petition as set out above, and this ruling virtually disposes of the objection interposed to the testimony hereafter referred to.

[4] Over appellant's objection, the plaintiff's counsel was permitted to ask him if his father rendered him any assistance in the support of his family, and he answered: "What he [deceased] had over, he would always give to me." And replying to another question propounded by his counsel, he said: "He gave it to me to buy clothing for the children." And responding to a question asking about how much his father contributed on a weekly average to the family support, he answered, "He would give me \$4 and keep \$2 when he made \$6 a week." For the rea-

sons already stated, we hold that this testimony was admissible, and that it was the province of the jury to determine whether the deceased intended the donations referred to primarily as aid and assistance to the plaintiff, or as gifts to members of his family.

[5] Several objections were urged against the court's charge, and rulings refusing requested instructions. The objections referred to are not regarded as tenable, and the points presented are not of such importance as to require specific discussion in this opinion. Only two objections are urged against the verdict, and one is presented under an assignment complaining of the action of the court in refusing to instruct a verdict for defendant, and the other charges that the verdict of the jury is excessive, outrageous, and unconscionable, "because the evidence indisputably disclosed that the plaintiff was an adult, nearly 40 years of age, to whom deceased owed no legal duty of maintenance or support; and there was no evidence that during the life of deceased he had actually contributed pecuniary aid to the plaintiff—the preponderant weight of evidence, if not the undisputed and uncontroverted evidence, disclosing that whatever pecuniary aid was contributed by deceased was not to plaintiff, but to his grandchildren." That assignment is submitted as a proposition, and it is not followed up by any other proposition. We overrule the assignment, because it is not supported by the record, which shows that there was evidence tending to prove that the deceased had contributed some pecuniary aid to the plaintiff.

Whether or not the verdict is excessive, because it allowed the plaintiff more than the deceased would probably have contributed as pecuniary aid to the plaintiff, if he had not been killed, is a question that is not presented for decision, and upon which we express no opinion. We merely hold that, in so far as it is complained of in this court, the verdict of the jury is supported by testimony.

No reversible error has been pointed out, and the judgment is affirmed.

Affirmed.

SWIFT & CO. v. ALLEN et al.

(Court of Civil Appeals of Texas. Texarkana.
Nov. 27, 1912. Rehearing Denied
Dec. 12, 1912.)

TORTS (§ 10*)—INTERFERENCE WITH EMPLOYMENT OR OCCUPATION—RIGHT OF ACTION.

Plaintiff, an express messenger, in violation of the company's rule prohibiting employes from soliciting or handling commodities of any kind forwarded by express on their personal account, engaged in the egg business at a profit. The manager of defendant company, engaged in the same business, after urging plaintiff to agree to a price for eggs, and without knowledge of the express company's rule or malice toward plaintiff, informed the express company, and in consideration of the business it gave the company requested that plaintiff discontinue such

business, but in a talk with plaintiff said that he would not object to fair competition at a fixed place of business, and at no time interfered with plaintiff's customers. The express company, as a result of the letter, required plaintiff to discontinue his personal activity, but permitted him to be a silent partner in a firm in the same business, from which he had a profit, but finally discharged him. Plaintiff, as messenger, had access to papers enabling him to learn who defendant's customers were, so that he might become an unfair competitor. Held, that while every one has a right to the advantages of his industry and enterprise, and to be free from malicious or wanton interference, he cannot be protected against competition, and that plaintiff had no action for an interference with his occupation in the way of fair competition, as to which defendant's rights as to the express company were equal to those of the plaintiff.

[Ed. Note.—For other cases, see *Torts*, Cent. Dig. § 10; Dec. Dig. § 10.*]

Appeal from District Court, Bowie County; P. A. Turner, Judge.

Action by Jas. R. Allen and others for an injunction against Swift & Co. and the Pacific Express Company. Judgment for plaintiff against Swift & Co. and judgment for Pacific Express Company, and Swift & Co. appeals. Reversed, and judgment rendered for Swift & Co.

The suit was brought by the appellee jointly against Swift & Co. and the Pacific Express Company for damages claimed to have been occasioned to him by reason of an alleged wanton and malicious intermeddling and interference with his business, and causing his discharge as an employé of the express company. Appellee was in the employ of the express company as a messenger in December, 1908, and for about eight years prior thereto. His duties were to handle express on the train between Texarkana and Whitesboro, Tex. His employment by the express company as messenger was by the month only, at a fixed salary. While and during the time appellee was employed as messenger of the express company he established for himself and conducted in person a profitable business of buying and selling eggs and turkeys to supply the hotels, restaurants, and merchants of Texarkana. He handled from 2,000 to 4,000 dozen eggs a month. The eggs and turkeys were purchased by appellee from the merchants and dealers at the different stations along the route of his express service, and they would ship to him by express to Texarkana, paying the regular charges of the company. The express company had in force the following rule, known to appellee: "Employés whose services are engaged exclusively by this company are absolutely prohibited from soliciting or handling for their personal account commodities of any kind forwarded by express on commission or speculation." The agent at Texarkana and the route agent of the express company, it seems, knew that appellee was engaged in the business contrary to the rules, but never said anything to him in reference thereto. Swift & Co. was engaged in handling and

supplying the trade in Texarkana with different kinds of meat and cold storage eggs and fowls, and was a patron of the express company. Stating it in the language of the appellee: "About December 1, 1908, Mullin, manager and solicitor of business for Swift & Co. at Texarkana, mentioned my business to me. He was just talking in regard to the egg business and about them being a little scarce along about then, getting near Christmas, and he asked me at what price I would sell him, and I told him 28 cents a dozen. He said that was not enough; that I ought to get 30 cents; and I told him the rest of them were selling at 28 cents and I could afford to sell for that. Well, he wanted me to raise the price to 30 cents to all except Bussey Bros., who were good patrons, and he would continue to furnish them at 28 cents. I told him as long as other parties were selling at 28 cents I could not make any agreement to go higher on it. I think that is all that occurred at that time until after Mr. Mullin had taken up the matter with the company, and requested them to have me discontinue." On December 21, 1908, the following letter was written and delivered to the express company: "T. N. Edgell, Supt. Pac. Exp. Co., Dallas, Tex.—Dear Sir: We respectfully call your attention to the fact that one of your employés, Mr. J. R. Allen, is shipping in eggs to this point and entering into competition with us. Inasmuch as we give you the preference on all business and consequently do considerable volume with you, we would ask that you cause the above-named party to discontinue his activity along this line that will come in competition with us. We are taking this matter up with you direct in preference to taking same up with our railroad department, as we feel satisfied that you will give the matter attention at once. Thanking you in advance for an early reply, we are, Yours respectfully, Swift & Company, per C. W. Mullin, Manager." The record admits the fact that Swift & Co. did nothing more than write this letter of complaint. The superintendent at once inclosed the letter to the appellee. The appellee, upon receiving this correspondence, went to the manager of Swift & Co., and told him of the correspondence, and asked him if he would not withdraw the complaint. According to the testimony of appellee, the manager replied that he could not, as I was competing with them, and that he understood I was selling eggs at a price for a profit that they could not afford to handle eggs at, as I have no regular place of business here he could not afford to withdraw his complaint. He said if I would engage exclusively in the business and go in competition with them in the right kind of a way, and get me a house and compete with them openly, that he had no objection, but that he would not withdraw his complaint. This was somewhere between the 1st and 10th of January, 1909." The ap-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

pellee then wrote a letter to the superintendent, and in reply received the following letter: "This is to acknowledge receipt of your letter of January 10, and I am inclosing an excerpt from monthly circular No. 95, paragraph No. 8, page 648, also a copy of the recommendation of the Interstate Commerce Commission to the U. S. Senate. While the name of messengers are not used, this prohibits the agents from doing what you are doing, and there is no reason why the agents should be forbidden to do so, and not the messengers. I trust that you will see the wisdom of this, and discontinue the egg traffic or resign your position as messenger and go into the egg business exclusively. They do not go well together, and in many instances I have found that it results in a loss of business to the company, which I am here to prevent." Upon receipt of this letter appellee then wrote the superintendent, asking him if he had any objections to his continuing the business, provided he ceased to be actively engaged in the business. The superintendent then wrote the route agent as follows: "There is no objection whatever in having Mr. Allen interested in the commission firm, but he must not be an active partner while in the employ of this company." This reply was shown to appellee, and he then engaged thereafter in the same business with C. W. Williamson, under the name of C. W. Williamson & Co., and he ceased to be an active partner in carrying on that business while he was a messenger. The business was thus carried on till January, 1910. Appellee was discharged from the service of the express company about the 4th or 5th of January, 1910. It appears that appellee made from \$40 to \$60 a month out of the business before he went into partnership with Williamson. After the partnership, it appears from the record that appellee cleared \$40 only. Appellee claims the loss from partnership to have been because he could not actively himself handle and solicit the business. By his petition appellee predicates liability for the loss upon the following grounds: (1) That the Pacific Express Company and Swift & Co. did "maliciously and wickedly conspire together for the express purpose of preventing the plaintiff from buying and selling to his said customers eggs and poultry, and in consequence of such malicious and wicked conspiracy between the said defendants plaintiff was prevented from engaging in said business and the same was ruined"; (2) "that Swift & Co. for the purpose of stifling competition, and in conspiracy against trade, did maliciously demand of the Pacific Express Company that said company cause the plaintiff to cease his business as a dealer and shipper and supplier of the trade as aforesaid, and did demand that said company discharge plaintiff from its service if he continued to engage in the legitimate business aforesaid, and that the said Pacific Express Company, at the instigation and un-

lawful interference on the part of Swift & Co., did demand of plaintiff that he either discontinue his business or it would discharge him from its service;" and (3) "that the said defendant, Swift & Co., maliciously induced the defendant Pacific Express Company by threats of withdrawing its patronage from it to break off this plaintiff's business and to finally discharge the plaintiff from its service, to the end that it might, contrary to the laws of the state of Texas, have a monopoly of the egg business in Texas and be able to fix and control the price thereof to its, Swift & Co.'s, great benefit." The trial was to a jury, and the jury returned a verdict in favor of the plaintiff against Swift & Co. The court gave a peremptory instruction in favor of the express company.

Glass, Estes, King & Burford, of Texarkana, for appellant. Smelser & Vaughan, of Texarkana, for appellees.

LEVY, J. (after stating the facts as above). By the first assignment of error the appellant, Swift & Co., predicates error upon the refusal of the court to peremptorily instruct a verdict in its favor. A verdict was directed in favor of the express company and the court in his charge excluded any claim for damages against Swift & Co. other than for the alleged ruin of appellee's egg and poultry business. In the absence of any complaint, as here, of the court's ruling applicable to such peremptory instructions, and there being a jury finding and judgment thereon, we must assume acquiescence in such rulings and the conclusiveness of the same as to this appeal. Any question as to liability at all of the express company, and any question of liability of Swift & Co. for alleged wrongfully procuring or causing the appellee's discharge from service as a messenger, would therefore be entirely eliminated from the appeal. Consequently the question remaining here is as to whether or not the court should have also directed a verdict in favor of Swift & Co. under the alleged complaint that it had effected and caused the ruin of appellee's egg and poultry business by wanton and malicious interference with it. There is no dispute in the facts, and it is not asserted by the parties that there is any conflict of evidence, unless it be that bearing on the question of damages.

The material facts appearing from the evidence, so far as essential to be stated for the purposes of the question under review, are that appellee Allen, while under employment as a messenger of the Pacific Express Company, was personally engaged in buying up turkeys and eggs from dealers along his route, and having them shipped to him by express to Texarkana, and there selling them to customers. Swift & Co. were also engaged in the poultry and egg business in Texarkana, and were patrons of the express company. On December 21, 1908, the manager

for Swift & Co. at Texarkana wrote a letter to the superintendent of the express company calling attention to the fact that Allen, its messenger, was shipping in eggs to Texarkana, and entering into competition with it, and to the further fact that it was a patron of the express company, and asked that the express company "cause the above-named party to discontinue his activity along this line that will come in competition with us." The express company referred the letter to Allen, with the result that Allen was required by the express company, in order to continue in its employ as messenger, to discontinue personally handling or actively carrying on the commission business while performing the duties of a messenger. But the express company consented that he might continue interested in the business as a silent partner of a firm, which was done thereafter under the name of Williamson & Co. The express company had a rule, known to appellee, but it does not appear Swift & Co. knew it, which reads: "Employees whose services are engaged exclusively by this company are absolutely prohibited from soliciting or handling for their personal account commodities of any kind forwarded by express on commission or speculation." Swift & Co. did not do or say anything more to the express company, as the record admits, in reference to appellee's business, or the appellee himself, than to write the letter of December 21, 1908. Prior to writing the letter the manager for Swift & Co. had a conversation with Allen to the effect of insisting that appellee should sell eggs at 30 cents, instead of 28 cents, per dozen. After the letter of December 21st was referred to Allen, he called on the manager of Swift & Co. to withdraw the complaint in the letter, and the manager replied to the effect that he would not withdraw the complaint to the express company, unless appellee would agree to engage exclusively in the egg and poultry business. It is upon this letter of December 21st to the express company, coupled with the two conversations of Mullin with him, that appellee relies to sustain a cause of action for wanton and malicious interference with his commission business. It may be said from the first conversation of Mullin with appellee, happening prior to the letter to the express company, that it appears clearly enough that the object or motive on Mullin's part was to have appellee agree to raise the selling price of eggs to what Mullin claimed was the only price he could afford to sell them at. But the purpose to injure appellee in his business as such is not evident from either the first or second conversation. In the second conversation it is clear that the only purpose Mullin had was to have appellee either follow the service of messenger, or go exclusively into the commission business. It can be assumed, as proven, that the letter written by Mullin to

the express company caused the express company to enforce its rule heretofore mentioned against Allen, and that by its enforcement Allen lost an advantage to him in his business of solely conducting it without partnership, along with his messenger service, that he would have been able to attain or enjoy but for the letter of complaint, unless sooner terminated by the express company by enforcement of its rule on its own motion. As it is not shown nor contended in the case that either the express company or Swift & Co. induced any of the customers or parties selling to appellee to break their contracts with him, or not to deal with him, neither the case nor the principle applied in the case of *Raymond v. Yarrington*, 96 Tex. 443, 73 S. W. 800, 62 L. R. A. 962, 97 Am. St. Rep. 914, would rule the question here. See 2 Page on Contracts, p. 2046; *Angle v. Railway Co.*, 151 U. S. 1, 14 Sup. Ct. 240, 38 L. Ed. 53. And, as there is no pretense in the facts that there were direct acts of interference or molestation in the conduct of appellee's business, as in the case of *Dunshee v. Standard Oil Co.* 152 Iowa, 618, 132 N. W. 371, 36 L. R. A. (N. S.) 263, cited by appellee and relied on by him, the principle there applied could not have force and application to the facts here. It is a significant fact here that the existence of the appellee's asserted right to continue unmolested in his dual capacity as messenger of a public service corporation and commission merchant was not a matter of contract with the express company. On the contrary, it was a violation of the promulgated and known rule of the express company. The defeat of the right, if so, to continue the business and the agency together for benefit to appellee, could not therefore be related to any contract right with the express company and Allen so to do, so far as the pursuit of the commission business was concerned. It is the aim of the law to protect every person against the wrongful act of every other person, and the law has provided an action for injuries done by disturbing a person in the enjoyment of any right or privilege he has. The principle has thus been laid down in *Walker v. Cronin*, 107 Mass. 555: "Every one has a right to enjoy the fruits and advantages of his own enterprise, industry, skill, and credit. He has no right to be protected against competition; but he has a right to be free from malicious and wanton interference, disturbance or annoyance. If disturbance or loss come as a result of competition or the exercise of rights by others, it is *damnum absque injuria* unless some superior right by contract or otherwise is interfered with. But, if it comes from the merely wanton or malicious acts of others without the justification of competition or the service of any interest or lawful purpose, it then stands upon a different footing." See, also, 2 Cooley on Torts, p. 536; 1 Cyc. 650. Following this principle, in order

to constitute the letter of December 21st an actionable wrong, there must be a violation of some definite legal right of the appellee. Allen, as a messenger in a public service corporation, was in a position to examine all the waybills, and to learn who the customers of Swift & Co. were and the amount of express it was doing in Texarkana; and being in the same business himself, and armed with this information obtained or obtainable by virtue of his employment as messenger, he could become an unfair competitor. The policy requiring public service corporations to treat all patrons alike and accord equal advantages to all shippers without discrimination would not sanction, we think, the idea that the express company properly could authorize or permit its employes to obtain such information and trade advantages for their own personal benefit by virtue of their employment as would enable them to use such information to their personal advantage as against patrons of the express company in the same line of business. In this view, then, appellee's right to use his employment in the public service corporation in connection with or as a means to assist him in carrying on his business to his advantage was not a right so superior to the appellant's right to complain and protest as to such methods as to be free from molestation by the appellant or the express company itself. If the appellant in the facts had the right in the interest of its business, as it did, to complain to the public service corporation that its employe was using his employment as he was to further his private business in competition with appellant, then such letter of complaint written by appellant to the express company would bring the act of appellant in making such complaint under the shelter of the principle of trade competition, and would not be a ground for action. Appellant in writing the letter of complaint was serving, it must be said from the facts, a purpose connected with its own business and founded on that purpose; and, being a complaint moving from a disposition only to protect its business, it could not be said that the act of appellant was done wantonly and without interest or occasion to do same. The letter contained presentation of reasons, not in themselves unlawful, why he should not continue as messenger and still be in a competitive business with a patron of the express company. The force of the letter, as seen, reached only to the purpose to have the express company "cause the above-named party to discontinue his activity along this line that will come in competition with us." As under the facts the object sought, and also the means used by appellant in complaining to the express company, was no broader than justified, the appellant was entitled to a verdict in its favor. The assign-

ment therefore should be sustained, and the judgment here rendered which should have been rendered below, that the appellee have and recover nothing of Swift & Co., and that appellant recover all costs of appeal and of the court below.

The judgment not appealed from will remain undisturbed.

S. W. SLAYDEN & CO. v. PALMO.

(Court of Civil Appeals of Texas. Austin. April 17, 1912. On Motion for Rehearing, Oct. 23, 1912. Rehearing Denied Dec. 4, 1912.)

On Rehearing.

1. EVIDENCE (§§ 213, 241*)—WITNESSES (§ 379*)—ADMISSIONS.

In an action on contract, evidence that defendant's agent said that he would advise defendant to settle was admissible to disprove an averment in the answer that plaintiff had abandoned his contract, but not to impeach the testimony of the agent or to show an offer to compromise.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 745-751, 753, 887-892; Dec. Dig. §§ 213, 241.* Witnesses, Cent. Dig. §§ 1209, 1220-1222, 1247-1256; Dec. Dig. § 379.*]

2. APPEAL AND ERROR (§ 1050*)—REVIEW—HARMLESS ERROR—EVIDENCE.

Where testimony substantially the same as some complained of was not objected to, a case will not be reversed even if the testimony complained of was not admissible.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1068, 1069, 4153-4157, 4166; Dec. Dig. § 1050.*]

3. APPEAL AND ERROR (§ 1006*)—EVIDENCE—SUCCESSIVE VERDICTS.

Where the jury has given the plaintiff a verdict three times, although the evidence in support thereof is meager, the verdict will be permitted to stand; but the mere fact that there have been three verdicts for plaintiff should not prevent this court from reviewing the evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3951-3954; Dec. Dig. § 1006.*]

Appeal from District Court, McLennan County; Marshall Surratt, Judge.

Action by Mi Palmo against S. W. Slayden & Co. Judgment for plaintiff, and defendant appeals. Affirmed.

J. E. Yantis, of San Antonio, and Clark & Clark, of Waco, for appellant. O. L. Stribling and Downs & Webb, all of Waco, for appellee.

KEY, C. J. This case has been before this court several times, and the nature of the suit and the rulings heretofore made can be ascertained by examining 90 S. W. 908, 100 Tex. 13, 92 S. W. 796, and 53 Tex. Civ. App. 227, 117 S. W. 1054. Upon the last appeal this court held that the contract purporting to have been made by S. W. Slayden & Co., and for a breach of which appellee is seeking to recover damages, was not within the

scope of the partnership business of that company, and was not binding upon S. W. Slayden, against whom recovery was had, unless it could be shown that after it was made S. W. Slayden had ratified the same. The case was reversed and that issue left open for trial; and at another hearing the jury decided it in favor of Palmo and against S. W. Slayden, and the latter has appealed.

While a number of other questions have been presented in appellant's brief and received consideration at our hands, we are of opinion that none of the assignments point out reversible error, except the nineteenth and twentieth, and those which challenge the verdict as being contrary to the great weight and preponderance of the evidence. The bill of exception copied in appellant's brief under the nineteenth assignment of error shows that, in overruling an objection which appellants had made to a question propounded to the plaintiff while testifying in his own behalf, the trial judge used the following language in the presence of the jury: "The court is of the opinion that all the facts and circumstances surrounding this contract can be proven, and surrounding the making of the contract sued upon, and also the making of the contract with Rowland. There was such a trade relation existing between Palmo and Slayden or Slayden and Palmo as renders it necessary, in order for the court and jury to understand and determine this case according to its true merits, to understand all those facts, and they will be taken by the jury and considered by them in arriving at what were the true facts in regard to it, and the court will not limit at all the evidence to what is stated simply in those contracts. All these surrounding circumstances, the facts and circumstances leading up to it, and the purposes of the party or parties, and with what view the Rowland contract was made and was attempted to be carried through, I think can be shown. It is one of the issues in this case, and that very purpose is one of the issues in this case. If it was one way the effect of it would be different than it was if it was another, and it is for the jury to determine, and without the facts they cannot determine which way it was."

The bill shows that appellant's counsel excepted to that portion of the judge's remarks in which he stated in the presence of the jury, that there was "a trade relation existing between the plaintiff and the defendant," and that exception constitutes the basis of the nineteenth assignment of error; and, in view of the long line of decisions by our Supreme Court, we feel constrained to sustain appellant's contention, and hold that the statement referred to constitutes reversible error. We have a statute which prohibits a trial judge from commenting upon the weight of testimony in charging the

jury; and, on account of that statute, our Supreme Court has held that it is reversible error for a trial judge to in any manner state or intimate to the jury his opinion as to how any controverted issue should be decided, or the weight that should be given to any testimony bearing upon such issue. In the case at bar this court had held that appellee had no case, unless he could show that appellant had ratified or adopted the contract sued on, and that he was endeavoring to do at the last trial; and no doubt appellant's counsel were then contending in that court, as they are now contending in this court, that the plaintiff had failed to make such proof, and therefore, in view of the line of decisions referred to, we hold that it was error for the trial court to make the statement complained of in reference to a trade relation existing between Palmo and Slayden.

By the twentieth assignment appellant complains of the ruling of the trial court in permitting Judge Richard I. Munroe, while testifying for appellee, to state that one Lastinger had told him that he would advise appellant to accept the witness' offer to settle the matter in controversy in the manner suggested by the witness. Conceding that Lastinger was appellant's agent in many other respects, the evidence fails to disclose that he had any authority to ratify the contract here sued on, or to accept the proposition submitted to him by the witness, and therefore the court erred in permitting Judge Munroe to state what he said he would advise appellant to do. The result was that, over the defendant's objection, the plaintiff got before the jury evidence to the effect that the defendant's agent Lastinger had recognized the fact that the plaintiff's claim was meritorious, and had advised the defendant to accept a proposition submitted by the plaintiff's counsel for a settlement. Ratification results alone from what has been done or said by the person sought to be held liable, and not from what has been done or said by an agent of such person, unless, by the terms of his agency, such agent has authority to ratify, which was not shown in this case. Hence we hold that the evidence referred to was not admissible, and that it was harmful to appellant is quite obvious. In fact, it formed the basis for an appeal and argument to the jury which may account for a verdict which otherwise appears to be contrary to the great weight of the evidence.

It is insisted on behalf of appellant that the verdict in appellee's favor is not supported by the testimony, and that this court should reverse and render judgment for appellant. The evidence tending to show ratification is meager and unsatisfactory, but we have reached the conclusion that the case should be reversed and remanded for ah-

other trial in the court below, and it is so ordered.

Reversed and remanded.

On Motion for Rehearing.

This case was reversed at the last term of this court, and appellee's motion for rehearing was brought over to this term; and, after careful consideration, we have reached the conclusion that the former judgment of this court is wrong, and that the case should be affirmed. As shown by our former opinion, the case was reversed upon two questions of law, which were: First, error of the trial judge in stating in the presence of the jury, while ruling upon the admissibility of certain testimony, that there was a trade relation existing between the plaintiff and the defendant; and, second, in overruling objections to testimony given by Judge Munroe to the effect that appellant's agent Lastinger had told him that he would advise appellant to accept Judge Munroe's offer to settle the matter in controversy in the manner suggested. Undisputed testimony coming from witnesses on both sides shows that at the time of the transaction in question business relations had existed between appellee and appellant for a long time, and therefore the remarks made by the judge and complained of by appellant were not calculated to prejudice the latter and the making of such remarks did not constitute reversible error.

[1] As to the testimony of Judge Munroe, appellant alleged in his answer that appellee abandoned the contract, and it may be that the testimony was admissible for the purpose of disproving that averment. According to the bill of exception, the only objection made in the court below to the testimony was that of immateriality, for the reason that the expression of an opinion by an agent cannot be used for the purpose of impeachment, if offered as contradictory testimony. Lastinger testified that he had no recollection of making the statement testified to by Judge Munroe, but he did not deny that he had made such statement, and it does not appear from the record that the testimony was offered for the purpose of impeachment. If Lastinger was appellant's agent and had plenary powers including authority to act for appellant in the particular matter, the testimony was admissible because it tended to show an admission by an authorized agent, unless obnoxious to the objection that it tended to prove an offer or willingness to compromise, which objection was not made. We cannot hold that the testimony was immaterial, and that seems to be the only objection that was urged against it.

[2] Furthermore, testimony substantially the same as that complained of was given by appellee, Palmo, and was not objected to by appellant, and for that reason the case should not be reversed, even if Judge Mun-

roe's testimony was not admissible. Appellee testified: "I went to Mr. Lastinger with reference to this contract, and Judge Munroe said, 'Why don't you kinder get this matter straight, Mr. Lastinger?' Mr. Lastinger spoke and said, 'Well, it ought to be settled.' Judge, he said, 'Well, why don't you settle it?' 'Well,' he said, 'I don't know. I am going to write to Mr. Slayden and make him settle it.'" We perceive no difference in substance between the testimony of Judge Munroe that was objected to and the testimony given by appellee that was not objected to, and, as Lastinger did not deny making the statement, we hold that the case should not be reversed on account of the admission of Judge Munroe's testimony.

[3] We have also reconsidered the testimony bearing upon the merits of the case, and while that tending to support the verdict is not entirely satisfactory, as reflected by the statement of facts, we cannot hold that there is no testimony to support the verdict. In order to find for the plaintiff, the court's charge required the jury to find that appellant had ratified the contract sued upon. There was some testimony, and especially that given by the plaintiff while on the stand as a witness, tending to show that the defendant Slayden in person had ratified and adopted the contract. There was also testimony tending to show that W. H. Lastinger was Slayden's agent with plenary powers, and that acting as such agent he had ratified and adopted the contract for Slayden. This is the third time that the jury has rendered a verdict in favor of appellee, and therefore, although the testimony in support of the verdict seems meager and unsatisfactory, nevertheless, being the third verdict to the same effect, and the trial judge having refused to set it aside, we think it should be permitted to stand, and thereby terminate the litigation.

For the reasons stated, and in deference to the finding of the jury, we hold that the verdict is supported by testimony; but before leaving this subject we deem it proper to say that we cannot agree with the apparent contention of appellee's counsel that, because this is the third verdict in appellee's favor, it should not be reviewed by this court, no matter what testimony may or may not have been presented to the jury. In support of that contention, counsel for appellee attribute to the Supreme Court a statement in the syllabus in *Duggan v. Cole*, 2 Tex. 396, which reads: "A second verdict will not be set aside as being contrary to and unsupported by the evidence after a motion for a new trial upon that ground has been refused in the court below, notwithstanding this court cannot perceive upon what evidence the jury found their verdict." The first opinion in that case was written by Mr. Justice Lipscomb, and he stated that if the witnesses did not directly contradict each other they swore to facts from which

very opposite conclusions might justly have been drawn, and for that reason the Supreme Court could neither say the verdict was without testimony or that it was contrary to evidence. The opinion on the motion for rehearing was written by Mr. Justice Wheeler, and in reference to the verdict he said: "I confess my inability very clearly to see upon what evidence the jury did arrive at the exact result which constitutes their verdict. But I cannot undertake to say that they found without or against evidence. I can only say that, to my mind, the evidence is unsatisfactory. Since, however, it has been sufficient to satisfy two juries, and especially since the judge who presided at the trial, with means of forming a correct judgment very superior to those which we possess, was satisfied with the verdict, I cannot undertake to disturb it."

Hence it appears from a reading of the opinions that the Supreme Court did not go to the extent indicated by the syllabus in that case, nor did the court use the language attributed to Judge Wheeler by counsel for appellee in their motion for rehearing. We presume counsel accepted the syllabus as correct, and felt justified in attributing its language to Judge Wheeler; but in that respect they were mistaken.

For the reasons above stated, the judgment rendered by this court at its last term, reversing the case, is set aside, and the judgment of the court below is affirmed.

Rehearing granted, and judgment affirmed.

FIRST BANK OF SPRINGTOWN v. HILL

(Court of Civil Appeals of Texas. Texarkana. Dec. 2, 1912. Rehearing Denied Dec. 12, 1912.)

1. WITNESSES (§ 379*)—IMPEACHMENT.

Where, in an action by a wife to recover a note constituting her separate property, the issue was whether she had consented to the transfer of the note, actually delivered to defendant by her husband, and the husband testified to facts showing her consent to the transfer, evidence of his confession that he had wrongfully disposed of the note was admissible to impeach his testimony.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1209, 1220-1222, 1247-1256; Dec. Dig. § 379.*]

2. WITNESSES (§ 193*)—COMPETENCY—HUSBAND AND WIFE.

Under Rev. St. 1895, art 2301, providing that the husband or wife of a party to a suit, or who is interested in the issue, shall not be competent to testify as to confidential communications, communications between husband and wife in the presence of third persons are not generally confidential.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 740, 741; Dec. Dig. § 193.*]

3. WITNESSES (§ 190*)—COMPETENCY—HUSBAND AND WIFE.

A conversation between husband and wife concerning her property rights and his admission to a wrongful transfer of her separate personality are not privileged, within Rev. St.

1895, art. 2301, making confidential communications between husband and wife privileged, and the wife suing for the property may testify to such conversations.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 737; Dec. Dig. § 190.*]

4. APPEAL AND ERROR (§ 1048*)—HARMLESS ERROR—ERRONEOUS RULINGS ON EVIDENCE.

The error, if any, in overruling an objection to a question, is not prejudicial where no affirmative fact was elicited.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4140-4145, 4151, 4158-4160; Dec. Dig. § 1048.*]

5. WITNESSES (§ 346*)—IMPEACHMENT.

Where, in a suit by a wife to recover a note constituting her separate property, the issue was whether she had consented to the transfer actually made by her husband, or whether he had wrongfully transferred it, and he testified to her consent to the transfer, proof that he attempted to have a material witness for the wife evade process was admissible to impeach the husband's credibility by showing his interest in the case.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 1133; Dec. Dig. § 346.*]

6. PARTNERSHIP (§ 219*)—PARTNERSHIP TRANSACTION—JUDGMENT AGAINST PARTNERS.

Where the petition, in an action against a firm, was sufficient to support a judgment against each partner personally, as well as against the firm, a partner against whom a personal judgment was rendered could not complain because no such judgment was rendered against the copartners.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 429-445; Dec. Dig. § 219.*]

7. APPEAL AND ERROR (§ 750*)—ASSIGNMENTS OF ERROR—QUESTIONS PRESENTED.

An assignment of error that a petition does not authorize a judgment does not raise the question of the sufficiency of service of process.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3074-3083; Dec. Dig. § 750.*]

8. JUDGMENT (§ 253*)—CONFORMITY TO PLEADINGS—PRAYER FOR RELIEF.

Where a petition demanded the return of a note, or its value, and alleged the value of the note at a specified sum and claimed damages in such sum, a money judgment could not exceed the amount stated in the petition.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 443, 444; Dec. Dig. § 253.*]

Appeal from District Court, Parker County; J. W. Patterson, Judge.

Action by Mrs. M. C. Hill against the First Bank of Springtown. From a judgment for plaintiff, defendant appeals. Reformed and affirmed.

Stennis & Wilson and McCall & McCall, all of Weatherford, for appellant. Hood & Shadle, of Weatherford, for appellee.

HODGES, J. The appellee, Mrs. M. C. Hill, instituted this suit against the First Bank of Springtown, a partnership composed of J. F. Ward, its president, J. D. Doughty, E. F. Ward, G. S. Frazier, G. B. Moody, Jim McDonald, Walter Doughty, and Henry Ward, for the possession of a promissory note or its value. The note is described as one

executed by J. R. Pugh and wife to J. K. P. Hill for the sum of \$1,000, with interest at the rate of 10 per cent. per annum from date, payable annually, and 10 per cent. attorney's fees if collected by process of law. It is dated January 1, 1909, and due two years after date, and is secured by a deed of trust on real estate. It is admitted that the note is entitled to a credit of \$100 for interest paid for the first year after its execution. The petition alleges that the note was the separate property of the plaintiff; that on the ——— day of October, 1910, it was transferred and assigned to the appellant bank by her then husband, John Birdwell, without her knowledge or consent. From a judgment in her favor for the recovery of the note and for \$1,178.06, its value in case it is not produced and delivered in accordance with the decree of the court within 20 days thereafter, the defendants below have prosecuted this appeal.

[1] The facts show that appellee was formerly the widow of J. K. P. Hill, deceased. On September 5, 1910, she was married to John Birdwell, who was then only about 24 years of age, 20 years younger than the appellee. In connection with this disparity in their ages there was some testimony tending to show that Birdwell married the appellee in order to get possession of her property; she being at the time worth about \$40,000. A part of the property which she owned consisted of the \$1,000 note described in the petition. Birdwell and his wife lived together only a few weeks, and then permanently separated. According to the testimony offered by the appellee, during the time they were living together, Birdwell surreptitiously secured possession of the note and without her knowledge or consent transferred it to the appellant, and then deserted her. The note when offered in evidence upon the trial had upon it a written assignment bearing the signature by mark of Mrs. Birdwell. There was also attached the signature of John Birdwell, the husband, and of two other persons purporting to be witnesses. Birdwell testified that after he and his wife were married the subject of paying off some of his personal debts was discussed between them; that in order to enable him to pay those debts she agreed that he might transfer to the appellant bank the note in controversy, and delivered it to him for that purpose; that, when he presented the note to Ward, the president of the bank, the latter informed him that Mrs. Birdwell would have to indorse it; that Ward wrote the assignment on the back of the note and instructed witness to have his wife sign the instrument in the manner described. Birdwell says that he told Ward that his wife could not write; that Ward thereupon instructed him how he could affix her signature by mark, and directed him to have two witnesses attest that fact. He further testified that upon his return home

he informed his wife of what Ward had told him, and the next morning she, in the presence of two witnesses and Birdwell's mother, affixed her mark to the signature as shown in the note, and that the two witnesses signed for the purpose of attesting the genuineness of that signature. As to the fact that Mrs. Birdwell had affixed her mark under the circumstances detailed by John Birdwell, the latter was corroborated by the two subscribing witnesses and by his mother, who claims to have been present at the time; the transaction having occurred at her house. Ward, the president of the bank, testified that when Birdwell presented the note to him he knew that it was the separate property of Mrs. Birdwell, and for that reason informed Birdwell that his wife would have to sign the transfer. Mrs. Hill, the appellee, denied all of those transactions, stating that she had never signed the transfer of the note by her mark or otherwise; that she never consented for it to be assigned, and did not know that it had been assigned till after her separation from Birdwell. There was a sharp conflict between her testimony and that of Birdwell, his mother, and the subscribing witnesses to the transfer.

It is insisted by the appellant that the court erred in permitting the plaintiff to testify as to what was said in an interview with her husband after their separation and after the note had been transferred to the appellant bank. The language objected to is as follows: "I replied, 'No, sir; the way you have treated me, stole my note, I can never live with you.' He did not deny it. He never made any reply; just dropped his head." Again, she says that Birdwell told her: "I feel too mean to live this morning. Linda, have mercy on me and give me a few days to see if I cannot get the note back." According to the testimony of Mrs. Hill, after her separation from Birdwell, she went to visit her sister, Mrs. De Spain, who lived in that vicinity. While she was there Birdwell sought and obtained an interview with her for the purpose of persuading her to again live with him. It was during that interview, and after he had been charged by her with having stolen her note, that the language referred to was used. Birdwell denies that any such conversation ever took place. This testimony was probably admitted for the purpose of impeaching John Birdwell, who swore that his former wife had signed the written transfer of the note and had consented to its assignment to the appellant. It could have no other relevancy. Practically the only issue in the trial of this case in the court below was whether or not the appellee had consented to the assignment and had executed the written transfer. The testimony shows conclusively that the note was her separate property and that Ward knew this fact at the time he took it. Birdwell having testified, as he did, positively

that his wife had signed the written transfer at the time and under the circumstances detailed by him, any legitimate means of impeaching him upon that issue was permissible. The particular objection most strenuously urged by the appellant against the admission of this testimony is that the appellee was permitted to disclose confidential communications between her and Birdwell, who was at the time her husband; and it is upon that ground that we are asked to reverse the ruling of the court and reverse the judgment. There is more than one reason for overruling that objection. Most of the conversation set out in the bills of exception occurred in the presence of a third party, Miss Bertha De Spain, who is shown to have been present at the time and who testified to substantially the same facts without objection.

[2, 3] Article 2301 of the Revised Civil Statutes is as follows: "The husband or wife of a party to a suit or proceeding, or who is interested in the issue to be tried, shall not be incompetent to testify therein except as to confidential communications between such husband and wife." In order that communications between husband and wife shall be held privileged under this statute, they must be such as should be regarded as confidential. *Mitchell v. Mitchell*, 80 Tex. 116, 15 S. W. 705; *Eddy v. Bosley*, 34 Tex. Civ. App. 116, 78 S. W. 565. Conversations which take place in the presence of third parties are not usually or generally to be considered confidential within the meaning of the law. 10 Ency. Ev. 193, and cases cited; 4 Wigmore on Evidence, § 2336, and notes. Whether or not the third person was present is a question for the court in passing upon the admissibility of the proffered testimony. 10 Ency. Ev. 196. From an examination of the statements objected to it appears that the only expression used by Mrs. Hill upon that occasion and detailed in her testimony, which was not made in the presence of Miss De Spain, was, "Linda, have mercy on me and give me a few days to see if I cannot get the note back." This seems to have been but a continuation of the conversation previously begun in the presence of Miss De Spain. The testimony of both the appellee and Miss De Spain shows a meeting between the husband and wife after separation, in which it appears that the wife repelled his advances and refused to receive him again as her husband. The testimony of appellee upon this issue as set out in the record is as follows: "After John Birdwell left me he came to the house of my brother-in-law, Mr. De Spain, where I was, and when he first came in he asked me to let him come back to live with me, and I replied: 'No, sir; the way you have treated me, stole my note, I can never live with you.' He did not deny it. He never made any reply; just dropped his head. Immediately thereafter I asked him, 'Johnnie, don't you feel mean after

stealing my note?' and he answered, 'I feel too mean to live this morning.' Immediately thereafter John Birdwell went into the hall and sat down on a bed. I did not stay there but just a few minutes. I went there just because John Birdwell asked me to go there and sit down with him. There he said, 'Linda, have mercy on me and give me a few days to see if I cannot get the note back.' I then got up and left the room and went into the room where my sister was sick in bed, and did not go back to John Birdwell; and from that time forward I have not spoken to him." It appears from this testimony that Birdwell's wife charged him with having wrongfully appropriated and disposed of her separate property, and that he admitted it and begged for mercy. Such a conversation concerning the wife's property rights should not, we think, be regarded as communications coming within the rule which makes them privileged under the statute. In a controversy like this, to so apply the rule would assist the husband in consummating the perpetration of a fraud against the property rights of the wife. *Eddy v. Bosley*, supra; *Edwards v. Dismukes*, 53 Tex. 611; 10 Ency. Ev. pp. 171-193. If the appellee is correct in her statement of what took place between her and John Birdwell upon that occasion, it amounted to a confession by him that he had wrongfully and unlawfully disposed of her property. Such an admission was wholly inconsistent with his testimony upon the trial that his wife had consented to the transfer. That confession was not only material for the purpose of contradicting Birdwell and of impeaching his credibility as a witness in this suit, but also tended to show a transaction which made the husband the wife's debtor. Some of the authorities referred to by the appellant are opinions rendered in criminal cases where the admissibility of the testimony was governed by article 774 of the Code of Criminal Procedure of this state. Such authorities are not applicable to this case.

[4] Objection is also made to the ruling of the court in requiring John Birdwell on cross-examination to answer as to whether or not he had such conversation with his wife as that detailed by her and Miss De Spain. In addition to the reasons which we have just discussed, it may also be said that no error was here committed because the witness Birdwell denied that any such conversation ever took place; hence no affirmative fact was elicited from him that could have injured the appellant in any respect.

[5] The eleventh assignment of error is as follows: "The court erred in admitting the testimony of plaintiff's witness Conrad Blackwell to testify in substance that, before the court met six months ago, John Birdwell came to him and asked him if he could not go visiting and stay awhile, and that he asked witness if he could not keep away

from the officers if they came down to subpoena him until after court met, in this, that said testimony was immaterial and an attempt to impeach a witness on an immaterial point." It appears that Birdwell had been asked if he had not approached Blackwell for the purposes indicated by Blackwell's testimony as shown in this assignment. Blackwell had testified that some time during that fall, after Birdwell and the appellee were married, and while they were living with Birdwell's mother, Birdwell came to him in the field and exhibited the note in question, and at the time stated that he had just had it fixed; that he came from the direction where Abe Birdwell (one of the subscribing witnesses) lived, and it was about 3 o'clock in the evening; that Birdwell then left him, saying that he was going to Springtown. This evidence tended to contradict Birdwell and three other witnesses as to the assignment having been executed and witnessed at the home of Birdwell's mother. Blackwell might naturally be looked upon by Birdwell as a hostile witness, and an effort to have this witness evade the process for bringing him into court to testify in this case would indicate more than ordinary interest on the part of Birdwell. As tending to show this interest, the testimony was properly admitted. 2 Ency. Ev. 406; 1 Greenleaf on Ev. §§ 450, 450a; 2 Wigmore on Ev. § 960. That is one of the methods of impeaching the credibility of a witness.

[6] It is also claimed that the court erred in rendering judgment against John F. Ward, president of the bank, individually, because such a judgment was not warranted by the pleadings. While in this respect the original petition is not as specific as it might have been, yet we think that in substance it is sufficient to support a judgment against each of the partners personally as well as against the firm. The fact that Ward is the only one of those partners against whom such a personal judgment was rendered is a matter of which he cannot complain.

[7] The question of the sufficiency of the service is not raised by this assignment. The complaint is that the pleadings did not authorize the judgment. We are not required to look any farther than the pleadings in passing upon this assignment.

[8] Complaint is also made that the amount of the judgment exceeds the amount sued for and bears a larger rate of interest than the court should have permitted. The plaintiff in her original petition alleged that the value of the note was \$1,125, which was the principal and accrued interest at the time suit was filed. It is also alleged that she had been damaged in that sum by the wrongful transfer of the note; the petition concluding with a prayer for damages to that extent. The jury, under an instruction from the court, found that the note was of the value of \$1,178.06, and a judgment

was entered against the appellant for that sum. While this amount might have been recovered under proper pleadings, it was unauthorized by those upon which the case was tried. We think therefore that the judgment should be reformed so as to allow a recovery only for the amount sued for with interest thereon at the rate of 6 per cent. per annum from the date of the rendition of that judgment in the trial court.

As reformed the judgment is affirmed, and the costs of this appeal are adjudged against the appellee.

WELBORN v. COLLIER et al.

(Court of Civil Appeals of Texas. El Paso.
Nov. 18, 1912. Rehearing Denied
Dec. 11, 1912.)

APPEAL AND ERROR (§ 100*)—DECISIONS REVIEWABLE—REFUSAL TO DISSOLVE INJUNCTION.

Jurisdiction to review an order denying a motion to dissolve or modify a temporary injunction is not given by Rev. Civ. St. 1911, art. 4644, authorizing appeal from an order granting, refusing, or dissolving a temporary injunction.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 670-680; Dec. Dig. § 100.*]

Appeal from District Court, Reeves County; S. J. Isaacs, Judge.

Action by H. T. Collier and others against W. C. Welborn and others. From an order refusing to dissolve a temporary injunction, defendant Welborn appeals. Dismissed.

Hefner & Cooke, of Pecos, for appellant.
Hudson & Canon, of Pecos, for appellees.

HARPER, C. J. This appeal is by W. C. Welborn from an order of the district court of Reeves county, dated 22d day of June, 1912, overruling his motion to dissolve a temporary writ of injunction which had been granted on 1st day of June, 1912. The trial court's order is as follows: "H. T. Collier et al. v. J. F. Harbour et al. No. 1010. On this the 22d day of June, A. D. 1912, came on to be heard the above-entitled cause on the motion of defendant, W. C. Welborn, to dissolve or modify the injunction heretofore granted in this case on June 1, 1912, and the plaintiff appeared in person and by attorney and announced ready, and the defendant, W. C. Welborn, appeared in person and by attorney, and announced ready. * * * Then came on to be heard the answer and motion of defendant, praying for a dissolution or modification of said injunction. Whereupon the court held that it was incumbent upon the defendant to introduce evidence to sustain his motion to dissolve, and the court requested defendant to offer evidence showing cause why said injunction should be modified; and the defendant Welborn refusing to offer evidence either to sustain his motion to dissolve or to modify said injunc-

tion, and stood upon the bill and answer, and the court, having considered same, is of the opinion that said motion and prayer should be overruled and said injunction continued in force. It is therefore ordered, adjudged, and decreed by the court that said motion and prayer by the defendant, W. C. Welborn, to modify or dissolve the temporary injunction issued in this cause be, and the same is hereby, overruled, to which order and judgment of the court the defendant then and there in open court excepted and gave notice of appeal to the Court of Civil Appeals for the Eighth Supreme Judicial District, at El Paso."

Article 4644 of the Revised Civil Statutes 1911 reads: "Any party or parties to any civil suit wherein a temporary injunction may be granted, refused or dissolved, under any of the provisions of this title, in term time or in vacation, may appeal from the order or judgment granting, refusing or dissolving such injunction, to the Court of Civil Appeals having jurisdiction of the case; but such appeal shall not have the effect to suspend the enforcement of the order appealed from, unless it shall be so ordered by the court or judge who enters the order; provided, the transcript in such case shall be filed with the clerk of the Court of Civil Appeals not later than fifteen days after the entry of record of such order or judgment granting, refusing or dissolving such injunction." As the order appealed from was not an order granting, nor refusing, nor dissolving the temporary injunction previously issued, this court has no jurisdiction to determine the appeal, which is therefore dismissed. *Baumberger v. Allen*, 101 Tex. 353, 107 S. W. 526. See, also, *C. B. Live Stock Co. v. Parrish*, 127 S. W. 855.

Appeal dismissed.

MOON et al. v. DOZIER et al.

(Court of Civil Appeals of Texas. El Paso. Nov. 21, 1912.)

APPEAL AND ERROR (§ 773*) — FAILURE TO FILE BRIEF—EFFECT.

Where plaintiff in error fails to file brief, and no fundamental error appears, the judgment will be affirmed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3104, 3108-3110; Dec. Dig. § 773.*]

Error from District Court, Harris County; Chas. E. Ashe, Judge.

Action by J. S. Dozier and another against Sarah L. Moon and another. There was a judgment for defendants, and plaintiffs bring error. Affirmed.

G. W. Tharp and W. G. Love, both of Houston, for plaintiffs in error. D. H. Hardy and Ingham S. Roberts, both of Houston, for defendants in error.

HIGGINS, J. Action of trespass to try title by defendants in error against plaintiffs in error, resulting in judgment in favor of defendants in error.

This cause by order of the Supreme Court was transferred to this court from the First Supreme Judicial District at Galveston. It was here submitted on October 31, 1912, upon brief filed by defendants in error. Plaintiffs in error having failed to file brief in the Galveston court and in this court, and no fundamental error appearing, it is ordered that the judgment be in all things affirmed. *Cox v. Hickman*, 110 S. W. 549.

HARPER, C. J., did not sit in this case.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

BURKE HOLLOW COAL CO. v. LAWSON.
(Court of Appeals of Kentucky. Dec. 20, 1912.)

1. MINES AND MINERALS (§ 51*)—TRESPASS—ACTION—EVIDENCE.

Evidence, in an action for damages for mining coal from plaintiff's land, *held* not to sufficiently show the quantity of coal taken by defendant to sustain a judgment for plaintiff.

[Ed. Note.—For other cases, see *Mines and Minerals*, Cent. Dig. §§ 137-141; Dec. Dig. § 51.*]

2. MINES AND MINERALS (§ 51*)—TRESPASS—TAKING COAL—DAMAGES—"ROYALTY."

The measure of damages for coal taken from another's land through an honest mistake is the value of the coal taken as it lay in the mine, or the usual reasonable royalty paid for the right of mining; the "royalty" being the price paid for coal as it lies in the earth.

[Ed. Note.—For other cases, see *Mines and Minerals*, Cent. Dig. §§ 137-141; Dec. Dig. § 51.*]

For other definitions, see *Words and Phrases*, vol. 7, p. 6270.]

3. DAMAGES (§ 105*)—FAIR "MARKET PRICE."

The fair "market price" of an article is the usual standard for measuring its value; it being worth what it may be reasonably sold for.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 266-271; Dec. Dig. § 105.*]

For other definitions, see *Words and Phrases*, vol. 5, pp. 4382, 4383.]

4. PLEADING (§ 406*)—DEFECTS—CURE.

Defect in a petition, in an action for damages for wrongfully mining coal from land, in only describing the land as adjoining the property where defendant was operating its coal plant, was cured by evidence definitely locating the land from which the coal was taken, in the absence of demurrer or motion to make more specific.

[Ed. Note.—For other cases, see *Pleading*, Dec. Dig. § 406.*]

Appeal from Circuit Court, Whitley County. Action by James Lawson against the Burke Hollow Coal Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded for new trial.

J. B. Snyder, B. B. Snyder, C. S. Wilson, and Geo. P. Johnson, all of Williamsburg, for appellant. R. L. Pope, of Williamsburg, and R. S. Rose, of Middlesboro, for appellee.

HOBSON, C. J. James Lawson brought this suit against the Burke Hollow Coal Company charging that it had without his consent entered upon his land and mined 602 tons of his coal, and after this had taken from the pillars between the rooms 212 tons more of his coal, leaving his land and coal in such a condition that the passage to the remainder of his coal was closed up, and at least 500 tons more had been lost to him. The defendant by its answer denied mining 602 tons of his coal, or any coal in excess of 400 tons, or that it took out from the pillars 212 tons or any coal, or closed up the passage so that any of his coal could not be mined. It pleaded that a settlement had been made with him for the coal that it took in this way, that it had accidentally gotten

over the line on his land and he had accidentally gotten over the line on its land, and these claims had been offset by agreement one against the other. On a trial of the case there was a verdict and judgment against the defendant for \$200. It appeals.

[1] To show that the defendant had taken from his land the quantity of coal alleged in the petition, the plaintiff introduced Lewis Francis, a civil engineer, who testified that he had run the line between the plaintiff's and the defendant's property on the top of the ground, and introduced in evidence a plot showing his survey. He had laid down on this plot the rooms which had been mined by the coal company and testified to the contents of these rooms. He testified, in substance, that he had laid these down from a mine map, which he said the mine foreman gave him, and, being asked who made the map, said that the name of L. A. Osborne was on it, that Osborne is a civil engineer, and that the map looked like his work. There was no proof by any one as to the accuracy of the map, and this was practically all the evidence introduced on the trial to show the amount of coal that had been taken. The evidence is not sufficient to sustain the judgment.

[2, 3] In *Sandy River Cannel Coal Co. v. Whitehouse Cannel Coal Co.*, 125 Ky. 278, 101 S. W. 319, 30 Ky. Law Rep. 1308, Id., 125 Ky. 278, 102 S. W. 320, 31 Ky. Law Rep. 374, we laid down the rule that, where coal is wrongfully mined from another's land but in good faith and as the result of an honest mistake, the measure of damages is the value of the coal taken as it lay in the mine, or the usual reasonable royalty paid for the right of mining. The instructions of the court to the jury did not define the measure of damages sufficiently under the rule adopted in that opinion. The "royalty" is the price paid for coal as it lies in the earth. This is what it sells for. The "fair market price" is the usual standard for measuring the value of an article. It is worth what it may be reasonably sold for. If the owner gets this, he is usually made whole; and he cannot ask more where coal has been taken innocently under an honest mistake as to the location of the line. Lawson was only getting a royalty on the coal taken out from his land by his authority, and all he has lost is the royalty on the coal taken by the defendant or that was lost to him by its wrong.

[4] The plaintiff's petition contains no description of his land except the statement that it adjoins the property where the defendant is operating its coal plant. There was no demurrer to the petition or motion to make it more specific, and this defect in the petition was cured by the evidence which located the land from which the coal was said to have been taken. But on the return of the case to the circuit court, that

the issue between the parties may be more clearly presented, the plaintiff will be required to describe the land in his petition if the defendant asks that this be done.

The amended answer which the defendant tendered on the trial is not made part of the record by bill of exceptions or by an order of court, and cannot be considered.

Under the evidence the verdict is for a much larger sum than should be recovered under the measure of damages we have indicated.

Judgment reversed, and cause remanded for a new trial.

THOMSON'S GUARDIAN et al. v. THOMSON et al.

(Court of Appeals of Kentucky. Dec. 20, 1912.)

GUARDIAN AND WARD (§ 102*)—SALE OF LAND—GUARDIAN AD LITEM—REPORT.

Where adversary proceedings were brought to sell land in which a number of infants had a remainder, and the guardian ad litem, who was appointed for three of them, but who did not at that time represent the others, filed his report in which, by mistake, the names only of those for whom he was not appointed, appeared, the infants for whom he acted were sufficiently represented, and the order of sale should not be set aside on that ground.

[Ed. Note.—For other cases, see *Guardian and Ward*, Cent. Dig. §§ 375, 376; Dec. Dig. § 102.*]

Appeal from Circuit Court, Fayette County.

Proceeding by Ellis Thomson and others against Edith Thomson and others to sell land. From a judgment overruling the motion of the guardian ad litem of Edith Thomson to set aside an order of sale, he appeals. Affirmed.

E. L. Hutchinson, of Lexington, for appellant. Field McLeod and Wallace & Harris, all of Versailles, for appellee Howard. Geo. C. Webb and Saml. M. Wilson, both of Lexington, for appellees W. L. Thomson and wife.

NUNN, J. It appears that Ellis Thomson, the wife of her coappellee, W. L. Thomson, owned a life estate in about 78 acres of land near Lexington in Fayette county, and that her eight children owned the remainder interest. An action was instituted in 1905, under section 491 of the Civil Code, for the sale of the land and the reinvestment of the proceeds. The testimony showed that Mrs. Thomson had an affliction which made it necessary for her to remove to another climate, and she had selected California; that real estate located in the vicinity where the 78 acres were had reached its highest market value; that the property, if rented, would decrease in value; and that if the land should be sold the proceeds could be invested in land in the foreign state and the increase in value would be beneficial to all the children. Summonses were served on all the

children over 14 years of age by delivering a copy thereof to them, and was served upon Edith, Frederick C., and Lee Thomson, who were under 14 years of age, by delivering a copy thereof to E. L. Hutchinson, who had been appointed guardian ad litem for them. Hutchinson filed a report on September 11, 1905, stating that he had carefully examined the papers in the case and the authorities, and that he was unable to present any defense on behalf of the infants. He inserted in that report, however, the names of three of Mrs. Thomson's children for whom he had not been appointed guardian ad litem and omitted the names of those for whom he had been appointed. On September 12, 1905, Mrs. Thomson's husband made an affidavit for the appointment of a guardian ad litem for the infants who were over 14 years of age, and on September 14, 1905, E. L. Hutchinson was appointed as such. On September 18, 1905, he filed his report as guardian ad litem for these children, but did not mention the names of the three infants for whom he was first appointed guardian ad litem. The land was sold for the purpose of reinvestment, and appellee C. A. Howard purchased it for about \$112 an acre. He filed many exceptions to the report of sale and moved the court to set it aside; but the court overruled the motion, confirmed the sale, a deed was made to the purchaser, and it appears that he paid for the land, and the proceeds were reinvested. On October 12, 1912, E. L. Hutchinson, after giving notice, moved the court to set aside the order of sale, claiming that it was erroneous because the three infant children under 14 years of age, for whom he was appointed guardian ad litem, had not been represented as required by law, as he, in making his report for the three infants under 14 years of age, had inserted therein the names of the three infants over 14 years of age and omitted the names of three under 14 years of age. The lower court overruled the motion, and the guardian ad litem has appealed.

We are of the opinion that the lower court did not err in the matter. It appears from a reading of the record that the names of the three older children were inserted by mistake. At the time he filed this report, Hutchinson was not guardian ad litem for the three older children, but was only such for the three under 14 years of age. He was not appointed guardian ad litem for the three older children until September 14, 1905, and he filed his report for them on the 18th of that month. Further, the guardian ad litem testified on the hearing of the motion to the facts above stated, and that the names of the three infants under 14 years of age were omitted and the names of the other three children inserted by oversight of himself or the stenographer who drafted his report. As stated, these facts are made to appear from the record itself, and we are of

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

the opinion that the lower court did not err in overruling the motion, and that Howard has a clear title to the land. This is the only question presented and decided upon this appeal.

For these reasons, the judgment of the lower court is affirmed.

CUMBERLAND TELEPHONE & TELEGRAPH CO. v. CITY OF CALHOUN et al.

(Court of Appeals of Kentucky. Dec. 17, 1912.)

1. TELEGRAPHS AND TELEPHONES (§ 30*)—LICENSE TAXES—FRANCHISE.

Where a telephone company, having a franchise for a telephone exchange and to occupy the streets of the municipality, pays a property tax to the city, the municipality cannot levy a license tax or tax on the privilege of conducting its business.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. § 19; Dec. Dig. § 30.*]

2. MUNICIPAL CORPORATIONS (§ 691*)—USE OF STREETS—TRESPASSER.

A public service corporation which uses or occupies the streets or public ways of a city without having obtained the right to do so under the Constitution is merely a trespasser, and cannot invoke in its favor any of the laws for the protection of corporations that have observed the law.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1492-1508; Dec. Dig. § 691.*]

3. TELEGRAPHS AND TELEPHONES (§ 30*) — FRANCHISES—LICENSES—"FRANCHISE."

A resolution of the board of trustees of a town to let a telephone company put up telephone poles on certain streets, though acted upon by the company, is not the grant of a franchise within Const. § 164, providing that no municipality shall grant any franchise for a term exceeding 20 years, and that, before granting such franchise, it shall first advertise for bids therefor, but is a mere license, which may be withdrawn at any time, and hence a license or occupation tax may be imposed on the company by the municipality.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. § 19; Dec. Dig. § 30.*]

For other definitions, see *Words and Phrases*, vol. 3, pp. 2929-2942; vol. 8, p. 7663.]

4. TELEGRAPHS AND TELEPHONES (§ 30*)—OPERATION—LICENSE TAXES.

As Const. §§ 163, 164, do not require a franchise for the maintenance of a telephone exchange, a license tax imposed on a telephone company which had no franchise, being based upon its maintenance of an exchange, cannot be defeated on the ground that it was occupying the streets without authority; the tax not being upon the use of such highways.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. § 19; Dec. Dig. § 30.*]

5. TELEGRAPHS AND TELEPHONES (§ 10*)—LICENSE TAXES—RIGHT TO USE STREET.

Where the state board of valuation and assessment, under Ky. St. § 4077, providing that every telephone company shall, in addition to other taxes, annually pay a tax on its franchise to the state, and a local tax thereon to the county, incorporated city, town, or taxing district where its franchise may be exercised,

levied a franchise tax upon a telephone corporation which had no municipal franchise, the receipt of the municipality of its portion of such taxes does not estop it from imposing a license tax; the imposition of such tax in no way giving the telephone company a right to use the municipality's streets.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. § 6; Dec. Dig. § 10.*]

6. MUNICIPAL CORPORATIONS (§ 122*)—CONFISCATORY TAX—BURDEN OF PROOF.

The burden of showing that a municipal occupation or license tax is unreasonable, oppressive, and confiscatory is upon the party attacking the tax, and, in the absence of evidence, cannot be held invalid on those grounds.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 281-289; Dec. Dig. § 122.*]

7. LICENSES (§ 7*)—ORDINANCES—VALIDITY.

A municipal ordinance imposing a license tax on a telephone company is not invalid because not stating the purposes for which such tax is levied.

[Ed. Note.—For other cases, see *Licenses*, Cent. Dig. §§ 7-15; Dec. Dig. § 7.*]

Appeal from Circuit Court, McLean County.

Action by the Cumberland Telephone & Telegraph Company against the City of Calhoun and another. From a judgment for defendants, plaintiff appeals. Affirmed.

J. W. Boston and Wm. B. Noe, both of Calhoun, for appellant. G. H. Cary, of Calhoun, and L. P. Tanner, of Owensboro, for appellees.

CARROLL, J. This suit was instituted by the appellant against the city of Calhoun and the police judge thereof for the purpose of testing the validity of an ordinance that imposed a license tax of \$100 upon appellant for the privilege of operating an exchange in the city, and with the purpose of having the ordinance declared invalid.

Calhoun is a city of the fifth class, and the ordinance attacked imposed upon "each telephone exchange" a license fee of \$100. The validity of the ordinance is assailed upon the ground that a telephone company, which pays both an ad valorem and a franchise tax to the city of Calhoun, as it is averred the telephone company did to the city of Calhoun, cannot be required to pay a business or occupation tax such as the ordinance provided for. The ordinance is also assailed upon the ground that the license tax imposed is unreasonable, oppressive, and confiscatory.

No evidence was taken in the case, but it appears from the petition, which was dismissed by the lower court: That the appellant is a corporation, organized under the laws of Kentucky, and engaged in the operation of telephone lines and telephone exchanges in the city of Calhoun and elsewhere in the state. That in July, 1894, the board of trustees of the town of Calhoun, it being then a town of the sixth class, adopted the following resolution: "On motion it was ordered to let the Cumberland Telephone Company put up telephone poles on the West side of Ferry

street to Second street; thence along Second street to Poplar street; thence along Poplar street to the river, without any damage to trees or property; said poles to be thirty feet above ground or over." That, under the authority granted by this resolution, the telephone company soon after proceeded to erect lines and poles and to establish a telephone exchange in Calhoun, and has continued to the present time to conduct an exchange in the city and occupy many streets of the city other than those mentioned in the resolution with its poles and wires. It further appears that in 1906, 1907, 1908, 1909, and 1910 a franchise tax was imposed upon appellant by the state board of valuation and assessment, which board apportioned to the city of Calhoun its proportionate part of the franchise tax for each of these years, and the same was paid by the appellant to the city. It is further shown that it has paid for a number of years annually to the city an ad valorem or property tax upon its property situated therein.

[1] If the appellant had, in fact, a franchise authorizing it to operate and conduct a telephone exchange in the city of Calhoun, and to occupy the streets, and it also paid an ad valorem or property tax to the city, it was not within the power of the council to charge it, as the ordinance does, with an occupation tax or a tax for the privilege of conducting its business in the city. This was expressly decided in *Cumberland Telephone & Telegraph Co. v. Hopkins*, 121 Ky. 850, 90 S. W. 594, 28 Ky. Law Rep. 846, where the court, in holding invalid a license tax attempted to be imposed by ordinance upon the Cumberland Telephone & Telegraph Company for the privilege of operating an exchange and conducting its business in the city of Eminence, after it had purchased, in the manner provided in the Constitution, a franchise to do business in the city, said: "After having sold the telephone company the privilege of putting up and operating its line and conducting its business in the town, the municipality cannot afterwards, without the consent of the telephone company, impose an additional charge for the identical privilege. This franchise sold by the city to appellant telephone company was the creature of the city. It was not only to occupy its streets, the consideration being compensation for the right of way, but it was for operating its exchange in the city and receiving tolls thereat upon its business. * * * The ordinance selling the franchise by its terms went further than to grant the right to occupy the city streets and alleys. It expressly dealt with and sold for a consideration the privilege of doing the identical business in the city that it is doing." Again, in *Adams Express Co. v. Boldrick*, 141 Ky. 118, 132 S. W. 175, in considering a similar question, we said: "To put it in another way, the general council, under this statute, has authority to impose either a license tax or a fran-

chise tax upon all corporations or persons engaged in business in the city, for the privilege of doing business there, but it cannot exact, for the privilege of doing business, both a franchise tax and a license tax at the same time or for the same period."

[2] But the principle announced in these cases does not sustain appellant in its effort to defeat the license tax, because it never obtained, in the manner pointed out in the Constitution, a franchise from the city authorizing it to erect lines or poles or establish an exchange in the city. Section 164 of the Constitution provides that: "No county, city, town, taxing district or other municipality shall be authorized or permitted to grant any franchise or privilege, or make any contract in reference thereto, for a term exceeding twenty years. Before granting such franchise or privilege for a term of years, such municipality shall first, after due advertisement, receive bids therefor publicly, and award the same to the highest and best bidder; but it shall have the right to reject any or all bids. This section shall not apply to a trunk railway." And a city is not authorized or permitted to grant to any public service corporation the privilege to use or occupy the streets or public ways of the city except as provided in the section. Putting aside for the moment the consideration of the privilege conferred by the resolution, to which we will later advert, when a public service corporation uses or occupies the streets or public ways of a city without having first obtained the right to do so under section 164 of the Constitution, and in the manner prescribed by the Legislature, if legislation has been enacted to carry into effect the section, it is nothing more than a trespasser, and cannot invoke in its favor any of the laws enacted for the protection or benefit of corporations that have observed the law, or shield itself from the consequences that may be visited upon the head of a wrongdoer. *Woodall v. South Covington & Cincinnati Street Ry. Co.*, 137 Ky. 512, 124 S. W. 843; *Nicholas Valley Water Co. v. Board of Councilmen*, 36 S. W. 549, 38 S. W. 430, 18 Ky. Law Rep. 592; *City of Somerset v. Smith*, 105 Ky. 678, 49 S. W. 456, 20 Ky. Law Rep. 1488; *City of Providence v. Providence Electric Light Co.*, 122 Ky. 237, 91 S. W. 664, 28 Ky. Law Rep. 1015; *Monarch v. Owensboro City Ry. Co.*, 119 Ky. 939, 85 S. W. 193, 27 Ky. Law Rep. 380; *Keith v. Johnson*, 109 Ky. 421, 59 S. W. 487, 22 Ky. Law Rep. 947; *Merchants' Police & Dist. Telegraph Co. v. Citizens' Telephone Co.*, 123 Ky. 90, 93 S. W. 642, 29 Ky. Law Rep. 512; *Hilliard v. Fetter Lighting & Heating Co.*, 127 Ky. 95, 105 S. W. 115, 31 Ky. Law Rep. 1330; *East Tenn. Telephone Co. v. Anderson County Telephone Co.*, 115 Ky. 488, 74 S. W. 218, 24 Ky. Law Rep. 2358; *Rough River Telephone Co. v. Cumberland Telegraph & Telephone Co.*, 119 Ky. 470, 84 S. W. 517, 27 Ky. Law Rep. 32; *Rural Home Telephone Co. v. Ky. & Ind.*

Telephone Co., 128 Ky. 209, 107 S. W. 787, 32 Ky. Law Rep. 1068.

[3] Coming now to consider the rights acquired by appellant under the resolution adopted by the council in 1894, and under authority of which the appellant company has been conducting its business, the argument is made in its behalf that this resolution in effect affords it the same protection that would have been afforded by the purchase of a franchise in the manner pointed out in the Constitution. But, for the reasons before stated, this position cannot be sustained. The resolution does not in any manner or form take the place of a constitutional franchise. At most, it was only a license by the council to do business in the city, and merely protected the corporation against summary ouster.

Substantially this question was before us in *East Tenn. Telephone Co. v. Board of Councilmen of City of Frankfort*, 141 Ky. 588, 133 S. W. 564. In that case the East Tennessee Telephone Company had a license to do business in the city of Frankfort, granted by the council in the form of a resolution very much like the resolution adopted by the council in this case, and under the license conferred by this resolution the telephone company had been operating in the city for many years. The city in 1909 adopted an ordinance the effect of which was to impose a heavy penalty upon the telephone company each day that it carried on business in the city without obtaining in the regular manner a franchise. Suit was brought by the telephone company to enjoin the prosecution of a number of warrants issued for the violation of this ordinance, and in considering the status of the company we said: "It is insisted for the telephone company that the rights given it by the resolution, after being accepted and acted upon, cannot be impaired by any subsequent action of the council, and that the franchise or privilege, being without limitation as to time, is perpetual. It will be observed that the resolution of April 11, 1881, does not purport to grant a franchise. It only grants permission to the telephone company to use the streets. A permission is no more than a license, and, as a rule, a license may be withdrawn by the party who grants it. * * * The council has not as yet revoked their permission, and, until it is revoked, the grantee is rightfully in possession, and cannot be fined for doing business without buying a franchise." The court further held that the council should have given the telephone company 90 days in which to obtain a franchise or remove its property from the streets, and that in the meantime it could not be fined for daily violations of the ordinance. But the principle announced in that case does not afford the appellant any protection against the payment of the license tax imposed by the ordinance. The city council of Calhoun is not attempting to im-

pose a penalty upon the appellant for using the streets without a franchise, as was attempted to be done in the *Frankfort Case*. It has only imposed a license tax upon the appellant for the privilege of conducting its "exchange" in the city, and provided penalties if it continues to operate its exchange without the payment of the license fee. The city might have given the appellant a reasonable time in which to remove its property from the city or obtain a franchise, but, in place of adopting this course, it has treated the appellant as a mere licensee and levied a license tax upon its exchange, and this it had the right to do.

[4] We do not hold that the city council could license in this manner the telephone company to occupy the streets or public ways of the city with its poles or wires; nor do we hold that the council could impose a license tax upon the company for using the streets and public ways, as this would be in effect a recognition of its legal right to use the streets and public ways of the city under the resolution. There is, however, quite a difference between operating an exchange in the city and using the streets and public ways of the city. It is the use of the streets and public ways for which a franchise must be obtained, and not for the mere operation of a telephone exchange. It is not necessary to obtain a franchise, under section 164 of the Constitution, merely to conduct a telephone exchange, but, if the streets or public ways of the city are used in connection with the exchange, then a franchise is necessary, to acquire the right to use the streets and public ways.

As said in *Bland v. Cumberland Telephone & Telegraph Co.*, 109 S. W. 1180, 33 Ky. Law Rep. 309: "It should be borne well in mind just what the franchise is that is the subject of sale as required by the Constitution. It is not, as sometimes seems to be thought, the right to operate a telephone exchange in a city. That right is not one to be granted or denied by the municipality any more than it could grant or refuse a franchise to conduct a dry goods store within the city. The franchise under discussion is the permission to do something which the city has the right of control over; that is, the occupancy of some part of the public streets." Section 163 of the Constitution provides in part: "No telephone company within a city or town shall be permitted or authorized * * * to erect its poles, posts, or other apparatus along, over, under or across the streets, alleys or public grounds of the city or town without the consent of the proper legislative bodies or boards of such city or town being first obtained." And to obtain this right a franchise must be secured as provided in section 164. As said in *Rural Home Telephone Co. v. Ky. & Ind. Telephone Co.*, 128 Ky. 209, 107 S. W. 787, 32 Ky. Law Rep. 1068: "These sections of the Constitution must be read together, as the right to occupy

the streets and public ways conferred by section 163 can only be granted in the manner provided in section 164." If the city had attempted to levy a license tax upon the company for the purpose of using the streets and ways of the city with its poles and wires, it might well have claimed exemption from the tax on the ground that the city had no authority to levy such a tax upon a corporation that had not secured, in the manner provided by law, the right to occupy the streets and ways. But, as the city is seeking to charge the license fee only upon the business of operating an exchange, the fact that the company has not secured a franchise to occupy the streets and ways does not deny the city the right to exercise the power conferred upon it by law to tax trades, occupations, and businesses.

[5] Another contention of counsel for the telephone company is that as the state board of valuation and assessment has levied upon its property in this state each year a franchise tax, and has apportioned each year a proper part of this franchise tax to the city of Calhoun, which has accepted it, this estops the city from imposing a license tax in addition to this franchise tax. Section 4077 of the Kentucky Statutes reads in part: "Every telephone company * * * shall, in addition to the other taxes imposed upon it by law, annually pay a tax on its franchise to the state, and a local tax thereon to the county, incorporated city, town or taxing district where its franchise may be exercised. * * *" Under this and other sections of the same article of the Kentucky Statutes, the state board of valuation and assessment assesses each year the value of the franchise of telephone companies and other public service corporations, and on the assessment so made these corporations pay a tax to the counties, cities, and towns in which they operate in proportion to the value of the franchise in each taxing district or municipality. But the state board of valuation and assessment cannot, and does not, confer upon any of these corporations the right to do business in any part of the state, or in any town or city therein. It merely assesses the property of the corporation that it finds in the state. The right to do business is obtained from other sources, and under provisions of the Constitution and statutes entirely disconnected from the one creating the state board of valuation and assessment, which is merely an assessing authority. It is therefore very clear that the telephone company, by the imposition of this tax by the state board of valuation and assessment, obtained no right whatever to conduct its business in the city of Calhoun, or to use or occupy the streets of the city, or operate therein an exchange.

[6] It is further insisted that the license tax imposed is unreasonable, oppressive, and

confiscatory. This contention was asserted in an amended petition, all the allegations of which were controverted by an answer, and the case was then submitted upon the pleadings and exhibits alone; no evidence being offered by either party, and judgment rendered dismissing the petition. With the record in this condition we cannot say that the tax imposed is unreasonable, oppressive, or confiscatory. When a license tax is assailed upon this ground, the burden of proof is upon the party attacking the ordinance, and he must show by satisfactory evidence the truth of his charge. *Bradford v. Jones*, 142 Ky. 820, 135 S. W. 290; *Wells v. Town of Mt. Olivet*, 126 Ky. 131, 102 S. W. 1182, 31 Ky. Law Rep. 576, 11 L. R. A. (N. S.) 1080.

[7] It is also urged that the ordinance is invalid, in that it does not state the purpose or purposes for which the license tax prescribed in the ordinance was levied. This argument is answered adversely to the contention of counsel for appellant by the opinions of this court in *Shugars v. Hamilton*, 122 Ky. 606, 92 S. W. 564, 29 Ky. Law Rep. 127; *Brown-Foreman v. Commonwealth*, 125 Ky. 402, 101 S. W. 321, 30 Ky. Law Rep. 793; *City of Mt. Sterling v. King*, 126 Ky. 526, 104 S. W. 322, 31 Ky. Law Rep. 919.

The judgment is affirmed.

KILLEBREW et al. v. MURRAY.

(Court of Appeals of Kentucky. Dec. 20, 1912.)

1. PLEADING (§ 412*)—WAIVER OF OBJECTION.

Error in first setting up matter in reply, instead of alleging it in the petition, is waived, where defendant did not demur or move to strike the reply, but traversed it.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1387-1394; Dec. Dig. § 412.*]

2. MINES AND MINERALS (§ 68*)—MINING LEASE—CONSTRUCTION—TIME FOR OPERATION.

Plaintiff leased to defendants the phosphate mining rights in 155 acres of land, valued at \$23,000, by a lease which recited a consideration of \$1 and "the covenants hereinafter contained on the part of" lessees, and further provided that the lease was for a term of 10 years from date, and so long thereafter as phosphate might be found in what should be considered by the lessees as paying quantities, and when they concluded that it was not found in paying quantities they should notify lessor, which notice should terminate the lease, "which, however, shall continue until such notice," and that lessees agree to pay 25 cents a ton as royalty for the phosphate when mined, and to pay a minimum of \$5 a year, whether the lands are mined or not, such payment to be considered as an advance on the royalty and be deducted therefrom, and that lessees should have the right to determine how much of the land should be mined each year, provided that the \$5 was paid. *Held*, that the lease did not permit the lessees to continue it for the 10-year period merely by paying \$5 annually, without beginning any operations thereon, but

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

required them to begin mining operations within a reasonable time.

[Ed. Note.—For other cases, see *Mines and Minerals*, Cent. Dig. §§ 188-191; Dec. Dig. § 68.*]

3. MINES AND MINERALS (§ 62*)—LEASE—EXECUTORY CONTRACT.

The lease was not an executed contract, but was executory.

[Ed. Note.—For other cases, see *Mines and Minerals*, Cent. Dig. §§ 173, 175-180; Dec. Dig. § 62.*]

4. CONTRACTS (§ 10*)—MUTUALITY.

The contract was unenforceable as lacking in mutuality, being a unilateral executory contract.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 21-40; Dec. Dig. § 10.*]

5. MINES AND MINERALS (§ 68*)—MINING LEASES—TIME OF OPERATION.

The lessees' failure to begin work under a gas or oil lease would operate as an abandonment thereof in a shorter time than in case of a phosphate lease, because of the greater danger of loss in the former case by reason of the migratory character of the minerals.

[Ed. Note.—For other cases, see *Mines and Minerals*, Cent. Dig. §§ 188-191; Dec. Dig. § 68.*]

6. MINES AND MINERALS (§ 63*)—LEASES—TERMINATION.

A phosphate mining lease, which authorized the lessee to terminate it at any time by written notice, will be construed as also making it terminable at the will of the lessor.

[Ed. Note.—For other cases, see *Mines and Minerals*, Cent. Dig. § 172; Dec. Dig. § 63.*]

7. MINES AND MINERALS (§ 58*)—MINING LEASE—FRAUD—EVIDENCE.

Evidence held to show that a phosphate mining lease was procured by fraud on the part of the lessees.

[Ed. Note.—For other cases, see *Mines and Minerals*, Cent. Dig. §§ 168, 169; Dec. Dig. § 58.*]

8. MINES AND MINERALS (§ 68*)—LEASES—TIME OF OPERATION.

In the absence of a provision in a phosphate mining lease fixing the time for beginning operations, it will be presumed that operations were to begin within a reasonable time.

[Ed. Note.—For other cases, see *Mines and Minerals*, Cent. Dig. §§ 188-191; Dec. Dig. § 68.*]

9. MINES AND MINERALS (§ 68*)—LEASES—BEGINNING OF OPERATIONS.

Where a phosphate mining lease did not fix any time for beginning operations, but the lessees inferentially fixed a year or 18 months as the time for beginning work, such period must be considered a reasonable time.

[Ed. Note.—For other cases, see *Mines and Minerals*, Cent. Dig. §§ 188-191; Dec. Dig. § 68.*]

10. MINES AND MINERALS (§ 68*)—LEASES—ABANDONMENT.

Where the lessees fixed a year or 18 months as a reasonable time within which to begin work under a phosphate mining lease, the lessor could properly treat the failure to begin operations within 3½ years as an abandonment of the lease.

[Ed. Note.—For other cases, see *Mines and Minerals*, Cent. Dig. §§ 188-191; Dec. Dig. § 68.*]

Appeal from Circuit Court, Woodford County.

Action by Margaret H. Murray against George W. Killebrew and others. From a judgment for plaintiff, defendants appeal. Affirmed.

Richard Godson, of Midway, Bruce & Bullitt, of Louisville, W. O. Davis, of Versailles, and Helm Bruce, of Louisville, for appellants. D. L. Thornton, Field McLeod, and Wallace & Harriass, all of Versailles, for appellees.

SETTLE, J. This is an appeal from a judgment of the Woodford circuit court declaring invalid and canceling a certain lease held by appellants upon the land of appellee. Such parts of the lease as are pertinent to the questions involved are here copied: "This phosphate lease made this the second day of September, 1908, by and between Mrs. Margaret Murray (unmarried), party of the first part, and George W. Killebrew of Mt. Pleasant, Tennessee, party of the second part, witnesseth as follows: The party of the first part for and in consideration of one dollar (\$1.00), and of the covenants hereinafter contained on the party of the second part, has leased unto the party of the second part, for the sole and only purpose of mining and excavating for phosphate and phosphate-bearing rock, all that certain tract of land situate in Woodford county, in the state of Kentucky, containing one hundred and fifty-five (155) acres, more or less, described as follows. * * * To have and to hold said premises above described unto the party of the second part for and during the term of ten years from the date hereof, and so long thereafter as phosphate or phosphate-bearing rock may be found in what shall be considered by the party of the second part as paying quantities. When the party of the second part shall conclude that phosphate or phosphate rock is not found on said premises in paying quantities, he shall notify the party of the first part thereof in writing, and such notice shall terminate this lease, which, however, shall continue until such notice. The party of the second part hereby covenants and agrees, in consideration of this lease, to pay unto the party of the first part 25 cents per ton of 2,240 pounds as a royalty for the phosphate when mined and removed, and agrees to pay a minimum of \$5.00 per annum, whether the lands are mined or not, such payments to be considered an advance on the royalty and to be deducted from the royalty on the first phosphate mined thereafter. The party of the second part shall have the right to determine when and how much of said land shall be mined during each year during the continuance of this lease, provided always that said minimum sum of \$5.00 per annum shall be paid each year during the continuance thereof, which amounts, as aforesaid, shall be considered as advancements

and shall be deducted from the royalty on the phosphate thereafter mined. * * *

The lease was signed by appellee alone, and her attack upon it was based on the grounds: (1) That it was without consideration, and so lacking in mutuality as to render it per se invalid. (2) That it was procured by fraud. (3) That if appellants ever had any intention of carrying out the lease it had been abandoned by them; and that their continuing to claim under the lease was not in good faith, but for the purpose of finding a purchaser of the lease to whom they could sell it at a profit.

[1] It is insisted for appellants that the ground of attack last mentioned should have been ignored by the circuit court, as it was set up by appellee's reply, when it should have been relied on in the petition, or by an amended petition. This contention is without force, in view of the fact that appellants did not demur to that part of the reply, or move to strike it out, but by rejoinder traversed its affirmative allegations. This was a waiver of appellee's error and an election on appellants' part to treat that part of the reply as an amended petition; and, as the circuit court so held, its ruling thereon was not error. *Ruffner v. Ridley*, 81 Ky. 165.

It must be taken for granted that the purpose of appellee in granting the lease was to obtain an income or profit in royalties from appellants' mining of her land, in the purchase of which she had expended \$23,000. It even appears from the admissions of some of the appellants that they represented to her before the lease was executed that the mining of the phosphate on her land would pay her in royalties \$500 per acre. It could not have been contemplated by her that she would receive no part of this royalty for 10 years after the execution of the lease. On the contrary, she was assured by appellants before its execution that they would begin the work of getting out the phosphate within a year or 18 months, yet, though more than 3 years intervened between the date of the lease and the institution of this action, nothing was done by them.

[2] It is, however, appellants' contention that such nonaction was allowed by the contract, and that it may, indeed, continue for 10 years, if appellee be paid by them the \$5 per annum which the lease provides shall be received by her, whether the lands are mined or not. Is this the meaning of the contract, and, if so, is the contract a valid one?

It was alleged in the petition and proved by appellee that the consideration of \$1, recited in the lease, was never paid; nor is its payment acknowledged in the writing. The only matter relied upon by appellants as showing a consideration is the sum of \$5, which they agreed to pay appellee annually, whether the land was mined or not, and she only accepted one such payment, which was made one year from the date of the contract; oth-

ers, though tendered, being refused because of appellants' failure to begin work under the lease.

It is not to be presumed that appellee would have incumbered her farm with the lease for these annual payments of \$5, in view of its insignificance as a return upon her investment of \$23,000 in the farm. It is manifest, therefore, that the real consideration or inducement for the granting of the lease was the mining of the phosphate upon the land, which she supposed, and was led by appellants to believe, they would commence within a reasonable time; and this conclusion is sustained by the fact that the annual payments of \$5 were to be regarded as mere advancements upon the royalty that appellee would receive from the mining of the land, to be credited to appellants upon the royalty first thereafter due appellee.

[3] We do not concur in the conclusion of appellants' counsel that the contract in question is an executed contract. In our opinion it must be classed as an executory contract merely. Under it nothing had been done; everything required by its terms of appellants was to be thereafter done. All that it required of appellee was that she should furnish the land, and this was done when the lease was executed. On the other hand, what it required of the appellants—payment of the consideration, mining of the land for phosphates, accounting to the appellee for the royalties—was to be thereafter done in fulfillment of the contract. The insignificant \$5 per year it obligates appellants to pay appellee, whether the land is mined or not, is not, of itself, sufficient to place the lease in that class of contracts known as executed contracts.

[4] But whether it be denominated an executed or an executory contract, it is manifestly lacking in mutuality. It obligates the lessor, in unequivocal language, to continue the lease for 10 years, all the while holding the leased premises in readiness for the lessee's mining operations, but gives her no right to terminate the lease, to compel the lessee to begin mining the land, or to continue the work, if abandoned, after being commenced. On the other hand, the lease does not bind the lessees to do anything. It permits them to begin the work of mining phosphate on the leased premises at any time within 10 years that may be selected by them, to quit when they choose, or not to begin at all, and also the right to terminate the lease at any time upon their mere ipse dixit that the land does not contain phosphate in "paying quantities"; it being left to them alone to decide whether it is in quantity sufficient to make the mining thereof profitable to them.

Reduced to its last analysis, this lease is but a unilateral executory contract, such as is, in *Berry v. Frisbie*, etc., 120 Ky. 337, 86 S. W. 558, 27 Ky. Law Rep. 724, declared

void, and in *Young v. McIlhenney*, 116 S. W. 728, held to be unenforceable. In *Berry v. Frisbie*, etc., supra, the lease, while in some respects dissimilar to that in the case under consideration, was, in others, closely akin to it. For instance, it contained the provision: "Should minerals, coals, ores, oils, gases, etc., be found on the leased land in quantities which in the judgment of the said Frisbie and his associates or assignees will pay to work," etc. While in the lease here involved a similar provision is thus expressed: "When the party of the second part [lessee] shall conclude that phosphate or phosphate-bearing rock is not found on said premises in paying quantities," etc. It is manifest that each of these provisions put it in the power of the lessees to begin or discontinue mining operations upon the leased premises as they might elect. The meaning and effect of the provision quoted from the lease in the case of *Berry v. Frisbie*, etc., is explained in the opinion in that case as follows: "But if his lessees were not bound in fact to sink a well or wells upon the land to test its mineral properties, yet could keep appellant and all others from doing so, it would be in the power of the lessees to prevent its development indefinitely or forever. In that way the lessor would get nothing from his lease; would get nothing from even the chance of finding minerals there. In this view of the contract, it does not bind the lessees, either to sink a well upon the land, or to work the wells, if sunk, and if minerals should be found in paying quantities. They could in that way, though satisfied that the land did contain oil and gas, and though it be a fact that it did, get from it these properties, without paying anything, by draining them off through wells tapping the same pools or veins on the adjacent lands; or they could plug the holes and indefinitely postpone working the wells. Such contracts lack the mutuality essential to their validity. A unilateral executory contract is, in law, a nudum pactum, and is unenforceable. Where it is left to one of the parties to an agreement to choose whether he will proceed or abandon it, neither can specifically enforce it in equity. *Litz v. Goosling*, 93 Ky. 185 [19 S. W. 527, 14 Ky. Law Rep. 91, 21 L. R. A. 127]; *Federal Oil Co. v. Western Oil Co.* [C. C.] 112 Fed. 373; *Marble Co. v. Ripley*, 10 Wall. 339 [19 L. Ed. 955]. Nor is the recited consideration of \$1 sufficient to uphold an action for the specific enforcement of a contract otherwise unsupported by consideration. As was said in *Federal Oil Co. v. Western Oil Co.*, supra: 'The consideration would be so trifling, compared with the value of the leasehold interest, as to shock the moral sense.'"

In *Young v. McIlhenney*, supra, the lessee also had, under the contract, the sole right of development, and, as in the instant case,

of indefinitely delaying or refusing to begin the work, yet retaining the option of protecting such right by small annual payments. After declaring that there was nothing in the lease binding the lessee to do anything, that the right to bore for oil or gas was purely optional with the lessee, that the lessor, though bound by the contract, could not compel the lessee to commence operations or continue them, the opinion quoted as applicable to the case the following excerpt from *Litz v. Goosling*, etc., 93 Ky. 185, 19 S. W. 527, 14 Ky. Law Rep. 91, 21 L. R. A. 127: "Reciprocity of obligation is however, essential to the validity of a contract; and it is a general rule that, in order to be binding upon or enforceable by one party, it must be so as to both. This is the very essence of it." And also the following from *Donahue on Petroleum*, etc., 155: "Where the lessee has a right to surrender the lease at any time, and be released from all liabilities under the lease, the lease is void for want of mutuality. * * * Where an oil or gas lease fails to bind the lessee to prosecute the work diligently, and the consideration for the lease is part of the oil or gas produced, the lease is void for want of mutuality. * * * A part of the oil produced as a consideration for the lease, and so much per well for gas, and, in case no wells are sunk, the lease to be null and void, unless the lessee paid a certain sum in advance for each quarter, the lease is but an option, and does not bind the lessee to pay any sum, and may be avoided by either party."

In *Tennessee Oil, etc., Co. v. Brown*, 131 Fed. 696, 65 C. C. A. 524, the action was one to obtain the cancellation of a lease as to coal and timber, as well as oil and gas; the lease containing a provision to the effect that the lessee should have the right to abandon the lease and mining at any time, and remove all his buildings and fixtures from the lands. Judge Lurton, in the opinion rendered, after apparently holding that the lease was an executory contract, said: "But, independently of any other ground, the chief provision of this lease authorizing the lessee to abandon whenever he should see fit makes it a lease at the will of the lessee. An estate terminable at the will of one of the parties is determinable at the will of the other, though it purports to be terminable at the will of only one."

[5] The fact that the cases of *Berry v. Frisbie*, etc., and *Young v. McIlhenney* involve leases with respect to oil and gas, which are "migratory," does not make the doctrine announced in those cases inapplicable to a lease as to coal or phosphate, although it may be, and doubtless is true, that the failure of the lessee to proceed with the work of development would be held to operate as an abandonment of an oil or gas lease in a shorter time than if such failure were to result in the case of a coal or phosphate

lease, because of the greater danger of loss by delay.

[6] No reason is apparent for declaring that this lease should be held to be different from any other lease which is determinable at the will of one party, and therefore determinable, in law, at the will of either party. We are of opinion that it authorizes the lessee at any time, by written notice, to terminate the lease; and, this being true, the general rule laid down in *Berry v. Frisbie*, etc., and *Young v. McIlhenney*, supra, and also by the authorities upon the law of landlord and tenant, makes it terminable at the will of the lessor. 1 Washburn on Property, 371; Taylor's Landlord and Tenant, § 14; 18 American & English Encyclopedia of Law, 182.

Indeed, regarding the language and meaning of the lease as a whole, its obvious purpose was to bring about the development and sale of the minerals underlying the lessor's lands, which purpose the conduct of the lessee has prevented from being carried out, in view of which and the fact that there is no provision of the lease under which the lessor can require the lessee to pay, or do, or perform, its want of mutuality authorized its cancellation, as the circuit court adjudged.

[7] We think it also apparent from the evidence that the lease was procured by fraud on the part of the appellants and their agent, Garrett. Such fraud is shown by positive and direct evidence introduced in behalf of appellee, which was only evasively controverted by that of appellants. In order to induce appellee to execute the lease, it was, in substance, represented to her by the appellant Stark, who is admittedly interested with the appellant Killebrew in the lease, and by Garrett, the immediate representative of Killebrew, that the mining of the phosphate on her land, as they proposed to conduct operations if she would execute the lease, would pay her at the rate of \$500 per acre "on all the rock territory or rock area where it could be mined." Stark also represented to appellee that she would receive the customary royalty paid in Tennessee for such phosphate as was mined on her land, which he claimed was 15 to 25 cents per ton. but that more of such leases were obtained at 15 cents than at 25 cents; and he and Garrett further represented to her that mining for the phosphate on her land would be commenced within a year or, at most, 18 months following the execution of the lease. According to her evidence, appellee believed these representations, and was induced by them to execute the lease, when without them she would not have done so. She seems to have especially relied upon what Stark said to her, as he was related to her by marriage and fully possessed her confidence. He, however, concealed from her the fact that he was to be interested

with Killebrew in the lease, and informed her that he wished to see her enter into the lease only because Killebrew would take a similar lease on his land if he could secure the lease on hers.

It appears from the weight of the evidence that the above representations were untrue; for the prevailing price or royalty paid at that time in Tennessee to the lessor on brown phosphate rock, such as underlies appellee's land, was \$1 to \$1.10 per ton, which was known to Stark, as he had been to Tennessee and there ascertained the customary royalty.

The falsity of the further representations made, both by Stark and Garrett, is also patent, as the mining of appellee's land was not commenced within a year or 18 months of the execution of the lease, or at all; and neither \$500 per acre, nor any other amount, in royalties, has been realized by her from the mining of her land.

As previously stated, Stark and Garrett were evasive in testifying as to the representations they made appellee to procure the lease. This is particularly true of Stark's deposition; his answers to questions as to such representations being, in the main, that he did not remember the conversation, or did not recall saying what was attributed to him as such representations by the evidence in behalf of the appellee.

In view of the foregoing evidence as to the manner in which the lease was obtained from appellee, to say nothing of the gross inadequacy of the royalty it stipulates she shall receive, and the like inadequacy of the \$5 per annum rental, by virtue of which appellants seek to hold the land without mining it, we are constrained to believe that its execution was unfairly, even fraudulently, procured.

We are also of opinion that appellee's third contention is sustained by the facts presented by the record; that is, that appellants had no intention of carrying out the provisions of the lease, and that their failure to do so was, in legal effect, an abandonment of it, which entitled appellee to its cancellation, as adjudged by the circuit court.

[8] As already observed, appellee's purpose in granting the lease was to obtain an income or profit, by way of royalties, from the mining of phosphate on her land by appellants; and, in view of their representations as to the abundance of the phosphate, and their purpose to begin the work of mining it within a year or 18 months, it cannot be doubted that she expected a handsome income in royalties, from year to year, beginning with their mining operations, and continuing throughout the entire term of the lease. It would be doing violence to her intelligence, and that of appellants as well, to say that she was induced to execute the lease and thereby incur her farm, which

had cost her \$23,000, because of appellants' undertaking to pay her the paltry sum of \$5 per annum during the continuance of the lease; nor it is to be presumed that she would have executed the lease if she had known that appellants had no intention of beginning work within a reasonable time, or that it was not their intention to begin at all. On the contrary, in the absence of a provision in the lease fixing the time for them to begin the work of mining, the presumption should be indulged that it was to begin within a reasonable time; and what would be reasonable time is a question of fact to be determined by all the circumstances of the case.

[9] Here the lease is silent as to the time of appellants beginning operations, but the circumstances attending its execution unmistakably show that they were to begin within a year or 18 months; and, as this time was fixed by appellants themselves, it must be considered a reasonable time.

In *Eastern Ky. Mineral & Timber Co. v. Swann-Day Lumber Co.*, 148 Ky. 82, 146 S. W. 438, we had under consideration an instrument of writing conveying the fee to a seven-eighths interest in the minerals and timber on a tract of land. Certain of its provisions read as follows: "The grantor reserves one-eighth interest in the mineral and timber of said land, outside of the seven-eighths conveyed, and is to share with grantees as above mentioned. That is to say, the grantor is to receive one-eighth of the net profits of all minerals and timber taken from said tract, so soon as mining operations commence; said grantor also reserving of the timber herein conveyed a sufficient quantity for mill, fuel and fencing for his own use on his farm. This deed is not to embrace, or intended to convey, anything but the minerals and timber as stated, and not to interfere with the farming interest of said territory, only so far as is necessary to work and mine minerals, and getting out timber."

In construing this writing we held it to be a lease, which, though silent as to the time of beginning operations thereunder, required the grantee to do so within a reasonable time, as the condition of the parties and the circumstances surrounding the execution of the paper made it necessary that this be done to protect the rights of the grantor and to effect the intention of the parties. Moreover, that the grantee having failed to begin the contemplated work within a reasonable time, such failure was properly treated by the grantor as an abandonment by the grantee of the leased premises, entitling him to take possession thereof.

An excellent statement of the doctrine elaborately discussed in the case, *supra*, is contained in a note to *Chauvenet v. Person*, 217 Pa. 464, 66 Atl. 855, 11 L. R. A. (N. S.)

417, wherein the editor, in a review of numerous cases on the subject, says: "Generally, all leases of land for the exploration and development of minerals are executed by the lessor in the hope and upon the condition, either express or implied, that the land shall be developed for minerals; and it would be unjust and unreasonable, and contravene the nature and spirit of the lease, to allow the lessee to continue to hold under it any considerable length of time without making any effort at all to develop it according to the express or implied purpose of the lease; and, in general, while equity abhors a forfeiture, yet, when such a forfeiture works equity, and is essential to public and private interests in the development of minerals in land, the landowner, as well as the public, will be protected from the laches of the lessee and the forfeiture of the lease allowed, where such forfeiture does not contravene plain and unambiguous stipulations in the lease."

To the same effect are the following additional authorities: *Shenandoah Land & Coal Co. v. Hise*, 92 Va. 238, 23 S. E. 303; *Aye v. Philadelphia Co.*, 193 Pa. 451, 44 Atl. 555, 74 Am. St. Rep. 696; 2 Page on Contracts, § 1123; *Adams v. Ore Knob Copper Co. (C. C.)* 7 Fed. 634; 2 Snyder on Mines, § 1136.

The rule laid down in the foregoing authorities must control in the case at bar. Looking at the lease in question, the situation of the parties, and the circumstances attending its execution, it cannot be doubted that it, by fair implication, imposed upon the lessees the duty to begin mining operations within a reasonable time, in order that appellee might receive the real and an adequate consideration for granting the lease.

[10] A year or 18 months was fixed by appellants as a reasonable time, yet they failed to begin work within that time, or at all. After waiting 3½ years for appellants to begin operations, during which time they made no effort to do so, appellee rightfully treated their inaction as an abandonment by them of the contract; therefore she had the right to bring suit for its forfeiture or cancellation.

Being of the opinion that the judgment of the circuit court properly determined the rights of the parties, it is hereby affirmed. Whole court sitting.

⟨ RHEA et al. v. MADISON et al.
(Court of Appeals of Kentucky. Dec. 17, 1912.)

1. WILLS (§ 165*)—CONTEST—UNDUE INFLUENCE—EVIDENCE—CONVERSATION WITH THIRD PERSONS.

In a will contest on the ground of undue influence alleged to have been asserted by testator's wife, evidence of conversations between

testator and his friend indicating undue influence by the wife is admissible.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 415-420; Dec. Dig. § 165.*]

2. WILLS (§ 164*)—CONTEST—UNDUE INFLUENCE—EVIDENCE.

In a will contest for alleged undue influence by testator's third wife, evidence that the bulk of testator's estate was accumulated during the life of his second wife, that he owed the most of his fortune to her good management, and that one of the contestants was a daughter by testator's second wife, and was practically disinherited by the will, was admissible.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 408-414; Dec. Dig. § 164.*]

3. WILLS (§ 164*)—CONTEST—UNDUE INFLUENCE—PROPERTY OF PROPONENT.

Where testator's will, leaving the bulk of his property to his third wife and her child, was attacked on the ground of her alleged undue influence, she could not complain of evidence that she had little or no property at the time she married testator.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 408-414; Dec. Dig. § 164.*]

4. WILLS (§ 166*)—CONTEST—UNDUE INFLUENCE—EVIDENCE.

In a will contest, evidence held to sustain a finding that testator's will was the result of undue influence.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 421-437; Dec. Dig. § 166.*]

Appeal from Circuit Court, Edmonson County.

Will contest by Minnie Madison and others against Eliza B. Rhea and another. Judgment for contestants and defendants appeal. Affirmed.

Grider & Logan, of Brownsville, and Grider & Harlin, of Bowling Green, for appellants. Sims & Rodes, of Bowling Green, and Logan & Hazelip, of Frankfort, for appellees.

LASSING, J. This is a contest over the will of W. T. Rhea. The will was executed on July 1, 1909. The testator died in October, 1911. By the will in question he devised to Mrs. Tamer Heester, Mrs. Minnie Madison, and Mrs. Lena Hudson, daughters by former marriages, the sum of \$100 each. After the payment of his debts and the payment of the special bequests to his daughters, he gave all his personal property to his wife, Eliza B. Rhea. His farm he gave to his wife for life, with remainder to his only son, W. Taylor Rhea, Jr. He further provided that in the event his wife, Eliza B. Rhea, did not survive him the farm should go to his infant son, W. Taylor Rhea, Jr., in fee simple, and that all his personal property, after the payment of his debts, should be equally divided among his four children. The contestants are the three daughters, who attacked the will on the ground of undue influence exercised over the testator by his wife, Eliza B. Rhea. The contestees are Eliza B. Rhea and the infant, W. Taylor Rhea, Jr. The jury found against

the will. Judgment was entered accordingly, and the contestees appeal.

The testator was married three times. By his first wife he had two children, Mrs. Tamer Heester and Mrs. Minnie Madison. His first wife did not live very long. After the death of his first wife he married Jane Merideth, who lived for a number of years and bore him one daughter, the contestant Lena Hudson. The testator's second wife died in March, 1905. In the month of June following the testator married appellant Eliza B. Rhea. During the following year William Taylor Rhea was born. The will in question was executed about two years and three months before the testator's death. During the latter part of June, 1909, the testator was a jurymen, and in attendance on the circuit court at Brownsville. While there, he approached John A. Logan, an attorney, and requested him to write the will. Mr. Logan prepared the will in accordance with the testator's directions. On July 1, 1909, the testator came to the bank at Rocky Hill and requested L. U. Cornelius and W. W. Saunders to witness the will. The testator signed the will in their presence, and they in his presence, and in the presence of each other, attested it. The will was then turned over to Mr. Cornelius, the cashier of the bank. Mr. Cornelius placed it in an envelope, sealed it up, and put it in a vault of the bank, where it remained until after the testator's death.

On the trial the will was produced and its execution proven by Messrs. Cornelius and Saunders. After describing the manner of its execution, Mr. Cornelius says that the testator's mind at that time was perfectly clear, and he had never known it to be otherwise. Mr. Saunders, after testifying to the execution of the will and its attestation by him and Mr. Cornelius, stated, on cross-examination, that he had three conversations with the testator with reference to his property, one about a year before the will was made, one about six weeks before he died, and one the night he died. In the first conversation the testator stated that he wanted to lay up \$100 a year for his wife and child, so if anything happened to him they would have that much advantage over the others. In the second conversation he stated that he was going to try to make money enough to pay the girls their part and let the boy have the farm. On the night he died he called the witness to his bed. He stated to witness that he had sold some cattle, and wanted the witness to look after them. He also said that his papers were in the bank, and he wanted witness to see that "Sis" (the name he usually applied to his wife) and his boy got their part. This witness was permitted, over the objection of appellants, to say that Jane, his second wife, had made all he had; that upon

going home after her death he found \$150 that she had saved, after buying the groceries, and which he did not know that she had. Witness also stated that Mrs. Rhea had told him that Mr. Rhea had burned up his former will. Witness also testified that Mr. Rhea had \$1,000 on time deposit in the bank, and one day he asked the witness to place half of it to the credit of his wife. Witness also stated that for a short time after his third marriage testator did not attend church regularly. Later on he became a regular attendant, and seemed to enjoy religion more than he ever did.

J. S. East testified that the testator told him that he intended to put \$1,500 in the bank, so his wife could pay off the other heirs. Testator also said that he wanted his boy to have the farm.

For the contestants the evidence is as follows:

Mrs. Hudson testified that she and her husband, at the time her father married the third time, had her father's farm rented for the rest of the year. About two months after the marriage she and her husband moved out of her father's home and moved into another place on the land. There was never any trouble between her and her father, and her father always treated her in a way that showed that he loved her. She says, however, that they moved out of her father's house because they became dissatisfied. The reason for the dissatisfaction was that things after the marriage did not go on as they had done before. She and her husband would do the cooking, and her father and stepmother took the meat away from them. Witness knew nothing of the will in question, and also stated, on examination, that her relations with her father and stepmother were always friendly. Her father would frequently visit her, and he and her stepmother would often come together. Witness also visited her father and stepmother.

Mrs. Madison testified that she lived near Smith's Grove and on a farm adjoining her father. There was never anything wrong between her and her father. On the contrary, he always acted in a way to indicate that he loved her. Witness frequently visited her father and stepmother, and they in turn visited her. Witness was permitted, over the objection of appellants, to say that she remembered hearing her father say that he had received about \$800 from witness' mother, who was her father's second wife. Witness also testified that she was 31 years of age, and had three boys and one girl.

Nathan Merideth testified that testator's farm was worth about \$12,000, and that his personal property was worth about \$4,000. He said that the testator was a member of the Baptist Church, and attended regularly before his last marriage. After that time he stopped for a while. Witness had a talk

with him, and later on Mr. Rhea became a regular attendant. This witness also stated that he considered Mr. Rhea, the testator, a man who could be easily influenced. He said that he had persuaded him to come back to church, and it had taken him a long time to do so.

Belle Parish, a negro woman, who did washing and ironing, testified that she sometimes worked for Mr. Rhea's last wife. On one occasion Mrs. Rhea told her that she thought he (Mr. Rhea) ought to leave the property to her and her child, as the other children had men to support them. Mrs. Rhea said that Mr. Rhea did not want to do that, and she said she thought he ought to leave the property to her and her child. Mrs. Rhea further said if he did not want her to have the property she would feel like going home. This conversation took place about three years before the witness testified.

John Whittle testified that on one occasion he had a conversation with testator, who said that he was going to put \$100 a year in the bank to his wife's credit until he got \$1,000, so that his wife might have it to raise the boy on, if anything should happen to him. He said he meant for all his children to share equally, but he wanted to give his wife and last child that much over the others. In answer to a question as to whether or not Mr. Rhea was a man who was easily influenced by his friends or those close to him, witness said: "I think Mr. Rhea was a mighty fine man, but if you come at him right you could handle Mr. Rhea most any way."

W. C. Caffee testified that he had three different conversations with the testator. He told him on each occasion that he wanted to make money enough to put \$100 in the bank each year for his wife to raise the boy on. In answer to a question as to whether or not Mr. Rhea was a man who could be easily influenced by those who were close to him, witness said: "I have always thought that particular friends could influence him. I have heard him say he would not do things, and go ahead and do them. I have seen him get aggravated about church matters, and say he wouldn't do things, and then I have seen him turn around and do them." Witness also stated that there was a period of time after testator's marriage that he did not attend church as regularly as he did before. On cross-examination witness stated that testator said that he wanted his boy to have the land, and that the testator told him that his boy's name was William Taylor Rhea, Jr.

John Rhea testified that the testator told him that he never would have been worth anything if it had not been for Jane, his second wife. Witness also stated that he thought that a man that Mr. Rhea liked could persuade him to do most anything.

Witness also said, "I believe I could have persuaded him to have loaned me money." Witness also stated that he himself was easily influenced by his friends.

Porter Compton testified that the wire fence running from the chicken house to the spring on the testator's place was built two or three years before he testified. He also said that anybody that the testator thought a right smart of might influence him. Witness further stated that he guessed that he himself could be influenced by persons that he liked.

Mart Whittle testified as follows: "I went over there one day to buy some 'ingerns.' I did not raise them. I could buy them cheaper. We went to see each other often, good neighbors and good friends; and we were out there in the 'ingern' patch, and I leaned up against the fence to talk awhile, and he said: 'My wife had been fretting at me and fretting at me to get me to make a will.' And he said: 'I finally said to her, 'I will make it your way.'" And he said he did make it her way, and took it and said, 'Thar it is.' But he said: 'I am going to tear it up. I want my children to share equal.' I said: 'Yes, Taylor, I would tear it up. That is her will. And I would make one of my own, and I would put it in the bank and say nothing to her about it.' He said: 'My first children are as good as my last, and I want them to share equal.'"

Witness, in answer to the question, "Did he [testator] have an apple at that time?" said: "Well, yes. I said: 'Taylor, sometimes I go home and I have an apple in my pocket, and I have four children, and when I get home I take my knife and cut the apple in four pieces and give each one a piece. I want them all equal.' And he laughed and said, 'That is right.' I said to him that I had some children that didn't do as I would have them do. I had a boy that drinks—" (Objected to by attorney for defendant.) By the Court: "Is he telling a part of the conversation he had with Mr. Rhea? If so, it is competent." Witness was then told to go ahead. He said: "It is not necessary to tell what I said about my boy. There is no need to tell about that." On cross-examination witness said he could not tell when it was that he went over there to buy onions. On being asked if it was before Mr. Rhea married the last time, he said: "I just don't know. I don't recollect. I paid no attention." Further on he said it had not been four years. He fixed the occasion as the one on which Henry Hudson built the wire fence from the henhouse to the spring. This witness was subsequently recalled for the purpose of laying the ground for contradiction. He was asked if he had not told a man by the name of Ferguson that the conversation that he had with Mr. Rhea occurred six or seven years ago, and during the lifetime of the second wife. Witness said: "I might have told him before thinking.

If I did, it was unthoughted. I didn't pay much attention."

For the contestees Mrs. Eliza B. Rhea testified that she was married to W. T. Rhea in June, 1905. At that time she lived close to his farm at Rocky Hill. She called her husband "Papa," and he called her "Sis." After she moved to her husband's place, Mr. and Mrs. Hudson moved out of the house to another house on the place. Her relations with her husband's daughters were always friendly and cordial. They frequently exchanged visits. The first time Mr. Rhea spoke to her about making a will was in the month of June, 1909. He came home from Brownville, and told her that he had had his will written. He told her that he was going to leave the will in the bank. He went over in a day or two, and told her that he had left it at the bank after he had signed it. Her husband said that he had raised all the others until they were grown, and he wanted Willie to have the farm. She stated that the wire fence that Mart Whittle referred to was built during the lifetime of the testator's second wife. Mart Whittle was there one day and sat out in the yard, but not by the fence. She never had any conversation with the negro named Belle Parish in reference to her husband's property. After she married her husband he showed her a former will which he had made. He said: "I will burn it up. It is no good; and when I know how I will make another." She never told him to burn it up. On cross-examination witness stated that she was 47, and the record showed that her husband was 64, at the time of his death. Over the objection of defendants, she testified that the first time her husband called he told her his business. This was on Wednesday. She told him she would think it over and pray over it. He came for his answer on Sunday. She got word on Thursday that he wanted to come to see her, and he came the following Wednesday. They were married the following Thursday. All this evidence was objected to. Witness also, over the objection of appellants, stated that Mary Merideth had told her that Mr. Rhea would make a new will; that he had made a will to his last wife, and would make another. It was some time after their marriage before he showed her the will that he had made during the life of his second wife. She thinks that he read it to her. After she and her husband were married, he never missed but one church meeting, and she never tried to keep him away from church. When she married her husband, she had only a yearling and a hog and her clothes and bedclothes. Mary Merideth said he had made a will, and would make a will to the woman he married. When her husband made the will in controversy, he brought it home. It was not then signed. He told her what was in it. Then he read it to her. Her husband then took it to Rocky Hill, and told her that he had signed it up and left

it at the bank. Her husband told her that he wanted to save \$1,500 and put it in the bank, so as to pay off any debts he had, and have enough left to run the farm.

John A. Logan testified that he drew the will in question. The testator was on the jury at the time, and came to witness in Rocky Hill. Testator was anxious to have the matter fixed right, and told witness to be careful. Witness was a stranger to the family, and had never done any business for the testator before. He did not know the name of a single child. The testator told him how he wanted the will written, and he wrote it exactly as testator directed. At the time the will was written, the testator was in perfect health, his mind was good, and he talked intelligently. Mr. Rhea was not present at the time the will was written. On cross-examination witness stated that Mr. Rhea was very cautious, and particular that no one should know that he had made a will. He asked witness if it was necessary for the witnesses to read the will, and witness told him it was not. He told the witness to keep the matter private, and not let any one know about the terms of the will.

J. W. Stice testified that the testator told him he wanted his son to have the farm, because he had his name, and wanted the business run in his name, just as he had run it. Mrs. Caffee testified that the testator said to her that he wanted the farm for Willie. W. F. Murphy testified that one month before the testator died he had a conversation with him, and his little boy was present at the time. Testator told witness that the boy's name was W. T., Jr., and that after he was dead he wanted his business to go on in the same name. Al. Whittle, a neighbor, 80 years of age, testified that he had a talk with the testator, in which the testator said that he had willed his farm to his son, and he wanted to put \$1,500 in the bank to his wife's credit, so she would have something to run on. Testator said that he wanted his wife to have the land during her life, and at her death he wanted it to go to the boy. He further said that Mrs. Rhea thought a heap of Mr. Rhea, and he thought a heap of her. Mr. Rhea was honest and just so far as he knew. Irvin Stice testified that he heard the testator tell his father that he wanted the boy to have the farm; that he did not know what might become of the boy. Daniel Keith testified that about a year and two months before the testator died the testator told him that he had willed his property to his wife and little boy; and W. R. Slaughter testified that he and testator were down at Brownsville in June, almost two years before he testified, and the testator said that he aimed for his wife and baby boy to have what he had.

A reversal is sought upon two grounds: First, because the verdict of the jury finding against the will is flagrantly against the evidence, and not sustained by sufficient

evidence; and, second, because the court erred in permitting incompetent evidence to go to the jury.

We will consider these objections in their inverse order. The record shows that the court, in the conduct of the trial, permitted the evidence to take a range covering practically the married life of appellant with the testator. Indeed, some of the witnesses testified to facts and circumstances leading up to their marriage. None of this evidence, however, can properly be objected to.

[1] The ground upon which the contest was based was undue influence, and it was sought by the contestants to show that from a period prior to the date of appellant's marriage with testator she had conceived the idea of acquiring all of his property. With this end in view, they introduced evidence to the effect that appellant was advised, shortly before her marriage to testator, that whoever became his wife would get his property. It is in rare instances only that undue influence can be established by direct evidence. Its existence is shown usually by the grouping of certain facts and circumstances together; and this frequently necessitates the introduction of evidence covering practically the married life of the parties concerned. It involves the introduction of conversations with the wife and with the testator; and when such conversations have a bearing upon the question at issue, and tend in any wise to support or establish the claim that undue influence has been exercised, it is but proper that the jury should have the benefit of the entire conversation. When viewed in this light, it is apparent that the evidence complained of, as to the conversation between the testator and his friend, Mart Whittle, was competent.

[2] Nor was it improper for the court to permit the contestants to show that the bulk of the testator's estate was accumulated during the life of his second wife, and that he recognized that to her efforts and good management, more than anything else, he was indebted for the fortune which he had at the time he married appellant. He had reared a daughter by his second wife. By the will in contest he had practically disinherited her; and it was not improper for her to show that practically the entire estate of her father, in which she was denied the right to participate, was brought to him or saved through the efforts of her mother.

[3] Nor can appellant complain that appellees called upon her to show what property she had at the time she married their father. The relation of the parties and their circumstances in life may always be shown; but if it should be held that the court erred in requiring appellant to testify as to what property she had at the time she married the testator we are of opinion that it was not prejudicial. On the contrary, it would rather be in her favor; for, if it created any impression at all on the minds of the jury, it

would be calculated to excite their sympathy, instead of their prejudice against her. We find no error in the admission or rejection of evidence of which appellant can complain.

[4] This brings us to the complaint that the verdict is not supported by sufficient evidence. It is conceded by counsel for appellant, in their brief, that the evidence of Mart Whittle and Belle Parish has a direct bearing upon the question of undue influence, and that because of this evidence the trial court necessarily had to submit the case to the jury. No complaint is made of the instructions as given, so that, unless it can be said that the verdict is flagrantly against the evidence, we would be unauthorized in setting it aside. It is shown by the testimony of many witnesses that the relation between the testator, appellant, and his three children by his former wives was entirely friendly. They lived in the same neighborhood. So far as the record shows, there never was the slightest jar or difference among them. He was undoubtedly very devoted to the child of his old age, who bore his name; and it is in evidence that he said to several of his friends that he wanted this boy to have the farm. He likewise said to several of his friends that he was laying aside money annually for the purpose of educating this boy and of making provision for him. Indeed, at one time he placed in the bank to the credit of his wife \$500, and said, when doing so, that he wanted to enable appellant to take care of the boy.

While there is much evidence going to show that the will in contest was the free and voluntary act of the testator, there is also evidence to the effect that it was not the character of will which he desired to make. There is evidence from which it could reasonably be inferred that it was the result of a determination on the part of his wife (appellant) to deprive his children by his former marriages of any participation in his estate. When the circumstances under which the will was drawn are read in the light of the information that was conveyed to appellant just before she married the testator, it is not difficult to understand what she meant when she said to her servant, Belle Parish, some time after her child was born, that she thought he (referring to her husband) ought to leave the property to her and her child, and if he did not want her to have the property she would feel like going home. But if the meaning of this conversation with the servant could not be seen to have any direct bearing on the question of undue influence on the part of the wife in the draft of the will in contest, when it is read in connection with the testimony of Mart Whittle as to what the testator said to him, the force and effect of this statement on the part of appellant is clearly brought out. He says that the testator said to him, "My wife has been fretting at me

and fretting at me to make a will," and that he finally yielded and told her that he would do so, and that, in obedience to that promise, he caused the will to be made as it was, took it home to her, and told her, "That it is," and that thereafter he caused it to be executed and left at the bank. It is a singular circumstance that, although the testator caused this will to be drawn by a lawyer who lived several miles from his home, he did not execute it until he had taken it home, exhibited it to his wife, and knew that she was satisfied with it. It is also a singular coincidence that the will, as drawn, disposed of his property in exactly the way in which his wife said to the servant, Belle Parish, that he should dispose of it.

It is argued that there is no direct evidence showing that appellant ever requested her husband to make a will of any character. It is true there is no direct evidence, but this testimony of the servant as to how appellant said it should be made, when read in connection with that of Mart Whittle that the testator told him how it came to be made, if true, is even more convincing; for it shows that appellant, while endeavoring to have a will drawn so as to give her and her son all of the property, was at the same time trying to proceed in such a way as to avoid deduction. If these witnesses are to be believed, their evidence shows that she determined to have the property willed to her and her son in the way and manner in which it was, and that she kept at her husband until he complied with her request. Whether she went so far as to advise him that if her wish was not complied with she would leave him, the evidence does not show. If the servant's evidence is true, there is no doubt that she would have pressed her claim to that extent, had it become necessary. All the testimony shows that he loved all of his children equally well, and wanted to treat them all alike. Under the circumstances we are not prepared to say that the jury was not warranted in finding that the paper in contest was the result of an undue influence, and was not the product of the free and unbiassed mind of the testator. No satisfactory explanation was offered by appellant for the unreasonable and unnatural act of the testator in attempting practically to disinherit the appellees. All of the evidence shows that he loved them. They lived near him; were constantly associated with him. Aside from the statement of the witnesses that he visited them and they visited him frequently, we have his expressed desire to treat them all alike in the distribution of his estate. Why, then, did he fail to do so? No satisfactory answer is given. The only explanation whatever offered is that to be found in the testimony of the servant, Belle Parish, coupled with that of the witness Mart Whittle; and the jury was warranted in accepting their statements as true. If

so, the testator was undoubtedly unduly influenced by his wife to give to her and her son his property to the exclusion of his daughters, who were equally dear to him, and for whom he desired to make the same provision.

After a careful consideration of the record, we fail to find any meritorious ground upon which a reversal should be based. The judgment is therefore affirmed.

CITY OF CARLISLE v. CAMPBELL.

(Court of Appeals of Kentucky. Dec. 17, 1912.)

1. MUNICIPAL CORPORATIONS (§§ 762, 763*)—DEFECTIVE STREETS—LIABILITY FOR INJURIES TO TRAVELERS.

A city must maintain its streets in a reasonably safe condition, and, where it knows that rock has been placed in a street by an abutting owner, it must see that it is properly guarded, and is liable to a traveler injured by driving on the unguarded rock, and it is no defense that the city had no knowledge that the owner failed to put lights on the rock.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1605-1611, 1612-1615; Dec. Dig. §§ 762, 763.*]

2. TRIAL (§ 260*)—INSTRUCTIONS—REFUSAL OF INSTRUCTIONS COVERED BY THE CHARGE GIVEN.

It is not error to refuse instructions substantially covered by the charge given.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 691-693; Dec. Dig. § 260.*]

3. MUNICIPAL CORPORATIONS (§ 762*)—DEFECTIVE STREETS—LIABILITY FOR INJURIES TO TRAVELERS.

A city may not shift the statutory burden imposed on it to keep its streets reasonably safe for public travel by adopting an ordinance allowing property owners, under the direction of the mayor, to use portions of the streets when erecting improvements on abutting lots; but it is answerable to a traveler injured by the unsafe condition of the street by reason of an obstruction placed thereon by an abutting property owner, where it knowingly suffers the obstruction to remain without taking proper precaution for the safety of the traveling public.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1605-1611; Dec. Dig. § 762.*]

Appeal from Circuit Court, Nicholas County.

Action by Newell Campbell against the City of Carlisle. From a judgment for plaintiff, defendant appeals. Affirmed.

Holmes & Ross, of Carlisle, for appellant. Wm. Conley, of Carlisle, and Jno. P. McCartney, of Flemingsburg, for appellee.

HOBSON, C. J. A property owner in September, 1911, was making an improvement on his lot fronting Main street in Carlisle and for this purpose hauled and placed in the street a pile of rock 10 or 12 feet long, 4 or 5 feet wide, and from 1 to 2 feet high; the pile of rock being 4 or 5 feet from the curb, and there being about 25 feet

of the street left unobstructed. The pile of rock had been there about two weeks when Newell Campbell, who lived in the country, while driving down the street about dusk in a buggy, drove over the rock and was thrown out of his buggy and hurt. He brought this suit against the city to recover for his injuries. The proof on the trial showed clearly that the city authorities knew of the rock pile in the street, or should have known of it in the exercise of ordinary care. There were no lights upon the pile of rock, the street lamps had not been turned on; but there were lights put up for private purposes along the street and not far from the rock pile. There is much in the evidence to show that Campbell might have seen the rock, but in fact he did not see it, and whether he was negligent was a question for the jury. There was considerable evidence tending to show that Campbell was under the influence of whisky and that this was the cause of the trouble. But all these matters were fairly submitted to the jury by the instructions of the court. They found a verdict for Campbell for \$375. There was much in the evidence to show that he was not much hurt, but we cannot say under all the proof that the verdict is palpably against the evidence or so excessive as to warrant us in disturbing it.

[1] It may be that the property owner was negligent in putting the rock in the street as he did and failing to put a light upon it to warn persons of the danger at night; but his negligence does not exonerate the city from liability. The primary duty rests upon the city to maintain its streets in a reasonably safe condition. When it knew the rock was in the street, it was incumbent on it to see that it was properly guarded, and it is liable to a person injured by reason of the street being in a dangerous condition. It is no defense to the city that it did not know that the property owner had failed to put lights on the rock. When it knew that the rock was in the street and that it made the street unsafe for public travel when without lights at night, it was its duty to see that its street was kept safe. In *Glasgow v. Gillenwaters*, 113 Ky. 143, 67 S. W. 881, 23 Ky. Law Rep. 2375, we sustained a recovery against the city where a person had been injured by falling in the dark over a wire stretched in the street by a contractor. We do not see that this case can be distinguished from that. See, also, *Midway v. Lloyd*, 74 S. W. 197, 24 Ky. Law Rep. 2448; *Carlisle v. Secrest*, 75 S. W. 268, 25 Ky. Law Rep. 336; *Paducah v. Simmons*, 144 Ky. 641, 139 S. W. 851; *Campbellsville v. Morgan*, 150 Ky. 417, 150 S. W. 521. The case of *Elam v. Mt. Sterling*, 132 Ky. 657, 117 S. W. 250, 20 L. R. A. (N. S.) 512, is very different from this case. That was a suit for a horse taking fright at some rock; and it was held that

there could be no recovery, as the rock was not of an unusual character and was out of the traveled way of the street. Here the rock was in the street, and when the buggy ran over it the man was thrown out.

[2] The instructions which the court gave were substantially the same as those asked by the defendant. We do not see that the jury could have understood them differently.

[3] The court properly sustained the demurrer to the second paragraph of the answer pleading that the city had enacted an ordinance allowing property owners under the direction of the mayor to use a portion of the street when erecting improvements on the lots abutting on the street, and that the rocks in question had been placed in the street by the property owner under the ordinance but without the direction of the mayor. The statute commits the streets to the care of the city, and imposes on it the burden of keeping them reasonably safe for public travel. This burden the city cannot by its ordinance shift from itself to a property holder. He may be liable to it, but it is answerable to the person injured, by reason of the unsafe condition of the street, where it knowingly suffers the obstruction to remain in the street without taking proper precaution for the safety of the traveling public.

Judgment affirmed.

SANDERS v. STANDARD WHEEL CO.
(Court of Appeals of Kentucky. Dec. 17, 1912.)

1. ACCORD AND SATISFACTION (§ 11*)—WHAT CONSTITUTES.

To constitute an accord and satisfaction, it is necessary that the sum less than that demanded be offered in full satisfaction of the demand and be accompanied by such acts and declarations as amount to a condition that the money, if accepted, is accepted in satisfaction, so that the party to whom the money is offered is bound to understand therefrom that, if he takes it, he acts subject to the condition.

[Ed. Note.—For other cases, see *Accord and Satisfaction*, Cent. Dig. §§ 75-83; Dec. Dig. § 11.*]

2. ACCORD AND SATISFACTION (§ 27*)—ACCEPTANCE OF SUM LESS THAN THAT DEMANDED—EVIDENCE.

Plaintiff sold a car load of spokes to defendant for \$1,574.74 subject to defendant's inspection and acceptance. After examination, defendant sent plaintiff an invoice with a check for \$1,280.99, the invoice containing a printed clause that the check was in full of the invoice and that the payee accepted it as such by indorsement of the check, and if satisfactory no acknowledgment was necessary. Plaintiff returned the check with a statement that it was not accepted, asked defendant to return the spokes, and sent a check to cover return freight. Defendant returned its original check, stating that the spokes could not be returned because some of them had been used; that if plaintiff would come to defendant's place of business defendant could convince him of the correctness of its inspection. Plaintiff, on receipt of that letter, cashed the check and

sued for the balance. *Held*, that defendant's second letter was not calculated to apprise plaintiff of the fact that it was intended as payment in full, and that plaintiff's acceptance of the check did not constitute an accord and satisfaction, as a matter of law.

[Ed. Note.—For other cases, see *Accord and Satisfaction*, Cent. Dig. §§ 59, 83, 97, 110, 135, 150; Dec. Dig. § 27.*]

Appeal from Circuit Court, Madison County.

Action by Alva Sanders against the Standard Wheel Company. Judgment for defendant, and plaintiff appeals. Reversed.

L. M. Morancy and W. S. Moberly, both of Richmond, and J. S. Fullerton, of Ashland, for appellant. Greenleaf & Herrington, of Richmond, for appellee.

LASSING, J. Alva Sanders of Ashland, Ky., entered into a contract with the Standard Wheel Company of Terre Haute, Ind., by the terms of which he agreed to sell and deliver to the company, for the sum of \$1,574.74, a car load of club-turned spokes, delivery to be made at the company's place of business in Terre Haute, Ind., and subject to its inspection and acceptance. Shortly thereafter a car load of spokes was shipped to the company. Upon examination, the spokes, according to the contention of the company, did not, in all particulars, meet the requirements of the contract. After such examination and inspection, it sent to Sanders an invoice of same, accompanied by its check for \$1,280.99. Upon the invoice there appeared the following printed matter: "Payment in full of the above invoices and payee accepts it as such by endorsement of check. If satisfactory, no acknowledgment necessary." Upon receipt of this invoice and check, Sanders, on March 1, 1911, wrote the company the following letter: "March 1, 1911. The Standard Wheel Company, Terre Haute, Ind.—Gentlemen: I am inclosing herewith your check for \$1,280.99. The same will not be accepted by me. Please return my spokes to me or send me check for same according to my invoice price. I am inclosing my check to cover freight on spokes if same are returned to me. In returning spokes be sure you get them all loaded. Yours truly, Alva Sanders." On March 10th, the Standard Wheel Company wrote, in response, this letter: "March 10, 1911. Alva Sanders Spoke Factory, Ashland, Ky.—Gentlemen: Yours of March 1st was received while the writer was in New Orleans, hence no reply sooner. The inclosed check is in accordance with our inspection of the car of spokes you shipped us. If you will refer to our letter, it provides for our inspection. We do not buy spokes for ornaments, but to put in wheels and some of the spokes you shipped us are now in wheels, the material being fairly dry when we received it. It is, therefore impossible to return the spokes to you. However, if you come here, we can convince you

and show you the percentage of D. & E. that we got out of this material when it came on the sorting bench. We therefore return our check as well as the one you sent us for freight. Very truly yours, Standard Wheel Co., President. M. Inclosures." Thereafter Alva Sanders cashed the check for \$1,280.99 and brought suit against the Standard Wheel Company to recover the balance of the money claimed to be due him under their agreement. The defendant denied that it owed plaintiff anything whatever, and, in an amended answer, pleaded accord and satisfaction and, in support of said plea, filed the check and invoice referred to. To this answer and plea, plaintiff replied, traversing the affirmative matter therein and, in addition, alleged that there was no letter or statement accompanying the check advising him that it was in full settlement of his claim. With this reply was filed the letter sent by him to defendant, referred to and copied above. The defendant thereupon filed its rejoinder, and with it the letter last above referred to. To this rejoinder, plaintiff filed no responsive pleading. The defendant thereupon moved the court to take the allegations of the rejoinder as confessed. The court, upon consideration, sustained this motion and entered a judgment dismissing the plaintiff's suit, and from that order and judgment he prosecutes this appeal.

The sole question raised is as to the sufficiency of the plea of accord and satisfaction. Appellant, in his reply, after denying the affirmative matter of the answer as amended, in which the plea of accord and satisfaction was set up, alleged that the letter which accompanied the check, when it was returned to him by appellee, failed to advise that it was intended as a full and complete settlement of his claim. The rejoinder was, in effect, but a restatement of the matter set out in the answer as amended. We are of opinion that no surrejoinder was necessary to complete the issue, for the answer and reply perfected the issue on this plea.

The correctness of the court's ruling depends upon whether or not the exhibits, filed with the several pleadings, support the contention of appellee that the check for \$1,280.99 was tendered to and finally accepted by appellant, in satisfaction of his claim. In 1 Cyc. p. 331, the author accurately states the essentials necessary to constitute an accord and satisfaction, as follows:

[1] "In order that the payment of a smaller sum than demanded shall operate as a satisfaction of the claim, it must be accepted as such. Where a person accepts a tender, but not in full of all demands, this acceptance will not conclude him from claiming more. The nature of the offer or tender by the debtor is an important consideration in determining whether there has been an acceptance and satisfaction. To constitute an accord and satisfaction it is necessary

that the money should be offered in full satisfaction of the demand, and be accompanied by such acts and declarations as amount to a condition that the money, if accepted, is accepted in satisfaction; and it must be such that the party to whom it is offered is bound to understand therefrom that, if he takes it, he takes it subject to such conditions."

In *Cunningham v. Standard Construction Co.*, 134 Ky. 198, 119 S. W. 765, this court had under consideration a question in many respects similar to that raised in the case at bar. The authorities are, in that opinion, reviewed at length, and, in their controlling principles, found to be in harmony with the text above quoted, the court saying: "No question is more thoroughly settled than that, where one owes a fixed and definite sum, the payment or tender of a sum less than the amount of the debt, even though accompanied with a statement that it is in full, though accepted by the creditor, does not operate to defeat him from collecting the balance of his debt, for the reason that there is no consideration for the surrender of the unpaid portion. There is nothing to support a consideration in such a case; but an entirely different rule obtains in that class of cases where the parties do not agree upon the amount of the indebtedness, and in such cases it has uniformly been held that, where a sum less than that claimed by the creditor is offered by the debtor in settlement or satisfaction of the claim, its acceptance and retention by the creditor discharges the obligation, and in such cases the creditor has been denied the right, after accepting the conditional offer, to collect the balance of his debt." After citing authorities from many states supporting this view, the opinion continues: "All of the authorities are in harmony with those which we have cited, and in each particular case where accord and satisfaction is relied upon as a defense, if it is made to appear that there is a dispute between the parties as to the amount due, and that a sum less than the amount in dispute is tendered by the debtor to the creditor in satisfaction of the claim, and accepted by the latter, the plea has been upheld. The right to name the terms upon which the tender shall be accepted rests alone with the debtor. He makes his own terms, and the creditor must either accept the tender burdened with the conditions thereto attached by the debtor or else reject it."

[2] Applying these principles to the case under consideration, we find that the invoice and check, by which it was accompanied, must be read and considered together, and, when so read, no one of ordinary intelligence could fail to understand that, if the check was accepted, it would necessarily be in full settlement and satisfaction of the claim. Appellant did not accept this proposition, but, as is evidenced by his letter, rejected it, and not only returned the check to appellee, but

also inclosed in the letter his own check to cover the cost of reshipment of the spokes to him, and requested that appellee exercise care to see to it that all of the spokes were returned. He was evidently not satisfied with the invoice, and certainly unwilling to accept the amount tendered to him. After the lapse of a week or ten days, appellee, through its president, wrote this second letter, and with it returned the same check which had been tendered in its first letter to appellant. This letter does not say that the check must be received in settlement of the claim, if it is accepted, nor is there any reference in this letter to the invoice which accompanied the first letter. The right to inspect is asserted, and this right appellant had not denied. There are two significant statements. One is to the effect that the spokes could not be returned, for the reason that some of them had been used; and the second is an invitation to appellant to visit its plant to satisfy himself with the inspection and invoice, as made by appellee. Now, this letter is clearly open to two constructions. It is susceptible to the construction given it by appellee and his counsel. This construction, however, can only be given it when it is read in connection with the first letter, in which the invoice was inclosed. It is likewise susceptible to another construction, and that is that appellee was willing to negotiate with appellant further, with the view of adjusting their differences, and it was in this light that appellant understood it, or else he would not have cashed the check. That this letter is susceptible to this construction is easily shown, for, suppose appellant had accepted appellee's invitation and gone to its plant in Terre Haute, and, upon investigation, it was found that appellant was entitled to more money, would the plea of accord and satisfaction have been available, and would he have been estopped from collecting the balance found to be due him over and above what he had received? Certainly not. The tender of a sum less than the contract price, in settlement of a disputed claim, must be accompanied with a statement, not which may be understood by the creditor as intended to be in full settlement and satisfaction of the claim, but which must be so understood by him. That is, the statement must be so clear, full, and explicit that it is not susceptible of any other interpretation. To hold otherwise would put it in the power of a sharp, shrewd business man frequently to take advantage of the ignorant, uneducated, or unwary, and open the way, in the business and commercial world, to the perpetration of frauds rather than the honest settlement of disputes. In our opinion, the letter in the case at bar which accompanied the check upon its second return to appellant was not such as was calculated to apprise him of the fact that it was intended as a payment in full, or, at least, it

was not such a letter as did not leave this question in doubt. The minds of the parties had not met. Where the facts surrounding a transaction show that the minds of the parties have not met, a tender and acceptance of a sum less than the full amount of the demand may not be regarded as an accord and satisfaction. *Louisville, New Albany & Chicago Ry. Co. v. Helm & Bruce*, 109 Ky. 388, 59 S. W. 323, 22 Ky. Law Rep. 964. The trial court erred, therefore, in holding, as a matter of law, that the cashing of appellee's check by appellant, under the circumstances disclosed in the exhibits, constituted a bar to the right of appellant to prosecute his claim for the balance due him under his contract.

For the reasons indicated, the judgment is reversed for further proceedings consistent herewith.

SAMUEL v. SAMUEL'S ADM'R.

(Court of Appeals of Kentucky. Dec. 17, 1912.)

1. LIMITATION OF ACTIONS (§ 157*)—PART PAYMENT—APPLICATION OF CREDITS—CONSENT.

The holder of a note cannot apply on the note anything he owes the maker without his consent, so as to interrupt the running of the statute of limitations.

[Ed. Note.—For other cases, see *Limitation of Actions*, Cent. Dig. §§ 631-634, 636; Dec. Dig. § 157.*]

2. PAYMENT (§ 39*)—APPLICATION OF PAYMENTS.

A holder of several notes, in the absence of a direction to apply a payment on either note, may credit it on any or all of the notes not barred by limitations.

[Ed. Note.—For other cases, see *Payment*, Cent. Dig. §§ 104-114; Dec. Dig. § 39.*]

Appeal from Circuit Court, Mercer County.

Action by Agnes B. Samuel against H. E. Samuel's administrator. Judgment for defendant, and plaintiff appeals. Affirmed.

R. H. Gaither, of Harrodsburg, for appellant. J. F. Vanarsdall, of Harrodsburg, for appellee.

CARROLL, J. In July, 1911, H. E. Samuel died, and the following November a suit was filed in the Mercer circuit court for a settlement of his estate. In this suit the appellant filed six claims against his estate, amounting in the aggregate to \$3,700. One of these claims was an open account for services rendered to him as clerk. The others were five notes, one for \$1,419.68, dated February 6, 1894, and due one day after date, one for \$200, dated May 3, 1895, due one day after date, one for \$400, dated June 19, 1897, due one day after date, one for \$200, dated March 30, 1897, due one day after date, and one for \$392.21, dated February 1, 1905, due one day after date. The notes for \$1,419.68 and \$200 were contested by the administra-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

tor, upon the ground that they were barred by the 15-year statute of limitation. From the judgment of the lower court, sustaining this defense, this appeal is prosecuted.

As more than 15 years had elapsed between the maturity of the notes and the death of H. E. Samuel, the statute presented a complete bar, unless, as contended by counsel for appellant, the life of these two notes was extended by payments, which, it is claimed, appellant had the right to credit them by, before the expiration of 15 years from their maturity. No credit is indorsed on either of the notes; but it is insisted, on behalf of appellant, that the amount of a store account and a board bill due by appellant to H. E. Samuel should have been credited on these notes, and that it was agreed this should be done.

The evidence in the case consists of checks and other written exhibits, an agreed statement of fact, and the deposition of Miss Mary Bright. The appellant also gave her deposition; but objection was properly sustained to so much of it as related to conversations or transactions had with the deceased, and the remainder of it throws no light on the controversy.

It appears that in 1898 the deceased began business in Harrodsburg as a druggist, at which time the appellant, who was his daughter-in-law, came to live with him, and so continued until his death. During this time, and beginning in January, 1898, the appellant opened an account at the drug store of H. E. Samuel, and this account continued to February 1, 1905, when it amounted, including \$50 for Miss Bright's board, to \$496.52. On this date it appears that the account of \$496.52 was deducted from a note for \$1,388.70, due to Mrs. Samuel, and a new note executed for \$892.21; this new note being one of the five heretofore mentioned. On March 4, 1905, a new account was opened, and this account, which was made up of various articles of merchandise, and included a charge of \$100 for Miss Bright's board from March 20, 1905, to January 28, 1906, continued until June 27, 1911, when it amounted to \$314.91.

Passing, for the present, the evidence of Miss Bright, it appears from the exhibits and agreed state of facts that appellant opened an account at the store of H. E. Samuel in January, 1898, and that this account continued to run until February 1, 1905, at which time it was settled in the manner before stated, and in March, 1905, a new account was opened by appellant, which continued to run until June 27, 1911, at which time it amounted to \$314.91. From this statement it will be seen that virtually all the time from January, 1898, to June, 1911, appellant owed H. E. Samuel a store account, which included the board of Miss Bright, and that H. E. Samuel owed appellant during all this time the two notes in controversy in this case, dated 1894 and 1895,

as well as the two notes dated in 1897, and, for about six years of this time, the note dated in 1905. No credit is indorsed on either of these notes, but it is the contention of appellant in her pleadings that it was agreed that the store account due by her and the board of Miss Bright should be credited on these notes at stated intervals; for example, in July and January of each year.

If this was done, of course the barred notes would be taken out of the statute. There is, however, no evidence tending to support this averment of the pleading, except the testimony of Miss Bright, whose board from November, 1904, to January, 1906, was due to H. E. Samuel, and Miss Bright's testimony, so far as pertinent, is as follows: "Q. When you came to live with her, were there any arrangements made about your board? A. Yes, sir. Q. Who paid that board? A. Mr. Henry Bright of Danville. Q. To whom was it paid? A. It was to go on Mrs. Samuel's notes. Q. What amount was paid? A. \$10 a month for 14 months, \$140. Q. When these arrangements were made for board, how did you know anything about it? A. My uncle told me so. Q. Were you present when the arrangements were made? A. Yes, sir; I was in the store. Q. When the checks would come in, they would be payable to Mrs. Samuel? A. Yes; and she would take them to the store and show them to him every month. Q. You heard Mr. Samuel tell her to let the board money go on the notes? A. Yes, sir. Q. And that is all you know about that? A. Yes, sir. Q. Did you know anything about these notes, except what she said? A. I knew he owed her money. Q. She told you that? A. Yes."

It appears from this evidence that the board Miss Bright paid was to go as a credit on the notes appellant held against H. E. Samuel, but she does not say on which of the five notes appellant at that time held it was to go as a credit. She only knew that she heard H. E. Samuel tell appellant to "let the board money go on the notes." She did not know anything about the notes, except what appellant told her; and it does not appear that appellant told her what notes she held, or anything about them, except that H. E. Samuel owed her money.

That the parties did not understand that Miss Bright's board was to be put as a credit on the notes executed in 1894 and 1895, or on any particular note, is shown by the fact that a part of her board was included in the settlement made on February 1, 1905, and went to reduce a note for \$1,388.70 to \$892.21. But treating this circumstance as of no importance in adjudging the case, the evidence of Miss Bright is not sufficient to save the notes in controversy from the statutory bar.

At the time Miss Bright's board was paid, no one of the notes was barred by limitation; and it may be conceded that under the

general direction given by H. E. Samuel as to the manner in which he wanted Miss Bright's board applied the appellant had the right, at the time, or in a reasonable time thereafter, to apply the amount of the board as a credit on any of the notes, or to distribute it as a credit on all of them, and that if she had then made this application it would have cut off the antecedent time on all of the notes to which the payment was applied as a credit. *Brown v. Osborne*, 136 Ky. 456, 124 S. W. 405.

But appellant did not, at the time the board was paid, or at any time during the five years that H. E. Samuel lived thereafter, apply the board money as a credit on any of the notes; nor is there any evidence to show why she did not do this, or to excuse or explain her failure to make the application when the board was paid, or within a reasonable time. This being true, the case must be considered as if no special direction was given by H. E. Samuel as to the application of the board money, and so we will treat the board money merely as a part of the account that appellant owed H. E. Samuel, and deal with it as a part of that account.

Indeed, appellant, in her pleading, does not rely on any special direction as to the application of the board money, but treats it as a part of her general account. Looking at the matter from this standpoint, the question for decision is: Did appellant, after the two notes in controversy were barred by limitation, or before that time, or at any time, have the right, without the consent or direction of H. E. Samuel, to apply the amount she owed him on account as a credit on these notes as of the date when the account became due—say at the end of each six months beginning in 1905—and by applying the store account as a credit on the notes in 1905, 1906, 1907, 1908, 1909, and 1910 save them from their being barred by the statute? We think not.

[1] When the creditor owes a claim or demand to the debtor, he cannot, without the consent or direction of the debtor, apply what he owes as a credit on the note or demand he holds against the debtor; and if he makes the application without the direction or consent of the debtor it will not interrupt the running of the statute of limitation. The reason for this rule is that the debtor, who is, to the extent of his demand, a creditor, has the right to direct and control the disposition that shall be made of his debt, and to apply, or not apply, as he pleases, to the payment of demands that he owes; and this privilege cannot be taken out of his hands by the mere act of another person.

As said in *Brown v. Osborne*, 136 Ky. 456, 124 S. W. 405: "The mere putting of a credit on an open account or note, unless there is evidence showing that the amount represented by the credit was paid by the

debtor on the note or account, will not be sufficient, in itself, to stop the statute from running. *Hopkins v. Stout*, 6 Bush, 375; *Frazer v. Frazer*, 13 Bush, 397. If the mere entry of a payment as a credit upon an open account or note would, of itself, have this effect, it would be an easy matter for the creditor, if he felt so disposed, to evade the plea of limitation and stop the statute from running against any account or note that was barred." To the same effect are *Anderson v. Baxter*, 4 Or. 105; *Nash v. Woodward*, 62 S. C. 418, 40 S. E. 895; *Phillips v. Mahan*, 52 Mo. 197; *Kyger v. Ryley*, 2 Neb. 20. As appellant could not do this before the notes were barred, of course she could not, after some of the notes were barred, apply, as a credit on these notes, the account she owed H. E. Samuel, and thereby restore them to life.

[2] If H. E. Samuel during his life, and after some of the notes had been barred, had directed her in a general way to credit his notes by the amount of her account, she could not have applied any part of the account on the barred notes, either in part payment of them, or as a payment that would arrest the running of the statute as to the balance of the notes. As she could not have done this if he were living, neither can she do it after his death.

There is some conflict in the cases as to the right of a creditor to apply undirected payments to barred notes; but we think the sound and correct rule is that where a debtor owes a creditor several notes, and he makes a payment without directing its application to either of the notes, the creditor may apply it to whichever one he pleases, except that he may not apply it in part payment of or as a credit on a note that is barred by limitation, and thereby restore life to the note. It will not be presumed that a debtor, in making a payment to a creditor who holds several notes against him, intended, in making the payment, that it should be applied to a nonenforceable note, or to impart life into notes that were then dead; nor will the creditor be permitted to so apply the payment, unless with the consent of the debtor. The presumption will be, if no direction is given by the debtor, that he intended the payment to be applied as a credit on subsisting, enforceable debts against him, and so if the creditor holds several subsisting, enforceable notes, none of which are barred by limitation, he will be at liberty to credit each of them by a part of the payment, unless directed otherwise to do by the debtor, and may thus prolong the life of all the notes; but the debtor has the exclusive right, in making a payment, to direct the particular debt he desires it applied to, and this direction the creditor must observe. *Anderson v. Nystrom*, 103 Minn. 168, 114 N. W. 742, 13 L. R. A. (N. S.) 1141, 123 Am. St. Rep. 320, 14 Ann. Cas. 54; *Wilden*

v. McAllister, 91 Mo. App. 446; Id., 178 Mo. 732, 77 S. W. 730; Blake v. Sawyer, 83 Me. 129, 21 Atl. 834, 12 L. R. A. 712, 23 Am. St. Rep. 762; Armour Packing Co. v. Vinegar Bend Lumber Co., 149 Ala. 205, 42 South. 866, 13 Ann. Cas. 951.

The judgment is affirmed.

DEPOSIT & SAVINGS BANK v. WRIGHT.

(Court of Appeals of Kentucky. Dec. 17, 1912.)

PLEDGES (§ 30*)—ENFORCEMENT OF MORTGAGE PLEDGED—DILIGENCE—WAIVER.

Where a bank assigned a note, secured by mortgage, to plaintiff as security for a loan, agreeing at the time to take up the note as soon as it could, such agreement constituted a waiver of diligence on plaintiff's part in enforcing a judgment on the security; plaintiff being entitled to recover against the bank on its oral promise at any time within the statute of limitations.

[Ed. Note.—For other cases, see Pledges, Cent. Dig. §§ 75-85; Dec. Dig. § 30.*]

Appeal from Circuit Court, Warren County.

Action by D. W. Wright, trustee, against the Deposit & Savings Bank. Judgment for plaintiff, and defendant appeals. Affirmed.

John M. Galloway and Galloway & Milliken, all of Bowling Green, for appellant. W. B. Gaines, of Bowling Green, for appellee.

CLAY, C. On July 5, 1906, P. E. Stiff being indebted to the Deposit & Savings Bank of Bowling Green, Ky., on an overdraft, he and his wife, Clara E. Stiff, executed and delivered to the bank a promissory note for that amount, bearing interest at the rate of 6 per cent. from date, and due and payable one day after date. To secure the payment of this note, they executed and delivered to the bank a mortgage on a house and lot in Bowling Green belonging to Clara E. Stiff. During the panic in the fall of 1907, the bank was in need of cash, and asked D. W. Wright if he had any money which he would let the bank have. Wright, as trustee for a client of his, had on hand the sum of \$234.88. He signified his willingness to let the bank have this sum provided the bank would secure him with good paper. Thereupon the bank produced the Stiff note. It appears that both Wright and the vice president of the bank, who was the bank's active officer, and attended to such matters for the bank, believed that P. E. Stiff was insolvent. The note was accepted by Wright in the belief and upon the assurance of the vice president that the note was good by reason of the mortgage securing it. Both Wright and the then vice president of the bank also testified that the vice president agreed on behalf of the bank that, if Wright would make the loan, the bank would take up the note as

soon as it could. On September 29, 1910, Wright and the bank as parties plaintiff brought suit against the Stiffs, wherein they asked for a personal judgment against them and the enforcement of the mortgage lien. Clara Stiff pleaded that she was an infant at the time the mortgage was executed, and, upon this fact being conclusively shown, the action as to her was dismissed on April 11, 1911. Prior to that time, and on November 12, 1910, personal judgment had been rendered against P. E. Stiff. Execution was not issued on this judgment until December 11, 1911. On the same day that it was issued it was returned no property found. On December 11, 1911, D. W. Wright, trustee, brought this action to recover on the note in question. The bank pleaded want of diligence on the part of plaintiff, not only in bringing the suit, but in having execution issued on his personal judgment against P. E. Stiff. Plaintiff pleaded that he was excused from diligence in bringing the suit because of the bank's agreement to take up the note as soon as it could, and because of the other facts above set out. The chancellor rendered judgment in favor of the plaintiff, and the bank appeals.

Whether or not want of diligence in bringing suit may be relied upon to defeat a recovery on a note in a case like this is a question which we deem it unnecessary to decide. There is practically no dispute as to the circumstances under which the note in question was assigned and the loan by the plaintiff to the bank was made. The bank was in need of funds. It applied to plaintiff for a loan. It agreed not only to give plaintiff the note in question as security for the loan, but at the same time agreed to take the note up as soon as it could. This separate undertaking on the part of the bank to take up the note as soon as it could was sufficient to dispense with and constituted a waiver of diligence in bringing suit and having execution issued on the judgment, even if diligence was required in order to hold the bank liable; and, suit having been brought before the oral promise of the bank was barred by the statute of limitations, we conclude that the chancellor properly adjudged a recovery in favor of the plaintiff.

Judgment affirmed.

DOCKINS et al. v. DUKES.

(Court of Appeals of Kentucky. Dec. 17, 1912.)

1. APPEAL AND ERROR (§ 597*)—RECORD—REQUISITES.

Civ. Code Prac. § 737, prescribing the manner of preparing transcripts on appeal, and court rule 27 (149 S. W. viii), requiring the court to presume, after submission, that the record brought up on schedule, as prescribed, is the complete record, contemplate the filing of a schedule, on appeal, of so much of the

record as is material to the appeal; and entire parts of the record must be ordered, and an entire deposition of a witness, or an entire pleading, must be brought up if any part of it is brought up.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2627-2638; Dec. Dig. § 597.*]

2. APPEAL AND ERROR (§ 907*) — PRESUMPTIONS—CORRECTNESS OF DECISION OF TRIAL COURT.

The court, on appeal, must presume that the trial court decided properly, in the absence of the evidence heard by it.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2899, 2911-2915, 2916, 3673, 3674, 3676, 3678; Dec. Dig. § 907.*]

3. BOUNDARIES (§ 43*) — JUDGMENT—AGREED ORDER—EFFECT.

An agreed order, in a suit involving title to land, that the chain of title to plaintiff's boundary, as set out in the petition, is deducible of record, that the chain of title to defendant's boundary, as shown by the deed filed, is deducible of record, and that the boundaries filed are the boundaries as shown by the surveyor's books and deeds, and that any deeds or records that may be required for a correct determination are considered filed, and may be supplied, merely avoids the introduction of evidence of claim of title on either side, but does not show which title is the older; and, though plaintiff's title from the commonwealth is superior, defendant and those under whom he claims may have acquired title by adverse possession, and judgment need not necessarily be entered for plaintiff.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. § 208; Dec. Dig. § 43.*]

Appeal from Circuit Court, Muhlenberg County.

Action by T. F. Dockins and another against J. W. Dukes. From a judgment of dismissal, plaintiffs appeal. Affirmed.

Milton Clark, of Greenville, and M. M. Logan and Ora E. Hazell, both of Frankfort, for appellants. Newton Belcher and Belcher & Sparks, all of Greenville, for appellee.

HOBSON, C. J. T. F. Dockins and L. F. Dockins brought this suit against J. W. Dukes, alleging in their petition that they were the owners and in actual possession of about 6 acres of land inclosed by a fence built by them, and bounded on one side by other land owned by them, on another side by the defendant's land, and on the third side by the lands of one George Foley. They alleged that Dukes had wrongfully built a fence around their six-acre tract of land, so as to include it in a boundary of land fenced up by him; that they had removed a portion of the fence, so as to give them access to their land; and that he was threatening to rebuild the fence. They prayed that he be enjoined from rebuilding the fence, or interfering in any way with them in the possession of the six acres of land. He filed an answer, in which he traversed the allegations of the petition and stated, in substance, that the land "was and is owned by said defendant." In their reply to the answer

the plaintiffs denied that the fence removed by the plaintiffs was around the land which was or is owned by the defendant, or that when defendant built said fence he built it around the land owned by him. After the pleadings had been made up, the following agreed order was entered: "By agreement, it is ordered that the chain of title to the plaintiffs' boundary of land, as set out in the petition, is deducible of record from the commonwealth, and was patented to Henry W. Hughes; that the chain of title to the defendant's boundary, as shown by the deed filed herein, is deducible of record from the commonwealth, and was patented to Thos. Dennis. It is further agreed that the boundaries filed herein are the boundaries of the John Dennis and Jernigan tracts and the Schafer tract, as shown by the surveyor's books and the deeds, and that any other deeds or records that may be required for a correct determination of this action are hereby considered filed, and may be supplied upon request of the court." Proof was taken, and on final hearing the circuit court dismissed the plaintiffs' petition. They appeal.

[1] They filed in the circuit court a schedule, which directed the clerk to copy, among other things, the first four pages of T. F. Dockins' deposition, and the first page of J. W. Dukes' deposition. No other part of the proof heard by the circuit court was included in the schedule. Rule 27 (149 S. W. viii) of this court was adopted some years ago and is as follows: "Hereafter this court will conclusively presume, after submission, that records brought up to this court on schedule filed in the clerk's office of the inferior court, as prescribed by section 737 of the Code of Practice, is the complete record, and that all parties interested have consented to try the appeal on such record. Before submission the court will in its discretion, allow a transcript of other parts of the record to be filed when deemed necessary in furtherance of justice."

Section 737 of the Code, as well as the rule, contemplates the filing of a schedule ordering for the appeal as much of the record as is material to the appeal. Entire parts of the record must be ordered, and not fragments of the different parts of the record. Neither the rule nor the statute contemplates that a party may order one question and answer of a deposition, or one page of a pleading. The entire deposition, or the entire pleading, must be brought up if any part of it is brought up. The purpose of the rule is to avoid the cost of copying unnecessary parts of the record. But where a pleading, or the testimony of a witness, or any other paper, is copied the whole paper must be copied, and not a portion of it.

[2] In the absence of the evidence heard before the circuit court, we must presume that the circuit court held properly, as we cannot consider, for any purpose, the frag-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

ments of the two depositions contained in the transcript.

[3] But it is insisted for the plaintiffs that, under the pleadings and the agreed order, judgment should have been entered for them. We do not so understand the agreement. It is agreed that the chain of title to the plaintiffs' boundary of land, as set out in the petition, is deducible of record from the commonwealth, and that the chain of title to the defendant's boundary, as shown by the deed filed, is deducible of record from the commonwealth. This agreement seems to have been made simply to avoid the introduction of the evidence making out the chain of title on either side. The agreement does not show which title is the older; and, even though the plaintiffs' title from the commonwealth was superior, the defendant and those under whom he claims may have acquired title by adverse possession. The defendant's answer was certainly understood by the plaintiffs to assert title in him to the land in controversy. Even if his allegations were not full enough on this subject, the statements in the reply made up the issue. The agreed order was simply as to the chain of title on both sides, and settled no other question in the case.

Judgment affirmed.

MADDEN v. MEEHAN et al.

(Court of Appeals of Kentucky. Dec. 13, 1912.)

1. APPEAL AND ERROR (§ 195*)—RESERVATION OF GROUNDS—NECESSITY OF OBJECTION BELOW.

An objection to the filing of an amended answer cannot be raised on appeal, where there was no such objection below, nor exception taken to the order filing it.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1490; Dec. Dig. § 195.*]

2. APPEAL AND ERROR (§§ 917, 919*)—REVIEW—PRESUMPTIONS.

Where it does not appear from the record on appeal that the trial court ruled on a demurrer to an amended answer or a written motion to strike from the answer certain indicated parts thereof, or that an exception was taken to its failure to pass on them, it will be presumed that the motion and demurrer were waived by the filing of a reply.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3708-3709, 3713; Dec. Dig. §§ 917, 919.*]

3. APPEAL AND ERROR (§§ 549, 671*)—REVIEW—CONDITION OF RECORD.

Where on an appeal the record does not contain the evidence, and the instructions given, and refused, while copied in the record, were not made a part thereof by a proper bill of exceptions, the reviewing court can only determine whether the pleadings support the verdict.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2441-2451, 2867-2872; Dec. Dig. §§ 549, 671.*]

4. ARREST (§ 63*)—POLICE OFFICER—NECESSITY OF WARRANT.

Under Ky. St. §§ 1309-1311, which forbidding the carrying of a pistol, require ministerial officers to apprehend all persons guilty

of such offense, and providing for the fining of an officer who willfully refuses so to do, a police officer who, while officially investigating a charge of keeping a disorderly house, discovered that the person charged, with whom he was talking, had a pistol concealed on his person, was justified in immediately arresting such person, though he had previously requested him to accompany him to the police station and the person arrested consented.

[Ed. Note.—For other cases, see Arrest, Cent. Dig. §§ 145-156; Dec. Dig. § 63.*]

5. APPEAL AND ERROR (§ 916*)—PRESUMPTIONS—SUFFICIENCY OF PLEADING.

On appeal, in testing the sufficiency of an answer to support a verdict for the defendant, the facts alleged therein must be taken as true.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3699-3705; Dec. Dig. § 916.*]

6. ARREST (§ 63*)—CRIMINAL CHARGES—AUTHORITY TO ARREST WITHOUT WARRANT.

Ky. St. § 2885, confers upon police officers of a city of the first class authority to arrest all persons violating any law or ordinance for the suppression of crimes or offenses "with or without a warrant." Cr. Code Prac. § 36, provides that a peace officer may make an arrest either in obedience to a warrant, or without a warrant when a public offense is committed in his presence, or when he has reasonable ground for believing that the person arrested has committed a felony. *Held*, that a policeman cannot go beyond the restrictions of the Criminal Code, which is merely explanatory of the common law, and section 2885 cannot therefore be construed to authorize a policeman of a city of the class named to make an arrest for a crime committed out of his presence without a warrant.

[Ed. Note.—For other cases, see Arrest, Cent. Dig. §§ 145-156; Dec. Dig. § 63.*]

Appeal from Circuit Court, Jefferson County, Common Pleas Branch, Second Division.

Action by W. C. Madden against Pat Meehan and others. From a judgment for defendants and the overruling of a motion for new trial, plaintiff appeals. Affirmed.

T. A. McDonald, of Louisville, for appellant. Joseph S. Lawton, of Louisville, for appellees.

SETTLE, J. This action was brought by the appellant against the appellee Pat Meehan, a policeman of the city of Louisville, and the sureties on his official bond, to recover damages for his alleged false arrest at the hands of the officer; it being averred in the petition that the arrest was maliciously made, without probable cause and without a warrant, for an alleged misdemeanor, to wit, keeping a disorderly house, which was not committed in the officer's presence and of which appellant was not guilty. On the trial the jury returned a verdict in favor of appellees, upon which judgment in their behalf was properly entered. In due course appellant filed motion and grounds for a new trial, but the motion was overruled, and he has appealed.

His first complaint is that the trial court erred to his prejudice in permitting the filing of appellee's amended answer. The original answer merely traversed the averments

of the petition. The amendment denied that appellant was arrested for keeping a disorderly house, and alleged that the arrest was made because of his carrying concealed upon his person a deadly weapon, a pistol, which offense, as further alleged, was committed in the presence of the officer, and for that reason that the arrest was legally made by the latter without a warrant.

[1] As the record falls to show that appellant objected to the filing of the amended answer or that he excepted to the order filing it, the objection will not now be considered by us, as it cannot be raised for the first time on appeal.

[2] It is also insisted for appellant that the trial court should have sustained his demurrer to the answer as amended, and also his written motion to strike from the amended answer certain parts thereof indicated in the motion. As it does not appear from the record that the court ruled either on the demurrer or motion, that it was asked to do so, or that an exception was taken to its failure to pass on them, we cannot on this appeal say that its failure to sustain them was error, but will presume that both were waived by the filing of appellant's reply.

Appellant's most serious contention is that neither the answer as amended, nor the evidence introduced in appellee's behalf, presented a good defense to the action; in view of which it is claimed that the court, instead of instructing the jury as was done, should have submitted the case to them under instructions advising them that the arrest was illegal and defining the measure of damages recoverable.

[3] The record does not contain the evidence introduced on the trial, and, while the instructions that were given, as well as those offered by appellant and refused, are copied in the record, they have not by bill of exceptions filed or approved by the court below been identified or made a part of the record. This being true, it only remains for this court to determine whether the pleadings support the verdict. *Martin v. Richardson*, 94 Ky. 183, 21 S. W. 1039, 14 Ky. Law Rep. 847, 19 L. R. A. 692, 42 Am. St. Rep. 353; *Bibb v. Miller*, 11 Bush, 306.

[4] We think the facts alleged in the amended answer presented a good defense to the action. Stripped of certain redundant expressions and matters of evidence set out in the first paragraph, it, in substance, alleges that the appellee Meehan, accompanied by one Williams, went in his official capacity, as a policeman, to interview appellant with respect to a charge of his maintaining a disorderly house in the city of Louisville, made by Williams, which is an offense under an ordinance of that city; that, after finding appellant at or near his home, the officer entered into a conversation with him as to the offense charged, which conversation was prolonged until the parties arrived at a house in the neighborhood, to which they re-

paired at the officer's request, for the purpose of investigating a complaint made of appellant by the resident thereof; that while at this house the discovery was made by the officer that appellant had concealed upon his person a pistol, which caused his immediate arrest at the hands of the officer.

It is true that we find it stated in the first paragraph of the amended answer that the officer, before discovering appellant's possession of the pistol, had requested him to go to police headquarters with him, to which the latter consented; but it does not appear from any fact alleged that he had placed him under arrest before the discovery of the pistol. On the contrary, it is distinctly alleged that the officer had not done so, and that the discovery by him of the pistol concealed upon appellant's person was the sole cause of the arrest.

[5] As in testing the sufficiency of the amended answer the facts alleged therein should be taken as true, we must conclude that it presents a good defense. Carrying concealed a pistol upon or about one's person is an offense defined and punished by section 1309, Kentucky Statutes. Section 1310, Kentucky Statutes, makes it the duty of ministerial officers to apprehend all persons guilty of this offense, and section 1311 provides that any such officer who shall knowingly and willfully refuse to discharge any of the duties required of him by section 1310 shall, upon indictment and conviction, be fined not less than \$100 nor more than \$500. As appellant was discovered by Meehan in possession of the pistol concealed upon his person, the latter had the right to arrest him without a warrant or other process, as the offense was committed in his presence; and, in the absence from the record of a bill of exceptions containing the evidence, we must assume that it conduced to prove that this was the offense for which he was arrested, and that the arrest without a warrant was authorized because of its commission in the presence of the officer.

[6] The brief of appellee's counsel claims for the appellee Meehan a right not asserted by the amended answer, that of authority to make an arrest for a misdemeanor without a warrant, even if the offense be not committed in his presence; such power, it is insisted, being conferred upon police officers of a city of the first class, like that of Louisville, by section 2885, Kentucky Statutes, which, after generally defining their duties, clothes them with authority "to repress and restrain all unlawful or disorderly conduct or practices therein; enforce or prevent the violation of all laws and ordinances in force in said city; and for these purposes, *with or without a warrant*, to arrest all persons guilty of violating any law or ordinance for the suppression of crimes or offenses."

We are far from sustaining this contention. Waiving consideration of the question, whether such power as is claimed for the police

officer would amount to a violation of the provisions of section 10, Bill of Rights, Constitution, or those of subsection 29 of section 59 or section 60 of that instrument, we are clearly of opinion that it is not conferred by the section of the statute, *supra*. The authority it gives to make an arrest, "with or without a warrant," is no greater than that which, from time immemorial, has been exercised by peace officers under the common law. The expression, "with or without a warrant," has no other meaning than that a policeman of the city of Louisville, like other peace officers, may, without a warrant, make an arrest for a misdemeanor if committed in his presence, or for a felony if he has reasonable grounds for believing that the person arrested has committed a felony. That there may be no doubt as to the duties and powers of peace officers, in the matter of making arrests, they are specifically set forth by section 36, Criminal Code, which provides: "A peace officer may make an arrest—(1) In obedience to a warrant of arrest delivered to him. (2) Without a warrant when a public offense is committed in his presence, or when he has reasonable grounds for believing that the person arrested has committed a felony." The powers here mentioned are cumulative and meant by the Code to be merely explanatory of the common law; and, as a policeman has no more power than any other peace officer, he cannot go beyond the restrictions they impose.

In *Jamison v. Gaernett*, 10 Bush, 221, we had under consideration a provision of the then charter of the city of Louisville, containing, with reference to the powers of its police officers in making arrests, the words "with or without a warrant" found in section 2885, Kentucky Statutes; but we therein held that they were not intended to give the police of that city any further power than that conferred upon other peace officers by the general law. In the opinion we said: "The provision of the charter referred to is as follows: 'Policemen may, with or without a warrant, arrest persons guilty of offenses against the laws or ordinances of the city.' We do not regard this enactment as necessarily conflicting with the general law which defines and limits the power of the arresting officer; but, if we did so construe it, we should hesitate to decide that it was not an infringement of the constitutional guaranty of security to the people, in their persons, houses, papers, and possessions against unreasonable seizures and searches."

In *Weaver v. McGovern*, 122 Ky. 1, 90 S. W. 984, 28 Ky. Law Rep. 883, the same question was again before us, and we again held that a police officer only had the right to make an arrest for a misdemeanor without a warrant where the offense was committed in his presence. The facts were that a policeman had been detailed at a polling place to preserve order, and there was a

great noise and confusion in the room, such as to indicate that a fight was in progress, and some one cried out for help. On the state of case thus presented it was held that the arrest of one of the persons present by the police officer was justifiable, as there was a commission of a public offense, by the person arrested, in the presence of the officer. It will be found upon examination that the doctrine announced in *Jamison v. Gaernett*, and *Weaver v. McGovern*, *supra*, has been approved in the following cases: *Mockabee v. Commonwealth*, 78 Ky. 380; *Fleetwood v. Commonwealth*, 80 Ky. 2; *Palmer v. Commonwealth*, 6 Ky. Law Rep. 510; *Wright v. Commonwealth*, 85 Ky. 123, 2 S. W. 904, 8 Ky. Law Rep. 718; *Wing v. Commonwealth*, 7 Ky. Law Rep. 216; *Dilger v. Commonwealth*, 88 Ky. 550, 11 S. W. 651, 11 Ky. Law Rep. 67; *Curran v. Taylor*, 92 Ky. 537, 18 S. W. 232, 13 Ky. Law Rep. 750; *Riggs v. Commonwealth*, 33 S. W. 413, 17 Ky. Law Rep. 1015; *Lynam v. Commonwealth*, 55 S. W. 686; *Hughes v. Commonwealth*, 41 S. W. 294, 19 Ky. Law Rep. 497; *Johnson v. Collins*, 89 S. W. 253, 28 Ky. Law Rep. 375; *Reed v. Commonwealth*, 125 Ky. 126, 100 S. W. 856, 30 Ky. Law Rep. 1212; *Myers v. Dunn*, 126 Ky. 548, 104 S. W. 352, 31 Ky. Law Rep. 926, 13 L. R. A. (N. S.) 881; *Commonwealth v. Robinson*, 84 S. W. 319, 27 Ky. Law Rep. 14; *Helm v. Commonwealth*, 81 S. W. 270, 26 Ky. Law Rep. 165; *Hendrickson v. Commonwealth*, 81 S. W. 266, 26 Ky. Law Rep. 224; *Commonwealth v. McCann*, 123 Ky. 247, 94 S. W. 645, 29 Ky. Law Rep. 707; *Stevens v. Commonwealth*, 124 Ky. 32, 98 S. W. 284, 30 Ky. Law Rep. 290; *Franks v. Smith*, 142 Ky. 232, 134 S. W. 484.

The conclusion reached in *Commonwealth v. Marcum*, 135 Ky. 1, 122 S. W. 215, 24 L. R. A. (N. S.) 1194, does not conflict with the doctrine announced in the cases *supra*. In that case we held that section 806, Kentucky Statutes, which authorizes the conductor of a railroad train either to arrest or put off the train persons who are disorderly and boisterous thereon, in his presence, or to deliver such disorderly person to a peace officer at the first station, to be placed under arrest by the latter without a warrant, does not violate the Constitution, section 10, Bill of Rights, providing that the people shall be secure from unreasonable searches and seizures. It appears from the facts of the case that a peace officer on the train, at the instigation of the conductor, attempted to arrest John Whittaker, a passenger, for drunkenness, boisterous conduct, and flourishing a pistol. Whittaker resisted the arrest and assaulted the officer, who, in self-defense, shot and killed him. Although the opinion might safely have justified the action of the officer upon the ground of his personal knowledge of the offense committed by Whittaker, it seems to go further and hold that the statute is a wholly reasonable and

necessary enactment, because required for the safety of passengers on trains, and that trains cannot be held at stations until the conductor goes to a peace officer and swears out a warrant for the arrest of offenders. The opinion, however, distinguishes the case from that of *Jamison v. Gaernett*, supra, and expressly approves the doctrine therein announced; the opinion on that aspect of the case saying: "The question as to whether a search or seizure of the person of a citizen is reasonable under the Constitution is a relative one. It might not be reasonable to seize or search the person of a citizen for a misdemeanor, where he was at large in the city or country, and where the circumstances would generally be such that a warrant could be secured in advance of the arrest. But it would not be reasonable to require the officer to wait for a warrant if the offense was a felony, because here the gravity of the offense and the importance to the public of the prompt seizure of the criminal overrides the unreasonableness of the search or seizure without a warrant. And so, in the case at bar, the circumstances which require the arrest of an offender against the statute are such as to make it reasonable that a peace officer should be authorized upon the request of the conductor of the train to arrest the violator without a warrant and without the offense for which the arrest was to be made being done in the presence of the officer."

We approve the rule laid down in that case, but the case at bar rests upon a wholly different state of facts, as the arrest seems to have been made by the officer on the street for an offense committed in his presence, and the pleadings, fairly construed, support the verdict declaring that it was so done, and no reason is presented for reversing the judgment.

It is therefore affirmed.

SLUSHER v. WELLER.

(Court of Appeals of Kentucky. Dec. 13, 1912.)

1. INFANTS (§ 47*)—CONTRACTS—VALIDITY.

An infant is not bound by contract made for him by another person purporting to act for him, unless such person has been appointed as guardian or next friend, or is in some manner authorized by law to act for him.

[Ed. Note.—For other cases, see *Infants*, Cent. Dig. §§ 99, 101-108, 110; Dec. Dig. § 47.*]

2. EXECUTORS AND ADMINISTRATORS (§ 87*)—INFANTS (§ 50*)—CONTRACTS—NECESSARIES—PROFESSIONAL SERVICES OF ATTORNEY.

An infant is bound for necessities furnished him, including food and maintenance, medical attendance furnished when his health or physical condition requires it, an education suitable to his station in life, and the professional services of an attorney in enforcing or protecting his civil or property rights, or in defending him in a criminal prosecution; but where an

administrator was appointed for decedent, leaving an infant wife and son and a claim against a railroad for wrongful death, which under Const. § 241, vested in the administrator, it was not necessary that the infants be advised as to a settlement.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 384-392; Dec. Dig. § 87; **Infants*, Cent. Dig. §§ 114, 115, 117-127; Dec. Dig. § 50.*]

3. DEATH (§ 31*)—EMPLOYMENT OF ATTORNEY—PERSONS AUTHORIZED TO EMPLOY.

Under Const. § 241, vesting an action for wrongful death in the decedent's personal representative, the distributees have no authority to contract with an attorney in relation thereto.

[Ed. Note.—For other cases, see *Death*, Cent. Dig. §§ 35-46; Dec. Dig. § 31.*]

4. EXECUTORS AND ADMINISTRATORS (§ 485*)—COMPENSATION—ATTORNEY ACTING AS ADMINISTRATOR.

An attorney, after qualifying as administrator, cannot charge for services which he renders as attorney for himself.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 2068; Dec. Dig. § 485.*]

5. EXECUTORS AND ADMINISTRATORS (§ 496*)—COMPENSATION—CONTRACTS—EFFECT OF INVALIDITY.

Where an attorney, upon request of an infant widow, qualified as administrator for her accommodation, and without the service of any other attorney and in a fair and proper way obtained \$3,000 in settlement of her claim for the wrongful death of decedent, he was, in view of the statute limiting an administrator's commission to 5 per cent., entitled to 5 per cent., or \$150, for services as administrator.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 2107, 2109-2113, 2115, 2116; Dec. Dig. § 496.*]

Appeal from Circuit Court, Bell County.

Action by Sally Slusher against N. J. Weller. Judgment for defendant, and plaintiff appeals. Reversed and remanded for judgment.

E. N. Ingram and N. R. Patterson, both of Pineville, for appellant. N. J. Weller, of Pineville, for appellee.

HOBSON, C. J. In August, 1907, Robert Pearce, a brakeman on the Louisville & Nashville Railroad, was killed in a tunnel. He left surviving him his widow, Sally Pearce, who was then 20 years old, and an infant child. Some propositions were made by the railroad company to settle the claim for his death, and \$2,000 was offered. In this condition of things, the widow, Sally Pearce, went with her uncle, Robert Goodin, to the office of N. J. Weller, an attorney at Pineville, to consult him. They proposed to have Robert Goodin qualify as administrator, and also consulted the attorney as to what amount they should take from the railroad company. He advised them that they ought not to settle under any circumstances for less than \$3,000, and said he thought that much more might be recovered. When they saw the county judge, he refused to allow Goodin to qualify as administrator, but finally said that he would allow Weller to quali-

fy. In this condition of things, it being important that some one should qualify at once, Weller finally agreed to qualify as administrator, telling Goodin and Mrs. Pearce that he would charge only \$10 or \$15 for making the bond. After he had qualified, he gave them a letter to show the railroad company authorizing them to make a settlement with the railroad company, the money to be paid him. They then made a settlement with the railroad company for \$3,000. The money was paid to Weller as administrator. When he came to settle his account, he charged and was allowed by the county court a fee of \$300 for his advice and services as attorney in the matter before he qualified as administrator. Sally Pearce, who is now Sally Slusher, brought this suit to surcharge the settlement, and on final hearing the circuit court dismissed her petition. She appeals.

[1, 2] It is true that both she and her child were infants, and that Robert Goodin was without authority to bind either of the infants, the rule being that an infant is not bound by a contract made for him by another person purporting to act for him, unless such person has been appointed his guardian or next friend, or is authorized in some manner by law to act for him. 22 Cyc. 584. An infant is bound for necessities furnished him. The rule as to what are necessities for an infant is thus stated in 22 Cyc. 593: "Necessaries for an infant include support and maintenance, food, lodging, and clothing, medicines, and medical attendance furnished him when his health or physical condition require them, and an education suitable to his station in life. The professional services of an attorney may be a necessity for which an infant is bound, whether such attorney be employed to enforce or protect the civil or property rights of the infant, or to defend him in a criminal action or prosecution." Many authorities are cited in the notes sustaining the text. It was necessary for the infants that an administrator be appointed for the decedent, but it was not necessary for them that they should be advised how to obtain a settlement with the railroad company, or what settlement they should make. The cause of action was in the administrator under the Constitution. In *Hill v. Johnson*, 15 Ky. Law Rep. 368, the husband and wife employed attorneys to sue the railroad company for the death of the wife's son, and agreed to pay them a fee equal to one-half of the recovery; the wife being the sole distributee. Afterward they had an administrator appointed who settled with the railroad company for \$2,000. The

attorneys then brought suit for their fee. It was held that neither the wife nor the husband nor the two together had any cause of action, as the right of action was in the personal representative by virtue of section 241 of the Constitution, and that there could be no recovery by the attorneys. We think the principle announced is sound.

[3] The right of action being vested by the Constitution in the personal representative, contracts should not be sustained made by the distributees; for to do this would beget confusion, and the personal representative would be unable to control matters as the Constitution contemplated he should.

[4] After Weller qualified, being the administrator, he could not charge for services which he rendered as attorney for himself. This we have held in a number of cases.

[5] But in view of all the evidence, we do not think he should be left without any compensation as administrator. The agreement that he would only charge \$10 or \$15 for making the bond evidently contemplated \$10 or \$15 more than he was otherwise to receive; that is, the agreement was that he was not to charge commissions as administrator in addition to a lawyer's fee. But, when he is allowed no fee as attorney, he should be allowed a reasonable commission as administrator. They could not have expected that he should serve them for nothing under the circumstances. He appears from the evidence to have treated them perfectly fairly and to have acted with entire propriety. He qualified as administrator for their accommodation and at their request. It is clear from all the evidence that they went to him and employed him in the usual manner as their attorney. He had had no communication with them before they came to his office, and had never seen Mrs. Pearce before. The proof in the record by a number of witnesses is to the effect that \$300 is a reasonable charge for his services. The circuit court who knew the witnesses and the parties as well as the scale of fees obtaining in the locality held the charge reasonable. He made no charge for services as administrator. The only allowance made to him was \$300 for his services as attorney before he qualified as administrator. The statute limits an administrator's commission to 5 per cent., and under all the evidence we conclude that he should be allowed 5 per cent. on \$3,000, or \$150 for his services as administrator. To the extent of \$150 the settlement should be corrected.

Judgment reversed, and cause remanded for a judgment as above indicated.

BALDWIN'S EX'R v. BARBER'S EX'RS.

(Court of Appeals of Kentucky. Dec. 11, 1912.)

1. WILLS (§ 114*)—REQUISITES—EXECUTION—ATTESTATION.

A writing of a decedent which is not holographic in character, and is not attested by witnesses, could not be probated as a part of her will.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 277-279; Dec. Dig. § 114.*]

2. GIFTS (§ 21*)—INTER VIVOS—NECESSITY OF DELIVERY—DELIVERY TO DONOR'S AGENT.

The delivery of a writing remitting future interest on a portion of a note to the agent of the person delivering, who had also been named as executor in her will, and who had never represented the obligor on the note, would not pass the writing from the control of its maker so as to render the act valid as a gift inter vivos.

[Ed. Note.—For other cases, see Gifts, Cent. Dig. § 36; Dec. Dig. § 21.*]

3. WILLS (§ 405*)—CONTESTS—ATTORNEY'S FEES—PAYMENT FROM ESTATE.

Under Ky. St. § 489, which provides that, in actions for the settlement of estates, the court shall allow the legatees prosecuting the cause reasonable compensation for their trouble, and necessary expenses, the portion of the common fund due a legatee whose share as a distributee was increased by a judgment obtained in an action to have certain codicils set aside as fraudulent is chargeable with a pro rata portion of the burden of counsel fees and expenses, where the legatee did not employ his own counsel to look after his presumed interests.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 879-884; Dec. Dig. § 405.*]

4. WILLS (§ 402*)—APPEAL—RENDERING FINAL JUDGMENT—FIXING ATTORNEY'S FEES.

A court on appeal from a will contest will not fix counsel fees; that being a matter for the lower court upon evidence taken.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 875; Dec. Dig. § 402.*]

On petition for rehearing. Reversed and remanded.

For original opinion, see 148 Ky. 370, 146 S. W. 1124.

W. H. Fulton, Kelley & Cherry, and G. S. & J. A. Fulton, all of Bardstown, for appellants. Morgan Yewell and Nat W. Halstead, both of Bardstown, W. C. McChord, of Springfield, Edelen & Davis, of Frankfort, McCandless & Larimore, of Munfordville, and C. T. Atkinson, of Bardstown, for appellee.

MILLER, J. The history of this litigation may be found in the original appeal of Barber's Ex'r v. Baldwin, 138 Ky. 710, 128 S. W. 1092, and in the opinion upon this appeal of the settlement suit of Baldwin's Ex'r v. Barber's Ex'rs, 148 Ky. 370, 146 S. W. 1124. In the petition for a rehearing, our attention is called to the fact that in the opinion upon this appeal (148 Ky. 370, 146 S. W. 1124) we failed to pass upon the ruling of the circuit court which failed to charge interest on the note of Lena Barber. That

question was raised by the fifth exception to the commissioner's report, but, on account of the many other questions discussed, it was inadvertently overlooked. We will now dispose of it.

By codicil C No. 3, Lena Barber was substituted as legatee in place of her husband, Philetus S. Barber. She owed Cecilla Barber \$7,115.11, evidenced by a note. Cecilla Barber died on May 15, 1908. About four years previous to her death, however, Cecilla Barber wrote the following letter to W. C. McChord, who was her agent, and had been named as executor in her will, to wit: "Springfield, Ky., August 15th, 1904. Mr. W. C. McChord, Springfield, Ky.—Dear Sir: In view of the fact that my grandchildren are not paying interest on the advancements heretofore made by me, and as the advancements amount to about half as much as the advancement to P. S. Barber and the note which I hold against his wife, Lena Barber. You will therefore only collect from Lena Barber from this date interest on Four Thousand Dollars of her note, the residue of said interest from this date I now remit to her. Cecilla Barber." The executors paid Lena Barber her legacy of \$5,000 on February 14, 1911, with interest to that date. In their settlement the executors charged her interest on \$4,000 from August 15, 1904, to February 20, 1911, the date of the report, but did not charge or collect any interest on the balance of her note, amounting to \$3,115.11, after August 15, 1904. They justified their failure to collect interest on the \$3,115.11 under the letter above set forth. Amelia Baldwin's executor contends (1) that the letter of August 15, 1904, was ineffective to absolve Lena Barber from the payment of interest on said \$3,115.11, for any period of time; and (2) that, in any event, the remission of interest thereon could not extend further than to the death of the payee, Cecilla Barber, on May 15, 1908. By the judgment of the lower court of December 5, 1909, which was afterwards affirmed by this court, the executors of Cecilla Barber were directed to pay the various legacies, with interest thereon from May 15, 1909, which was one year after the testatrix's death, as is provided by the statute; and in that judgment the \$5,000 legacy to Lena Barber was set out. When the executors paid this legacy on February 14, 1911, it amounted, with interest, to \$5,525. And the court having refused to charge her with interest on the \$3,115.11, either before or after the death of the testatrix, it was insisted by appellants that the \$3,115.11 should be applied in diminution of the legacy, as of the time the legacy, under the law, would begin to bear interest, to wit, May 15, 1909. If this had been done, only the excess of the legacy over the \$3,115.11 or \$1,884.89 would have continued to bear interest from May 15, 1909, until its payment on February 14, 1911. But

the court not only refused to do this, and allowed Lena Barber interest upon her entire legacy from May 15, 1909, to February 14, 1911, the date of its payment, but also refused to charge her with interest on the \$3,115.11 during that period. The difference between the interest on the \$5,000 for 21 months, and interest on the \$1,884.89, for the same period, is \$305.09.

[1] Appellant's exception, however, goes farther than a mere setting off of the \$3,115.11 against the legacy, and insists that the paper of August 15, 1904, was not effective to remit or abate the interest on any portion of said note for any time. This contention is based upon the idea that, in order for this paper to have any effect, it must be good either as a will, or as a gift *inter vivos*, and that it is not effective in either respect. The paper not being holographic, and not having been attested by witnesses, it could not have been probated as a part of Cecilia Barber's will, and no attempt was made to do so. It is not contended that it operated as a will.

[2] Did it operate as a gift *inter vivos*; or, to put it in another form, did it operate as a remission of interest from that date, which would be, in fact, a gift? The test as to the sufficiency of the writing to effect a gift is the determination of its irrevocability at the time the donor placed the paper with her agent and nominated executor, McChord. If, at that time, the gift was an irrevocable one, and completely separated Mrs. Barber from the ownership and control of the future interest on this sum, and was not merely ambulatory and subject to recall, then the gift of this interest to Lena Barber was complete; otherwise not, and the paper relied on by the executors was wholly ineffective for any purpose. It is conceded that McChord was acting for Cecilia Barber throughout the transaction. He in no sense represented Lena Barber, the debtor. It is clear, therefore, that Cecilia Barber could have withdrawn the paper, or its operation, at any time, with or without the consent of Lena Barber. If Cecilia Barber in her lifetime had brought suit upon the note, claiming interest according to its terms, and disregarding the paper of August 15, 1904, could Lena Barber, although she might have learned of the execution of the paper, and its delivery to McChord, have relied upon it to escape the payment of interest on this \$3,115.11? We think it is clear that she could not have made such a defense; and, if she could not have made a defense against Cecilia Barber in her lifetime, we do not see how she could make that defense against Cecilia Barber's executors, since the effectiveness of the paper as a gift did not depend upon whether Cecilia Barber actually revoked it, but whether it was revocable.

In the leading case of *Basket v. Hassell*, 107 U. S. 602, 2 Sup. Ct. 415, 27 L. Ed. 500, the court, after reviewing at length the authori-

ties bearing upon this question, said: "The point which is made clear by this review of the decisions on the subject, as to the nature and effect of a delivery of a chose in action, is, as we think, that the instrument or document must be the evidence of a subsisting obligation and be delivered to the donee, so as to vest him with an equitable title to the fund it represents, and to divest the donor of all present control and dominion over it, absolutely and irrevocably, in case of a gift *inter vivos*, but upon the recognized conditions subsequent, in case of a gift *mortis causa*, and that a delivery which does not confer upon the donee the present right to reduce the fund into possession by enforcing the obligation according to its terms will not suffice." In 20 Cyc. 1208, the rule as to gifts, in so far as it applies to the forgiveness of the donee's debt, is thus stated: "A debt due from the donor to the donee may be forgiven as a gift, and, when the transaction is complete, the debt is extinguished, and cannot be enforced afterward. A promise by an obligee or payee to forgive a debt, the promisor being under no legal obligation to do so, is but an executory gift, and so long as the transaction remains executory, and the promisor retains the evidences of indebtedness, the gift is not a perfected one, and no equity passes to the promisee thereby. The usual method of making a gift of a debt is for the donor to cancel and deliver to his obligor the evidences of his indebtedness, thereby indicating a forgiveness thereof, or a destruction thereof by the obligee with intent to release. However, a gift of a debt due by parol can be made only by the creditor's execution of a release in writing, or the performance of some act by which the debt is placed beyond his legal control." See, also, *Knott v. Hogan*, 4 Metc. 99, *Brown v. Brown*, 4 B. Mon. 535, and *Rodemer v. Rettig*, 114 Ky. 634, 71 S. W. 869, 24 Ky. Law Rep. 1474. The interest on the whole note from August 15, 1904, to February 20, 1911, is \$2,782; while the interest on the \$4,000 for the same period is \$1,564, showing a difference of \$1,218 which Lena Barber yet owes, if the rule above announced is to be applied. We do not see how the application of the rule under the facts of this case can be avoided. The paper applied only to future interest, and was revocable at any time. It never passed beyond the donor's control. It was never delivered to Lena Barber, or to any one for her. In our opinion the paper was not effective for any purpose, and the executors should have ignored it by collecting interest upon the note according to its terms.

[3] 2. In the opinion we approved the ruling of the chancellor that John R. Barber was not individually liable by way of contribution or otherwise for any portion of appellants' counsel fees or costs. 148 Ky. 378, 146 S. W. 1124. It is urgently insisted by the appellants in their petition for a rehear-

ing that that ruling is inconsistent with the opinion of this court in Louisville Presbyterian Seminary v. Botto, 117 Ky. 962, 80 S. W. 177, 25 Ky. Law Rep. 2137, and that, if the court intends to adhere to the ruling made in this case, it should overrule the Botto Case. Under the rule of the Botto Case, it is insisted that appellants' attorneys' fee in the successful will contest, in the construction suit, and for the trial of the exceptions to the commissioner's report, should be assessed pro rata against John Barber, and paid out of the common or residuary fund of the estate. John Barber was a legatee under the original will to the extent of \$9,000. He was not represented by counsel in any of the litigation instituted by the appellants, but stood indifferent as to the result. The effect, however, of that litigation was to increase his share of the estate to an amount claimed by appellants, approximating \$25,000. Appellees insist that his gain was not that much, but the precise amount of his gain is not now material. It is further true that the interest of his children under the original will was lessened by the result of the will contest, and the father's gain was, to some extent, their loss.

The pioneer case upon this subject in this state is Thirlwell's Adm'r v. Campbell, Guardian, 11 Bush, 163. That was an action to sell land owned jointly, and involved the trial of exceptions to the report of settlement of a personal representative, being in the last-named respect similar to the case at bar. All the parties to the action desired a sale of the land, and three of the defendants employed counsel of their own, who represented them throughout the litigation, while four of the parties were not represented by counsel. As to the exceptions to the report of settlement, all of these parties were either indifferent or opposed to the exceptions. The court rested its decision requiring contribution from those not represented by counsel, upon the act of March 1, 1860 (Laws 1859-60, c. 1049), as amended in 1867 (Laws 1867-68, c. 579), which related to contribution between legatees, devisees, and distributees, where one had prosecuted an action for the benefit of others. The act of 1860 above referred to is substantially reproduced as section 489 of the Kentucky Statutes, which reads as follows: "In actions for the settlement of estates, or for the recovery of money or property held in joint tenancy, coparcenary, or as tenants in common, if it shall be made to appear that one or more of the legatees, devisees, distributees or parties in interest have prosecuted for the benefit of others interested with themselves, and have been at trouble and expense in conducting the same, it shall be the duty of the court to allow such person or persons reasonable compensation for such trouble, and for necessary expenses, in addition to the fees and costs; said allowance to be paid out of the funds recovered before

distribution, the persons interested having notice of the application for such allowance." In the course of its opinion in the Thirlwell Case the court said: "Appellee insists that under these acts he has a right to have his counsel paid out of the general fund; yet his counsel in their argument concede that several of the distributees thus sought to be charged with fees were indifferent to the result, if indeed they were not opposed, as some of them certainly were, to the efforts made by plaintiff to surcharge the settlement which involved the principal amount of labor done by his counsel in the case. We construe these acts as applying only to such parties as are not represented in the case by attorneys selected and employed by themselves. * * * So far as those parties are concerned who were not represented by attorneys selected by themselves, we think the services rendered by the counsel for the appellee in procuring a sale of the real estate and in surcharging the settlement fall within the provisions of the statutes, supra, and for such services they should be paid out of the common fund." In construing section 489, in Taylor v. Minor, 90 Ky. 548, 14 S. W. 545, we said: "Where, however, one person has prosecuted an action at extra expense and trouble, and the recovery inures equally to the benefit of others, the chancellor may, in the exercise of his power to compel parties to do equity, require them, as a condition to sharing in it, to contribute their proper proportion of the expenses, and may order it paid out of the common fund." In other words, it was held that the recovery should bear its own expenses, and the attorney's fees of all persons who participated in the recovery, except those who specially employed counsel to represent them, should be paid out of the fund recovered.

It is insisted, however, that since John R. Barber, through his children, will lose more than he will himself gain in the will contest, he is not within the meaning of the statute, and should not be required to contribute. We can see no difference, however, in principle between the Botto Case and the case at bar. In the Botto Case, W. M. Botto, and his mother, Cloteal Botto, were the principal beneficiaries of certain codicils, which were finally invalidated, and were represented throughout the entire litigation by counsel of their selection; and they were beneficiaries, in a smaller way, under the will as it was finally established. It was contended there, as here, that the statute did not apply to them, and that they should not be required to contribute to the fees of counsel who, against their wish, had succeeded in setting aside the fraudulent codicils, and thereby increasing the general estate. As above stated, the Bottos were represented by counsel in their effort to sustain those codicils. In this respect their case was stronger than Barber's Case. Nevertheless, they were required to contribute to the payment of counsel fees for the contestants. After reviewing

at some length the decisions of this court bearing upon section 489, and the question generally, the court there said: "These cases are not in conflict with Thirlwell's Adm'r, etc., v. Campbell's Guardian, etc., 74 Ky. [11 Bush] 163, as in that case all the parties to the litigation were represented by counsel who participated therein. The court in that case simply held that one jointly interested in a recovery could not be compelled to pay counsel employed by others, when he had himself employed counsel to represent what appeared to be his interest. It seems to us that there can be no doubt in this case that all the legatees in the original will of Mrs. Florence Irvine Botto equally shared in the benefits which accrued from the litigation instituted by the appellants for their common benefit. It is true that the contest of the codicils was inimical to the pecuniary interest of the two Bottos, W. M. and Colteal B., who were the principal beneficiaries in the fraudulent codicils, and who were represented in the entire litigation by counsel of their own selection. But we cannot shut our eyes to the fact that these defendants occupied a dual attitude. They were large legatees under the original will, as well as the chief beneficiaries of the alleged fraudulent codicils, to invalidate which all of the costs and expenses were incurred; and we are unable to see any reason why they should be exempted from the burden cast upon the legatees, especially as they were the chief, if not the only, upholders of these fraudulent codicils." 117 Ky. 972, 80 S. W. 180, 25 Ky. Law Rep. 2137.

Counsel for Barber, however, insist that the decision in the Botto Case was rested upon the fact that the Bottos were guilty of fraud, in that they were the chief, if not the only, beneficiaries and upholders of the fraudulent codicils, and therefore cast upon the contestants the burden of undoing their fraudulent acts. While there is some language used in the opinion giving color to that claim, a careful reading of the opinion will show that the decision really rests upon the broader ground that the recovered fund must pay its own attorney's fees, and, as the Bottos were participants in that recovery, the rule applied. This is easily apparent from the following quotation taken by the court from *Weed's Estate*, Appeal of McGinnis, 163 Pa. 595, 30 Atl. 272, to wit: "It is argued, however, that they were losers by the litigation, and therefore they are not within the rule recognized and enforced in *Trustees v. Greenough*, 105 U. S. 527, 23 L. Ed. 1157, and kindred cases. But in what sense were they losers? In the same that he is a loser who fails to acquire what he has no right to, or who, having unlawfully obtained possession of the property of another, is compelled to restore it to the owners. The equity which the wrongdoer has

in consequence of such a loss is not easily discoverable. If the allowance in this case was for services in a suit to recover the trust property from a stranger who had unlawfully taken it into his possession, there could be no doubt that equity would require that it should be paid from the trust fund. The fact that the wrongdoers were creditors of the estate ought not to shift the burden from the trust fund to that portion of it which the creditors were entitled to receive on a pro rata distribution of it. In either case the services were for the benefit of the estate, and it should pay for them." We conclude, therefore, that the case at bar comes within the principle announced in the Botto Case, and that John R. Barber's share of the recovery should contribute to the payment of appellant's counsel fees for effecting the recovery. So much of the former opinion found on pages 378 and 379 of 148 Ky., on pages 1127 and 1128 of 148 S. W., as holds otherwise, is withdrawn, and that opinion is modified to the extent above indicated.

[4] It is suggested in the briefs that this court now fix the fees of appellant's counsel. That question, however, should be tried by the lower court upon preparation duly made. Counsel fees should be fixed upon evidence taken, as in other cases; and, as the fee in this case is to be measured by the recovery when considered in connection with the services rendered, the precise amount of the recovery should be ascertained. In the record before us counsel vary widely in their estimates as to the result of appellant's exertions.

So much of the judgment of the circuit court as declined to charge Lena Barber with interest upon any portion of her note after August 15, 1904, is reversed, so much of that judgment as declined to charge John R. Barber with any portion of appellant's counsel fees is reversed, and the cause is remanded for further proceedings consistent with this opinion.

KENTUCKY COAL & TIMBER DEVELOPMENT CO. v. CARROLL HARDWOOD LUMBER CO.

(Court of Appeals of Kentucky. Dec. 17, 1912.)

1. APPEAL AND ERROR (§ 447*)—INJUNCTION PENDING APPEAL—CONTINUANCE—STATUTES.

Civ. Code Prac. § 747, authorizing an application to the Court of Appeals for the continuance of an injunction pending appeal, contemplates that the circuit court in the first instance shall decide whether the injunction shall be so continued together with the terms on which it may be continued, and then that either party dissatisfied with the ruling may have the action of the circuit court or judge reviewed by the Court of Appeals or a judge thereof in vacation.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2207; Dec. Dig. § 447.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes 151 S.W.—44

2. APPEAL AND ERROR (§ 597*)—INJUNCTION PENDING APPEAL—REVIEW.

On an application to the Court of Appeals to review an order continuing or refusing to continue an injunction pending appeal, the party applying for review must bring to the appellate court a transcript of all that part of the record appertaining to the injunction, so as to enable the court to intelligently exercise its discretion.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2627-2638; Dec. Dig. § 597.*]

3. APPEAL AND ERROR (§ 456*)—INJUNCTION—CONTINUANCE PENDING APPEAL.

Where an appeal in a suit to enjoin the cutting of timber involved difficult questions of law, an injunction granted by the trial court, but dissolved as to a part of the land in controversy, would be continued pending appeal; it appearing that no substantial harm would result therefrom.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2215; Dec. Dig. § 456.*]

Appeal from Circuit Court, Breathitt County.

Suit by the Kentucky Coal & Timber Development Company against the Carroll Hardwood Lumber Company. A judgment was rendered in favor of plaintiff for part only of the relief demanded, and plaintiff applies for the continuance of an injunction pending appeal. Granted.

Hazelrigg & Hazelrigg, of Frankfort, and J. J. O. Bach and Grannis Bach, both of Jackson, for appellant. O'Rear & Williams and McQuown & Beckham, all of Frankfort, and Geo. Fleenor, O. H. Pollard, and Chester Gourley, all of Jackson, for appellee.

HOBSON, C. J. [1] Section 747 of the Code is as follows: "An appeal shall not stay proceedings on the judgment unless a supersedeas be issued. The provisions of the Civil Code concerning supersedeas on appeals shall not apply to judgments granting, modifying, perpetuating or dissolving injunctions. When an appeal shall be taken from any judgment granting, modifying, perpetuating or dissolving any injunction, the court which rendered the judgment may, in its discretion, if the ends of justice so require, at the time the appeal is taken, make an order suspending, modifying or continuing the injunction during the pendency of the appeal, upon such terms as to bond or otherwise as may be proper for the security of the rights of the opposite party. Either party, within twenty days after the entry of such order, may take a transcript of the record, or all parts thereof appertaining to the injunction, and upon reasonable notice in writing to the opposite party, move the Court of Appeals, or, if in vacation, any judge thereof, to revise the order of the lower court, and finally determine how far the injunction shall be suspended, modified or continued pending the appeal. Pending such application to the Court of Appeals or judge thereof, but not longer than for twenty days, the status ex-

isting immediately before the entry of the judgment appealed from shall be maintained, and the lower court shall so provide in the judgment upon the request of either party. If, at any time, upon reasonable notice to the party affected, it be made to appear that the sureties upon the bond required in the court below are insufficient, the Court of Appeals, or a judge thereof in vacation, may set aside the order suspending, modifying or continuing the injunction pending the appeal, unless sufficient surety be furnished by a day fixed by the court or judge."

The Kentucky Coal & Timber Development Company brought this suit against the Carroll Hardwood Lumber Company and others, enjoining them from cutting timber from certain lands alleged in their petition to be the property of the plaintiff. An answer was filed by the Carroll Hardwood Lumber Company denying the plaintiff's title to the land, and asserting title in it thereto. An injunction was taken out by the plaintiff. On the trial of the case before a jury there was a verdict and judgment in favor of the plaintiff as to a part of the land and in favor of the defendant as to the remainder of it, and the court entered an order dissolving the injunction as to the lands which were adjudged to the defendant. The plaintiff excepted and prayed an appeal, and on its motion the injunction granted in the action was continued in force for a period of 40 days pending the appeal. A motion has been entered before us within 20 days to continue the injunction in force pending the appeal. When this motion was entered, only a transcript of the pleadings and the orders made in the case had been filed, and since then and within the 40 days the appellant has tendered and moved to file a copy of the transcript of the evidence heard on the trial.

The circuit court in the order which it entered did not follow the statute as we construe it. Under the statute, if the ends of justice so require, the court which makes the judgment dissolving an injunction may in its discretion make an order continuing the injunction in force during the pendency of the appeal upon such terms as to bond or otherwise as may be proper, and when the court has entered such an order, or has refused to so order, either party within 20 days after the entry of the order which the court makes may take a transcript of the record or all parts thereof appertaining to the injunction, and upon reasonable notice in writing to the opposite party move this court, or, in vacation, any judge thereof, to revise the order of the lower court, and finally determine how far the injunction shall be continued pending the appeal. In other words, the intention of the statute is that the circuit court shall decide in the first place whether the injunction shall be continued during the appeal, and on what terms it shall be continued;

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

caught between them and thus became fastened, so that, instead of permitting the shaft to revolve beneath it, it was whirled around the shaft, making it dangerous to those near it.

[2] It is contended by counsel for defendant that, if these conditions of the machine and pulleys were defective, it was attributable to the negligence of the plaintiff rather than to that of the defendant. They urge that plaintiff was foreman at the factory, and as such foreman it was his duty to discover defects in the machinery, and to remedy such as were of an ordinary character, and to report those which were of a nature that he could not remedy; and that he failed to perform this duty. The plaintiff, however, testified that he was not a machinist; and it might be inferred from his testimony that it was not within the province of his duty to make these repairs, but that this was the duty of the manager. If therefore this duty was imposed upon the manager, and plaintiff was injured through the failure on the part of the manager to exercise ordinary care to perform that duty, such negligence of the manager would be the negligence of the defendant for which it would be liable for resultant injuries to plaintiff, regardless of the grade of his service as foreman. *Bryant Lumber Co. v. Stastney*, 87 Ark. 321, 112 S. W. 740; *Oak Leaf Mill Co. v. Smith*, 98 Ark. 34, 135 S. W. 333.

[3] But in the view which we have taken of this case, we do not find it necessary to pass upon the question as to whether or not the testimony was sufficient to warrant a finding that the injury was due to an act of negligence upon the part of the defendant. We are of the opinion that the testimony clearly shows that the injury which plaintiff received was due to one of the risks which he assumed by reason of his employment.

According to his own testimony, the plaintiff knew of any defect which there was in the cracker mill and in the platform on which it stood. With this knowledge he had worked at the machine while this condition existed for probably more than a year prior to the accident. While he called the attention of the manager to this defect, and the manager promised to repair it, still his testimony clearly shows that he continued to work at the mill without any reliance upon that promise, and without any complaint of the failure to repair it.

But we do not think that the defective condition of the cracker mill or the shaky condition of the platform were the proximate cause of the injury. The testimony shows that the machine had not been in operation for some days, and was not choked at the time of the injury, and that the belt was placed upon the pulleys. The proximate cause of the injury was the whirling of the belt. Counsel for plaintiff concede that this

was the proximate cause of the injury, but they earnestly contend that it was due to the defendant's negligence in permitting the two pulleys on the shaft to be placed so close together, with the set screws protruding from one of them, thereby catching the belt between them and causing the upper end of it to become fixed, and thus to wrap around the shaft. The undisputed evidence shows, however, that the pulleys and set screws could be readily seen from the floor. They were plainly open to observation, and they could more certainly be seen when one was within a foot of them, as plaintiff had been upon a number of occasions, and was upon the occasion of this injury. The expert witness introduced by plaintiff testified that he could not conceive of any one going within 12 inches of this shaft and not being able to see the set screws and the position of the pulleys. He said he was bound to see them. The plaintiff had placed this belt upon the pulley at this place under the same conditions for at least six times prior to the accident. Under this testimony, therefore, we are compelled to say that the plaintiff must have seen the smaller pulley and set screws upon the shaft and the condition of the machinery. He had been warned of the danger of putting the belt upon this pulley while the machinery was in motion, and himself testified that he appreciated the dangers arising therefrom. In fact, he had been ordered not to place the belt upon the pulleys while the machinery was in motion. While he contends that this order was abrogated by its violation, nevertheless it shows that he fully appreciated the danger of performing this duty in this way. If the injury was due to these defects of which he now complains, the testimony shows that they were open and obvious, and that he fully appreciated the dangers arising therefrom. The risk of the danger arising from putting the belt upon the pulley under these conditions, while the machinery was in motion, was one which he necessarily assumed.

The injury which plaintiff received is a very severe one, but under his own testimony it is one for which under the law the defendant is not liable.

The judgment is, accordingly, affirmed.

JOHNSTON-REYNOLDS LAND CO. v. FUQUA.

(Supreme Court of Arkansas. Nov. 25, 1912.)

1. BROKERS (§ 83*)—COMMISSIONS—ACTIONS—EVIDENCE—INSTRUCTIONS.

Where, in an action by a broker for commissions for procuring a purchaser of real estate, the undisputed evidence showed that the original contract of employment fixing a commission of a sum per acre was modified by an agreement that the owner, if making a sale to a prospective purchaser, would pay the broker a specified commission, and the broker testified

that he agreed to accept such commission, provided the sale was made in a day or two, and that he was notified of it, and the owner testified that the agreement did not embrace any such condition, and that the broker informed the owner that the contract expired on May 31st, while it did not expire until June 30th, and that the owner, relying on the statement, gave to a third person an option to take effect on June 1st, and that during June the third person elected to purchase, and the sale was consummated, instructions allowing the broker to recover the specified sum if he agreed to allow the owner to sell to the prospective purchaser, and the owner did not agree to make the sale in any specified time, and that the broker was entitled to the full amount of commissions on a sale made by himself, if the agreement to accept the specified sum was limited to a sale made by the owner within a day or two and immediately reported to him, sufficiently submitted the issues and the broker obtaining a verdict for the specified sum could not complain.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. §§ 121-130; Dec. Dig. § 83.*]

2. BROKERS (§ 44*)—COMMISSIONS—CONTRACT—MODIFICATIONS.

Where an owner gave to a broker the exclusive right to sell real estate for a commission, and thereafter the parties made a new agreement to the effect that the owner could sell and pay the broker a less commission, the original contract was modified, and the broker did not have the exclusive right to sell, and a sale subsequently made by the owner operated as a revocation of the broker's authority to sell, and the broker subsequently making a sale could not recover the commission.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. § 45; Dec. Dig. § 44.*]

3. APPEAL AND ERROR (§ 1068*)—HARMLESS ERROR—ERRONEOUS INSTRUCTIONS.

The error in an instruction based entirely on a party's claim, and ignoring the contention of the adverse party, is not prejudicial to the adverse party obtaining a verdict in his favor.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4225-4228, 4230; Dec. Dig. § 1068.*]

4. TRIAL (§ 260*)—REFUSAL OF INSTRUCTIONS COVERED BY THE CHARGE GIVEN.

It is not error to refuse requested instructions covered by instructions fairly submitting the issues.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 651-659; Dec. Dig. § 260.*]

Appeal from Circuit Court, Miller County; Jacob M. Carter, Judge.

Action by the Johnston-Reynolds Land Company against Joe Fuqua. From a judgment granting partial relief, plaintiff appeals. Affirmed.

James D. Head, of Texarkana, for appellant. William H. Arnold, of Texarkana, for appellee.

MCCULLOCH, C. J. Appellants instituted this action in the circuit court of Miller county against appellee to recover the amount of commissions alleged to have been earned in the sale of a tract of land in Miller county owned by appellee. The tract of land in question is composed of about 2,000 acres, a part of which is in cultivation, and on March 1, 1911, a written contract was entered into between the parties to this action, whereby

appellee granted to appellants the exclusive right to sell said property during the period of four months thereafter, and that they should have as their commission all the purchase price over and above \$7 per acre. Appellants assert that within the time specified they procured a purchaser for the land "ready, willing, and able" to purchase for the price of \$8.50 per acre, that they thereby earned a profit or commission of \$1.50 per acre, but that appellee had refused to consummate the sale and refused to pay the commission. The commission, according to the contention of appellants, amounted to the sum of \$3,075.48, and this is the amount for which they prayed judgment. On the trial of the cause before a jury, a verdict was rendered in favor of the appellants for the sum of \$500. They were not satisfied with the recovery of that amount, and have prosecuted an appeal to this court, and urge as grounds for reversal that the court erred in giving one of the instructions requested by appellee, and in refusing to give two of the instructions which they requested.

It is undisputed that about the middle of the month of April, 1911, the parties had an interview, in which appellee stated that he had a prospective purchaser for the land, and proposed to pay appellants a commission of \$500 on the sale, if made, and that appellants agreed to accept that amount if the sale should be made by appellee himself. There is, however, a dispute in the testimony as to one point in this interview: Appellants insist that, when this proposal was made, they agreed to accept the commission of \$500, provided the sale was made in a day or two and that they be notified of it; whereas, appellee testified that the agreement did not embrace any such condition as that. Appellee testified that on the same occasion he asked appellants to tell him when the contract expired; that he had lost his copy of the contract, and did not know the date of expiration; and that appellants informed him on that occasion that the contract expired on May 31, 1911. He further states that on the faith of that statement to him he gave to one Munn an option on the place to take effect on June 1st; that during the month of June Munn elected to purchase the place; and that he consummated the sale and conveyed the property to him. Appellants testified that on or about June 15th they negotiated a sale of the land to one Sanderson, and immediately requested appellee to furnish an abstract of title, which he promised to do, but failed to comply with his promise. On June 30th, which was the last day of the contract, they closed the trade with Sanderson, and entered into a written contract with him for the sale of the property. It is upon this sale that they seek to recover the commission. But the jury allowed them the sum of \$500 as a commission on the sale made by appellee himself.

Numerous instructions were given at the request of both sides.

[1] The following instruction was one of those given at the request of appellants: "If you find that plaintiffs did in April, 1911, agree to allow defendant to sell the land to the party with whom he was negotiating and did agree to accept \$500 for their commissions, and that Fuqua did not, at the time, agree to make the sale in any specified time, and that plaintiffs did not lead Fuqua to believe and act upon the belief that their contract on said lands expired June 1st, then you are instructed that plaintiffs, if the contract of sale was made by Fuqua on or prior to June 30, 1911, are entitled to recover in the sum of \$500." Now, this is the instruction upon which the jury evidently based the verdict in appellants' favor for the sum of \$500. In following this instruction it is manifest that the jury found that appellants agreed to accept the commission of \$500 without condition as to the time the sale should be made, and that they did not mislead appellee by any statement as to the date of the expiration of the contract.

Appellants also requested the court to give, among others, instructions numbered 4 and 5, which read as follows:

"(4) If you find that in April, 1911, Fuqua did advise plaintiffs that he had a prospective purchaser, and asked plaintiffs what they would charge as a commission if he sold the property himself and they agreed to charge \$500, yet if you further find that Fuqua represented at the time that, if he made the sale, it would be made in a day or two, and he would immediately report it, and failed to either make the sale within a day or two, or, having made it, failed to report it to plaintiffs within a reasonable time, then, in either event plaintiffs would not be estopped from claiming commissions, if thereafter, they, in good faith, sold said property in accordance with the terms of the written contract to a responsible party, and within the time named in the contract.

"(5) If you find that about April 15, 1911, plaintiffs did agree to accept in full payment from defendant the sum of \$500 if defendant sold to the party with whom he was then negotiating, yet, if you further find from the proof that defendant did make the sale within the time contemplated and thereafter failed to promptly report such sale within the time stipulated (or, if no time was stipulated, then within a reasonable time thereafter), but withheld knowledge of such sale from plaintiffs, and requested or encouraged them or knowingly suffered them to continue their efforts to sell same, and as a result thereof plaintiffs did, within the time allowed by the contract, effect a sale, on the terms authorized by the contract, to a person who was able, ready and willing to take same on such terms, then plaintiffs are entitled to recover commissions as specified in the contract."

The court gave No. 4 as requested, but refused to give No. 5. The effect of instruction No. 4 was to tell the jury that appellants would be entitled to the full amount of commissions on the sale made by themselves if the agreement to accept \$500 was limited to a sale made by appellee within a day or two and immediately reported to them. So the jury necessarily found in returning a verdict in favor of appellants for only \$500 that there was no such limitation of time upon the sale made by appellee himself.

[2] But in refused instruction No. 5 appellants asked the court to go further, and tell the jury that, even if appellee made a sale of the land within the time limited by the oral agreement and pursuant thereto, yet, if he failed to inform them of such sale, and suffered them to continue their efforts to effect a sale on the terms authorized by the original contract, they would be entitled to the full commission on the sale which they thereafter negotiated. This instruction was incorrect, and the court properly refused to give it. If a new agreement was made, to the effect that appellee should have the right to sell the land himself and pay appellants a commission of \$500, this operated as a modification of the original contract, and it thereafter remained no longer as a contract giving appellants the "exclusive" right to sell the property, and a sale made thereafter by appellee pursuant to the agreement would operate as a revocation of appellants' authority. The effect of the instruction was to tell the jury that, unless appellee notified appellants of the sale thus made by himself, they could continue in their efforts to find a purchaser, and would be entitled to a commission if they found one "ready, willing, and able" to purchase the property. As the sale made by appellee under the terms of the modified agreement operated as a revocation of appellants' authority to sell, they were not entitled to notice, and could not claim a commission on the sale thereafter made by themselves. *Hill v. Jebb*, 55 Ark. 574, 18 S. W. 1047.

[3] The next ground urged for reversal is that the court erred in giving instruction No. 1 on request of appellee, which reads as follows: "If you believe from the evidence that defendant had forgotten the date of the expiration of the contract with plaintiffs, and called upon the plaintiffs to inform him of the date, and that plaintiff Johnston informed him that the contract expired June 1, 1911, and that Fuqua relied upon said information, and, believing that to be true, sold the lands which had been listed with plaintiffs, after said date, then you will find for the defendant." It is contended that this instruction was incorrect and prejudicial to appellants, for the reason that it ignored their contention that appellee during the month of June encouraged them to continue in their efforts to make a sale. This instruction is based entirely upon appellee's

contention that appellants misrepresented to him the date of the expiration of the contract, and thereby induced him to enter into another contract for the sale of the property. The jury, however, found against appellee on that issue, otherwise they could not have found in favor of appellants for the \$500. Therefore the instruction was not prejudicial, even if it is open to the objection urged by appellants that it ignored one of their contentions in the case.

[4] As to the other refused instructions requested by appellants, we think that they were not prejudicial, as the other instructions in the case fairly submitted the issues.

We are of the opinion, upon the whole, that the case was properly submitted to the jury, and that the verdict should not be disturbed.

Judgment affirmed.

FRIEDMAN et al. v. SCHLEUTER et al.

(Supreme Court of Arkansas. Nov. 25, 1912.)

1. FRAUDS, STATUTE OF (§ 49*)—CONTRACTS TO BE PERFORMED WITHIN A YEAR.

A contract for the erection of a building, which may be performed within a year, is not prohibited by the statute of frauds, and may be oral.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. § 74; Dec. Dig. § 49.*]

2. CONTRACTS (§ 32*)—MEETING OF MINDS—REDUCTION TO WRITING—NECESSITY.

Where the terms of a contract are actually agreed on, the contract is effective, though it is expected that the contract shall be reduced to writing as evidence of the agreement.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. § 159; Dec. Dig. § 32.*]

3. CONTRACTS (§ 32*)—BUILDING CONTRACTS—AGREEMENT OF PARTIES—VALIDITY.

Where a contract for the construction of a building was orally agreed on, including the time for completion of the building and damages per day for any delay, the mere fact that the contract was to be reduced to writing as evidence of its terms did not prevent it from being effective from the date of the agreement of the parties.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. § 159; Dec. Dig. § 32.*]

4. CONTRACTS (§ 212*)—BUILDING CONTRACTS—TIME FOR PERFORMANCE.

Where a contract to erect a building does not fix the time for completion, the law implies that a reasonable time for performance is intended.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 944-956; Dec. Dig. § 212.*]

5. CONTRACTS (§ 212*)—BUILDING CONTRACTS—IMPLIED OBLIGATIONS.

In the absence of any provision in a building contract as to the time of payment, the law presumes that payment shall be made on the completion of the work.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 944-956; Dec. Dig. § 212.*]

6. CONTRACTS (§ 9*)—BUILDING CONTRACTS—VALIDITY—CERTAINTY.

A contract for the construction of a building according to plans prepared by an architect, which fixes the time for the completion of

the building and damages per day for any delay, and which requires the contractor to immediately enter on the work, is sufficiently definite for enforcement, though it is intended that the contract shall be reduced to writing as evidence of its terms.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 10-20; Dec. Dig. § 9.*]

Appeal from Circuit Court, Sebastian County; Daniel Hon, Judge.

Action by Frederick J. Schleuter and another against Lewis Friedman and another. From a judgment for plaintiffs, defendants appeal. Affirmed.

Appellees brought this suit in the circuit court against appellants to recover damages for an alleged breach in a building contract with them. Appellees were contractors and house builders, and appellants were the owners of certain lots in the city of Ft. Smith upon which they desired to erect a three-story business house. Appellants advertised for bids for the erection of the house on the lots according to the plans and specifications furnished by them. The notice and advertisement for bids and the plans and specifications which accompanied them comprised 22 typewritten pages of legal size. Hence it is impracticable to set them out in full here. We deem it sufficient to say that the description of the lots upon which the house was to be built is contained in the notice and advertisement for bids. The plans and specifications were prepared by the architect of appellants, and were full and complete. They contained a definite and detailed statement of the kind and quality of material to be used, the dimensions of the building and the various rooms to be contained therein, and the exact manner in which every part of the work should be done. In short, they were as specific as could be, and were intended as a definite and specific guide in the erection of the building. They provided for a bond to be executed by the builder, and contained clauses relative to changes in the contract and disputes arising between the builder and owner. They provided that the work should be done by union labor, and that the contractor should be responsible for all damage suits arising out of and in connection with the work. Another clause provided that the details, drawings, and specifications are intended to describe the work, and shall not be deviated from without written instructions from the architect. The notice and advertisement reserved to the owner three days to determine the successful bidder, and provided that any and all bids might be rejected after the bids were opened. The bid of the appellees was as follows:

"Ft. Smith, Ark., Aug. 9-11.

"We propose to erect the building for Friedman-Mincer according to plans and specifications for the sum of \$26,229.00 (twenty-six thousand two hundred and twenty-nine dollars). This bid is subject to the agreement

of June 15, 1911, between architects and contractors, and subject to three days' acceptance."

The testimony on the part of appellees tended to show that the bids were opened on Thursday, and that appellants, after looking at the bids, said they would not need three days to determine who was the successful bidder, but that they would decide the question the next morning. Will Schleuter, one of the appellees, testified that he met Mr. Friedman, one of the appellants, the next morning after the bids had been opened, and in regard to the acceptance of the bid of appellees by appellant we quote from his testimony as follows: "A. I met Mr. Friedman, and asked him whether he had decided on who was to have the job. Q. That was Friday morning about what time? A. That was between 9 and 10 o'clock. Q. Where did you meet him? A. Right at Padgett's café. Q. In front of where their office had been? A. Yes, sir. Q. And he said, 'Yes,' they had decided that yesterday? A. Yes, sir; and that we got the job, and he was glad we got it, and that he had told Mr. Strong to make up the contract, and that he was working on it then. I told him I was glad of it, glad that we got the job, and went on. That same afternoon, Friday afternoon, I met Mr. Mincer on the car, and he told me the same thing; that we had the job, and they were fixing up the contract and bond then. So the next morning—that is, Saturday morning—there was to be another job let out of Mr. Strong's office, and I went up there to see him about it, and I went up and he said: 'Here is the bond. You take the bond and have it fixed up, and come back here at 10 o'clock, and I will have the contract ready for you.' So I took the bond, and was going to give it to Fred, my brother, and that is all I know about that. He took it off at that time." He testified, further, that appellees were the lowest bidders, and that the architect, who made the plans for appellants, and whose business it was to prepare the bond and contract, did prepare the bond and gave it to appellees, and also prepared a written contract. The testimony showed that appellees executed the bond, with sureties, and that the bond was submitted by them to appellants, who retained it. Later on the appellants refused to sign the contract, and notified appellees that they would not be permitted to construct the house. Fred Schleuter testified that appellants examined the bond executed by appellees and accepted it. He said they told him the bond was satisfactory, and then suggested that we had not agreed on the time limit and the forfeiture. After some discussion of the matter we agreed to complete the job in 100 working days, and agreed on \$25 per day for damages for delay. He also stated that Mr. Mincer, one of the appellants, said they had not signed the contract that morning; that he wanted to see his attorney, and would

be ready to sign the contract at 4 o'clock that afternoon; that he went to see Mr. Mincer about 4 o'clock, and after some discussion about the matter he declined to sign the contract. Appellees also adduced evidence tending to show the amount of damages suffered by them.

The evidence on the part of appellants tends to show that they did not accept the bid of appellees, by exercising their right under the notice and advertisement to reject it. They were questioned in regard to the conversation with Will Schleuter and Fred Schleuter, and denied that they had it, or that they told them that appellees' bid would be accepted. The architect admitted that he prepared the contract, but testified that he wrote it at the suggestion of one of the appellees, and that neither one of appellants requested him to prepare it.

The jury returned a verdict for appellees, and from the judgment rendered appellants have duly prosecuted an appeal to this court.

Read & McDonough, of Ft. Smith, for appellants. C. B. & H. P. Warner, of Ft. Smith, for appellees.

HART, J. (after stating the facts as above). [1] Counsel for appellants asked the court to direct a verdict for them, and the refusal of the court to do so is the only ground upon which we are asked to reverse the judgment. They asked for a directed verdict on the ground that no agreement was ever made between appellants and appellees, and contend, further, that, if there was an agreement entered into, it was an oral agreement, and not binding on the parties, because it was the understanding and intention of the parties that any agreement entered into should be reduced to writing before it should become binding. The contract could be performed within a year, and contracts of this character are not prohibited by the statute of frauds in this state; hence a written contract was not necessary. 6 Cyc. 10; *Salies et al. v. Sharlow et al.*, 5 Dak. 100, 37 N. W. 748.

[2] In the case of *Emerson v. Stevens Grocer Co.*, 95 Ark. at page 426, 130 S. W. at page 543, the court said: "If the contract is actually entered into and made, whether by messages, correspondence, or by word of mouth, the agreement becomes at once effective, although it was expected that the terms would afterwards be embodied in a written instrument and signed. The mere reference to a future contract in writing would not negative a present contract, if the terms thereof were actually assented to by both parties. The written draft of the contract would only be a convenient record of the agreement and the evidence thereof; but it would only constitute evidence of the agreement, and its absence would not affect the binding force of the contract that was

closed. Therefore, if an unconditional offer is made, and that offer accepted, this will constitute an obligatory contract, although the parties also understand that a written contract embodying the terms should be drawn and executed."

The principles of law applicable here are well stated in the case of *Rosster v. Miller*, 3 App. Cas. (Eng.) at page 1151, where Lord Blackburn said: "I quite agree with the Lords Justices (wholly independent of the statute of frauds) it is a necessary part of the plaintiff's case to show that the two parties had come to a final and complete agreement, for, if not, there was no contract. So long as they are only in negotiation, either party may retract; and though the parties may have agreed on all the cardinal points of the intended contract, yet, if some particulars essential to the agreement still remain to be settled afterwards, there is no contract. The parties, in such a case, are still only in negotiation. But the mere fact that the parties have expressly stipulated that there shall afterwards be a formal agreement prepared, embodying the terms, which shall be signed by the parties, does not, by itself, show that they continue merely in negotiation. It is a matter to be taken into account in construing the evidence and determining whether the parties have really come to a final agreement or not. But as soon as the fact is established of the final mutual assent of the parties, so that those who draw up the formal agreement have not the power to vary the terms already settled, I think the contract is completed." To the same effect, see *Western Roofing Tile Co. v. Jones*, 26 Okl. 209, 109 Pac. 225, Ann. Cas. 1912B, 127; 7 A. & E. Ency. of Law, 140; Page on Contracts, vol. 1, par. 54; *Boysen v. Van Dorn Iron Works*, 94 App. Div. 95, 87 N. Y. Supp. 995; *Lowrey v. Danforth*, 95 Mo. App. 441, 69 S. W. 39; *Green v. Cole*, 103 Mo. 70, 15 S. W. 317; *International Harvester Co. v. Campbell*, 43 Tex. Civ. App. 421, 96 S. W. 93; *Lane v. Warren*, 53 Tex. Civ. App. 122, 115 S. W. 903; *Disken v. Herter*, 73 App. Div. 453, 77 N. Y. Supp. 300.

In the application of the principles above announced to the facts in the case at bar, it cannot be said that the undisputed evidence shows that the agreement made was not the end of negotiations between appellants and appellees. Counsel for appellants insist that because the contract was to be reduced to writing and a bond tendered accompanying it, and because the notice and advertisement and the plans and specifications did not provide a time of payment to the builder and a time for the completion of the contract, that no contract could exist without such writing.

[3] The testimony of appellees shows that the bond provided for in the notice and advertisement was executed by appellees and

accepted by appellants, that their bid was accepted by appellants, that they subsequently agreed that the time for the completion of the building should be 100 working days, and that the damages for delay in the completion of the building should be \$25 per day. It appears, then, from their testimony, that all the terms of the contract were agreed upon, and its reduction to writing was intended merely for facility of proof as to its terms. In such cases the provision for a contract in writing is not inconsistent with the present contract, and this is especially true in a case where the things to be done are provided for in written plans and specifications, which are so definite and detailed as to present a perfect guide as to the rights and duties of the respective parties in the erection of the proposed building. According to the evidence for appellees, the minds of appellants and appellees were in accord as to all the provisions of the contract, and the writing was intended to exhibit and set forth just what they had agreed upon and understood. Appellants did more than telling appellees that they were the lowest bidders. According to the testimony of appellees, they told them that they had gotten the job, and that their architect was then working on the contract. As we have already seen, the terms of the contract were then as definite and certain as they could be, except as to the time of payment, the time of completion of the work, and the amount of damages for delay in the completion of the work. The time for completion of the work and the damages for delay were subsequently agreed upon.

[4] Moreover, where a contract fails to specify a time for completion it will be implied that a reasonable time for performance was intended. 6 Cyc. 66; *Long v. Chas. T. Abeles & Co.*, 77 Ark. 150, 91 S. W. 29.

[5] In regard to the time of making payment, it may be said that, in the absence from the contract of any provisions on the point, the time of making payment is presumed to be on completion of the work. 6 Cyc. 76; *Wright v. Maxwell*, 9 Ind. 192; *Shanks v. Griffen*, 14 B. Mon. (Ky.) 153.

[6] The contract, then, could not be said to be too uncertain and indefinite for enforcement. Under the instructions of the court the jury in effect found that the contract was made or entered into, that its performance was to be immediately entered upon, that the preparation of the written form of the contract was matter to be subsequently attended to, and that the written contract was not intended to be a condition precedent to the taking effect of the contract. The verdict of the jury was supported by the evidence, and the court did not err in refusing to direct a verdict for appellants.

No other assignments of error are urged for the reversal of the judgment, and the judgment will be affirmed.

BLAGG et al. v. FRY et al.

(Supreme Court of Arkansas. Nov. 25, 1912.)

APPEAL AND ERROR (§ 185*)—PRESENTATION BELOW—SUBSTITUTION OF JUDGES.

A party who went to trial when a special chancellor was substituted cannot first object on appeal that when the regular chancellor announced his disqualification, special chancellor was elected to try the case.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1166-1176, 1375; Dec. Dig. § 185.*]

Appeal from Circuit Court, Yell County; Tom D. Patton, Special Judge.

Action by H. N. Fry and others against B. D. Blagg and another. From a judgment for plaintiffs, defendants appeal. Affirmed.

Jo Johnson, of Ft. Smith, for appellants. Priddy & Chambers, of Danville, for appellees.

HART, J. Appellees instituted this suit in the chancery court against appellants. The record shows that, when the case was reached on the regular call of the calendar, the Hon. J. G. Wallace, the regular chancellor, announced his disqualification to sit in the cause. Whereupon the clerk of the court proceeded to hold an election for a special chancellor to hear said cause, which resulted in the election of Hon. T. D. Patton, a member of the bar of the court, as such special chancellor. The regular chancellor then administered to him the oath required by law, and upon the regular chancellor vacating the bench the special chancellor assumed the bench, and proceeded to try the cause. A decree was rendered in favor of the appellees, the plaintiffs below, against appellants, the defendants below. The record recites that both the plaintiffs and defendants were present at the trial. The case is here on appeal.

It is now insisted by counsel for appellants that the regular chancellor had no right to withdraw and to cause the substitution of a special chancellor, and for this reason the decree should be reversed. In the case of Sweepster v. Gaines et al., 19 Ark. 96, the court held: "In order to present any question in the appellate court as to the right of a special judge to preside in the trial of the cause, his power and authority must be questioned in the court below, and the grounds of the objection stated in the record." Both appellees and appellants were present at the trial of the cause in the chancery court, and, so far as the record discloses, no objection was at any time or in any manner made to the special chancellor acting as judge in the case. This court will not now for the first time hear such an objection. As held in the case of Sweepster v. Gaines, supra, in order to be available here, the power and authority of a special chancellor must have been questioned in the chancery court. The record shows that the regu-

lar chancellor announced his disqualification, and that the special chancellor was elected and qualified in the manner provided by the Constitution. The parties went to trial before him without objection. The proceedings were had at a regular term of the court, and the usual presumption must be indulged in in favor of their regularity.

The decree will be affirmed.

ST. LOUIS, I. M. & S. R. CO. v. BROGAN.

(Supreme Court of Arkansas. Oct. 28, 1912.)

1. APPEAL AND ERROR (§ 232*)—OBJECTION TO EVIDENCE.

Objections, in an action for injuries, to the testimony and conclusions arrived at "from an examination made by the witness of X-ray pictures, when the witness testified that he was no X-ray expert," reserved in the motion for new trial, did not assign error from the admission of testimony showing a controversy among the physicians as to the nature of plaintiff's injuries and his present and future condition as a result thereof.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1851, 1868, 1426, 1430, 1431; Dec. Dig. § 232.*]

2. DAMAGES (§ 132*)—PERSONAL INJURIES—EXCESSIVE RECOVERY.

Where a locomotive fireman, 27 years of age, in good health, earning from \$125 to \$150 per month, with prospect of an early promotion to the position of engineer, paying \$175 to \$250, was injured, and one leg would have to be amputated, the bone of one shoulder was broken and would probably not unite, and he was permanently incapacitated for performing the duties of his vocation, and at the time of trial had endured intense suffering for over three months, and been at an expense of about \$500 for surgical treatment, a verdict for \$25,000 was not excessive.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 372-385, 396; Dec. Dig. § 132.*]

3. DAMAGES (§ 187*)—EVIDENCE OF LIFE EXPECTANCY.

Where there was evidence of plaintiff's age at the time of his injury, that he was then in good health, and of his occupation, the jury could estimate the probable duration of his life, though mortuary tables were not in evidence.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 509; Dec. Dig. § 187.*]

4. TRIAL (§ 296*)—INSTRUCTIONS—ERRORS CURBED BY OTHER INSTRUCTIONS.

An instruction, in a fireman's action for injuries from his engine colliding with a car standing on a side switch, to find for plaintiff if he was injured, in the performance of his duties, from his engine colliding with a car which defendant, in its failure to exercise reasonable care had negligently placed and left standing, and which caused the collision, was not erroneous, as assuming that defendant was negligent, when followed by other instructions clearly showing the court's intention to submit to the jury the question whether defendant was negligent in placing the car on the side switch.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 705-713, 715, 716, 718; Dec. Dig. § 296.*]

5. MASTER AND SERVANT (§ 217*)—INJURY TO SERVANT—ASSUMPTION OF RISK.

Where a locomotive fireman is injured from a collision between his engine and a car on a side switch, and the collision results from

the railroad company's failure to exercise reasonable care to permit safe passage for the engine, the fireman is not chargeable with having assumed, as an incident of his employment, the risk of being hurt, unless he actually knew of the dangerous position of the car, and realized the danger, and then voluntarily exposed himself to it.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 574-600; Dec. Dig. § 217.*]

6. MASTER AND SERVANT (§ 295*)—INJURY TO SERVANT—INSTRUCTION—MODIFICATION.

The court properly refused to modify instructions dealing only with the issue of assumed risk, so as to present also the issue of contributory negligence; these two defenses being separate and independent.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1168-1179; Dec. Dig. § 295.*]

7. MASTER AND SERVANT (§ 203*)—"ASSUMED RISK"—"CONTRIBUTORY NEGLIGENCE."

The defenses of "assumed risk" and "contributory negligence" are separate and independent; the former arising out of contract relations, and the latter not.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 538-543; Dec. Dig. § 203.*]

For other definitions, see Words and Phrases, vol. 1, pp. 589-591; vol. 3, pp. 7584, 7585; vol. 2, pp. 1540-1547; vol. 8, p. 7617.

8. APPEAL AND ERROR (§ 1066*)—REVIEW—HARMLESS ERROR—INSTRUCTION.

An instruction submitting the issue of contributory negligence, if erroneous, was harmless as to the defendant, where there was no evidence from which reasonable minds could have concluded plaintiff was negligent.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4220; Dec. Dig. § 1066.*]

9. MASTER AND SERVANT (§ 265*)—INJURY TO SERVANT—CONTRIBUTORY NEGLIGENCE—BURDEN OF PROOF.

In a fireman's action for injuries from the collision of his engine with a car on a side switch, the burden was on defendant to prove plaintiff's contributory negligence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 877-908, 955; Dec. Dig. § 265.*]

10. TRIAL (§ 183*)—ARGUMENT OF COUNSEL—ACTION OF COURT.

Statements of plaintiff's counsel, in argument, that defendant had time before suit was filed to offer settlement, and none was offered, were not prejudicial, where they were immediately withdrawn, and the court admonished the jury not to consider them.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 316; Dec. Dig. § 183.*]

11. DAMAGES (§ 216*)—INJURIES TO SERVANT—MEASURE OF DAMAGES.

Where, in an action for injuries, there was evidence limiting definitely plaintiff's expense to a certain sum, an instruction that, in arriving at the amount of plaintiff's damages, the jury could consider "the expense to which he is subjected as a result of his injured condition," was not erroneous, as permitting the jury to speculate.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 548-555; Dec. Dig. § 216.*]

Appeal from Circuit Court, Hot Springs County; W. H. Evans, Judge.

Action by F. T. Brogan against the St. Louis, Iron Mountain & Southern Railway

Company. From judgment for plaintiff, defendant appeals. Affirmed.

The instruction on the measure of damages was as follows:

Instruction No. 5: "You are instructed that if you find for the plaintiff you will assess his damages at such a sum of money as will be a fair and reasonable compensation to him for the injuries he has received as a result of the alleged accident; and in arriving at the amount of said sum of money you will take into consideration, as you find from the evidence, the nature and extent of his injuries, whether temporary or permanent in character, results reasonably certain to follow, any disfigurement of his person as a result of his injuries, the bodily pain and mental suffering he has endured, and that he is reasonably certain from the evidence to hereafter endure, as a result of his physical injuries, the loss of earnings from his labor since he received his injuries, and the loss of earnings in the future of his life by virtue of his decreased capacity to earn money because of his injured condition, his age and reasonable expectancy of years of life, his vocation and earning capacity prior to his injury, with his probable chance of being promoted to a position of increased remuneration of his services had he not been injured, his condition of physical strength and health prior to his injuries, and the expenses to which he is subjected as a result of his injured condition."

Appellee was in the employ of the appellant as a locomotive fireman. On October 17, 1911, he was engaged in firing on a locomotive engine in the Argenta yards while switching freight cars. He had never before worked in that yard as a switch engine fireman, nor had he ever worked as a switch engine fireman on any other road. He was not familiar with the tracks in the Argenta yards. He had been firing on the main line of the Iron Mountain until he was called on the night of October 17th to fire on the switch engine in the Argenta yards. He went on duty that night about 9 o'clock; had to keep firing right along all the time to keep steam and water in the engine. He had no time to look out; had put a fire in the engine, and got up in the seat, and his eyes were blinded from the fire and heat. Five cars were attached to the head of the engine. They were moving towards the north. He did not know what kind of cars were coupled in front of the engine, other than that there was a box car next to the engine. That car was as high as the top of the headlight on the engine. The distance between the end of the box car and the headlight on the engine was about two feet. The box car, appellee says, caused the headlight to reflect back in his eyes. He could not have seen the car standing out at the side and ahead of the engine because of the light re-

flecting in his eyes. The signals for working purposes were given on the engineer's side. As his engine was propelling, at a slow speed, the cars ahead of it along the lead track, the cab of the engine collided with a car standing on the side track leading out from the lead track on appellee's side of the engine. The cars ahead of the engine on the lead track had passed the car standing on the side track, but the cab of the engine cornered with it. When appellee heard the crash, he endeavored to get out through the front window; but his leg was caught, and he sustained serious injuries, which will be hereinafter described.

Appellee did not know that the box car with which the engine collided was so close to the lead track on which the engine was moving. This car had been dropped into the side track from the lead track, and left there by the engine on which the appellee was at work. After the box car had been dropped in on the side track from the lead track, the engine had pulled back onto the lead track with the remaining five cars of the string, and as these cars were pushed forward by the end of the side track the collision occurred by which the appellee was injured. The foreman of the switch crew directed the movement of the switch engine and the location of the cars. He had placed the car in the position where it was at the time it struck the engine. He states that the appellant company had rules covering the placing of cars in the clear on side tracks. The rule required that "conductors must see that brakes are set on cars they leave on sidings, and when the siding is on a grade they must, when practicable, couple all the cars together, and, in addition to setting the brakes, the wheels must be blocked and safety switches properly adjusted. When not in use, safety switches must be left open. In switching, trainmen must know that brakes are in good order before cutting off cars."

The rule refers to conductors, and in switchyards the yard foreman is the same as the conductor. There was a downgrade there to the east from the south end. The grade there was such as to cause the cars to go away from the lead, and the engine was headed east when they kicked the car in on the track where it stood when the collision occurred. The foreman stated that according to his judgment the rules of the company were complied with in placing the cars there that night. The downgrade would be to prevent the car coming out, if moving. The brake would not have to be set on that car. If the brakes were set on the cars below, they would hold that car. He went down and got on top of the rail, which was the custom and the rule, and stood on top of the rail and held his hand out, and ordinarily, if it cleared his fingers, holding his arm out straight, as he did that night, it would clear a car or an engine. He adopted the usual method that they had adopted and

been using for 27 years to see if it would pass, and in his judgment he thought it would. The brakes were not set on the box car that collided with the engine, nor was any block placed under the wheel on the end of the car towards the lead on which the engine was moving. He stated that it was not necessary. He kicked the car in on the track, which consisted in giving a cut of cars a start, and then cutting the car loose from the rest, and it rolls into the track. On that occasion he kicked the car in, and walked up the lead, and stood on the rail, and held his hand out, taking the precaution above mentioned. The witness testified that the box car would "have no reflection on a person's eyes looking ahead. If you were looking directly at the light alone, it would; but, where you are looking at the reflection, it does not."

Appellee brought this suit on November 6, 1911, and in his complaint he alleged that "the cab in which he was working was struck by a car that had been negligently left standing on the side switch north of the one in which plaintiff's engine was turning, and the left side of the cab was crushed in upon the plaintiff and seriously injured him"; that "said accident and injury was caused by the negligence of the defendant and its servants in placing and leaving on the side track, so near the lead switch, the car which struck the locomotive on which plaintiff was at work, and in negligently directing the train on which plaintiff was working to move in to the side switch." The defendant answered, denying the material allegations of the complaint, and setting up that the plaintiff was injured by his own negligence in failing to keep a lookout, which it was his duty to do, and also setting up that plaintiff "was as well informed of the dangers from cars being left too close as any of defendant's other servants, and assumed the risk of such injury as might occur thereby."

The above are substantially the facts on the issues of negligence, contributory negligence, and assumed risk. The court granted and refused requests for instructions, to which appellant duly excepted, and which we will comment upon in the opinion. The jury returned a verdict for \$25,000, judgment was entered for that sum in favor of the appellee, and this appeal has been duly prosecuted. Other facts are stated in opinion.

E. B. Kinsworthy, R. E. Wiley, and W. G. Riddick, all of Little Rock, and W. V. Tompkins, of Prescott, for appellant. Robertson & De Mers, of Little Rock, for appellee.

WOOD, J. (after stating the facts as above). The appellant contends that the verdict was excessive, caused "partially at least by the exploitation" in the testimony of a "disagreement amongst the doctors who treated appellee at the hospital and those treating him after he left the hospital as to

whether his injuries were properly treated at the hospital, and as to the present and future results of his injuries as affected by that treatment." The testimony of physicians on behalf of appellee, one of whom had treated him for 12 days preceding the trial, tended to show that when they examined appellee his broken leg was unhealed; that, notwithstanding the efforts of the physicians at the hospital to save appellee's foot from amputation, same was now necessary, in order to save appellee's life; and that by reason of a failure to operate at first, and on account of the prolonged treatment in trying to save the limb, the bone had decayed, and the limb had become so infected that it would have to be amputated above the knee, whereas, in their opinion, if the limb had been amputated soon after the injury occurred, it would have been only necessary to amputate between the ankle and the knee. In describing appellee's injuries, the testimony of physicians in his behalf tended to show that he had a broken shoulder, the bones of which, on account of the long lapse of time since the injury, could not be knitted together, because of the decayed bone at the fractured ends. The testimony of the physicians and surgeons on behalf of the appellant, who treated appellee at the hospital where he was taken immediately after his injury occurred, tended to show that the methods adopted by them were the latest and most improved methods for the treatment of injuries such as appellee had received, and were adopted because of the hope they entertained of saving the appellee's limb. They gave appellee the same treatment that they gave other patients, under similar conditions, in order to save his leg; that the progress towards ultimate recovery had been satisfactory up to the time the patient was taken out of their charge; and that there had been no indication of death of the bone and no infection, and they still believed the bone could be saved.

[1] Appellant contends here that this dispute among the doctors, as shown by the testimony, prejudiced the minds of the jury, resulting in an excessive verdict. It is sufficient to say of this contention that appellant did not make any objection at the trial to the testimony of the physicians on behalf of appellee describing the nature of appellee's injuries. Appellant only objected to one of the physicians testifying as to the nature of these injuries, and giving the conclusions he arrived at as to the condition of the injury from an examination made by the witness of X-ray pictures, when the witness testified that he was no X-ray expert. This objection, reserved in the motion for a new trial, does not assign any error growing out of the ruling of the court in permitting testimony showing a controversy among the physicians as to the nature of appellee's injuries and his present and future mental and physical condition as a result thereof.

[2] Moreover, the verdict was not excessive. Appellee, at the time of his injury, was 27 years of age and in good health. His wages were from \$125 to \$150 per month, and he was in line of promotion, after three years' service, to the position of engineer, whose average monthly wage was \$175 to \$250. The jury were warranted in the conclusion that appellee would be permanently incapacitated for performing the duties of the vocation that he had selected and for which he was qualified. In fact, it was practically certain from the testimony that appellee, by reason of his injuries, had lost his earning power. His left leg was so badly crushed as to necessitate amputation of same above the knee, and the bone of the left shoulder, that helps to support and gives motion to the arm, was broken; and one of the physicians testified that it had been broken so long that "it would be very difficult to get down in there and wire it together." It was a question, says he, "whether the bone could ever be brought up together and kept in place." "The effect of the failure of the broken bone to reunite would cause the shoulder to drop down and the bone to come up. As a consequence he could not use the left arm without a good deal of pain, as the fragments would be rubbing together all the time, and it would be impossible for him to get around on a crutch at all." There was a severe injury to the back, that would give appellee "trouble with his spinal column and spinal cord for a good many years, and cause him to suffer with a nervous condition." Appellee at the time of the trial had endured intense suffering for a little over three months. He described his suffering as follows: "I suffered pain, and didn't sleep much of the time. I was awake most of the time at night. I couldn't sleep. My back hurt me. My leg and my heel hurt me so bad that they had to take the wrapping off of the bottom part of my foot, and my heel hurt so bad I couldn't stand it, and it worked independent of the front part. Every time I would move, I could feel the bone. It hurt me every time I moved, and every time I moved my back hurt. My shoulder hurt all the way up in the back of my neck. I suffered all kinds of pain and everything."

The testimony showed that for surgical treatment appellee would be at an expense of \$500. Appellee at the time of his injury was receiving an average of \$1,650 per annum for his work. It would require nearly \$22,000 to purchase an annuity amounting to \$1,650 for one during appellee's expectancy of life. If at the end of 3 years he had been promoted to the position of engineer, then his yearly income for his work would have been \$2,550, and it would have required over \$30,000 to have purchased an annuity for appellee with his expectancy of life at the age of 30 years. In *Railway Co. v. Sweet*, 60 Ark. 550, 31 S. W. 571, this court, having under

consideration the damages resulting to the family of Sweet from his death, said: "He was 84 years of age, in good health, a robust man. He had an expectancy, as shown by the Carlisle Life Tables, of 25 years. The jury doubtless weighed all the probabilities of loss from sickness and other various contingencies, likely to arise in the course of a man's life, and balanced these against the probabilities, also, of an increase of efficiency in money-making power. They might have found from the evidence that Sweet's life was worth at least \$800 per annum to his wife and children; * * * and, according to the Carlisle Tables (which were in evidence), estimating money at the legal rate, it would require over \$10,000 to purchase an annuity of \$800 for one of Sweet's age."

[3] So we say here that the jury, weighing all the probabilities of loss from various contingencies, and also the probabilities of an increase in money-making power, might have well reached the conclusion that appellee would have earned for the term of his expectancy in life at least the sum of \$1,650 per annum, and that he lost the power to produce this by reason of the injury, and that it was a total loss to him. It would have taken about \$22,600 to have compensated him for this loss alone. When to this is added the expense of his surgical and medical treatment and damages for the mental anguish which he has endured on account of his personal disfigurement and the pain and suffering which he has undergone and must continue to undergo by reason of his bodily injuries and infirmities, we cannot say that the verdict is excessive. While mortuary tables were not in evidence, it was shown that appellee at the time of his injury was in good health, and the jury could judge from the character of the work in which he was engaged as to his power of physical endurance. In *St. Louis, I. M. & S. R. Co. v. Glossup*, 88 Ark. 225, 114 S. W. 247, we said: "Introduction of mortuary tables is not the only method of proving life expectancy. The question may be submitted to the jury upon testimony showing the age, health, habits, physical condition, etc., of the individual, so that the jury may estimate the probable duration of life."

[4] II. Appellant objected to an instruction, given at the instance of appellee, wherein the court told the jury: "If you find that, while he was engaged in the performance of his duties as fireman, the cab of the engine on which he was working collided with a car which defendant, in its failure to exercise reasonable care and precaution for the safe passage of plaintiff's engine over its tracks, had negligently placed and left standing on a side switch so close to the lead switch, on which plaintiff's engine was running at the time of the accident, as to obstruct its free passage, and caused the col-

lision, and as a result thereof plaintiff was injured, then the defendant is liable," etc. Appellant contends that the above instruction assumed that there was negligence on the part of the appellant. In *Brinkley Car Works & Mfg. Co. v. Cooper*, 75 Ark. 325, 87 S. W. 645, the court had under consideration an instruction reading as follows: "If the jury find from the evidence that the Brinkley Car Works had notice that children did frequent the place of this pool, or were from the nature of the surroundings likely to do so, and that it carelessly left a pool of hot water there concealed in such a way that one would reasonably expect it to occasion injury to such children, the company would be liable for damages to the plaintiff, who, by reason of its concealed nature, walked into the pool of hot water and was burned." The court said: "Counsel for appellant insist that the instruction is erroneous, in that it assumes the existence of facts which were disputed, viz., that the plaintiff walked into the pool of hot water on account of its being concealed, and that he was not aware of the presence of the water, or that it was hot. The instruction, standing alone, might be open to that construction, and would be objectionable; but not so when read with the other instructions, given at appellant's request, submitting to the jury the question as to whether the plaintiff knew at the time that the water was hot and that it was concealed."

In other instructions, following the one under consideration here, the court made it clear that it did not intend to assume as an established fact that appellant was negligent in placing the box car on the switch track, but submitted that question to the jury. For instance, in an instruction given at the request of the appellant the court told the jury as follows: "It devolves upon the plaintiff to show, by the greater weight of the evidence, that the defendant was negligent in the manner alleged. If the proof shows that the defendant's servants exercised ordinary care in the use of the precautions taken to prevent the cab and cars coming in contact," etc. And in an instruction on behalf of the appellee the court told the jury: "If you find that the alleged collision between plaintiff's engine and the car on the side switch was the result of the failure of the defendant railway company to exercise reasonable care and precaution to place said car on said side switch," etc. If the instruction, standing alone, is susceptible of the construction for which appellant contends, it could not be so construed when taken in connection with the instructions following it, under the doctrine of the above case; and, when all are considered together, it is manifest that the court did not assume negligence on the part of appellant, but submitted that issue to be determined by the jury. There is no conflict in the instructions.

[5] The appellant objects to the following instructions:

"(2) You are instructed that if you find that the alleged collision between plaintiff's engine and the car on the side switch was the result of the failure of the defendant railway company to exercise reasonable care and precaution to place said car on said side switch and to maintain it in such position as to provide a safe passageway for plaintiff's engine, then plaintiff cannot be charged with having assumed the risk of being hurt by said collision as one of the ordinary risks incident to his employment.

"(3) You are instructed that plaintiff had the right to presume that the defendant railway company had discharged its duty towards him by the exercise of reasonable care and precaution for his safety, by so placing the car upon the side switch and so maintaining it in a position that would provide a safe passageway for his engine, and that he cannot be charged with having assumed the risk of being hurt by the collision with said car, unless you find that prior to the time of the alleged collision he actually knew of the dangerous position of the car on the side track, and realized the danger of being hurt by a collision between said car and his engine, and that with such knowledge and appreciation of danger he voluntarily exposed himself to it."

The appellant contends that these instructions, as well as that part of instruction No. 1 already quoted, absolved the appellee from any duty to exercise ordinary care for his own protection. In instructions Nos. 2 and 3, and that part of instruction No. 1 set out above, the court was declaring the rule under the statute in regard to the assumption of risk. The court announced that doctrine correctly according to many decisions of this court since the passage of the act of March 8, 1907 (Laws 1907, p. 162), making railway companies and other companies and corporations liable in damages caused by the negligence of a fellow servant. *St. L. S. W. R. Co. v. Burdg*, 93 Ark. 88, 124 S. W. 239; *St. L. I. M. & S. R. Co. v. Ledford*, 90 Ark. 543, 119 S. W. 1123; *Aluminum Co. of North America v. Ramsey*, 89 Ark. 522, 117 S. W. 568; *Ozan Lumber Co. v. Biddle*, 87 Ark. 587, 113 S. W. 796. The doctrine of the above cases is that a servant has the right to assume that a fellow servant will exercise due care in the performance of the duties imposed upon him, and if a servant is injured, while exercising ordinary care for his own safety, through the negligence of a fellow servant, the master will be liable for the damages resulting from such negligence. While the servant does not assume any risk or danger arising from the negligence of the master or of a fellow servant of which he has no knowledge and does not appreciate, he is not, under the act of March 8, 1907, supra, relieved of the duty of exercising ordi-

nary care for his own protection. See cases supra.

[6, 7] The instructions criticised correctly declared the law under the statute on the issue of assumed risk, and they were directed solely to that issue. The court, in other instructions, given at the instance both of the appellant and the appellee, presented the issue of contributory negligence. The instructions set out above are not obnoxious to criticism because they do not embrace the defense of contributory negligence. The defenses of assumed risk and contributory negligence are separate and independent. The former arises out of contract relations, while the latter does not. *St. L. I. M. & S. R. Co. v. Corman*, 92 Ark. 102, 122 S. W. 116; *St. L. I. M. & S. R. Co. v. Holman*, 90 Ark. 555, 120 S. W. 146; *Johnson v. Mammoth Vein Coal Co.*, 88 Ark. 243, 114 S. W. 722, 123 S. W. 1180, 19 L. R. A. (N. S.) 646; *Southern Cotton Oil Co. v. Spotts*, 77 Ark. 458, 92 S. W. 249; *C. O. & G. R. Co. v. Jones*, 77 Ark. 367, 92 S. W. 244, 4 L. R. A. (N. S.) 837, 7 Ann. Cas. 430. The court did not err, on the specific objection of appellant, in refusing to modify these instructions, so as to embody therein the issue of contributory negligence.

[8] III. The appellant contends that the court erred in the latter part of the first instruction, in which it undertook to present the doctrine of comparative negligence under the act of 1911, which modifies the doctrine of contributory negligence theretofore existing in this state. We will not pass upon that statute, and the court's instruction under it, for the reason that the undisputed evidence in this record shows that there was no negligence on the part of the appellee causing or contributing to his injury, and therefore the instruction of the court, even if erroneous, could not have prejudiced the rights of appellant. The court, in our opinion, might have very well declared as a matter of law that the appellee, under the uncontroverted evidence, was free from negligence. Therefore the instructions submitting that issue to the jury, even if erroneous, were favorable to appellant, and it could not complain.

[9] The appellee testified that he was not familiar with the switch tracks of the yard where he was injured; that he was called to the service about 9 o'clock that night, and was injured the next morning about 1:50 o'clock; that he did not know the position of the car on the switch track with which the engine collided; that while it might have been his duty to look for cars on the switch track, he could not have seen the car, had he looked, for his eyes were at the time so blinded by the heat and bright glare of the fire, that he had just replenished, that he could not have seen had he looked; that he had no time to look out; that he was very busy firing the engine—had just got up on the seat

box and was putting on the injector when the crash came. If appellee, while discharging his duties as fireman, had no time to look out, as this testimony shows, then it was wholly immaterial whether the reflection from the car would have blinded his eyes or not. Appellee's testimony shows he was so busy he could not look for the car when the collision took place. The appellant offered no testimony to the contrary, and the burden was on it to do so. His testimony is reasonable and consistent, and there is no evidence in the record to the contrary. Therefore it was the duty of the jury to consider it, and reasonable minds could have reached no other conclusion than that the appellee himself was diligent in discharging his duties.

The issue of appellant's negligence was correctly submitted to the jury, and there was evidence to support the verdict. There was testimony tending to show that the foreman, who acted as conductor of the switch engine, ignored the rule, introduced in evidence, adopted by the company for the protection of the employes while switching. No brakes were set on this car. It was not coupled to the other cars. The wheels were not blocked. The foreman, having the placing of the cars in charge, only endeavored to see that the lead track was clear by placing his hand out to ascertain if there was space sufficient for cars on the lead track to pass the car on the side track. He said, if it cleared his fingers, holding his hand out straight, it would clear a car or engine, and he had adopted that method and used it for 27 years; that it was the usual method. But the jury would have been warranted in finding that this method itself was negligent, or the jury might not have accepted his testimony; for the fact remained that the box car was too near the lead track. Either the foreman did not take the precaution he says he did, or else the car ran down too close to the lead track after he had held out his hand, showing that it had no brakes or blocks to check it. The rule required these. Had the foreman but observed the requirements of the rule to keep the lead track free and safe from collisions, the unfortunate accident would not have happened. The slightest diligence on his part would have prevented the occurrence of the accident.

[10] IV. The record shows that in the argument to the jury Mr. A. N. De Mers, of counsel for appellee, stated: "Now, gentlemen, I want to be fair about this matter. I will ask you to place yourselves in the place of the Iron Mountain Railroad, and see what you would do under the circumstances in this case; then put yourselves in the place of Mr. Brogan, and see what is fair and just to both of these parties." Mr. W. V. Tompkins,

counsel for appellant, in his argument, said to the jury: "Gentlemen, as counsel ask you to put yourselves in the place of the parties, if you are going to do this, then I will ask you to consider how it would appear to you, if you had accidentally injured a man on the 17th of October, and had sent him to a hospital and was caring for him as best you could, and he should sue you on the 6th of November, as Mr. Brogan has done in this case? Mr. T. N. Robertson, counsel for appellee, in his closing argument, said: "Mr. Tompkins has said to you to put yourselves in the place of the railroad company, and seems to criticize plaintiff for suing on the 6th of November, when the injury occurred on the 17th of October. They had all that time to offer a settlement, and none had been offered." Appellant objected to the argument that appellant should have offered a settlement. Counsel for appellee thereupon said: "Well, I will withdraw the argument, since he objects to it." Appellant's counsel then said: "I object to these wrongful statements, and then, when an objection is made, letting counsel say he withdraws them. They have already had their ill effect." The court said to the jury: "Well, gentlemen, it is withdrawn. Do not consider that statement."

Appellant saved its exception to the action of the court in permitting counsel for appellee to make such argument, and in refusing to rebuke him for making such argument. There was no prejudicial error in the ruling of the court. The improper argument of counsel for appellee was not so flagrant in character as to create a prejudice in the minds of the jury against appellant, especially after counsel had withdrawn the remarks and the court had admonished the jury not to consider them. This action of the court and counsel was sufficient, in our opinion, to remove any possible prejudice that the objectionable argument was calculated to produce.

[11] V. Appellant complains of the ruling of the court in giving the instruction on the measure of damages. (See statement of the case.) There is no error in the instruction. It is not open to the criticism which appellant's counsel makes. The instruction is not argumentative, but only mentioned elements of damage proper for the jury to consider in the event that they find, from the evidence, such elements to exist. There was evidence in the record limiting definitely the expense to which appellee had been and would be subjected, by reason of his injured condition, to the sum of \$500. The jury, therefore, were not allowed to speculate as to the amount of such expense.

There is no error in the record, and the judgment is therefore affirmed.

ST. LOUIS, I. M. & S. RY. CO. v. JACKS.

(Supreme Court of Arkansas. Nov. 18, 1912.)

1. DEATH (§ 99*)—DAMAGES—PECUNIARY LOSS TO BENEFICIARY—EXCESSIVE DAMAGES.

A bright, healthy, industrious boy, 16 years old, of good habits and affectionate disposition towards his parents, was killed. His father had an expectancy of a little over 14 years, and his mother had an expectancy of a little over 17 years. The boy, at the time of his death, earned \$55 per month, and was in line of promotion. He contributed the whole of his earnings to his own and his parents' support. He had stated that he would stand by his parents as long as he lived. *Held*, that a verdict for the benefit of the parents for \$5,000 was not excessive.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 125-130; Dec. Dig. § 99.*]

2. DEATH (§ 72*)—ACTION FOR DEATH—EVIDENCE—ADMISSIBILITY.

In an action for the negligent death of an infant, brought for the benefit of his parents, evidence of the father's deafness and inability to obtain work was admissible only to show why the father was unemployed and needed his son's assistance.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 91; Dec. Dig. § 72.*]

3. MASTER AND SERVANT (§§ 295, 296*)—INJURY TO SERVANT—CONTRIBUTORY NEGLIGENCE—ASSUMPTION OF RISK.

In an action for the death of a boy 16 years old, employed as clerk to a railroad storekeeper, caused by a collision with cars used as a storeroom, an instruction that, in passing on the questions of contributory negligence and assumed risk, the jury must consider decedent's age, experience, intelligence, and means of knowledge, and if he, on account of his youth or inexperience, did not know or appreciate the danger of doing what he did at the time of the accident and under the circumstances then existing, he was not guilty of contributory negligence and did not assume the risk, unless the danger was obvious to a person of his age, intelligence, and experience, was correct.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1168-1179; Dec. Dig. §§ 295, 296.*]

4. TRIAL (§ 260*)—INSTRUCTIONS—REFUSAL TO GIVE INSTRUCTIONS COVERED BY CHARGE GIVEN.

It is not error to refuse a requested instruction fully covered by the instructions given.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651-659; Dec. Dig. § 260.*]

5. MASTER AND SERVANT (§ 288*)—INJURY TO SERVANT—ASSUMPTION OF RISK.

Though the jury may have found that decedent, at the time of his death, while in cars on a track used as a storeroom, engaged in the performance of his duties, was in a dangerous and unnecessary position, the question whether he assumed the risk was for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1005, 1068-1083; Dec. Dig. § 288.*]

6. MASTER AND SERVANT (§ 289*)—INJURY TO SERVANT—CONTRIBUTORY NEGLIGENCE.

Whether decedent was guilty of contributory negligence *held* for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1089-1132; Dec. Dig. § 289.*]

Appeal from Circuit Court, Desha County; Antonio B. Grace, Judge.

Action by J. J. Jacks, administrator of Elkins Jacks, deceased, against the St. Louis, Iron Mountain & Southern Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

The following is instruction No. 7 given by the court: "In passing upon the question of contributory negligence on the part of the deceased, and of assumed risk, you must take into consideration his age, experience, intelligence, and means of knowledge; and after considering these matters, if you believe from the evidence that the deceased, on account of his youth or inexperience, did not know or fully realize and appreciate the danger incident to the act or employment in which he was engaged at the time of the injury complained of, then you cannot hold him guilty of contributory negligence, nor can he be held to have assumed the risk, unless the danger of doing whatever he is shown to have done was, at the time and under all the circumstances then existing, obvious and apparent to a person of his age, intelligence, and experience."

The court refused defendant's requested instructions 2 and 3, which merely requested the court to instruct the jury that the burden of proof in this case was upon the plaintiff to establish each and every material allegation of his complaint.

The court also refused defendant's requested instruction 7, as follows: "If you find from the evidence that the injury and death of plaintiff's intestate was due to a dangerous position assumed by him, and which was wholly unnecessary in the discharge of his duties connected with his employment, then plaintiff cannot recover, and your verdict should be for the defendant."

The court also refused defendant's requested instruction 10, as follows: "The court instructs the jury that the law does not presume negligence from the mere happening of the accident."

Elkins Jacks, a boy a little over 16 years of age, was in the employ of the appellant as clerk to its storekeeper at McGehee. The appellant was handling its supplies from two box cars. They were placed on its coach track, at McGehee station. The cars were in bad condition; one of them having the drawbar out, permitting the cars to come within six or eight inches of each other. There were doors in the ends of the two cars, so that one could pass from one car to the other. It was Jacks' duty to go in these cars and get out supplies for the employes who asked for them. It was his duty to go from one car to the other, and to stay around these cars. The appellant had been using these cars as a storeroom for four or five days, while its regular storeroom was

being repaired. Jacks had been working there in the store one or two months. There was nothing between these storeroom cars and the end of the track. The way to protect them from being bumped into by other cars on the track was to place a blue flag in the center of the track some distance above them. The rule required that no train should go over the flag. The servant whose duty it was to place the flag did not look to see that morning whether the flag was there. There was no reason to suppose that the cars would be moved. They were placed on the coach track for the special purpose of a storeroom.

While the switch crew was making couplings at McGehee on the morning of September 12, 1910, the switch engine caused a collision to take place with the cars where young Jacks was engaged in the discharge of his duties, which caused his death. After the collision occurred, Jacks was observed with one foot in one car and the other foot in the other car, standing up. He had his head between the two cars. When the engine released the pressure from the cars, he fell forward into the car. There was a bolt projecting out of the end of one of the cars, about as high as a man's head, if he had been between the cars. This bolt was four or five inches from the door, and projected out about one inch. There was blood on the bolt. The base of Jacks' skull was fractured, and both of his ears were bleeding. The blow against his ears on both sides killed him, causing concussion of the brain. He died instantly.

His administrator brought suit against the appellant, alleging that it negligently permitted and caused its engine to go upon the track upon which the cars were standing and collide with the cars while Jacks was at work, without any kind of warning to Jacks of their approach, with such violence that he was thrown about and knocked against the said car, or some object or objects thereon or thereto attached, and thereby injured him in such manner that he soon thereafter died from the effect of such injuries. The suit was brought for the benefit of Jacks' father and mother. Appellee alleged that they were entitled to his earnings until he reached his majority, and that he would have continued to have contributed to their support thereafter. The appellant denied the allegations of the complaint, and pleaded contributory negligence and assumption of risk on the part of Jacks.

A witness was permitted, over the objection of appellant, to state that Jacks' father, on account of deafness, often did not have any employment. The jury returned a verdict in favor of the appellee for \$5,000. Judgment was rendered for this sum, and the appellant brings this appeal. Other facts will be stated in the opinion.

J. C. Knox, of Monticello, and Thos. B. Pryor, of Ft. Smith, for appellant. Danaher & Danaher, of Pine Bluff, for appellee.

WOOD, J. (after stating the facts as above). [1] The appellant contends that the verdict was excessive. Jacks had an expectancy of 44 years, his mother an expectancy of 17.41 years, and his father an expectancy of 14.09 years, as shown by the mortuary tables. Young Jacks was earning at the time of his death a salary of \$55 per month, and was in line of promotion. He was industrious and intelligent. He contributed the whole of his earnings to his own and his father's and mother's support. He had stated that he would "stand by them [his father and mother] as long as he lived"—said they "could depend on him." At the time of his death his yearly salary, less his expenses for food and clothing, would have been \$540. During the expectancy of his mother this income would have amounted to \$9,396. That amount, reduced to its present value, according to the Carlisle Tables, would be \$5,865.11.

In *Railway v. Robbins*, 57 Ark. 377, 21 S. W. 886, this court said: "The amount of the contributions, calculated upon the basis that they would continue without interruption for the term of his expectancy of life, should have been discounted on account of the contingencies to which they were subject." But, while this is true, it is also true that the jury were warranted in taking into consideration the fact that Jacks was in line of promotion, as shown by the evidence, and the reasonable probability that he would have been promoted and his earning power thereby increased. As was said by us in the recent case of *Railway Co. v. Brogan*, 151 S. W. 699, quoting from *Railway Co. v. Sweet*, 60 Ark. 550, 31 S. W. 571: "The jury doubtless weighed all the probabilities of loss from sickness and other various contingencies likely to arise during the course of a man's life, and balanced these against the probabilities, also, of an increase of efficiency in money-making power."

There is nothing in the amount of the verdict to indicate that the jury pursued any improper method in arriving at the same, and there is nothing in the record to warrant us in saying that they were actuated by passion, prejudice, or sympathy. Their verdict was responsive to the evidence, and while the verdict, in the absence of pain and suffering, reached the limit, perhaps, of the amount that should have been allowed under the circumstances, yet we are of the opinion that Jacks' father and mother were not more than fully compensated for his death. Jacks was a bright, healthy, industrious boy, of good habits and affectionate disposition towards his parents. The proof makes it reasonably certain that he would have con-

tinned to contribute his earnings to their support as long as they lived. With the disposition and ability that he possessed, according to the proof, it is reasonably certain that he would have contributed to them, had he lived, during the course of their lives as much as the jury awarded by their verdict.

[2] Appellant contends that the court erred in admitting evidence of the father's affliction (and inability to obtain work on that account) to go to the jury. We are of the opinion that this evidence was proper. It tended to show that young Jacks' father was dependent. The court was careful to tell the jury that the affliction of the father was not an element of damage in the case, but was only for the purpose of showing why his father was unemployed, and therefore needed his son's assistance. The instruction given on the measure of damages excluded any affliction of the father as an element of damages. Testimony showing the pecuniary circumstances of the next of kin, calling for help from those upon whom they are dependent, is certainly relevant and proper to be considered. It is relevant to the issue as to whether or not, by reason of the injury and death, the next of kin have suffered any pecuniary loss. See *Cooper v. Railway Co.*, 66 Mich. 261, 33 N. W.

306, 11 Am. St. Rep. 482, and cases there cited.

The instructions of the court on the issues of negligence, contributory negligence, and assumed risk covered every phase of the evidence and were exceptionally free from error. The charge was in accord with the doctrine on these subjects often announced by this court, and it is unnecessary to discuss them here.

[3] Of the instructions given appellant only criticises No. 7. (See statement of the case.) This instruction was based upon the evidence and was correct.

[4-6] The court refused several prayers for instructions offered by appellant. (See statement of the case.) Of these 2, 3, and 10 were correct, but they were fully covered by instructions which the court gave. Instruction No. 7 was erroneous. It did not follow as a matter of law that, if Jacks assumed a dangerous and wholly unnecessary position, appellant was not liable; for, although the jury may have found that Jacks at the time of his death was in a dangerous and unnecessary position, it was still a question for them to determine as to whether or not in so doing he assumed the risk or was guilty of contributory negligence.

Finding no error, the judgment is affirmed.

CRUMP v. WALKUP et al.

(Supreme Court of Missouri, Division No. 1.
Nov. 30, 1912.)

1. FRAUDULENT CONVEYANCES (§ 278*)—TRANSACTIONS BETWEEN HUSBAND AND WIFE—PRESUMPTIONS.

The common law governing husband and wife, giving rise to the presumption that property purchased during coverture, title to which was taken in the name of the wife, was paid for by the husband, has been abolished by Rev. St. 1909, §§ 8304, 8309, empowering a married woman to contract and carry on business in her own name, and providing that all realty and personalty belonging to any woman at the time of her marriage, or which may come to her during coverture by gift or inheritance, or by purchase with her separate money, shall be her separate property, and the presumption is entitled to but little weight in determining whether conveyances made to a wife by third persons are fraudulent as against the husband's creditors.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. §§ 801, 802; Dec. Dig. § 278.*]

2. HUSBAND AND WIFE (§ 121*)—SEPARATE PROPERTY OF WIFE—STATUTORY PROVISIONS.

Under Rev. St. 1909, §§ 8304, 8309, empowering a married woman to contract and carry on business in her own name, and providing that all property belonging to her at the time of her marriage, or which may subsequently come to her, shall be her separate property, real and personal estate purchased by a wife, by a donation given her by a third person, and by the fruits of her labor, and by the proceeds of the sales of her personalty, are her separate property, and cannot be taken to satisfy her husband's debts.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. §§ 435-441; Dec. Dig. § 121.*]

3. FRAUDULENT CONVEYANCES (§ 800*)—TRANSACTIONS BETWEEN HUSBAND AND WIFE—EVIDENCE—SUFFICIENCY.

In a suit by a creditor of a husband to set aside conveyances by a third person to the wife, evidence held to show that the wife purchased the property by means of her separate estate, so that the conveyances were not in fraud of the husband's creditors.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. §§ 896-903; Dec. Dig. § 300.*]

4. FRAUDULENT CONVEYANCES (§ 300*)—TRANSACTIONS BETWEEN HUSBAND AND WIFE—EVIDENCE—SUFFICIENCY.

That a husband without his wife's knowledge mortgaged her separate chattels is not evidence that he owned the chattels, and that the wife's claim thereto is in fraud of his creditors.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. §§ 896-903; Dec. Dig. § 300.*]

5. FRAUDULENT CONVEYANCES (§ 800*)—TRANSACTIONS BETWEEN HUSBAND AND WIFE—EVIDENCE—SUFFICIENCY.

That a husband gave to the assessors, for assessment, a list of personalty, claimed by the wife, as his own, is not conclusive evidence that the wife's claim of ownership is in fraud of his creditors; but the question of ownership is for the court on all the evidence, in a suit

by a creditor of the husband to subject the chattels to his claims.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. §§ 896-903; Dec. Dig. § 300.*]

Appeal from Circuit Court, Monroe County; D. H. Eby, Judge.

Action by Robert H. Crump against Emma W. Walkup and another. From a judgment for defendants, plaintiff appeals. Affirmed.

This is a suit in equity, instituted in the circuit court of Monroe county, by the plaintiff against the defendants, seeking to set aside and for naught hold six certain deeds, executed by various persons, conveying as many tracts of land situate in said county to defendant Emma W. Walkup, wife of defendant John H. Walkup, and to subject said lands to the payment of a certain judgment for \$958.20, dated October 29, 1898, based upon two promissory notes, one dated May 22, 1891, for \$32, due one day after date, bearing 8 per cent. interest, and the other dated August 9, 1892, for the sum of \$700, bearing the same rate of interest in favor of the plaintiff against the defendant John H. Walkup, upon the alleged ground that the purchase price of said lands was owned and paid for by John H. Walkup, the husband, and the title thereto was taken in the name of Emma W. Walkup, his wife, for the purpose of hindering, delaying, and defrauding his creditors. The record in the case is quite voluminous, covering about 250 printed pages. To state even the substance of the testimony of the various witnesses would unnecessarily prolong the statement of the case, and the opinion which is to follow. We will, therefore, do the next best thing which the nature of the case will permit, and that is to briefly state what the evidence tends to prove, and then emphasize the weak and strong points in the case, and point out the evidence which tends to corroborate or disprove the same. In passing, however, we might add, that the evidence in this case, like that in most of its kind, is largely drawn from the lips of the defendants, and consequently there is not much conflict in the testimony; but the deductions to be drawn therefrom, and the rules of equity governing the same, greatly vary, and constitute the real grounds upon which the respective parties to the action stand, and upon which they wage the legal battle.

The following tracts of real estate constitute the land in controversy, and were acquired by defendant and Emma W. Walkup from the following named persons, upon the following dates, and in consideration of the following sums, to wit: Eighty acres from Julia E. Mudd, by deed dated April 10, 1902, in consideration of \$350 paid and a pair of old mules valued at \$50; 4.7 acres from Edward H. O'Daniel, by deed dated February 8, 1906, in consideration of \$47; 40 acres from William M. McCreery et al., by deed

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

dated November 10, 1906, in consideration of \$510; 113 acres from John W. Young, by deed dated March 7, 1907, in consideration of \$3,390; 40 acres from Samuel M. Locke, by deed dated June 20, 1907, in consideration of \$200; and 40 acres from Thomas F. Hurd et al., by deed dated July 1, 1907, in consideration of \$275. Emma W. Walkup never inherited any property from her father, nor any one else, nor did she own any property at the time of her marriage to John H. Walkup, nor at the time they moved to the farm of John W. Young, to be presently noted. All of this land, except the 113 acres, was very rough and broken, covered with small timber and brush, and was unfit for cultivation, only valuable for grazing purposes. At the time of the trial the 113 acres were worth \$30 per acre, and all the remainder was worth about \$10 per acre. Mrs. Walkup borrowed the entire \$350 from a Mrs. Glenn, with which she paid for the Mudd tract, and secured the loan by deed of trust on the land. She paid Mrs. Glenn said \$350 on November 10, 1906. The entire purchase price of the 113 acres, \$3,390, was borrowed by Mrs. Walkup from the Bank of Stoutsville, and she secured the same by a deed of trust on that and all the other land mentioned, which cost her about \$1,600. None of the \$3,390 so loaned had been paid at the date of the trial.

Prior to July, 1893, John H. Walkup had been engaged in the live stock and livery business in the little town of Florida, Monroe county, at which time he failed and practically all of his property was taken by his creditors and sold to pay his debts, leaving about \$3,500 of indebtedness unpaid. In July, 1893, defendants moved to the farm of John W. Young, an uncle of John H. Walkup. At that time his entire possessions consisted of a cow, an old pony, a second-hand wagon, a set of buggy harness, the family household and kitchen furniture, and 18 head of mules, which were mortgaged to said John W. Young for more than they were worth, and afterwards sold for several hundred dollars less than the amount of the mortgage. The cow died shortly after they moved to Young's farm. The household and kitchen furniture was worth about \$50, the harness \$20, and the pony \$15. John W. Young was an old bachelor, and lived alone when defendants moved to his farm. Emma W. Walkup, after moving there, kept house for him, and did his cooking and all other duties pertaining to the household. In other words, all of them lived together as one family; defendants paying no rent and Mr. Young paid no board. When defendants went to live with Mr. Young, he turned over to Mrs. Walkup all the poultry which was then on the farm, and gave her the use of nine good milk cows. The next year Mrs. Walkup added to the poultry some turkeys, geese, and ducks, but just how many is not shown. John H. Walkup had, nothing to do

with the poultry except at times, to assist his wife in marketing the same. She used a part of the proceeds of the sales of poultry in supporting the family, and a part of the proceeds were deposited in her name in the Bank of Stoutsville. At one time Mrs. Walkup exchanged some ducks to Lon Hughes for a pig, which, with its increase, was kept on the farm for several years. From those came the stock of hogs which was on the farm at the date of the trial, which at all times belonged to Mrs. Walkup. A few years prior to the date of the trial, John H. Walkup, as the agent of Mrs. Walkup, traded some of the hogs to a man by the name of Green for a small bunch of sheep, and from this start the sheep on the farm at the date of the trial sprang. None of the sheep ever belonged to her husband. About this same time Mrs. Walkup, out of the proceeds of the sales of poultry, eggs, and butter, purchased a small bunch of black heifer calves, the number not stated.

From the time defendants moved upon the farm of Mr. Young, up to April 10, 1902, the date of the purchase of the first piece of land by Mrs. Walkup, John H. Walkup, her husband, was doing general farm work upon the farm. The farm was largely in grass, except a small piece of timber. Neither of the defendants cultivated any of his land, but John H. Walkup rented and cultivated a piece of ground adjoining, and raised small crops thereon for a year or two. Mr. Young permitted John H. Walkup to cut some wood from the piece of timber on his land, which from time to time he hauled to Stoutsville and sold for \$1.50 per cord. The proceeds of those sales were expended for living necessities. Some time prior to April 10, 1902, a man by the name of Turnbaugh owed Mrs. Walkup a board bill, and in settlement thereof he gave her a mare "pretty badly crippled." Later she traded the mare to a Mr. Gaston for a mule, and gave him \$10 "to boot." The \$10 was hers, the proceeds of sales of turkeys and chickens; and later she sold more turkeys and chickens, from which she realized \$25, and purchased therewith another mule. In the spring of 1902 Mrs. Walkup purchased the first tract of land, 80 acres, from Mrs. Mudd, and paid for the same with the \$350 she borrowed from Mrs. Glenn and the two mules last before mentioned. This land was covered with small timber; the big timber having been cut off years before. Shortly after purchasing it she began to fence and clear the land. She cut therefrom between 800 and 900 cords of wood and sold most of it at \$3.50 per cord. John H. Walkup did part of the chopping and hauling of the wood to market, but the greater part thereof was done by hired labor, and the cost thereof was paid from the proceeds of the sale of the wood. This wood was cut and sold between the years 1902 and 1907. Part of the proceeds of the sale of this wood and the sales of poultry, eggs, and

butter provided the largest part of the living expenses for the family. Most of the live stock and its increase were kept on the farm, but occasionally a few hogs were sold on the market.

For some time prior to 1902, down to the date of the trial, Mrs. Walkup had an account with the Bank of Stoutsville. All the land purchased by Mrs. Walkup was paid for by checks drawn on her account in said bank, signed by her. She testified that all the money received from the sales of her poultry, eggs, butter, live stock, and wood, except what was paid out for family expenses, etc., was deposited, either by herself or by her husband, to her credit in said bank. This testimony of Mrs. Walkup is contradicted by the books of the bank. They show that there was another account kept in said bank under the name of "J. W. Young by J. H. W." The deposits in this account were rather frequent, and were for considerable amounts, and were made by John H. Walkup, and the checks against this account were usually drawn by him. John H. Walkup frequently, without the knowledge of his wife, deposited money arising from the sale of poultry, stock, and cordwood, belonging to her, in the account of "J. W. Young by J. H. W.," and that, whenever Mrs. Walkup purchased a piece of land, John H. Walkup would, without her knowledge, draw a check against the account standing in the name of "J. W. Young by J. H. W.," and deposit it in said bank to the credit of Mrs. Walkup, and she would draw a check against her account in said bank in favor of the person from whom she had purchased the land, in payment thereof. In other words, John H. Walkup, without the knowledge of his wife, would, when selling her property, collect the proceeds of the sales and deposit them to the account "J. W. Young by J. H. W.," and that whenever she purchased a piece of ground he would draw a check against said account and deposit it in said bank to the credit of his wife, and then she would draw her check against her account in favor of the person from whom she had purchased the land. She had no knowledge of this shifting of accounts made by her husband. There was at no time any money deposited to the account of "J. W. Young by J. H. W." which was not the proceeds of sales of property belonging to Mrs. Walkup. Nor is there any evidence which tends to show that she had any knowledge of the existence of said account, or that her money was being deposited in that or any other account than her own. She understood and believed that the proceeds of the sales of all her property, made by her husband, were being deposited by him in her name; and, so believing, she drew checks against her own account in payment of land purchased by her, or in payment of any other of her indebtedness. J. W. Young had an account of his own in said bank, in which he deposited his own money.

The plaintiff in this case was, for several years prior to the year 1902 and down to the date of the trial, a member of the board of directors of the Bank of Stoutsville, the bank in which all these accounts were kept, and for a year or two just preceding the trial he was the president of said bank. John H. Walkup was shown to have had some horses, mules, and a few head of cattle on the farm of John W. Young, or at least he claimed he owned them; but whether they were the same as those claimed by Mrs. Walkup is not made clear by the evidence. But the evidence is clear that on several occasions he borrowed money and gave chattel mortgages on Mrs. Walkup's live stock to secure the loan, sometimes with her consent, and at other times without her knowledge; that the money thus borrowed was generally used in purchasing other live stock; that from the date of the failure of John H. Walkup to the date of the trial he had paid off and discharged more than \$3,000 of his old indebtedness, and that the greater part thereof was paid off with money belonging to his wife, the proceeds of sales of her live stock and from the products of her real estate, the exact amount thereof not appearing, but he testified that it was considerably more than she had used in the purchase of real estate; that respondent John H. Walkup assisted in the care of the real estate, that he attended to and fed the stock, that he assisted in cutting and hauling the cordwood and in clearing and fencing the land, and that he acted as respondent Emma W. Walkup's agent in the transaction of most of the business, buying, selling, and trading stock, marketing the poultry, stock, and cordwood, and collecting the proceeds for her; that respondent John H. Walkup on several occasions gave in to the county assessor for taxation in his own name all the personal property on the premises, including that of respondent Emma W. Walkup, and also sometimes the property of John W. Young. It does not appear from the evidence that Mrs. Walkup knew anything about the property being listed by the assessor in the name of John H. Walkup, or that she in any way consented to it.

It was not shown, and it is not claimed by appellant, that respondent Emma W. Walkup at any time gave her husband, respondent John H. Walkup, authority or assent in writing to sell, incur, or in any manner dispose of any of her personal property. It is not shown, and plaintiff made no effort to show, that respondent John H. Walkup had any means of his own, or that he received money from any source prior to the purchase of the first piece of real estate, which was July 1, 1907, except from the sales of stock or other products of real estate involved in this suit, which Emma W. Walkup claims as her separate property. It appears in evidence that respondent Emma W. Walkup had no knowledge of plain-

tiff's judgment against respondent John H. Walkup until the bringing of this action, and that she thought his indebtedness to plaintiff had been paid long before the year 1902.

Upon the evidence introduced the trial court found issues in favor of the defendants, and rendered judgment accordingly for them, and denied the relief asked by the plaintiff. After the motion for a new trial was overruled, the plaintiff duly appealed the cause to this court. Numerous errors are assigned, but we will only consider those bearing upon the merits of the case.

E. T. Fuller and J. P. Boyd, both of Paris, for appellant. Whitecotton & Grimes and F. W. McAllister, all of Paris, for respondents.

WOODSON, J. (after stating the facts as above). It is not contended by counsel for appellant that their case is made out and supported by the weight of the direct and positive evidence in the case; but, if we correctly understand their position in that respect, they tacitly, at least, concede that the direct and positive testimony in the case is against their theory of the case. But, be that true or false, counsel for appellant plant their case squarely upon a presumption of law, presently to be noted, supported and strengthened, as they contend, by certain undisputed facts in the case, which they state in connection with said presumption.

[1] The contention of counsel for appellant is clearly stated in the following language, viz.: "The fact that the respondents John H. Walkup and Emma W. Walkup were husband and wife at and prior to the date of the obtaining of the original judgment by the appellant herein against the said John H. Walkup, and that the land in controversy was purchased during coverture, being admitted, or, at least, uncontradicted by the evidence in this case, the presumption is that each and every tract of land in controversy was paid for by respondent John H. Walkup, the husband." Counsel for appellant in various ways and in different language restate the foregoing legal proposition, as well as certain well-known rules of evidence, which, if resorted to by the court, would, as they contend, lead to the conclusion above stated. For convenience and brevity, we will consider all of those matters under the one proposition before stated.

Before going directly to the consideration of the presumption above stated, and relied upon by counsel for appellant to make out their case, it may not be out of place in this connection to state that said presumption grew out of and originated under the common law governing domestic relations. Briefly, under that law, the husband and wife were considered one—that is, one person; and the law gave to the husband an estate by curtesy in all of the real estate of which the wife was seised during coverture. It also gave to him all of her personal proper-

ty, and so much of her choses in action as he reduced to possession during the marital relation (which was generally all of them), and under the common law the wife had no capacity to contract. Consequently, the law having divested her of all property she had at the time of her marriage, and she having no capacity to contract for or purchase other property, and even though she had in any manner acquired other property, real, personal, or mixed, barring uses and trusts, it would under that law have passed to and become the property of the husband in the same manner that her original estate passed to him at the date of the marriage; therefore very naturally the law raised a presumption that, where the wife held the title to real estate or personal property during coverture, the husband paid for the same, and took the title thereto in her name, for the reason that as a rule she had no other way to acquire it. That presumption has been recognized and enforced by the courts of this state and most of the other states of the Union, as well as by the courts of the United States. *Lins v. Lenhardt*, 127 Mo. 271, 29 S. W. 1025; *Sloan v. Torry*, 78 Mo. 623; *Patton v. Bragg*, 113 Mo. 601, 20 S. W. 1059, 35 Am. St. Rep. 730; *Seitz v. Mitchell*, 94 U. S. 580, 24 L. Ed. 179.

The conditions that existed under the common law and which gave birth to that presumption no longer exist in this or in any of the other states, in so far as my knowledge extends. By section 8304, R. S. 1909, a married woman is empowered to contract, carry on business in her own name, and to sue and be sued, as a feme sole; and by section 8309, R. S. 1909, it is provided that all real estate and personal property, including rights in action, belonging to any woman at the time of her marriage, or which may have come to her during coverture, by gift, bequest, or inheritance, or by purchase with her separate money or means, or be due as the wages of her separate labor, or grow out of any violation of her personal rights, shall, together with all income, increase, and profits thereof, be her separate property and not liable for her husband's debts. The enactment of both of these statutes antedate the matters and things involved in this litigation.

If we adhere to the wise maxim that the reason of the law is the soul of the law, and that when the reason of the law ceases then the law itself ceases, we should attach but little, if any, importance to the presumption before stated, invoked, and relied upon by counsel for appellant, to make out and sustain his case. But give to that veteran presumption, which has served a good and useful purpose in the past, but which has been practically, if not totally, abolished by necessary implication through the enactment of the wise and just statutes governing married women, in this and other states, all the

weight it is entitled to, nevertheless we are of the opinion that appellant has wholly failed to make out and support his case, for the reason that this record shows affirmatively that the respondent John H. Walkup was himself totally insolvent, and had no money or means with which he could have purchased and paid for the lands, or any part thereof, involved in this litigation; nor does the evidence show that he earned, accumulated, inherited, or otherwise acquired the money or means with which it was paid for.

[2] But, upon the contrary, the only direct and positive evidence in the case bearing upon that point shows that Emma W. Walkup, the wife of John H., "was the better man of the two," and that by the exercise of good judgment, hard labor, and strict frugality she was enabled to support the family and save and add to the small donation given to her by Mr. Young, when she and her husband went upon his farm to live. Everything she put her hands to turned into gold; and after a few years she had acquired several small pieces of real estate, worth, less the incumbrances thereon, about \$1,600. She also accumulated considerable live stock, poultry, and other personal property, about the farm, besides paying off about \$3,000 of her husband's old debts, incurred by him while he steered their ship of fortune. Not only that, but the uncontradicted evidence shows that Mrs. Walkup purchased and paid for the Mudd tract of land with her own means, and from that she sold some 800 or 900 cords of wood at \$3.50 per cord, which amounted to somewhere between \$2,800 and \$3,200. This was the only money of any consequence that the evidence shows either of them ever had, and clearly this was the foundation of all their subsequently acquired property. The proceeds of the sales of poultry, eggs, butter, etc., went largely to buy calves, lambs, pigs, and other poultry, and what was not expended in that way was expended for the necessities of life. And I might add that there is not a scintilla of evidence to be found in this record which tends to show that any of said poultry ever at any time belonged to John H. Walkup; but, upon the other hand, the evidence is uncontradicted that John W. Young gave to Mrs. Walkup the first lot of poultry she ever had, and all that which was subsequently found on the premises was the issue of the original stock given to her by Mr. Young. Under the statutes before mentioned, all the real estate and personal property, as well as the issues, rents, and profits thereof, which Mrs. Walkup earned during coverture, belongs to her, and it cannot be taken to satisfy her husband's debts.

[3] Counsel for appellant lay much stress upon the fact that John W. Young had an account of his own in his own name in the Bank of Stoutsville, that John H. Walkup had one in his own name, and one in the

name of "John W. Young by J. H. W.," and that Emma Walkup had one in her name, and the fact that John H. Walkup frequently deposited money to the account of "John W. Young by J. H. W.," and would, whenever his wife purchased a piece of land and go to pay for it, draw a check upon the "John W. Young by J. H. W." account, and deposit it to the account of Emma W. Walkup, his wife, and that she would then draw her check on her own account in payment of the purchase price thereof. This juggling of accounts between them it is insisted is evidence of fraud on the part of both Mr. and Mrs. Walkup; that is, that by depositing the money in the account of "John W. Young by J. H. W." they would conceal the fact that either of them had any money in the bank, and that the transfer of the money from the "John W. Young by J. H. W." account to the Emma Walkup account, and the drawing of the check by her on the latter account in favor of the vendor of the land would conceal the fact that John H. Walkup was paying the purchase price, and at the same time make it appear to the outside world that Mrs. Walkup was paying for it with her own money.

This evidence, if standing alone and unexplained, would carry considerable probative force; but, explained as it is, we attach but little importance to it. In the first place, Mrs. Walkup testifies that she never knew or heard that there existed in the bank the "John W. Young by J. H. W." account, or that her husband had ever deposited her money in that account. She testified that she directed him to deposit her money in her own account, that she supposed up to the day of the trial of this cause that he had always done so, and, so believing, whenever she purchased land or wished to pay for anything else, when she did not have the money, she always drew a check on the bank against her own account. This testimony of hers is not contradicted by any of the bank officers, who had charge of the books and accounts of the bank, and who are presumed to know their customers, and to whom the funds deposited in the bank belong.

But, independent of that, it is undisputed that the appellant had been for a number of years a member of the board of directors of this bank, and for a year or two just before the institution of this suit he was the president thereof, and presumably was perfectly familiar with the condition of its accounts; but whether he was actually familiar with them or not is wholly immaterial, for the reason that no person, man or woman, who has any sense whatever, who wanted to perpetrate a fraud upon a person, would go to the bank of that person and open up a series of accounts therein which would expose and lay bare the fraudulent scheme by which the fraud was to be perpetrated. The mere statement of such a proposition condemns its sanity.

[4] Counsel also lay much stress upon the fact that John H. Walkup upon one or two occasions mortgaged some of his wife's live stock. The evidence shows that he did so once or twice without her knowledge, and at other times with her consent. He should not have done so without her knowledge and permission; but the fact that he did so, with or without her knowledge or consent, did not injure appellant. Nor does he so contend, but he insists that the mere fact that he mortgaged them is evidence of the fact that he owned the stock so mortgaged. How can that be? Certainly not, if he got her permission to mortgage them, and equally true, if she had no knowledge of the fact that he had done so. That might be evidence against him, but not against her. That still left the question of ownership of the property open, to be proven or established by competent evidence.

[5] Counsel lastly insist that the fact that John H. Walkup gave to the assessor for assessment a list of the personal property claimed by the wife as his own is evidence of fraud. Concede that said act is an admission of ownership as against him, it is no evidence against her whatever, without it was shown that she had knowledge of the fact, and the record in this case fails to disclose that knowledge. But concede that she had knowledge thereof, and that it was evidence of fraud, nevertheless it was not conclusive evidence of fraud. The question of the ownership of the property in this class of cases is still a question of fact, for the court to determine upon all the evidence in the case, and not one of estoppel. It is not an uncommon thing for a husband, with or without the knowledge of the wife, to give in her property in his own name for taxation. I dare say that it is given in that way more frequently than it is given in in her own name. And it is a well-known fact that in the great majority of cases it is done in that way for convenience or thoughtlessly. The husband, wishing to pay the taxes on his wife's personal property, never thinks of making out a separate list of her property; nor, as a rule, does the question of fraud enter his mind. From a sense of duty and a spirit of generosity toward his wife springs the desire to pay her taxes and other obligations, and for convenience merely he includes her property in his list.

This is common knowledge, and to hold as a matter of law that such conduct is fraudulent in this class of cases would stamp the seal of disapproval upon one of the noblest and most generous spirits that abides in the human heart. I am not saying that such conduct may not be the result of a fraudulent design, or that it may not be evidence of fraud where credit has been extended upon it; but what I do say is this: That it is but one fact or circumstance which tends to

show fraud, but standing alone, and uncorroborated by other facts and circumstances indicating a fraudulent intent, is itself insufficient for that purpose. Evidently this was the view the trial court took of the matter, and caused him to find for the respondents. In our opinion that finding was right, and that the evidence in this case was insufficient to sustain the allegations of the petition.

So believing, we are of the opinion that the judgment should be affirmed. It is so ordered. All concur.

HUNTER et al. v. PEMISCOT LAND & COOPERAGE CO.

(Supreme Court of Missouri, Division No. 1
Nov. 30, 1912.)

1. QUIETING TITLE (§ 22*)—TITLE OF PLAINTIFF—SUFFICIENCY—COMMON SOURCE.

In an action under Rev. St. 1890, § 650, to quiet title, where there was no assumed or agreed common source of title in the pleadings, but plaintiff undertook to deraign a record title from one P., and defendant relied upon a deed from P. and another, a common source of title in P. was not shown, and plaintiff, claiming only a paper title, was thereby forced to show a good paper title.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. § 54; Dec. Dig. § 22.*]

2. PUBLIC LANDS (§ 61*)—SWAMP LANDS—CERTIFICATE OF ENTRY—OPERATION.

A mere certificate of entry on swamp lands is insufficient to pass title, although a receiver's receipt, showing that the purchase price has been paid, gives the person making the payment an equitable interest in the land described in the receipt.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 192-213; Dec. Dig. § 61.*]

3. RECORDS (§ 17*)—SUPPLYING LOST RECORD—ABSTRACTS—EFFECT.

Act March 28, 1901 (Laws 1901, p. 251), making Carleton's Abstract Books, or certified copies of the entries therein, prima facie evidence of the matter and entries therein contained as taken from the records of Pemiscot county prior to their destruction, has no reference to entries in a register's book of locations on public swamp lands, as such register is not a public record required by law to be kept, and hence the entries from such abstract book are not admissible as prima facie evidence of entries in such register.

[Ed. Note.—For other cases, see Records, Cent. Dig. §§ 25, 26, 28-35; Dec. Dig. § 17.*]

Appeal from Circuit Court, Pemiscot County; Henry C. Riley, Judge.

Action by Sterling P. Hunter and others against the Pemiscot Land & Cooperage Company. Judgment for defendant, and plaintiffs appeal. Affirmed.

Action under old section 650 to quiet title. Petition is short, but in the usual form. By a supplemental abstract, filed by respondent, appears a lengthy answer. This additional and supplemental abstract is not attacked by the appellants, and hence the answer therein set out must be taken as the proper pleading in the case, although it differs from

the answer set out in appellants' abstract. By the supplemental abstract, respondent challenged the correctness of appellants' abstract. By this answer, the defendant, now respondent, says: (1) That it is the owner of the lands in dispute and denies that plaintiffs have any title or interest therein; (2) it pleads the 10-year statute of limitations, averring that it and its grantors have been in the open, notorious, and peaceable possession of said lands for more than 10 years; (3) it invokes the 30-year statute of limitations; and (4) the answer then concludes with the invocation of the 10-year statute of limitations from another angle in this language: "And defendant, for its other and further answer and defense herein, avers that under the provisions of section 1 of an act entitled 'An act to enlarge the jurisdiction of courts of record in suits to determine and quiet the title to real estate,' approved March 15, 1897 (Laws 1897, p. 74), plaintiffs were at said last-mentioned date empowered to institute this action; that the time in said act and in section 650 of the Revised Statutes of 1899, under and by virtue of which plaintiffs were empowered to sue, expired on March 15, 1907, and that plaintiff did not commence this action until June 14, 1907, more than 10 years after he was by said statute empowered to do so, and that by reason of said facts and of said statute plaintiff is now barred from prosecuting or maintaining this action; and defendant pleads these facts and the above statute of limitations, and all of them, in bar of this suit. And defendant again prays judgment, and for his costs in this behalf sustained. And defendant, having fully answered, now again prays judgment, and let it go hence with its costs."

After a finding of facts, the judgment entered is in this language: "It is therefore considered, ordered, adjudged, and decreed that the plaintiffs, Sterling C. Hunter and Lella Hunter, nor either of them, have no right, title, or interest in and to the lands in controversy, and that the defendant, so far as plaintiffs are concerned, have the title in and to said land in fee; that plaintiffs take nothing by their suit herein, and that defendant recover of and from plaintiffs its costs expended herein and have execution therefor." From such adverse judgment, the plaintiffs have appealed.

Pierce, Reeves & Brewer, of Caruthersville, for appellants. Faris & Oliver, of Caruthersville, for respondent.

GRAVES, P. J. (after stating the facts as above). [1] From the pleadings it will be observed that there is no assumed or agreed common source of title. Nor does the record, other than the pleadings, show an agreed or assumed common source of title. Neither does the record show a proven common source of title. Going to the evidence,

the plaintiffs by a record title showing undertake to deraign title through one Thomas C. Powell. They attempt to show that Thomas C. Powell bought the land from Pemiscot county, and that by sheriff's deed it passed to John E. Powell, and that they succeeded to John E. Powell's title. Defendant relies upon a deed from Thomas C. Powell and John H. Powell, so far as they rely at all upon a record title. This deed, however, was subsequent in date to the alleged sheriff's deed, mentioned supra. Had defendant undertaken to deraign title through Thomas C. Powell alone, and offered in evidence such an instrument, it might be well said that by the proof a common source of title was shown, but such is not this case. There is a vast difference between a deed from Thomas C. Powell alone, and one from Thomas C. Powell and John H. Powell. We had a very similar question up in the case of *Nall v. Conover*, 223 Mo. loc. cit. 492, 122 S. W. 1039. In that case there was a title bond by Thomas C. Powell and John H. Powell shown, and we held under the facts and pleadings in that case that we could not proceed with the case upon the theory of a common source of title. The reasoning there meets the situation here, and the contention of the plaintiffs, to the effect that there was shown a common source of title in Thomas C. Powell, must be ruled against them on the strength of the *Conover Case*, supra. With this question to the side, there is but little left to the case. Plaintiffs were thereby forced to show a good paper title, for they claimed title in no other way. *Nall v. Conover*, supra. If there was a link out of their title, the judgment must be against them.

[2, 3] These lands were swamp lands, and the law relating thereto was fully reviewed in the *Nall-Conover Case*. We there held that a mere certificate of entry was insufficient to pass any title. We then said, and now say, that if there was a receiver's receipt in evidence, showing that such land had been paid for, it would give the payor an equitable interest in the lands described in such receipt. But this holding cannot avail the plaintiffs in this case. The only thing offered in evidence to show the transfer of the title to Thomas C. Powell from Pemiscot county is Carleton's abstract of a registry entry in Register's Book 1, page 52. This record we held in the *Nall-Conover Case* was not a public record required by law to be kept, and for that reason Carleton's abstract thereof did not make it evidence under the act of 1901. We further hold that, even if it was properly admitted as evidence, it would show no title in Thos. C. Powell. The whole matter is fully discussed in the *Nall-Conover Case*, supra, and we shall not go further. Under the ruling made in that case, and in the subsequent case of *Whitman v. Giesing*, 224 Mo. loc. cit.

615, 123 S. W. 1052, the plaintiffs in this case failed to make out a case.

Other questions urged need not be discussed. The Nall-Conover Case, *supra*, should be read in connection with this opinion.

The judgment nisi is affirmed. All concur.

STATE ex rel. GRAHAM et al. v. SEEHORN,
Judge.

(Supreme Court of Missouri. Nov. 26, 1912.
Motion for Rehearing Denied
Dec. 10, 1912.)

1. COURTS (§ 188*)—MUNICIPAL COURTS—EMINENT DOMAIN.

Kansas City Charter, art. 6, conferring jurisdiction on the municipal court in proceedings by the city to condemn private property for street purposes, is valid under Const. art. 9, § 16, authorizing cities of over 100,000 inhabitants to adopt charters for their own government consistent with the Constitution and laws of the state, and article 6, § 1, providing for municipal corporation courts, but not fixing their jurisdiction, since the condemnation of property for public streets is purely a matter of municipal concern.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 437-468; Dec. Dig. § 188.*]

2. COURTS (§ 472*)—EXCLUSIVE OR CONCURRENT JURISDICTION—EMINENT DOMAIN.

Circuit courts have not exclusive original jurisdiction of proceedings to condemn property for street purposes in Kansas City under Const. art. 6, § 22, giving them exclusive original jurisdiction in all civil cases not otherwise provided for, since such cases are otherwise provided for by Kansas City Charter, art. 6, conferring concurrent jurisdiction on the municipal court of that city.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 1199-1224, 1247-1259; Dec. Dig. § 472.*]

3. PROHIBITION (§ 11*)—GROUNDS FOR RELIEF—EXCEEDING JURISDICTION.

On an appeal in a proceeding by a city to acquire property for street purposes, the validity of the ordinance upon which the proceeding rests or the fact that parties are not regularly before the court in the manner prescribed by the city charter do not affect the court's jurisdiction, and it will not therefore be prevented by prohibition from acting in the matter.

[Ed. Note.—For other cases, see Prohibition, Cent. Dig. § 36; Dec. Dig. § 11.*]

Graves and Woodson, JJ., dissenting.

In Banc. Original prohibition proceeding by the State, on the relation of George S. Graham and others, against Thomas J. Seehorn, Judge of the Circuit Court of Jackson County. On demurrer to the return. Preliminary rule quashed and writ denied.

Douglass & Watson, Ball & Ryland, and E. J. White, all of Kansas City, for relators. A. F. Evans, John G. Schaich, Hunt C. Moore, A. F. Smith, John G. Park, and Jay M. Lee, all of Kansas City, for respondent. C. S. McLane, W. C. Culbertson, and R. W. Crimm, all of Kansas City, amici curiæ.

KENNISH, J. This is an original proceeding by prohibition. The relators are owners

of real estate in a proposed benefit district in a certain condemnation proceeding in Kansas City. Respondent is judge of division No. 3 of the circuit court of Jackson county, in which division the said condemnation proceeding is now pending. The purpose of this suit is that respondent, as judge of said court, may be prohibited by the writ of this court from further holding cognizance of said condemnation proceeding. A preliminary rule in prohibition was granted upon the filing of the petition. In due time respondent filed his return thereto, and relators filed a demurrer to the return. Upon the issues of law thus presented the case stands before us for decision.

There is a companion case to the case in hand, entitled *State ex rel. Tuller et al. v. Seehorn*, 151 S. W. 724, now under submission in this court. It was brought at the same time, arises out of the same litigation nisi, and is against the same respondent; but the relators therein are the owners of the property sought to be taken for public use in said condemnation proceedings, and they ask this court to issue its writ of prohibition against the respondent upon grounds different from and antagonistic to those relied upon by relators in this case.

The facts admitted by the pleadings herein, and as gathered from the petition and return, are substantially as follows:

In June, 1909, ordinance 3,209 was enacted by the common council of Kansas City, for the purpose of widening and improving Sixth street between Broadway and Bluff streets, and to that end providing for the condemnation of the necessary adjacent property; also creating a benefit district and fixing the limits thereof, in which, for benefits received, the property should be subject to the payment of special tax assessments to meet the cost of the proposed improvement. The municipal court, after a plat of the property to be taken had been delivered to the clerk thereof, made an order directed to "all persons whom it may concern," appointing a day and place for impaneling a jury to ascertain the compensation for the property to be taken and to make assessments to pay the same, as required by section 2 of article 6 of the charter of said city. A copy of the order was published in the proper newspaper, and the parties owning real estate proposed to be taken were duly served with a copy of said order. In accordance with the order and notice a jury was impaneled, and, after hearing the evidence and viewing the property, it returned a verdict fixing and allowing the compensation for the property to be taken, assessing against the city the amount of the benefits to the city and to the public, and assessing against the several lots and parcels of property within the benefit district the balance of said compensation, as

a special tax and assessment, according to the benefits received. The verdict was confirmed by the common council, judgment rendered thereon by the municipal court, and, no appeal having been taken therefrom, the verdict was sent to the office of the city treasurer for the collection of such special assessments, and more than one-half of the total amount so assessed was paid.

Some of the owners of property in the benefit district refused to pay their assessments and brought an injunction suit against the city to restrain and enjoin the collection of said assessments, upon the ground that the notice of the order for the impaneling of the jury by the municipal court had not been published as required by the provisions of the charter, and upon the further ground that the municipal court was without jurisdiction to proceed under ordinance 3,209, and that the proceedings in said municipal court were null and void. Upon the assumption that the publication of said order was defective and the subsequent proceedings invalid, another ordinance, 6,686, was introduced in the common council for the purpose of repealing ordinance 3,209 and beginning the proceedings for the proposed improvement anew. Thereupon the owners of the property to be taken, and for which compensation had been allowed pursuant to ordinance 3,209, and which was also proposed to be taken under ordinance 6,686, brought an injunction suit against the city to restrain and enjoin the officers thereof from repealing said ordinance 3,209, upon the ground that compensation had been awarded for the property so taken and that, as the verdict and judgment therefor was unappealed from, the same had become a final judgment under which rights had become vested and which could not be set aside or annulled by enactment of the common council. Both injunction suits were heard before respondent at the same time, and the issues were found in favor of the plaintiffs in each case. In the injunction suit brought by the property owners of the benefit district who had refused to pay their assessments (relators herein), the court in its decree, after finding that "said proceedings, verdict, confirmation thereof, and judgment is, as to these plaintiffs and each of them and as to their respective properties, null and void," proceeded as follows: "It is therefore considered, ordered, adjudged, and decreed that said verdict, judgment, and proceedings, in so far as they affect or purport to affect plaintiffs or any of them or any of their said several properties, be and the same are hereby annulled and for naught held; that the several assessments against the respective properties aforesaid of the plaintiffs and each of them be and the same are hereby set aside and annulled; that defendants Kansas City, M. A. Flynn, city clerk, U. S. Weary,

clerk of said municipal court, and the officers and agents of said city, be and they are each of them perpetually restrained and enjoined from making out, certifying, or attesting any tax bills against the several properties of the plaintiffs or any of them under and by virtue of said assessments; and that plaintiffs have and recover of and from defendant Kansas City the costs herein expended and have execution therefor." No appeal was taken from the judgment and decree in either of said injunction suits.

Section 23 of article 6 of the charter of Kansas City, under which said condemnation proceedings were being prosecuted, is as follows: "When by reason of any error, defect or omission in any proceedings, or in the verdict or judgment therein that may be instituted under the provisions of this article, a portion of the private property sought to be taken, or some interest therein, cannot be acquired, or an assessment is made against private property which cannot be enforced or collected, or when, by reason of any such defect, private property in the benefit district is omitted, the city may, by ordinance, institute, carry on and maintain supplemental proceedings to acquire the right and title to such property or interest therein intended to be taken by the first proceeding, but which cannot on account of such defect, error or omission, be acquired thereunder, or to properly assess against any piece or parcel of private property against which an assessment was in the first proceeding erroneously made or omitted to be made, the proper amount such private property, exclusive of the improvements thereon, is benefited by the proposed improvement to be determined by the verdict of the jury in such supplemental proceedings; and the original assessment may be revived, corrected, increased or diminished as may be necessary or equitable under the provisions of this article for the original proceedings. Such supplemental proceedings shall be instituted and conducted as to the particular piece or pieces of private property sought to be acquired or assessed in like manner and with like effect as in the original proceedings, and shall be known and described as supplemental proceedings for the purposes specified in the original ordinance; and a supplemental verdict and assessment shall be made, confirmed and copies of the original verdict certified in every particular as in the original proceedings; and the assessments as established and corrected by such supplemental verdict shall be collected by the City Treasurer in the same manner and under like conditions and restrictions, powers and duties as in the case of original proceedings."

In the month of February, 1911, after the injunction against the city had been made perpetual, restraining the enforcement of the special assessments in the benefit district un-

der ordinance 3,209, the common council passed, and the mayor approved, ordinance 7,539, which is as follows:

"An ordinance providing for, authorizing and directing the institution, carrying on and maintaining of supplemental proceedings to properly assess benefits against certain pieces and parcels of land included within the benefit district prescribed by ordinance No. 3,209, approved October 19, 1909.

"Whereas the common council of Kansas City, Missouri, passed an ordinance entitled 'An ordinance to open and widen Sixth street from the east line of Bluff street to the west line of Broadway,' approved July 14, 1909, which said ordinance was numbered 3,209 and was duly approved October 19, 1909, and whereas proceedings were instituted under said ordinance in the municipal court of Kansas City to condemn the land in said ordinance described and a verdict was rendered in said municipal court, and whereas by reason of certain errors, defects and omissions certain assessments were made against land in the benefit district prescribed by said ordinance which cannot be enforced or collected and certain pieces of private property in the benefit district were omitted and not assessed by said verdict, and whereas in order to pay the total amount of damages awarded for land taken and damaged by said condemnation it was and is necessary and required that said certain pieces and parcels of land shall be assessed if they are deemed benefited by the jury: Now therefore be it ordained by the common council of Kansas City:

"Section 1. That the mayor and city counselor are hereby authorized and directed to institute, carry on and maintain supplemental proceedings to properly assess against any piece or parcel of private property within the benefit district prescribed in ordinance No. 3,209, approved October 19, 1909, against which an assessment was in the first proceeding wrongfully made or which was omitted to be made the proper amount such private property, exclusive of the improvements thereon, is benefited by the proposed improvement, such amount to be determined by the verdict of a jury in such supplemental proceedings as provided by article 6 of the Charter of Kansas City.

"Sec. 2. Nothing in this ordinance contained shall be held to limit the scope of such supplemental proceedings but such proceedings shall be deemed to be for all purposes authorized by article 6 of the Charter of Kansas City.

"Sec. 3. Such supplemental proceedings shall be begun in division No. 1 of the municipal court of Kansas City and shall be known and designated as supplemental proceedings for the purposes specified in said ordinance numbered 3,209.

"Sec. 4. All ordinances or parts of ordi-

nances in conflict with this ordinance are in so far as they conflict with this ordinance hereby repealed."

The preliminary steps having been properly taken under said ordinance 7,539, an order was made by the municipal court and due notice published of the time and place fixed "for impaneling a jury to properly assess against any piece or parcel of private property within the benefit district above described, against which an assessment in the original proceedings was wrongfully made or which assessment was omitted to be made, the proper amount such private property, exclusive of the improvements thereon, is benefited by the proposed improvement." On the 31st day of May, 1911, the jury impaneled under said ordinance 7,539, as stated by relators, "returned into said municipal court their verdict purporting to assess the sum of \$168,004.57 (being the amount of compensation found by the jury in the aforesaid proceedings under ordinance No. 3,209 to be paid to the owners of property taken or damaged) against the city and the property in said benefit district, including the property of the relators; that there are over 13,000 lots and parcels of land within the benefit district prescribed by said ordinance No. 3,209; that the jury's verdict in said so-called supplemental proceedings was in all respects precisely the same as to the amount of benefits as the verdict returned in the original proceedings." The verdict thus returned was duly confirmed by ordinance and judgment rendered thereon by the municipal court, as in the former proceedings. An appeal was then taken to the circuit court of Jackson county, by the owners of the property in the benefit district whose property had been assessed with benefits in the supplemental proceedings and who had not paid the assessments theretofore made pursuant to the provisions of ordinance 3,209. In the circuit court the cause was assigned to division No. 3, over which division respondent presides. When the trial was about to be commenced in said division, respondent announced it as his opinion that the case should be tried de novo, "as though it were a trial of proceedings under ordinance No. 3,209, and that there should be ascertained before him, independent of previous proceedings, the amount of damages to be allowed for property taken or damaged, and the amount of assessments to be levied against property in the benefit district as benefits from the opening and widening of said street." Thereupon relators gave notice of an application to this court for a writ of prohibition, and further proceedings before respondent were suspended.

Upon the foregoing facts, relators contend: "(a) That they have the right of appeal from the municipal court after the conclusion of the so-called supplemental proceedings. (b) That the municipal court never had any ju-

jurisdiction of the original proceedings under ordinance No. 3,209, or of the supplemental proceedings under ordinance No. 7,539; that the municipal court never had any power or authority to hear and determine said cause in either proceeding, or to impanel a jury for that purpose, or to render any judgment at any time in said cause; that all of the proceedings in said municipal court were null and void and without jurisdiction, and consequently the circuit court on appeal is without jurisdiction; and that said proceedings should be dismissed by the respondent."

It should be stated in explanation of relators' proposition "a," which seemingly has no place in a proceeding challenging the jurisdiction of respondent in the case sought to be prohibited, that relators, in the companion case heretofore referred to, make the contention that no appeal is authorized by the charter of Kansas City from supplemental proceedings under said section 23 of article 6. But whether that contention be well founded or not, it is obvious that the successful affirmance of the proposition that an appeal was authorized from the municipal court to the circuit court in the supplemental proceedings under ordinance 7,539 would not tend to show want of jurisdiction or excess of jurisdiction in respondent to hear the condemnation proceedings on appeal, and therefore affords no ground for relief by prohibition.

Relators have set forth in their brief eight separate points or propositions which they learnedly argue in support of their right to the relief prayed for. In the view we take of the case, we think their contentions may be disposed of under two heads, as follows: First. "The charter of Kansas City could not confer original civil jurisdiction on the municipal court, and so much of sections 1 and 2 of article 6, and section 10 of article 4, of the charter of 1908, as purports to do so, is violative of sections 1, 22, 34, 36, and 37, article 6, of the Constitution of Missouri, and section 15 of the Schedule of the Constitution, conferring jurisdiction exclusively on circuit courts, except as otherwise provided, and of section 16 of article 9 of said Constitution, authorizing Kansas City to frame and adopt a charter, and is inconsistent with the Constitution and laws of the state." Second. That the proceedings and judgments of the municipal court under ordinance 3,209 and also under ordinance 7,539 are void for noncompliance with the charter.

[1] I. The first proposition demanding consideration is that of the jurisdiction of the municipal court in condemnation proceedings, as provided for by article 6 of the charter. If that court was without jurisdiction, it follows that the circuit court acquired none on appeal, and relators in such case are entitled to relief.

Article 6 of the charter of Kansas City purports to confer jurisdiction upon the mu-

nicipal court, in proceedings to condemn private property "for straightening, opening, widening, extending or altering, for public use, any street, avenue, alley," etc., and also jurisdiction in supplemental proceedings for the same purposes in case of an error or defect in original proceedings. The same article provides for an appeal in condemnation proceedings from the municipal court to the circuit court of Jackson county, where the cause shall be tried de novo. By section 10 of article 4 of the charter the municipal court is created and its jurisdiction and powers prescribed. It is there provided that: "The municipal court and each division thereof shall have jurisdiction of all cases arising under any provision of this charter or any ordinance of the city and shall likewise exercise such jurisdiction as may be delegated to it by the general law of the state of Missouri." Section 1 of article 6 of the Constitution of this state is as follows: "The judicial power of the state, as to matters of law and equity, except as in this Constitution otherwise provided, shall be vested in a Supreme Court, the St. Louis Court of Appeals, circuit courts, criminal courts, probate courts, county courts and municipal corporation courts." Section 16 of article 9 of the same instrument vests in cities of over 100,000 inhabitants power to adopt a charter for its own government "consistent with the Constitution and laws of this state." In the exercise of that power, the qualified voters of Kansas City, in the year 1908, adopted the present charter, which created the municipal court and clothed it with apparent jurisdiction in condemnation proceedings in the taking of property for public use and providing for the payment of compensation therefor.

Upon the foregoing provisions of the Constitution and the charter respondent rests his jurisdiction in the case pending before him. It cannot be doubted that the framers of the charter intended to confer upon the municipal court the jurisdiction challenged in this proceeding. The charter provisions upon that subject are clear and explicit. The sole question is as to the power of the people of Kansas City to lodge such judicial authority in a municipal court. Relators do not deny that municipal courts form a part of the judicial system of this state. The Constitution expressly makes them such, but the Constitution does not prescribe the bounds of their jurisdiction; neither does it prescribe the authority under which such courts shall be established and their jurisdiction fixed, and therein lies the root of the relators' contention. Doubtless, if the inhabitants of Kansas City had not availed themselves of the right to adopt a charter, the General Assembly of the state, as the repository of general legislative power, would have had full constitutional warrant to provide a charter for the city, to create a mu-

municipal court, and to define its jurisdiction, even over such subjects as the relators dispute in the present proceeding. Indeed, that was the recognized source of the authority of this municipality in such matters prior to the adoption of the Constitution of 1875 and long thereafter.

Respondent maintains that the condemnation of property for public streets is purely a matter of municipal concern, and that as the Constitution, by section 18 of article 9, conferred upon the qualified voters of the city full power and control over such matters, by the adoption of a charter and making provisions therefor, the voters may thus speak with authority equal to that of the General Assembly in the absence of such charter. It will be observed that the power thus vested in the voters of the city is not conditioned upon any action to be taken by the General Assembly, but is absolute and direct from the source of all governmental power, subject only to the condition that such charter shall be consistent with the Constitution and laws of the state.

That the jurisdiction thus conferred upon the municipal court is not inconsistent with the Constitution and laws of this state is further affirmed upon the fact that the Enabling Act, enacted by the General Assembly in the year 1887 (Laws 1887, p. 42), and made applicable to Kansas City, provided that the charter adopted by the city should "constitute the entire organic law of the city and should supersede all laws then in force not otherwise governing or appertaining to cities having one hundred thousand inhabitants or more," and that by a further provision of said act the city is expressly given "exclusive control over its public highways, streets," etc.

On the other hand, it is urged by relators that as the Constitution does not define the jurisdiction of "municipal corporation courts," and that as section 22 of article 6 thereof confers upon circuit courts "exclusive original jurisdiction in all civil cases not otherwise provided for," the circuit court alone has jurisdiction over such civil proceedings as the condemnation of real estate for public use. We are not favorably impressed with this argument. Under repeated decisions of this court it is settled beyond question that the condemnation of property in municipalities, for use as public streets, is a matter pertaining to local municipal government as contradistinguished from such as belong to the domain of general state control; and, further, that the procedure prescribed by the charter in such condemnation cases, "not inimical to the general scope of the policy of our Constitution and laws," will prevail as against provisions of the general law upon the same subject. The language last quoted was used by Lamm, J., in the case of *Brunn v. Kansas City*, 216 Mo., loc. cit. 117, 115 S. W. 449, and, dis-

cussing the procedure prescribed by the charter in the exercise of the right of eminent domain, it is further said: "Such special provisions may be likened to exceptions read into and grafted on the general law." These propositions are fully supported by the following authorities: *Brunn v. Kansas City*, 216 Mo. 103, 115 S. W. 446; *State ex rel. v. Telephone Co.*, 189 Mo. 83, 88 S. W. 41; *Kansas City v. Bacon*, 147 Mo. 259, 48 S. W. 860; *State ex rel. v. Field*, 90 Mo. 352, 12 S. W. 802; *Kansas City v. Oil Co.*, 140 Mo. 458, 41 S. W. 943; *Kansas City v. Ward*, 134 Mo. 172, 35 S. W. 600; *Kansas City ex rel. v. Scarritt*, 127 Mo. 642, 29 S. W. 845, 30 S. W. 111.

From the foregoing it follows that, as the proceedings sought to be prohibited involved a subject of purely local concern,* it was within the power of the city to confer jurisdiction thereof upon the municipal court, as provided in its charter. That jurisdiction rests upon the same well-recognized basis as the jurisdiction of municipal or police courts in prosecutions for violations of city ordinances, enacted for the good order and health of the people. Proceedings under ordinances of the class last mentioned have always been held by this court to be civil cases, and therefore any argument based upon the exclusive jurisdiction of the circuit court in civil cases is equally as valid against the exercise of jurisdiction by a municipal court for the violation of any city ordinance, as in case of a proceeding to condemn real estate for a public street.

[2] By the adoption of the charter creating the municipal court and conferring jurisdiction thereon in condemnation proceedings, and by authority of the Enabling Act, if such were necessary, we are of the opinion that the circuit court was deprived of exclusive original jurisdiction in such civil cases, for the reason that jurisdiction was otherwise provided for within the meaning of said section 22 of article 6 of the Constitution.

[3] II. The question remains as to the invalidity of ordinances 3,209 and 7,539 and the judgments and proceedings of the municipal court thereunder, for noncompliance with the provisions of the charter.

We have held that the municipal court had jurisdiction of condemnation proceedings, and also that respondent, as judge of the circuit court, had jurisdiction on appeal from the municipal court. That jurisdiction over the persons of the relators was obtained in the cause sought to be prohibited is shown by the facts alleged in the return and admitted by the demurrer. These propositions being conceded, it follows that the circuit court, being possessed of the cause on appeal from the municipal court, was clothed with judicial power to determine the validity of the ordinance or ordinances upon which the condemnation proceedings rested;

to determine the question whether the parties in interest were legally before the court in the manner prescribed by the charter, as well as any other question arising in the course of the trial. Such questions did not strike at the jurisdiction of the court, but at the regularity and validity of the proceedings up to that stage, and when the respondent decided, or was about to decide, adversely to the contention of the relators, he was acting neither without jurisdiction nor in excess of jurisdiction, but deciding such issues as arose in a cause rightfully before him and which that court alone was clothed with authority to decide. It is well-settled law that, so long as a court is proceeding within the sphere of its judicial authority, it is not amenable to the writ of prohibition. *Delaney v. Police Court*, 167 Mo. 667, 67 S. W. 589, and authorities cited; *State ex rel. v. Tracy*, 237 Mo. 109, 140 S. W. 888, 37 L. R. A. (N. S.) 448, and authorities cited; *State ex rel. v. Shannon*, 130 Mo. App. 90, 108 S. W. 1097.

In the *Delaney Case*, *supra* (167 Mo., loc. cit. 679, 67 S. W. 592), this court said: "The jurisdiction of the police court to try cases for violation of municipal police regulations, leveled at disorderly conduct and drunkenness on the streets, is exclusive. Its procedure in the exercise of its jurisdiction may or may not be erroneous, but so long as it has jurisdiction, and acts within its jurisdiction, its rulings and proceedings cannot be reviewed or corrected by means of a writ of prohibition, no matter how erroneous such rulings and proceedings may be. Mere error or irregularity or mistake, be it ever so manifest, which does not amount to an excess of jurisdiction, will not be ground for a prohibition. *Lloyd on Prohibition*, p. 48; *Shortt on Mand. & Prohib. marg.* p. 436; *19 Am. & Eng. Ency. Law* (1st Ed.) p. 263. A writ of prohibition 'cannot be made to perform the functions of an appeal, a writ of error or a certiorari, its purpose being, not to correct errors, but to prevent a usurpation of jurisdiction.'"

And in the *Tracy Case*, *supra* (237 Mo., loc. cit. 125, 140 S. W. 893, 37 L. R. A. [N. S.] 448), this court said: "There is no fact alleged tending to show the exercise or threatened exercise of jurisdiction in excess of his judicial power and authority, or that he has assumed or is about to assume any power other than that conferred upon him by the charter of the city and required of him by his oath of office. While so acting in the line of his duty and within the scope of his judicial power as prescribed by the charter, it cannot be maintained, in the light of the authorities heretofore cited, that he should be restrained and prohibited by the extraordinary writ of prohibition which issues only to prevent the usurpation of judicial power."

Under the law governing the issuance of
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writs of prohibition, we are of the opinion that the respondent, in the matters complained of, was not guilty of usurpation of judicial authority, and that therefore the preliminary rule should be quashed and the writ denied. It is so ordered.

LAMM and BROWN, JJ., concur. VALLIANT, C. J., and FERRISS, J., concur in separate opinion by VALLIANT, C. J. GRAVES and WOODSON, JJ., dissent in opinion filed by GRAVES, J.

VALLIANT, C. J. If the question of jurisdiction in the municipal court of cases of this kind were one of first impression, I would concur in the dissenting opinion filed by my Brother GRAVES. But on looking back over the cases that have been decided by this court I have come to the conclusion that, whilst the question has not been directly decided by this court, yet cases have been here in which the question might have been raised but was not, and the subject was passed over in silence, the jurisdiction apparently acquiesced in by the parties and not questioned by the court. In its first charter adopted in 1889 by Kansas City, under section 16, art. 9, there was created a mayor's court, upon which was conferred jurisdiction in cases of this kind, and which the charter of 1909 now confers on the municipal court. Thus for more than 20 years the city has acted on the assumption that it had authority to create such a court and confer on it such jurisdiction. In that period, doubtless, property rights have been acquired to a great extent, and I believe it would now be unwise to declare that rights which have arisen out of the exercise of such jurisdiction by such courts cannot be upheld.

For this reason I concur in the opinion of Brother KENNISH in this case.

FERRISS, J., concurs in these views.

GRAVES, J. I dissent from the majority opinion in this case. I shall not take the time to block out my views in my own language, because they have been elegantly expressed by our Chief Justice, in a dissenting opinion, which he prepared, and which at one time was indorsed by a majority of this bench. Owing to imagined disastrous results, some of my Brothers have concurred in a modified way in the present majority opinion. For myself, I prefer to stand upon the law and the state Constitution, irrespective of results. It is for the people to rewrite the Constitution and not for the courts. For the court to rewrite it in this instance only furnishes a precedent to further discard the organic law.

As expressive of my views of this case, I therefore adopt the dissenting opinion prepared by our Chief Justice VALLIANT, as follows:

"I cannot concur in the judgment denying

the writ of prohibition because in my opinion the municipal court of Kansas City had no jurisdiction of this cause or of suits of this kind, although the city charter essays to confer such jurisdiction.

"Section 16, art. 9, of our state Constitution says: 'Any city having a population of more than one hundred thousand inhabitants may frame a charter for its own government, consistent with and subject to the Constitution and laws of this state.' That clause of the Constitution was designed to give the city power to make a charter for itself which would be beyond the power of the General Assembly to repeal or amend. But the charter so authorized is restricted by the term of the grant to be for the city's 'own government,' and it must be 'consistent with and subject to the Constitution and laws of this state.' It is for city government, not state government, that the Constitution confers this power on the city. The words 'consistent with and subject to the Constitution and laws of this state' show an express purpose to withhold from the city the power to include in its charter governmental subjects that belong to the state as distinguished from subjects of mere municipal government. A charter adopted by the city in compliance with the terms of that clause of the Constitution can be amended only by a vote of the people in the city, not by the General Assembly. There have been numerous decisions by this court construing this clause of the Constitution as well as a somewhat similar clause relating to the city of St. Louis. I will not lengthen this opinion by reviewing those cases, they will be found in the annotations in the Revised Statutes 1909 at pages 113-115. What I have above said is, in my opinion, in conformity with those decisions.

"Kansas City, under authority of section 16, art. 9, has adopted a charter, and in the charter it has created a court called the municipal court of Kansas City, and has attempted to confer on that court, besides the jurisdiction that usually belongs to a city police court, jurisdiction in suits to collect taxes, suits for the enforcement of special tax bills, proceedings for taking and damaging private property, for ascertaining damages caused by change of grade or other exercise of the power of eminent domain. Those are subjects which in my opinion belong to the jurisdiction of the state courts, not to the city courts.

"The municipal court of Kansas City is merely a city court. The charter (section 10, art. 4) says: 'There is hereby created a court not of record to be known as the municipal court of Kansas City.' It is a court 'not of record.' It has no origin except the city charter. The charter provides that the judge shall be elected by the people of the city, but it could as well, without changing the character of the court, have provid-

ed that he be appointed by the mayor. It does provide that, if a vacancy occurs in the office, it is to be filled by election by the common council, and until the common council elects, the mayor may appoint to fill the vacancy. The charter also declares that the judge of the municipal court shall be ex officio a justice of the peace and exercise the jurisdiction and powers conferred by law on justices of the peace.

"The right of eminent domain is a sovereign right. It can be exercised only by the state or by permission or grant of authority from the state. The state has granted to Kansas City the power of eminent domain in the matter of opening, widening, and grading its streets, the taking and damaging of private property for public use; but it has not granted to the city the right to create its own court for that purpose, and nowhere in the state except Kansas City is that right claimed. The right to exercise the power of eminent domain is one thing, it is a right essential to the city government therefore properly covered in the charter adopted by the city under section 16, art. 9, 'for its own government'; but the court in which that right is to be enforced or litigated is quite another thing. The grant of the right does not carry with it the power to create the court, nor is such power to be implied ex necessitate because the state has already established its courts to try such cases. Section 22, art. 6, of the Constitution confers on the circuit court 'exclusive original jurisdiction in all civil cases not otherwise provided for.' This is a law not local in its character, but applicable to the whole state, and the term 'not otherwise provided for' means not otherwise provided for by a state law; until a state law otherwise provides, the charter must be 'consistent with and subject to that law.' In every county in the state, Jackson county not excepted, there was at the time this charter was adopted, and still is, a circuit court having jurisdiction to try causes involving rights claimed by the city under the power of eminent domain as also suits to collect taxes, and suits on special tax bills, and therefore, when the city undertook by its charter to confer jurisdiction in such matters on its municipal court, it did not conform 'to the constitutional laws of this state,' but it undertook in effect to repeal the state law as to the exclusiveness of the jurisdiction of the state court.

"It is true the charter says that the municipal court shall exercise jurisdiction in such cases concurrent with the circuit court, but that does not alter the case. The question is not whether the charter could confer on the municipal court exclusive jurisdiction, but whether it could confer such jurisdiction at all. The jurisdiction attempted to be conferred is full and complete, though not exclusive. If the court is given jurisdiction to try such cases, its jurisdiction in any

such case that is brought before it would not be impaired by the suggestion that the suit might have been brought in another court which has concurrent jurisdiction. In the very section of the charter (section 10, art. 4) which attempts to confer jurisdiction in such cases on the municipal court, the jurisdiction of the circuit court also is recognized. The charter seems to proceed on the idea that because it does not repeal the state law which gives the circuit court jurisdiction, but only creates a city court giving it concurrent jurisdiction, it is 'consistent with and subject to the Constitution and laws of this state.' The charter does not in so many words attempt to repeal the state law which gives the circuit court jurisdiction, but it does attempt in effect to repeal so much of the state law as gives that court exclusive jurisdiction.

"The charter undertakes to make the judge of the municipal court ex officio a justice of the peace and to confer on him all the powers and jurisdiction of a justice of the peace. The framers of the charter might just as well have said that the judge of the municipal court should be ex officio a circuit judge. A justice of the peace is as much a state officer as a circuit judge, he is an officer created by the Constitution, and his election is a matter regulated by state law.

"I have before me a volume entitled 'Charter and Revised Ordinances of Kansas City 1910,' which purports to be 'Printed and Published by authority of Kansas City.' It bears on its title page the names of a number of distinguished members of the bar of Kansas City who have prefaced the work with an 'Introductory Note' very learned in its character, and it is so apt to the subject under discussion that I am tempted to quote from it: 'But it is not every power that may be essayed to be conferred on the city by such a charter that is of the same force and effect as if it were conferred by an act of the General Assembly, because the Constitution does not confer on the city the right, in framing its charter, to assume all the powers incident to its municipality, yet the Legislature may, if it should see fit, confer on the city powers not necessary or incident to the city government. There are governmental powers the exercise of which is essential to the happiness and well-being of the people of a particular city, yet which are not of a character essentially appertaining to the city government. Such powers the state may reserve to be exercised by itself, or it may delegate them to the city, but until so delegated they are reserved. Nor does the Constitution confer unlimited power on the city to regulate, by its charter, all matters that are strictly local, for there are many matters local to the city, requiring governmental regulations, which are foreign to the scope of municipal government.'

"The point is made that under an act of

the General Assembly called the Enabling Act approved March 10, 1887 (Laws 1887, p. 42), the purpose of which act was to provide the means by which a city entitled to frame its own charter under section 16, art. 9, could do so, it is declared that such a charter, when so adopted, 'shall be and constitute the entire organic law of such city, and shall supersede all laws of this state then in force in terms governing or appertaining to cities having one thousand inhabitants or more.'

"At the time of the passage of that act there was existing a general statute providing a charter for all cities having a population of more than 100,000, and the purpose of the clause in the Enabling Act just quoted was to declare that the charter adopted by the city under the terms of that act was to take the place of the charter prescribed for cities of 100,000 inhabitants by the general statute. The clause in the Enabling Act does not say that the charter so adopted 'shall supersede all laws of this state then in force,' but the language is it 'shall supersede all laws of the state then in force in terms governing or appertaining to cities having one hundred thousand inhabitants or more.' It is only laws of the general statutes expressly designed for the government of cities of 100,000 inhabitants that the charter is to supersede.

"I refer again to the language of the 'Introductory Note' from which I have already quoted: 'There are governmental powers the just exercise of which is essential to the happiness and well-being of the people of a particular city, yet which are not of a character essentially appertaining to the city government. Such powers the state may reserve to be exercised by itself, or it may delegate them to the city; but until so delegated they are reserved.' And again, it is said: 'Nor does the Constitution confer unlimited power on the city to regulate, by its charter, all matters that are strictly local, for there are many matters local to the city, requiring governmental regulations which are foreign to the scope of municipal government.'

"The creating and furnishing courts to try important lawsuits is a right of the state; it is a conspicuous feature of state sovereignty; it does not naturally belong to a city. We have statutes conferring on police courts, mayor's courts, etc., of certain cities, jurisdiction of the character attempted to be conferred by the Kansas City charter on its municipal court; but those statutes are acts of the state, not of the city. Such jurisdiction was conferred on the mayor's court of Kansas City under the charter granted by the General Assembly in 1888, but the mayor's court under the charter of 1888 is not the municipal we are now considering.

"A charter framed strictly within the authority of this clause of the Constitution cannot be repealed or amended by an act of the General Assembly, yet powers not natu-

rally appertaining to a city government, but appropriate thereto, may be conferred on the city by an act of the General Assembly, but such an act would not be an amendment of the city charter; it would be an act delegating state powers which the city otherwise did not possess. Suppose, in framing the charter, now under discussion, there had been no attempt to confer such jurisdiction on the city court, and the Legislature had thereafter passed an act conferring such jurisdiction on such court. If the conferring of such jurisdiction was within the scope of the authority given the city under section 16, art. 9, then the act of the General Assembly would be an intrusion into that authority, an amendment of the charter adding something to the charter which the city might have added but chose not to add. But the General Assembly cannot amend a charter framed within that constitutional scope. Therefore the act would be void. If such an act could be deemed valid, it could be so only on the ground that it was a power belonging to the state not within the scope of the constitutional authority conferred on the city.

"I am therefore of the opinion that the writ of prohibition should issue."

WOODSON, J., concurs with me in these views.

STATE ex rel. TULLER et al. v. SEEHORN, Judge.

(Supreme Court of Missouri. Nov. 26, 1912.)

1. EMINENT DOMAIN (§ 256*)—PROCEEDINGS—RIGHT TO APPEAL.

Under Kansas City Charter, art. 6, § 6, providing that, in proceedings to acquire property for street purposes, any person interested in the property taken or assessed for benefits may appeal from the municipal court to the circuit court, and section 23, authorizing supplemental proceedings to assess property against which an assessment was erroneously made or omitted in the original proceedings, and providing that the supplemental proceeding shall be instituted and conducted as to the piece or pieces of property sought to be acquired or assessed in like manner and with like effect as in the original proceedings, a person interested has a right of appeal in a supplemental proceeding the same as in the original proceeding.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 667; Dec. Dig. § 256.*]

2. STATUTES (§ 181*)—CONSTRUCTION—INTENTION OF LEGISLATURE.

The primary rule in construing statutes is to ascertain and give effect to the intent.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 259, 263; Dec. Dig. § 181.*]

3. MUNICIPAL CORPORATIONS (§ 495*)—PUBLIC IMPROVEMENTS—ASSESSMENT OF BENEFITS—JURISDICTION.

Under Kansas City Charter, art. 6, § 23, authorizing supplemental proceedings to assess property benefited by a public improvement against which an assessment was erroneously made or omitted in the original proceeding, and section 6, authorizing an appeal to the circuit court where the cause shall be tried de novo, neither the municipal court nor the circuit

court in the supplemental proceeding has any jurisdiction over benefits or damages to property, properly included in the verdict in the original proceeding, when that verdict and the judgment thereon had not been appealed from, in view of the provision of the charter that the common council may repeal the ordinance for an improvement at any time before any of the parties assessed with benefits have paid the amount assessed, which excludes the right to repeal the ordinance after such payment, article 6, § 4, providing that no assessment shall be affected or interfered with because any other assessments are invalid in whole or in part, and also providing for a reduction of the assessments where they exceed the compensation allowed, section 8, authorizing the board of public works to pay the damages awarded and take possession of the property before collecting the assessments for benefits, section 5, providing that, if the property to be taken is owned by a corporation, it may file a petition for a jury trial, in which event the case must be transferred to the circuit court, and section 13, providing for payment out of the city treasury of any deficiency through a failure to collect assessments, especially as those whose property is properly included in the first verdict are not required to be notified to appear in the supplemental proceeding.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1166; Dec. Dig. § 495.*]

4. EMINENT DOMAIN (§ 177*)—NECESSARY PARTIES.

The owners of property benefited by a proposed public improvement are not necessary parties to a proceeding by the city to acquire the property necessary for such improvement; the only necessary parties being the city and the owner of the property taken.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 478, 480, 481, 483, 485; Dec. Dig. § 177.*]

5. PROHIBITION (§ 10*)—GROUNDS—JURISDICTION.

Prohibition will lie to prevent the exercise of judicial power by a court having no jurisdiction to exercise any authority or where the court is exceeding its jurisdiction in a case rightfully before it.

[Ed. Note.—For other cases, see Prohibition, Cent. Dig. §§ 37-56; Dec. Dig. § 10.*]

6. PROHIBITION (§ 10*)—GROUNDS—JURISDICTION.

Where the circuit court, on appeal in a supplemental proceeding to assess property benefited by a public improvement, was about to assume jurisdiction over the assessment on property properly included in the verdict in the original proceeding, the owner of which appeared specially for the purpose of challenging its jurisdiction, the judge of that court would be restrained by prohibition from exercising jurisdiction thereafter.

[Ed. Note.—For other cases, see Prohibition, Cent. Dig. §§ 37-56; Dec. Dig. § 10.*]

In Banc. Original prohibition proceeding by the State, on the relation of Bert H. Tuller and others, against Thomas J. Seehorn, Judge of the Circuit Court of Jackson County. On demurrer to the return. Preliminary rule made absolute.

C. S. McLane, W. C. Culbertson, and R. W. Crimm, all of Kansas City, for relators. A. F. Evans, John G. Park, Hunt C. Moore, John G. Schaich, Jay M. Lee, and A. F. Smith, all of Kansas City, for respondent.

KENNISH, J. Relators filed their petition in this court praying the issuance of a writ of prohibition against the respondent as judge of division No. 3 of the circuit court of Jackson county. The cause sought to be prohibited is a condemnation proceeding now pending in said division No. 3, in which the property of relators is proposed to be taken for public use in widening Sixth street, between Broadway and Bluff streets, in Kansas City. A preliminary writ was issued upon the filing of the petition, and in due time respondent filed his return. Relators filed a demurrer to the return, and upon the issues of law thus raised the case was argued and submitted for decision.

The case of State ex rel. Graham et al. v. Seehorn, Respondent, 151 S. W. 716, decided at the present term of this court, but not yet officially published, is a companion case and almost identical in its facts with the facts pleaded and admitted in this case. A full statement of the facts will be found in the Graham Case, and it is not deemed necessary to repeat them at length herein.

Briefly, the important facts necessary to an understanding of this case are the following: A condemnation proceeding was instituted by ordinance 3,209, passed by the common council of Kansas City, in which the property of the relators was proposed to be taken for the widening of a public street, and a benefit district created for the purpose of providing the necessary compensation to be paid for the property so taken, by making the several tracts and parcels of property therein subject to tax assessments for special benefits received by reason of the proposed improvement. The proceedings regularly progressed until, under the provisions of the charter, an order was required to be made by the municipal court, giving notice of the pendency of the proceedings, and of the impaneling of a jury, at the time and place named, to fix the compensation for the property to be taken and to assess benefits against the property within the benefit district. The order was duly made and published in the proper newspaper and a copy thereof served upon each of the owners of the property to be taken. Personal service of the order was not required upon the owners of the property within the benefit district.

In compliance with the order and the provisions of the charter, the jury returned their verdict, in which compensation for the property condemned was awarded in the total sum of over \$168,000. The city was assessed with its proportional part of the benefits received, and each tract of property in the benefit district was also assessed its proportional part, according to the benefits received. The verdict was confirmed by the council and judgment thereon rendered by the municipal court. No appeal having been taken within the time allowed, a copy of the verdict was delivered to the city treas-

urer, and more than half of the benefits assessed were paid before any question was raised as to the validity of the proceedings. It was then discovered that the order of the municipal court for the impaneling of the jury was not published as required by the charter, and that by reason of such defect the collection of the unpaid assessments could not be enforced. An injunction suit, brought by the property owners who refused to pay their assessments, was tried, and with the result that the municipal officers were enjoined from enforcing the collection of such assessments. Thereupon an ordinance was introduced in the common council for the purpose of repealing the original ordinance under which the proceedings had thus far been conducted, with a view of beginning new proceedings for the proposed improvement. Relators herein, owners of the property proposed to be taken, brought an injunction suit to enjoin the passage of said ordinance, upon the ground that a final judgment had been rendered, fixing the damages for the property to be taken, which judgment was unappealed from and under which rights had become vested. This suit was tried, and the injunction was granted as prayed for.

Section 23 of article 6 of the charter of said city provides that the city may carry on and maintain supplemental proceedings to properly assess any property in the benefit district "against which an assessment was in the first proceeding erroneously made or omitted to be made," and that "such supplemental proceedings shall be instituted and conducted as to the particular piece or pieces of private property sought to be included or assessed, in like manner and with like effect as in the original proceedings, and shall be known and described as supplemental proceedings for the purposes specified in the original ordinance." Pursuant to the provisions of said section 23, ordinance 7,539 was introduced in the common council for the purpose of levying assessments of benefits against property within the benefit district, as fixed by the original ordinance, and "against which an assessment was in the first proceeding erroneously made or which was omitted to be made." Due notice was given, a jury impaneled, and a verdict returned to the municipal court. This verdict purported to assess the total amount of compensation as found by the jury in the original proceedings to be paid to the owners of the property to be taken or damaged, and also assessed benefits against all of the tracts or parcels of land in the benefit district, including as well the tracts and parcels, the assessments upon which, under the original proceedings, had been paid to the city treasurer, as the tracts and parcels upon which payment of the assessments had been refused. The verdict was confirmed by the council and judgment rendered thereon by the municipal court. Within the time allowed an appeal was taken to the circuit

court of Jackson county and the cause regularly assigned to division No. 3, presided over by respondent. In the circuit court the relators filed a plea to the jurisdiction, challenging the jurisdiction of the court to proceed against relators, upon a number of grounds therein stated. The plea to the jurisdiction was overruled and the cause called for hearing. Respondent gave it as his opinion that the cause would then be tried de novo, both as to compensation for property taken and as to the assessment of benefits upon all of the property within the benefit district, as though the appeal was from the proceedings under the original ordinance. Upon the foregoing intimation of the court, relators gave notice that a writ of prohibition against respondent would be applied for in this court, and thereupon further proceedings were suspended.

Relators base their right to a writ of prohibition against respondent upon the three grounds following: "(1) The charter of Kansas City does not provide for an appeal in a supplemental proceeding begun in the municipal court of Kansas City from that court to the circuit court, and the respondent has no jurisdiction over the supplemental proceeding over which he has assumed jurisdiction. (2) The respondent has no jurisdiction to award damages for land taken for a street because the ordinance under which he is assuming to act does not ask to have such damages awarded. (3) Prohibition will lie if the supplemental proceeding cannot be taken to the circuit court by appeal, and will also lie if there is a right of appeal, to prevent the respondent from exercising any jurisdiction over matters not brought before the court by supplemental ordinance."

[1] I. The first proposition urged by relators is that no appeal is allowed by the charter from the verdict and judgment in a supplemental proceeding in the municipal court to the circuit court, and that, as the case against which prohibition is asked is such an alleged appeal, respondent is without jurisdiction to proceed therein.

The general provision of the charter, section 6 of article 6, as to the right to an appeal, is: "In case the city, or any person affected by the proceedings, either as the owner thereof or interested in any of the property taken or damaged, or as the owner of, or interested in any of the property assessed, shall feel aggrieved by the verdict of the jury, such party so aggrieved may, within twenty days from the time the verdict of the jury is confirmed, appeal to the circuit court of Jackson county, Missouri, at Kansas City." Section 23 of article 6, authorizing supplemental proceedings, provides that: "Such supplemental proceedings shall be instituted and conducted as to the particular piece or pieces of private property sought to be acquired or assessed, in like manner and with like effect as in the original proceedings, and shall be known and described as

supplemental proceedings for the purposes specified in the original ordinance." The language thus used as to the procedure in supplemental proceedings, when considered in the light of the large number of tracts of real estate and of owners thereof to be affected, and the correspondingly increased liability to mistake, leaves little doubt that the intention of the framers of the charter was to provide a remedy by which such mistakes could be corrected, while permitting the original proceedings, so far as regular, to remain in force and effect, and that in supplemental proceedings brought for that purpose the property owners should be entitled to all the rights accorded to those whose property was assessed or taken in the original proceedings. Any other construction is unreasonable and would render such provision of the charter invalid, upon the ground that it would deny to some owners of property rights conferred upon others of the same class.

[2] In construing a statute the rule is: "The intent is the vital part, the essence of the law, and the primary rule of construction is to ascertain and give effect to the intent." 2 Lewis' Sutherland on Statutory Construction (2d Ed.) 363. Applying this rule to the clause of the charter that supplemental proceedings shall be "instituted and conducted * * * in like manner and with like effect as in the original proceedings," we are of the opinion that the same course of procedure should be followed in both cases, so far as practicable, and that the right of appeal was intended to be open to any party in interest in a supplemental proceeding.

[3] II. Relators' second contention is as follows: "The respondent has no jurisdiction to award damages for land taken for a street, because the ordinance under which he is assuming to act does not ask to have such damages awarded." The foregoing too narrowly states respondent's position as to the effect of the appeal from the verdict in the municipal court. That position, as set forth in the return, is: "That said appeal so taken operates to carry the entire proceedings to the circuit court for rehearing and trial de novo; that when said cause has reached the circuit court of Jackson county, Mo., in said manner and method, it was there as though it had been appealed (by a party interested) from the first proceeding had in the municipal court under ordinance 3,209, and there should be ascertained de novo the amount of damages to be allowed for the property taken and the amount of assessments to be levied against property in the benefit district as benefits from the opening and widening of said street."

Relators maintain that, although the publication of the order of the municipal court under ordinance 3,209 was defective, yet the court had jurisdiction of the subject-matter and of all property owners, both of the bene-

fit district and of the property to be condemned, who appeared and participated in the proceedings; that as to them, when the verdict and judgment in the municipal court was unappealed from, was delivered to the city treasurer for collection, and a large amount of the assessments paid, it became *res adjudicata*, the subject-matter of which respondent had no power to readjudicate in a supplemental proceeding brought to assess other property omitted by mistake in the first. Both relators and respondent stand committed to the theory that the original proceeding was regular and binding upon the parties appearing thereto, up to some point in the progress thereof in the municipal court; otherwise there would be no basis for a supplemental proceeding, nor for the injunction against the city when it sought to begin the proceedings anew.

In elucidation of respondent's contention upon this point, we quote from his brief as follows: "It is undoubtedly true that if an error had been committed in the proceedings in the municipal court, and that error had been discovered in the proceedings in that court, a supplemental proceeding in that court would have been necessary to cure the defect thus discovered, and the judgment of the municipal court would be affected only in so far as it was necessary to correct the same in curing the defect. Thus, for example, if proceedings had been regular in the municipal court with reference to ascertainment of damages for property taken, and irregular with reference to the assessments of benefits against property in the benefit district, the supplemental proceeding would have been directed solely to the correction of the error in the assessing of benefits. And the judgment in the original proceeding would be cured by the correction of that judgment in the supplemental proceeding. The original judgment in such a case would, in a sense, be an interlocutory judgment, to be perfected and ripened into a final judgment, upon the conclusion of the supplemental proceeding. If there had been no appeal, either from the judgment in the original proceeding or from the judgment in the supplemental proceeding, in the mayor's court, the corrected judgment in that court would be final and would be one entire judgment. A condemnation proceeding under the Kansas City charter is 'one proceeding, not many; one judgment and not several.'"

The position of the respondent, as shown by the above excerpt, is that if an appeal had not been taken in the supplemental proceedings, then the verdict in the original proceedings should be corrected by the verdict in the supplemental proceedings, so as to include all property affected, and then, as corrected, to be delivered to the city treasurer, or, in case of an appeal, to be transferred to the circuit court, where the entire case would be reopened for trial *de novo*. This view is

not in accord with the course pursued by the city in the municipal court, for, as shown by the record, the jury in the supplemental proceedings assessed all of the property in the benefit district and also allowed compensation for all of the property to be taken, and this, notwithstanding the fact that the ordinance and the order of the municipal court purported to be for the sole purpose of making assessments as to property "against which an assessment was in the original proceeding wrongfully made or which was omitted to be made." It seems obvious that the jury in the supplemental proceeding would have no authority to include in their verdict the estimate of damages and benefits as found by the former jury, in regard to property not included in the supplemental proceedings, for, as only those whose property was omitted in the original proceedings were notified to appear in the supplemental proceedings, the scope of the verdict could not extend beyond such persons and their property. We are satisfied that the jury in the supplemental proceedings were without authority to include in their verdict assessments of benefits and damages upon property properly included in the first verdict.

If the verdict in the original proceedings was valid as to those who appeared and who accepted it, why should it become "interlocutory" merely because supplemental proceedings were necessary as to other property, and be entirely vacated because an appeal was taken in such supplemental proceedings? We are of the opinion that the original proceedings, when unappealed from, became *res adjudicata* and not subject to trial *de novo* in the supplemental proceedings, and for the following reasons:

(a) The charter makes no provision for vacating the original proceedings or treating them as interlocutory in case of supplemental proceedings. On the contrary, it is expressly provided that the common council may repeal the ordinance for the proposed improvement "at any time before any of the parties assessed with benefits shall have paid the amount so assessed, * * * and in such event the judgment for compensation and benefits shall be void." Under a well-recognized principle of construction, the right of the city to avoid the proceedings and judgment before the payment of any benefits excludes such a right after benefits have been paid.

(b) It is provided by section 4 of article 6 of the charter that "no assessment shall be affected or interfered with for the reason that any other assessment or assessments made in the same proceeding may be invalid in whole or in part." This provision would preclude, as a valid defense to the enforcement of the assessment, the fact that other property benefited was not also legally assessed. If the city can enforce the collection of assessments in such cases, it must be for the reason that the

judgment is final and not merely interlocutory, and, if final as to the city, it is also final as to the property owner. The reason underlying this provision of the charter is apparent, namely, that as the city is given power to subject property, omitted by mistake, to its proportional part of the cost of the improvement, by a supplemental proceeding, there is no reason why the assessment of other property should not be paid if, as to it, the assessment was regular.

(c) By section 8 of article 6 it is provided that, when recommended by the board of public works, the city may pay the damages awarded for the property taken and have possession thereof before the assessments for benefits are collected. In such case the assessments, when collected, are credited to a fund to reimburse the city. If, after the city had thus acquired the property, a defect should be discovered in the proceedings as to some of the property assessed with benefits, and there was a refusal to pay for that reason, as was done in this case, would a supplemental proceeding to remedy such defect, and an appeal therefrom to the circuit court, take up the entire case for trial *de novo*, including the ascertainment of compensation for the property taken? Clearly it would not, for the owners would have received the amount awarded as damages, either in the municipal court or on appeal in the circuit court, and would have no further interest in the proceedings; and, besides, the city conducting the condemnation proceedings would itself own and be possessed of the property taken.

(d) By section 5 of article 6 of the charter it is provided that, if the property to be taken is owned by an incorporated company, such company may file in the municipal court a petition demanding a trial by a common-law jury. This petition must be filed before the jury is impaneled, and the entire case, without further action in the municipal court, must then be transferred to the circuit court. If supplemental proceedings should be made necessary because of a defect in the taking of property belonging to such a company and a petition as above should be filed in the municipal court, where, in such case, would the supplemental proceeding, as stated by respondent, begin to "ride with the original proceeding and accompany it through its course"? If at the stage in which the petition is so filed, then it would be before the municipal court acquired jurisdiction of those property owners who were not legally served but voluntarily appeared.

Many other illustrations could doubtless be given from the several provisions of the charter, to show the unsoundness of the construction that an appeal to the circuit court in a supplemental proceeding necessitates a retrial of the entire case intended to be included in the original proceeding.

We shall now consider the main objections

urged by respondent in opposition to the construction of the charter as herein adopted.

It is contended that a condemnation proceeding is an entirety; that there is the compensation to be allowed on the one hand and the assessments of benefits on the other, the benefits to correspond exactly in amount with the compensation; and that such result could not be secured if the compensation and benefits were not determined by the same jury. There are two sufficient answers to that contention: First. As only the property not legally assessed in the original proceeding, and the owners thereof, are included within the provisions of the ordinance authorizing the supplemental proceeding, and such owners only are notified of the impaneling of the jury in the municipal court, it cannot be maintained that the jury so impaneled in the supplemental proceeding is clothed with authority to balance damages and benefits, when in so doing it would necessarily require an exercise of authority over persons and property not in court. Second. The charter recognizes that conditions may arise in which the assessments may exceed or may not equal the compensation allowed, by providing for a reduction of assessments in the one case (section 4, art. 6) and for paying out of the city treasury the deficiency, by reason of a failure to collect assessments, in the other (section 13, art. 6).

[4] It is also urged that the charter contemplates "that the property owners in the benefit district shall have their day in court on the question of the amount of the allowance to be made for the property taken and damaged." It is plausibly argued in support of the foregoing that, as the property owners of the benefit district and the city must pay the damages awarded for property taken, they should have their day in court as to the amount of damages for which their property shall become charged.

In the exercise of the right of eminent domain in the taking of private property, as in the case in hand, the necessary parties are the city as the plaintiff, on the one side, and the property owner as the defendant, on the other. And while it would be entirely proper as a matter of grace to permit the owner of property in the proposed benefit district to aid the city in preventing an unduly high valuation of the property condemned, yet such owner would have no standing in court as a necessary party. *St. Louis v. Ranken*, 96 Mo. 497, 9 S. W. 910; *St. Louis v. Brinckwirth*, 204 Mo. 280, 102 S. W. 1091; *St. Louis v. Calhoun*, 222 Mo. 44, 120 S. W. 1152; *Pleadwell et al. v. Glass Co.*, 151 Mo. App. 51, 131 S. W. 941; *Kansas City v. Smart*, 128 Mo. 272, 30 S. W. 773; 1 *Page & Jones on Taxation by Assessment*, 213; *Goodrich v. Detroit*, 184 U. S. 432, 22 Sup. Ct. 397, 46 L. Ed. 627. In the case of *Kansas City v. Smart*, *supra*, a proceeding under charter provisions similar to those involved

in this case, in answer to questions raised by owners of property in the benefit district as to a denial of the rights of owners of property to be taken, this court (128 Mo. loc. cit. 292, 30 S. W. 778) said: "No person is interested in the *compensation* to be awarded these incorporated companies, except the city and the companies." The same subject is discussed in the case of *Goodrich v. Detroit*, supra. The contention of the owners of the property to be assessed, and the answer thereto, are stated by the court (184 U. S. loc. cit. 437, 22 Sup. Ct. 399, 46 L. Ed. 627), as follows: "The argument of the plaintiffs is that the owners of the property liable to be assessed for the benefits are just as much interested in the question as to the necessity of making the improvement and the amount of compensation as are the owners of land to be taken for such improvement, and the same reasons for notice apply in the one case as in the other. The law in this court is too well settled to be now disturbed that the interest of neighboring property owners, who may possibly thereafter be assessed for the benefit to their property accruing from opening a street, is too remote and indeterminate to require notice to them of the taking of lands for such improvement in which they have no direct interest. The position of plaintiffs in this particular would require a readjustment of the entire proceedings, and a determination of the property incidentally benefited, before any proceedings are taken for the condemnation of the land directly taken or damaged by such improvement. It might be argued upon the same lines that, whenever the city contemplated a public improvement of any description, personal notice should be given to the taxpayers, since all such are interested in such improvements and are liable to have their taxes increased thereby. It might easily happen that a whole district or ward of a particular city would be incidentally benefited by a proposed improvement, as, for instance, a public school, yet to require personal notice to be given to all the taxpayers of such ward would be an intolerable burden. Hence it has been held by this court that it is only those whose property is proposed to be taken for a public improvement that due process of law requires shall have prior notice."

The foregoing authorities fully answer respondent's complaint as to the right of the property owners in the benefit district to a hearing on the question of the compensation to be allowed for property taken, and make further discussion unnecessary.

III. The question remains: Are relators entitled to relief by prohibition?

[8] It is the recognized law of prohibition that the writ will lie to prevent the exercise of judicial power in a case where there is a want of jurisdiction in the court to exercise any judicial authority, or where the

court is acting in excess of its jurisdiction in a case rightfully before it. *State ex rel. v. Tracy*, 237 Mo. 109, 140 S. W. 888, and authorities cited; *State ex rel. v. Fort*, 210 Mo. 512, 109 S. W. 737, and authorities cited; *State ex rel. v. Bradley*, 193 Mo. 33, 91 S. W. 483; *State ex rel. v. Sale*, 188 Mo. 493, 87 S. W. 967; *State ex rel. v. Fort*, 178 Mo. 518, 77 S. W. 741. In *State ex rel. v. Fort*, 210 Mo., loc. cit. 525, 109 S. W. 739, this court stated the law as follows: "It cannot be doubted that (subject to a judicial discretion to be exercised in issuing all discretionary writs) the writ of prohibition may go to confine a court within the limits of its jurisdiction whether such court has no jurisdiction at all or is exercising powers in excess of its rightful jurisdiction. So much is elementary. The writ may go whenever judicial functions are assumed, not rightfully belonging to the person or court assuming them. Generally speaking, it is available to keep a court within the limits of its powers in any particular matter as well as to prevent the exercise of jurisdiction in a cause not given to it by law. *State ex rel. v. Foster*, Judge, 187 Mo. 590 [86 S. W. 245]; *State ex rel. v. Elkin et al.*, County Judges, 130 Mo. 90 [30 S. W. 333, 31 S. W. 1037]; *State ex rel. v. Eby*, Judge, 170 Mo. 497 [71 S. W. 52]; *State ex rel. v. Bradley*, Judge, 193 Mo. 33 [91 S. W. 483]; *State ex rel. v. Fort*, Judge, 178 Mo. 518 [77 S. W. 741]."

[8] We have held that neither the municipal court in the supplemental proceedings, nor the circuit court on appeal, had jurisdiction over relators' property. As relators limited their appearance in the circuit court specially for the purpose of challenging the court's jurisdiction, there was a want of jurisdiction both as to the subject-matter and the persons, and, as respondent as judge of said court was about to exercise judicial power in a matter in which the court was without jurisdiction, relators have shown themselves entitled to the relief prayed for.

It follows that the preliminary rule should be made absolute. It is so ordered.

VALLIANT, C. J., and LAMM, FERRISS, and BROWN, JJ., concur. GRAVES, J. concurs in the result. WOODSON, J., not sitting.

STATE ex rel. MILLION v. GRAHAM et al.
(Supreme Court of Missouri, Division No. 1.
Nov. 30, 1912.)

1. STATUTES (§ 114*)—EXPRESSION OF SUBJECT IN TITLE.

The title of the local option law (Laws 1887, p. 179) is "An act to provide for the preventing of the evils of intemperance by local option in any county in this state, and in cities, * * * by submitting the question of prohibiting the sale of intoxicating liquors to the qualified electors of such county or city;

to provide penalties for its violation, and for other purposes." The act provides for a petition for an election, signed by one-tenth of the qualified voters of the county or city, and addressed to the city council; that the city shall order, conduct, record the result, and pay the expense, of such election. It also provides for the taking of a census of a city and a method for the giving of notice. *Held*, that all such provisions are not only germane to the title, but are of its very essence; and the statute does not violate Const. art. 4, § 28, providing for a singleness of subject-matter and its expression in the title.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 145, 147-149; Dec. Dig. § 114.*]

2. INTOXICATING LIQUORS (§ 29*)—LOCAL OPTION—ELECTIONS—STATUTORY PROVISION—TIME OF HOLDING—"GENERAL ELECTION."

Local Option Law (Laws 1887, p. 179) § 1, provides for the submission of the question whether intoxicating liquors shall be sold to the qualified voters residing outside of certain cities and towns, provided that no such election shall take place on "any general election day or within 60 days of any general election." Section 2 provides for the submission of the same question in such cities and towns, but not "within 60 days of any municipal or state election." The statutory rule of construction (Rev. St. 1889, § 6570) that the term "general election" refers to the ordinary biennial November election has existed since before the passage of the local option law, and is made controlling, unless plainly repugnant to the intent of the Legislature or of the context. The original law dealing with primaries (Rev. St. 1889, §§ 4795-4798) was merely extended for the protection of political parties who might choose such method of selecting candidates; and the primary feature was made a part of the election system by Laws 1907, p. 263, in which the word "election" is used but once, and in an amendment to a section of the act. The primary authorized thereby is simply a part of the machinery provided for the holding of general state elections. *Held*, that such primary is not a "general election," within the meaning of the local option law; and the holding of a local option election within 60 days thereof is not prohibited.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 37; Dec. Dig. § 29.*]

For other definitions, see Words and Phrases, vol. 4, pp. 3062, 3063; vol. 8, p. 7669.]

Appeal from Circuit Court, Audrain County; J. D. Barnett, Judge.

Mandamus by the State, on the relation of John W. Millon, against E. D. Graham and others, the Mayor and Members of the City Council of the City of Mexico, to compel the calling of a meeting of the council and the ordering of an election under the local option law. From a judgment awarding a peremptory writ, the defendants appeal. Affirmed.

Robertson & Robertson, of Mexico, Mo., for appellants. Barclay, Fauntleroy & Cullen, of St. Louis, and F. R. Jesse, S. D. Stocks, and E. A. Shannon, all of Mexico, Mo., for respondent.

BROWN, C. This is an appeal from the judgment of the Audrain circuit court awarding a peremptory writ of mandamus against the mayor and members of the city council of the city of Mexico, a city of the third class

having more than 2,500 inhabitants, commanding them to call a meeting of the council and order an election under the local option law (chapter 22, art. 3, R. S. 1899), upon a sufficient petition presented May 11, 1908. The council had denied the petition, on the ground that an election ordered in pursuance of the terms of that law must necessarily be held within the 60 days next preceding the August primary to be held on the 4th day of the succeeding August. Whether this is a state election, within the meaning of that term as it is used in section 3028 of the Revised Statutes of 1899, is the principal question in the case. It was also insisted in the return of the applicants to the alternative writ that the local option statute conflicts with section 28 of article 4 of the state Constitution, because it contains various subjects vitally necessary to sustain any proceeding under its authority, which are not expressed in its title.

[1] 1. The constitutional provision, in as far as it relates to the questions raised in this case, is as follows: "No bill . . . shall contain more than one subject, which shall be clearly expressed in its title." The title of the local option law (Laws 1887, p. 179) is as follows: "An act to provide for the preventing of the evils of intemperance by local option in any county in this state, and in cities of twenty-five hundred inhabitants or more, by submitting the question of prohibiting the sale of intoxicating liquors to the qualified voters of such county or city; to provide penalties for its violation, and for other purposes." In support to their position the appellants, in their brief, make the following points: "Lying outside of the purview of the title, the act provides for the petition to be signed by one-tenth of the qualified voters of the county or city; second, such petition shall be addressed to the city council of the city; third, such city shall order such election; fourth, the city shall conduct such election; fifth, it shall record such election and the result thereof; sixth, it shall pay the expenses of such election; seventh, it shall take the census of such city. In another section it provides for the giving of notice of such elections, etc. All of these things lie outside of the submission of the question of prohibiting the sale of intoxicating liquors to the qualified voters of any city or county."

The provisions are not only germane to the title, but are all of its very essence. The subject is the submission of the question to the qualified voters of the county or city. This implies the permission to elect by vote what course they will pursue in the matter, and includes every detail which, in the legislative discretion, is proper to take a fair vote and to ascertain and express the result. There is nothing in this act not designed for this purpose and clearly expressed in its title.

[2] 2. Section 1 of the act, the title to which we have already quoted, and the interpretation of which presents the real ques-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

tion raised in this appeal, provides for the submission to the qualified voters of any county, who shall reside outside the corporate limits of any city or town having a population of 2,500 inhabitants or more, the question whether or not spirituous and intoxicating liquors, including wine and beer, shall be sold in such county outside such city or town. This section contains the following proviso: "Provided, that no such election, held under the provisions of this act, shall take place on any general election day, or within sixty days of any general election held under the Constitution and laws of this state, so that elections as are held under this act shall be special elections and shall be separate and distinct from any other election whatever." At the time these words were used, there existed in this state, as there has been ever since, a statutory rule of construction (R. S. 1889, § 6570), as follows: "The term 'general election' refers to the election required to be held on the Tuesday succeeding the first Monday of November, biennially," which should control, unless such construction be plainly repugnant to the intent of the Legislature, or of the context of the same statute. This name had been conferred by the Constitution of the state upon the regular biennial election for officers of the state and its political subdivisions, had been accepted and used by the Legislature in many enactments, and was expressly defined in the statute last quoted, and there is nothing in its use in this act repugnant to the definition so established; and we have no doubt it was used deliberately for the purpose of expressing that meaning. It made it impossible to submit the question of local option during the period of political excitement preceding and succeeding the important event that determines the political complexion of the state and country at large; and it used the words which follow to impress more strongly upon the act that, in addition to the exclusion of this considerable portion of the year from the period during which it might be held, the election is to be a special one, devoted to the submission of that proposition separate and distinct from all others.

The second section of the act provides for the submission of the same question in cities and towns having 2,500 inhabitants or more. It provides that such election shall not be held "within sixty days of any municipal or state election held in such city." This clause was evidently intended to add to the description used in the proviso of the first section the municipal election, and for no other purpose. The general election is the one in which the officers of the state and its political subdivisions are chosen—the state election; the municipal election is the one in which municipal officers are elected. Although the word has many meanings, in the connection in which it is here used, it im-

plies a vote for the choice of public officers.

The idea of a "primary" or primary election was not in the mind of the Legislature, because at the time of the passage of the act there was no such thing authorized by the laws of the state. In 1889 (R. S. 1889, c. 60, art. 4) the arm of the state was extended for the protection of political parties who might choose this method of selecting persons to be presented as the candidates of such parties for the suffrages of the qualified voters, or for delegates to their nominating conventions. This statute simply provided for the prevention and punishment of fraud, as the public laws frequently provide for the protection of purely private property and private rights and contracts. The primary was only made a feature of the public election system by the act of March 18, 1907, which is the law now invoked by the appellant for the purpose of avoiding this election. Its title (Laws 1907, p. 263) is "An act to provide for party nominations by direct vote." One is struck by the care with which the word "election" is excluded from this act and its title as a designation of the plan or method of nomination for which it provides. It gets in, however, by an amendment to section 31, to which it is attached as "section 31a," and its incongruity seems to emphasize the general plan of exclusion which pervades the act. It does not apply to special elections to fill vacancies, nor to county superintendents of schools, to city officers not elected at a general state election, nor to town, village, or school district officers. Instead of being an election, within the ordinary political meaning of that term, it is a part of the machinery provided by the Legislature for holding the general state election; its office being the qualification of the candidates from which officers are to be selected in that final function.

It follows that the August primary of 1908 was not a state election, within the meaning of section 2 of the local option act of 1887, and that the judgment of the circuit court should be affirmed; and it is so ordered.

PER CURIAM. The foregoing opinion of BROWN, C., is adopted as the opinion of the court. All concur.

HILGEDICK v. GRUEBBEL

(Supreme Court of Missouri, Division No. 1.
Nov. 30, 1912.)

1. BOUNDARIES (§ 46*)—AGREEMENT TO PARTIES—VALIDITY.

A boundary may be established by agreement of parties.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. §§ 212-226, 249-251; Dec. Dig. § 46.*]

2. BOUNDARIES (§ 35*)—ADMISSIBILITY OF EVIDENCE—AGREEMENTS.

In ejectment where it was in issue whether previous owners of the respective tracts had

agreed upon a boundary line, cross-examination of a witness for plaintiff to show that a survey establishing such boundary line, upon which a rail fence was constructed, was incorrect and did not locate the true line was admissible, in view of the fact that such witness was the only person who had ever heard of such agreement, and the only witness testifying that such agreement was ever made, that plaintiff had never heard of such agreement, and that the uncontradicted evidence practically showed that the fence was not straight, but ran along in an irregular line.

[Ed. Note.—For other cases, see *Boundaries*, Cent. Dig. §§ 153-155, 157-159, 163, 165, 177-183; Dec. Dig. § 35.*]

3. WITNESSES (§ 406*)—CREDIBILITY—CONTRADICTION.

Upon such facts, the testimony of such witness on cross-examination tending to show that a boundary line claimed to have been agreed upon by previous owners and on which a fence had been built was not the true line was admissible in contradiction of the witness.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 1276-1279; Dec. Dig. § 406.*]

4. BOUNDARIES (§ 37*)—SUFFICIENCY OF EVIDENCE—AGREED BOUNDARY.

Evidence held to show that the prior owners of the respective tracts had not agreed upon a boundary line.

[Ed. Note.—For other cases, see *Boundaries*, Cent. Dig. §§ 184-194; Dec. Dig. § 37.*]

5. BOUNDARIES (§ 41*)—INSTRUCTIONS.

Instructions given for plaintiff in ejectment, involving a disputed boundary, held to present the issue as favorably for plaintiff as he was entitled to.

[Ed. Note.—For other cases, see *Boundaries*, Cent. Dig. §§ 205-207; Dec. Dig. § 41.*]

6. TRIAL (§ 252*)—INSTRUCTIONS—APPLICABILITY TO ISSUES.

In ejectment involving a boundary line, where there was evidence of a fence built by the prior owners of the respective tracts, but no evidence or issue as to the purpose for which it was erected, other than for the use and convenience of the parties in inclosing the premises, an instruction that, if such prior owners had a line surveyed to erect a fence between the tracts "for their convenience," which was so erected, such line would not be considered as establishing an agreed boundary unless such owners agreed that the line should thereafter be the boundary between their lands was not objectionable on the ground that there was no evidence to show that such owners had erected the fence "for their convenience."

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 505, 597-612; Dec. Dig. § 252.*]

Appeal from Circuit Court, Warren County; James D. Barnett, Judge.

Ejection by William R. Hilgedick against Gustave A. Gruebel. Judgment for defendant, and plaintiff appeals. Affirmed.

This is a suit in ejectment instituted in the circuit court of Warren county by the plaintiff against the defendant to recover the possession of two small V-shaped tracts of land in United States survey numbered 758, situate in township 45, range 1, Warren county, Mo., particularly described in the petition. Said tracts of land are situate along the boundary line, separating the lands of plaintiff and defendant. The petition is in conventional form, and the answer is a general denial. A trial was had before the

court and jury, which resulted in a verdict and judgment for the defendant, and the plaintiff duly appealed to this court. The respondent is not represented here, and the record presented to this court is so poorly gotten up and so indefinite that it is almost impossible for us to find heads or tails of the case. The appellant does not claim that he has the paper title to the land in controversy, but bases his right to a recovery, first, upon an agreed boundary line established by the grantors of both appellant and respondent in the year 1879; and, second, adverse possession under color of title. The respondent interposed three defenses: First, that he had the paper title to the land in controversy; second, a denial of adverse possession; and, third, a denial of the agreed boundary line.

In order to establish the appellant's case, he offered as a witness J. A. Ulfers, who testified, in substance, that he was 68 years of age; that he was reared in Warren county, and lived on land of appellant with his father, from 1847 to 1884, Hyronimus Ulfers, who died about the year 1895; that he was familiar with the tract of land immediately east of appellant's; that ever since 1870 Rudolph Dennert, Sr., owned and occupied the latter tract, which now belongs to the appellant; that Rudolph Dennert, Sr., died about the year 1886; that in the year 1878 or 1879 Hyronimus Ulfers, the father of the witness and Rudolph Dennert, Sr., wishing to build a fence between their farms, and not knowing the exact boundary line, agreed to have a survey made thereof and agreed upon James Biglow, a surveyor of St. Charles county, to make the survey, and agreed to build the fence on the line to be established by the Biglow survey; that the witness was present and assisted in making the survey, carried the flag, and Dennert's son carried one end of the chain; that the survey was made, and the stakes driven and corners set as the surveyor went along, and that, when he had gone around the tracts, the survey was satisfactory to both parties; that they then built a fence along the line established by the survey; that the witness built the fence, and Dennert, Sr., furnished part of the material, and his father furnished the remainder; that Dennert and his son were present when the survey was made; that the land on each side of the line was cultivated by Ulfers and Dennert, respectively, until 1884, when the witness left the place; that the fence remained there all the time while he lived there; that, after leaving the house of his father, he visited him off and on until 1893 or 1894, when his father moved from there. That during all the time while he lived there, and during all his visits, he never noticed any change in the line or the fence built thereon. That, after his father left the place, the appellant moved on it, and

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

has occupied it ever since. That he saw the premises just previous to the trial in April, 1909, and he noticed that most of the old fence had been torn down, and that a new wire fence had been placed there, some 10 feet over on the land formerly occupied by his father. That the north end of the old fence was still standing. That the old fence was a straight worm fence built of rails, and the corners of the fence were placed on his father's land by agreement between him and Dennert. That when he was last there he saw the marks of the old fence on the ground, and new stakes put there by a surveyor in the line of the old fence. That he did not know who called Biglow to make the survey, whether it was his father or Dennert. That Biglow had some deeds there while making the survey. That the survey he made began on the north end at the northeast corner of his father's land and ran down to a rock in the creek. He then went back and surveyed this fraction where the corner is supposed to be. Biglow, in surveying the property, ran around the fraction and surveyed the line in dispute; that is, the fraction of three acres and something, sold out of original Ulfer's place. He also testified that his father and Dennert agreed that the line surveyed by Biglow should be their dividing line. The agreement was not in writing. That there was an old fence there prior to and at the time when this agreement was made; "it was there when we moved on the place." There was a number of other witnesses introduced by appellant, whose testimony corroborated much of the testimony of J. A. Ulfers.

The respondent, in order to sustain the defense, testified in his own behalf substantially as follows: That he purchased the Rudolph Dennert place in the year 1903 and received a warranty deed, and went into possession of it on July 1, 1903. That at the time he moved there he found an old rail fence on the western boundary of the land. That about a month afterwards he met the appellant, and the latter said to him, "I understand you want your land surveyed." "Why," I says, "I haven't thought about it yet." I says, "I don't know; ain't the line all right, the corners? Do you know the lines or the corners?" He said, "No, sir; I don't know no corners on my land." I told him, "I don't know the lines because I ain't acquainted. I just bought it, and I am sort of new in this country, and if you don't know the line and I don't know the line, I think it would be right well to survey it." He said, "I wish you would survey it, because I would like to find out where the true line is." "Well," I says, "if that is your intention, I am satisfied with that." Proceeding, he testified further that they dropped the subject there, and that about two weeks later they met again and appellant asked the witness if he had engaged Wehmeyer to survey his

land. The answer was "No." He then said, "I wish you would have the land surveyed so that we can find the true line between your land and mine." Witness replied that he would get Mr. Wehmeyer and let him survey the land and run the line between them. That Wehmeyer is the county surveyor. That he requested all the parties who were interested in the lands to bring their deeds so the surveyor would know how to survey the lands. That he wrote to Wehmeyer some time in October, 1903, to come up and make the survey; that he promised to come in November, but did not do so until March, 1904. That, when the surveyor came, they went to the home of appellant and requested him to come over the next day to make the survey; that they got their chainmen, and the next morning appellant and the other landowners further up the line appeared. That Wehmeyer surveyed the land of both the witness and that of the appellant, also that of Peters and Meyer. That he surveyed all of those places, ran entirely around them. That he had appellant's deed there and used it in making his survey. That he saw the lines run and staked off; that he placed his new wire fence on the line established by the surveyor between his land and that of appellant. That, after the surveys were completed, he and appellant agreed to build a new fence along the line established between them; that the witness was to pay for sawing the lumber and making the posts for the entire fence, and appellant was to haul the lumber and posts and build the entire fence. That, in pursuance to that agreement, appellant hauled the logs to the sawmill of Mr. Mutert, and witness hired Fritz Garde to split the posts; that Garde split 150 posts on his land, and he paid him for his work; that he paid Mr. Mutert for sawing the lumber and had the receipts from both him and Garde. That appellant tore down the north end of the old fence. That there were two small tracts of land in controversy. The north one was about 120 feet long and 6 or 8 feet wide at one end and runs to a point at the other, while the south tract was about 300 feet long and 12 feet wide at one end and ran to a point at the other end. That the old rail fence which was there when he purchased the place was crooked—that is, it did not run on a straight line, it had bends, and was very crooked. That this old fence disappeared in the latter part of March, 1905, and that he did not know who moved it. That this was almost two years after appellant agreed to build the new fence. That appellant seemed to be pleased with the surveys when first made, but when he saw where the fence was to be built he seemed to get out of humor and would say but little. Appellant never built the fence he agreed to. That they had several conversations about it, and appellant suggested additional propositions looking to a settlement of the matter, but witness would not agree to that without

the agreement should be reduced to writing, and that each party should execute a bond in the sum of \$1,000, conditioned that each should abide by the agreement. That on May 17, 1906, in the presence of Mr. Peters and Mr. Knipker, he said to appellant that he would agree to abide by the survey made by "any competent surveyor of St. Charles, Montgomery, or Franklin counties." "Yes, sir; county surveyor or government surveyor, if there was one, it would suit me better, and I had to be satisfied with the surveyor, and that it had to be in writing and a \$1,000 bond on top of it." That the appellant refused this proposition, and the negotiations there stopped. That the posts he hired Garde to split disappeared also, and that he does not know what became of them. That, after appellant refused to build the fence as per agreement, he (the witness) had the wire fence, mentioned in the evidence, built along the line established by the Wehmeyer survey, which consisted of two smooth galvanized wires stretched along on posts set right on the line; that this fence of his has been cut to pieces about a dozen times. That the new wire fence was on the line established by the Wehmeyer survey and was perfectly straight, but the old rail fence was not; it was very crooked and varied from the line of the wire fence. At the north end the wire fence runs right into the middle of the old rail fence, and, as you go south, it leaves the old fence and the space between widens most all the way down to the south end where they are 10 or 12 feet apart. However, at one point near the center of the wire fence, the old rail fence almost touches the wire fence. That he built the wire fence on July 2 and 3, 1906. Appellant came over after his cows which he had put up and saw him building the wire fence and asked if he was putting it on the line, and, when informed that he was, the appellant said that was all that he wanted, and turned away and drove his cows home. That he had only one survey made, and that was on March 3 and 4, 1904, by Mr. Wehmeyer. That he did not have another agreement with the appellant to build the fence in the year 1906, but offered to enter into another agreement in that regard about that time, but appellant declined to enter into it. That at the time Wehmeyer made the surveys for them, they were on the best of terms; both he and Wehmeyer dined, and they stayed with appellant while the survey was being made, at the request of the latter. That appellant set some of the posts in pursuance of agreement to build the party fence, but subsequently he or some one else removed them; that appellant never completed the fence, so in 1906 the witness built the wire fence before mentioned. That at this time the feeling between him and appellant was not friendly; that he did not know what offended the latter, without he became so when he saw where the new fence would run.

On direct examination witness testified that the original agreement was that he was to furnish the material for the party fence, and appellant was to furnish the labor necessary to construct it on the line of the Wehmeyer survey, and that there was never any modification of that agreement made by them. That he simply waited for appellant to build the fence, and, when he saw appellant was not going to do so, he built the wire fence on the line where appellant had agreed to build it, and that appellant then instituted this suit. That he did not use the posts made by Garde in building the wire fence, because he did not want to haul them. Later they disappeared, but he did not know what became of them.

On recross-examination witness testified that appellant came to him three or four different times and requested him to have the surveys made, and maybe oftener, before he wrote to Mr. Wehmeyer to come and make them.

John Mutert, the sawmill man, Fritz Garde, the man who split the posts, William Peters and Frank Meyer, two of the adjoining land-owners, William Riske, John D. Waller, farmers, Dr. A. O. Bentnick, A. H. Wehmeyer, county surveyor, and many others, testified on behalf of respondent, who fully corroborated respondent's testimony in almost every particular. Both appellant and respondent introduced many deeds, plats, and other exhibits in evidence. The plats are poorly drawn and incomplete, and some of them give no corners or directions whatever. For those reasons we have been compelled to largely put aside the plats and gather the facts of the case as best we can from the oral testimony of the witnesses and the deeds introduced in evidence. The deeds show that the legal paper title to the land in controversy is in the respondent; in fact, that is not disputed by counsel for appellant.

Kurt Von Reppert and Henry Higginbotham, both of St. Louis, for appellant.

WOODSON, J. (after stating the facts as above). Counsel for appellant at some length state at the outset of their brief, and cite in support thereof, many authorities, certain academic propositions of law, which we need not here stop to consider. Counsel for appellant first assign as error the action of the trial court in admitting in evidence, on cross-examination, certain parts of the testimony of J. A. Ulfers, one of the witnesses offered by appellant. That testimony was elicited for the purpose of showing that the survey made by Biglow, establishing the boundary line as contended for by counsel for appellant, upon which the old rail fence between Hyronimus Ulfer's and Rudolph Dennert's land was constructed, was incorrect, and did not properly establish or accurately locate that true line between them.

[1] Counsel contend that said testimony was irrelevant and immaterial for the rea-

son that, if Ulfers and Dennert agreed upon the line upon which the old fence was constructed as the true line, then it was wholly immaterial whether that line was correctly located by Biglow or not. Many authorities are cited in support of that contention, and, because of its soundness, we presume it is not controverted by counsel for respondent. However, counsel for him insist, that said testimony of Ulfers was admissible in this case notwithstanding the soundness of the legal proposition previously stated.

[2-4] Their position is that, if it be conceded that Ulfers and Dennert agreed upon a fixed boundary line between them, then appellant's contention would be sound; but, contending, as counsel for respondent do, that no such agreement was ever entered into, a question of fact is thereby presented to the jury for determination, and that any evidence which tends to show that no such agreement was ever made, or which contradicts the testimony of J. A. Ulfers upon that question, is admissible in evidence. That being true, clearly the testimony complained of was admissible for both of said purposes, especially in the light of the facts disclosed by this record, namely: (a) That he (J. A. Ulfers) was the only human being on earth who ever heard of that agreement, and was the only witness who testified that any such an agreement was ever entered into between them, notwithstanding the fact that young Dennert was living and assisted in making the Biglow survey, and presumably would know as much about the agreement as young Ulfers did. (b) That the appellant himself, the purchaser of the land from Hyronymous Ulfers, never heard of said agreement. His words and whole conduct for years regarding the Wehmeyer survey, and the agreement between him and the respondent to build a party fence upon the lines established by that survey, shows conclusively that he never heard of any such agreement. Common prudence would have suggested to appellant, before or at the time he purchased the land from Ulfers, that he should have made inquiry of the latter as to the location of the boundary lines thereof, and common knowledge and experience teach us that such inquiry is usually, if not universally, made, by all purchasers of land, when present, as the appellant was in this case. Presumably for this reason, if for none other, he was more likely than any one else to have heard of the agreement, if in fact it was ever entered into, and, having never heard of it, is evidence that it never existed. (c) Practically the uncontradicted evidence shows that the old rail fence which witness Ulfers said was located upon the Biglow survey was not straight, but was crooked, meandering in and out, and at one point near the middle thereof the fence came almost to the line established by the Wehmeyer survey, which all the evidence shows was a straight

line, and from there meandered along an irregular line north and south, varying in places, in and out, from a straight line many feet, which, if we correctly understand the record and plats introduced in evidence, caused the narrow strips of land involved in this controversy to be located upon the appellant's side of the old rail fence.

This evidence tends strangely to show that the old rail fence was not put upon the line of the Biglow survey or upon any other survey, for that matter, for the reason that the witness Ulfers himself testified that the Biglow survey was a straight line, which presumably is true, for a surveyor generally runs a straight line and not a crooked one like a snake, even though it should vary from the true course. Therefore, if the Biglow survey located a straight line, as Ulfers testified that it did, then his testimony to the effect that the old rail fence was built upon that line is unquestionably untrue—that is, provided the testimony of many of the other witnesses who testified that the fence was crooked is true—but, be that as it may, that was a question for the jury to determine, and the evidence complained of was admissible for the purpose of showing that fact and to contradict said witness. It necessarily follows that, if the Biglow survey located a straight line between the farms of Hyronymous Ulfers and Rudolph Dennert, and that the old rail fence mentioned was crooked, meandering in and out many feet in places, and not straight, then the testimony of J. A. Ulfers to the effect that they agreed upon the Biglow survey as the true line between them, and that, in pursuance of said agreement, they built said fence upon that line, is untrue. At any rate, that evidence was admissible in evidence, tending to prove that no such agreement was ever entered into. It also follows from the foregoing facts, if the jury found them to be facts, that there was no agreement made and entered into by and between said Ulfers and Dennert fixing a boundary line between them, or that they built a fence upon that line for the purposes claimed by appellant.

[5] On behalf of and at the request of counsel for appellant, the court instructed the jury as follows: "(1) The court instructs the jury that if they believe and find from the evidence that Rudolph Dennert, which owner of the land east of the line in controversy, about the year 1878 agreed with Hyronymous Ulfers on the line run by Biglow mentioned in the evidence as the division line between their respective tracts of land, and that afterwards the said Dennert and the said Ulfers built their division fence on such division line so agreed upon, and that the fence so built is the old fence mentioned in evidence, and if the jury further believe and find from the evidence that plaintiff and said Ulfers, under whom said plaintiff claims, have ever since occupied the land on their

side of such division line and up to the same to the time of the entry, if any, of the defendant on the west side of said division line and said fence, then it is wholly immaterial where the survey would put the line; and the said Rudolph Dennert and all persons deriving title to the land east of said division line and fence under him (said Dennert), including the defendant Gruebbel, are bound by said agreed division line and fence, and are not entitled to any land west of said division land and old fence. And if the jury further believe and find from the evidence that the defendant at the time of the institution of this suit, September —, 1908, was and is now in possession of said land sued for, their verdict must be for the plaintiff for the possession of the land sued for and described in the evidence. (2) If the jury believe and find from the evidence that the plaintiff Wm. R. Hilgedick and those under whom he claims, who in this case is Hyronimous Ulfers, have been in the open, notorious, peaceable, continuous, uninterrupted, exclusive, and adverse possession of the strips of land in controversy, and up to the old fence mentioned in the evidence for a period of 10 years preceding the entry, if any, of the defendant on said land, and that the defendant at the time of the institution of this suit was and is not in possession of said land, their verdict must be for the plaintiff for the possession of said land. (3) The court instructs the jury that the plaintiff is not bound to prove both an agreed division line and adverse possession for 10 years, as defined by the other instructions herein, in order to entitle plaintiff to recover herein. But the plaintiff may recover on proof of either such agreed division line or such adverse possession. (4) The court instructs the jury that, if they believe and find from the evidence that the plaintiff or the plaintiff and his grantor, Hyronimous Ulfers, for a period of 10 years preceding and up to the time when the defendant entered into the possession of the land sued for, have been continuously in the actual possession of said land up to the old fence mentioned in the evidence, claiming the land up to said old fence as their own, then such possession is adverse possession within the meaning of these instructions, unless the jury further believe and find from the evidence that the plaintiff or his grantor Ulfers did not claim the land up to said old fence unconditionally as the true division line. In the event you find from the evidence that the plaintiff or his grantor Ulfers did claim the land up to the said old fence unconditionally as the true division line as hereinbefore explained, it makes no difference that the plaintiff or said Ulfers was mistaken as to the location of the true division line, nor that said old fence line may not have been the true division line, nor that plaintiff or the said Ulfers may not have intended to take any of

the land east of the true division line. (5) The court instructs the jury that, if they believe and find from the evidence that Rudolph Dennert, while owner of the land east of the line in controversy, and Hyronimous Ulfers, while owner of the land west of the line in controversy, did establish an agreed division line between their respective tracts of land, and that afterwards the said Ulfers and the said Dennert built their division fence on such division line so agreed upon, and if the jury further believe and find from the evidence that said Ulfers thereafter occupied the land on his side of such agreed division line and up to the fence so built for the period of 10 years, and that said fence is the old fence mentioned in the evidence, and that said Ulfers claimed to own said land up to such division line, then the said Ulfers owned the land on the west of and up to said division line and old fence as fully as if his deed called for and described the said line and old fence as the western boundary line of his said land, and in such case the deed to Gruebbel, the defendant, could not and did not convey to said Gruebbel any of the land west of such agreed division line and old fence." These instructions presented the law of the case to the jury in as favorable a light as the appellant was entitled to have it, and of course they do not complain of the action of the court in giving them.

The converse of the legal propositions stated in the foregoing instructions were submitted to the jury, in instructions asked by counsel for respondent. The principal objection urged against respondent's instructions is that there was no evidence upon which to predicate them. This objection is not well grounded as previously shown.

We have set out at some length the substance of the testimony for the purpose of showing that there was evidence tending to show that there was no agreement made and entered into by and between Ulfers and Dennert fixing the boundary line between their tracts of land, etc., and also tending to show that Dennert nor the appellant claimed adversely to Ulfers and the respondent. We therefore rule this point against the appellant.

[6] In addition to giving the instructions for respondent before mentioned, negating the propositions submitted to the jury by instructions on behalf of appellant, counsel requested, and the court gave, the following instruction for respondent, viz.: "The court instructs the jury that, if they believe and find from the evidence that one Ulfers and one Dennert were the adjoining owners of the lands in dispute in this case about the year 1878 or 1879, and that they about that time procured one Surveyor Biglow to run a line between said adjoining tracts of land for the purpose of erecting a fence for their convenience between their said tracts of land,

and that on said Biglow line a rail fence was erected, then the line marked by the rail fence will not be regarded by the jury as establishing an agreed boundary line between their said tracts of land, unless you further find from the evidence that said Ulfers and Dennert agreed that said line marked by said rail fence should be thereafter the boundary line between their land, and that each of them thereafter claimed to own to the said line marked by the said rail fence and no farther." Counsel for appellant complain of this instruction for the reason stated that there was no evidence introduced to show that Ulfers and Dennert erected the old rail "fence for their convenience."

It is true there was no evidence introduced for the purpose of showing that the fence was erected for the convenience of the parties, nor for any other purpose for that matter, but the supposition is that it, as well as all other fences, are erected for the use and convenience of the parties who build them. Nor was there any evidence tending to show that the fence was erected for the purpose of establishing the boundary line between Ulfers and Dennert. But the evidence for the appellant tended to show the line was established by the Biglow survey, and that Ulfers and Dennert agreed upon that line as the true dividing line, and in pursuance to that agreement the fence was erected thereupon, not for the purpose of establishing the line (for that had already been done by the survey, and the stakes and corners had been previously set by the surveyor), but for the uses and purposes that all farm fences are erected, namely, to inclose the premises, and excluding therefrom man and beast, and clearly this is the sense in which the word "convenience" in the instruction was used. No other meaning could have been drawn from the word, nor could it have misled the jury or injured the appellant in the least, for the simple reason that the purpose for which the fence was erected was not an issue in the case in any sense of the word. There are other minor questions presented and briefed by counsel, and, after a careful consideration of them, we are of the opinion that none of them cut so deep into the merits of the case as to change the result before indicated. We will not, therefore, prolong this opinion by discussing them.

There was sufficient evidence introduced to justify the court's action in submitting the case to the jury upon the theory of the respective parties, and the jury under proper instructions having found the issues for the respondent, we are of the opinion that the judgment should be affirmed. It is so ordered. All concur.

COUSINS v. WHITE et al.

(Supreme Court of Missouri. Division No. 1.
Nov. 30, 1912.)

1. ADVERSE POSSESSION (§ 84*)—KNOWLEDGE OF RECORD TITLE—EFFECT.

Where for more than 10 years prior to the filing of suit defendant held the open and exclusive possession of the land in dispute, claiming title, her possession had ripened into title, although she may have known the record title was in another.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 488-500; Dec. Dig. § 84.*]

2. ADVERSE POSSESSION (§ 116*)—INSTRUCTIONS—EVIDENCE.

In a suit for the recovery of land, where title by limitation was set up, and there was evidence that defendant, who was in possession, found it included in the tract which she purchased more than 10 years before, that she was assured that her grantor had perfect title thereto, and that she had held the exclusive possession dispossessing one who claimed adversely to her, it was sufficient evidence of holding under color of title to authorize an instruction that 10 years adverse possession under claim of ownership ripens into title.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. § 66; Dec. Dig. § 116.*]

3. TRIAL (§ 386*)—TRIAL TO COURT—DECLARATIONS OF LAW.

In a case tried before the court without a jury, the rules of law governing the giving and refusing of instructions are not changed.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 901, 902; Dec. Dig. § 386.*]

4. APPEAL AND ERROR (§ 987*)—REVIEW—LOCAL CASES.

While the appellate court may, in an equity case, review and weigh the evidence, it has no such power to review on appeals in actions at law.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3893-3896; Dec. Dig. § 987.*]

Appeal from Circuit Court, Oregon County; W. N. Evans, Judge.

Action by Lee Cousins against B. F. White and another. From a judgment for plaintiff, defendants appeal. Reversed and remanded.

This suit was instituted in the circuit court of Oregon county by the plaintiff against the defendant to quiet the title to the S. W. $\frac{1}{4}$ of section 21, township 22, range 5, under old section 650, R. S. 1899. The defendant answered, denying any claim to said quarter section, except to about five acres lying in the southwest corner thereof, described as follows: "Beginning at the southwest corner of section 21, running thence north to a point where the public road intersects the section line between sections 20 and 21, the same being a distance of 554 feet; thence in a southeasterly direction along said public road to and intersecting the section line between sections 21 and 28; thence west a distance of six hundred feet to the point of beginning."

Said answer was as follows: "Now come

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes 151 S.W.—47

defendants in the above-entitled cause, and for their answer to the petition of plaintiff deny each and every allegation in said petition contained. Defendants, further answering, say that they are in possession of and have within their inclosure a portion of the land described in plaintiff's petition; that they and their grantors have for twenty-six (26) years last past maintained an inclosure around said portion of land, have been in the open, continued, exclusive, and adverse possession of the same for the whole of said period of 26 years, claiming title thereto and have made valuable improvements thereon; that the portion of said land so held by defendants and their grantors more particularly described is as follows: [Then follows the description as above set forth.] Defendants further say by reason of the open, notorious, exclusive, and adverse possession of the above-described land under claim of ownership by them and their grantors for a period of more than 10 years as aforesaid they are vested with the full title to said land, both legal and equitable. Wherefore, defendants pray that the court may by its judgment and decree adjudge that the defendants are the owners of the above described land; that defendants be vested with full title thereto, both legal and equitable, by the judgment and decree of the court; and that plaintiff be divested of any title or interest he may hold to the same, and that the same may be vested in these defendants, and for such other orders and judgments as to the court may appear meet and proper."

At the trial all defenses, except the statutes of limitations, were abandoned.

The following facts are undisputed: The record title to the land is in the plaintiff, he having acquired it from one O'Neal, who through mesne conveyances acquired it from William H. Taylor, about the year 1880. The defendant, Margaret White, purchased lands adjoining that in controversy from Amos Huffstедler in the year 1894. She testified that at the time she purchased said lands she purchased all the lands which were within the Huffstедler inclosure, which it is conceded included this five acres. She testified that she had Huffstедler point out the lines to her, which included the land sued for; that he told her that all the lands in that country were sold as farms, and that this farm included all the lands inclosed by the fences which he pointed out to her; that he told her that he had been in the possession of this five acres for thirteen years, and had cultivated it all that time; that she took possession of said five acres along with the other land which was inclosed by the same fence, and had the actual, exclusive, adverse, and notorious possession of it from that time down to July, 1909, about 16 years, when this suit was instituted, cultivating it each and every year, and receiving all the rents, issues, and profits thereof during all that time, and that during all that time she

claimed title thereto, which was not questioned nor was her possession ever disturbed, except upon one occasion, about a year after she purchased the land, namely, in the year 1894, and that was by William H. Taylor, who at that time claimed to have had the record title thereto; that upon that occasion Taylor made claim to the five acres, and took possession thereof, and set some posts near the present controverted line; that she so vigorously protested against his claim of title and wrongful possession that he pulled up and left the place, and never again claimed title thereto or disturbed her possession thereafter, which was about 12 or 14 years prior to the institution of this suit.

Amos Huffstедler testified for plaintiff, but did not contradict the testimony of Mrs. White, except in this manner: He testified that at the time he made the contract of sale with Mrs. White he stated to Mr. Tribble, the attorney who drew the deed, in the presence of Mrs. White, that there was some agricultural land that cornered down in the field (this five acres) he was not selling to defendant.

Mrs. White testified that she never heard Huffstедler make that statement to Tribble, but that after she had contracted for the land, and "had made the payment" thereon, Huffstедler for the first time said to her that there was some agriculture land that cornered down in the field, and that he assured her that she would never be bothered about it, that he had held it for 13 years, had cultivated it all those years, and had never been bothered about it, and that he deemed the title to the same to be safe for her. (The record is not clear upon this point, but from this remark I suppose the land was purchased upon the installment plan, and that the payment referred to was the first payment made under the contract of purchase.)

Huffstедler also testified that he held the actual, exclusive, and notorious possession of said five acres of land for 13 years prior to making the deed to Mrs. White, and cultivated it all that time, and received all the issues, rents, and profits thereof, but that he never claimed the land adversely. The record is silent as to the reason and as to the conditions that existed under which he took possession of said five acres, or why it was inclosed with his lands.

Mrs. White was recalled, and testified that she took possession of all the land in question, under the deed, believing that she had a good title to all of it as Huffstедler had told her she had.

The only evidence introduced tending to contradict the evidence of Mrs. White to the effect that she claimed the five acres of land adversely under order of title was that of the plaintiff and his attorney, S. M. Meeks, regarding a conversation which took place in the latter's office a few days prior to the institution of this suit.

Plaintiff testified as follows: "I had a conversation with Mrs. White about this piece of land in Mr. Meek's office, after I bought it from Michael. She came in, and said she would buy it from me, if I would sell it, and I told her I would, and she asked me how much I wanted, and I said \$75 an acre; she, 'That is too much.' She asked me how much I gave, and I said \$9.25 per acre, and she said she would give me twice as much as it cost me. She said there was something like five acres, and she would give me \$100 for it." Cross-Examination: "Don't know that she said who was the owner of that land. Nothing was said about the ownership of it. The best I remember she came in and asked me if I would sell that piece of land. I didn't talk with her much."

The following was Mr. Meek's testimony: "I heard the conversation between Mr. Cousins and Mrs. White. I couldn't tell all of it. Mrs. White came in. I think Mrs. White and I came in together, and went in and sat down, and Mr. Cousins came in directly from another room. They were talking about this land, and he told her that he would draw a line from that section corner to Mr. Shaver's fence and set a price and give or take, if I remember right, and she told him she wouldn't do it; she had none to sell. She asked him what he gave for it, and he said \$9.25, and she told him she would give him twice that for what was in the field and considered that a reasonable offer, or something to that effect. She said, 'You say there is five acres,' and she would give him \$20 or \$100 for what was there. That was a few days before this suit was filed." Cross-Examination: "Mrs. White came down to my office to see me about this land. She understood that Cousins was making a claim to it. She came and talked to me about it when Bill Payne was making some claim to it, about a dozen years ago. I don't remember whether I advised her she could hold that land. I think Mr. Kenner was mixed up in it, and Mr. Payne and Mrs. White. It was three-cornered controversy. I heard that Mr. Payne had got it and set some posts. I might have advised her she could take those posts out. I don't remember whether I advised her to that effect, or whether I told her that the land belonged to her by right of possession." Redirect examination: "I had no knowledge of the facts, and, if I gave her any advice, it was upon her own statements."

William Miller testified for defendants as follows: "I have known the land in controversy for 29 years I would say. I remember Bill Payne claiming it. I don't recollect how long it has been, probably a dozen years ago. I heard him making some claims to that corner down in Mrs. White's field there. I heard him say something about it in the court here to Judge Evans, something about wanting possession of it. I don't know what

steps were taken, but I understood Judge Evans to state they would hold it by statute of limitations. I had put his poles in there to build a fence, and then he didn't build it. I don't know what year that was. Q. You never knew or heard of him making any further claims to that land? A. That is the last I heard said about it." Cross-examination: "I don't know what he claimed. I don't know what kind of matter or proceeding it was I heard in court. I don't know exactly—I heard Payne name something about wanting possession of this land, or something of the kind, to Judge Evans. It was after Payne was out of office here, 10 or 12 years ago. I couldn't tell how long it has been. I don't know what the general knowledge and understanding was out in this neighborhood, as to whether this corner out of that quarter section run down into the field. I don't know what the general knowledge, but I knew it. I don't know how the general opinion is about it being part of that White farm, but I would consider it a part of the farm. It belonged to the field."

Joseph Rizenour, being introduced on the part of defendant, testified, in substance, as follows: "I am the tenant cultivating the Wahit farm, and rented it from Mr. White, through my son. It included the piece of land in controversy here. I have known this place about 29 years. This land in dispute has been held under the inclosure of the White farm ever since I knew the farm. The fence has been set back a little this year, a new fence put in there this year. It may have been set out a little, but it follows the road. For the last five years I have known Mr. White to have control of it. As far as I know, Mrs. White's renters have occupied it from the time she bought it on down. The new fence was set up against the old fence in places, and out six feet north of it in places."

Mrs. White upon recall further testified that: "Mr. Huffstедler told me when we were trying to make the deal that all the land was sold in farms. That is the way he told it. He didn't tell me anything about this piece until he told me about the lines; that about telling me before Mr. Tribble. I wasn't there, and don't know anything about that. He said I could hold the land all right, that he had held it 18 years, and never been bothered. Mr. Nettleton bought it in 1882. Q. About this conversation that took place in Mr. Meek's office—state why you went. A. The reason I went there I heard Lee Cousins bought it, and I heard that he was going to take forcible possession of it, and when I went up to Mr. Meek's office and asked him what I should do, and he said he wouldn't do that. Before that the surveyor came to the house and I thought it was the county surveyor, and, instead of that, it was Mr. Haskell. And then I came down and Lee came while I was there, and he said he was

going to survey, and I said I didn't want any trouble. I said, 'How much did you pay for the land?' And I offered him \$100 for his claim, and he said he would have to have \$75 per acre, and was going to law to get. I made that offer to get the matter settled without a suit. Q. About how long after you bought this land was it that Mr. Payne made this claim? A. When he put them holes in was about three years. I owned it I guess eight or nine months when they had it surveyed. Mr. Huffstедler told me there was nothing to it. I claimed up to the fence. When he went to show me the line fence and the corner, he said that was a piece of this land got from another corner in there. This was known as railroad land. Nettleton bought it in 1882." Cross-examination: "Mr. Meeks didn't tell me he was Cousins' attorney the day I was in there. He said he wouldn't represent either of us on account of being a friend of both of us. I didn't tell Mr. Meeks in that conversation that Huffstедler told me he wasn't selling this land because he didn't tell me so."

Plaintiff admitted that the land in dispute had been in cultivation for about 29 years. Whereupon defendants rest. Thereupon plaintiff recalled S. M. Meeks, and inquired whether Mrs. White said that Amos Huffstедler told her he was selling the land in controversy when he made the deed. Witness said: "She stated he told her there was a corner of this other section run down in to it. * * * She didn't state when he told her that."

Defendant asked the following instructions, numbered 1 and 2.

"No. 1. If the defendant Margaret White understood and believed at the time she purchased the farm adjoining the land in question that said land went with said farm and was a part of the same, that she went into possession of the disputed land, maintained an inclosure around the same, and continued in the open, adverse, and exclusive possession of the same for a period of 10 years, claiming title thereto, then the finding should be for defendants, although defendant may have afterwards learned that the title to said lands was in dispute.

"No. 2. If the defendant Margaret White had the land in dispute within her inclosure for a period of more than 10 years consecutively prior to the filing of this suit and during all that time held the open, exclusive, and adverse possession of the same, claiming title thereto, then such possession has ripened into a title in the defendants, although she may have known that the record title to such land was in other persons, and that her title to said land was in dispute."

The court gave the first instruction, but refused the second, to which action of the court the defendant duly excepted. The plaintiff asked no instruction.

The court sitting without the assistance

of a jury found the issues for the plaintiff; and the defendants, after moving unsuccessfully for a new trial, appealed the cause to this court.

J. N. Burroughs, of Westplains, for appellants. S. M. Meeks and G. M. Miley, both of Thayer, for respondent.

WOODSON, J. (after stating the facts as above). [1] 1. There are but two errors assigned: First, that the court erred in refusing to give instruction numbered 2, requested by defendants; and, second, that upon the whole record the findings and judgment were erroneous, and should have been for the defendants, and not for the plaintiff. We will dispose of those questions in the order stated.

As to the first, if this case had been tried as an action at law, which unquestionably it was, as the only defense was the statute of limitations (Lee v. Conran, 213 Mo. 404, 111 S. W. 1151), instruction numbered 2 should have been given, for the reason that it correctly announces the principle of law governing the statute of limitations pleaded in the answer.

[2] The only excuse offered by counsel for appellant for the action of the court in refusing said instruction is that there was no evidence introduced tending to show that the defendants were claiming adversely under color of title. Counsel for respondent have either overlooked some of the evidence or have misconceived its import. Mrs. White, one of the defendants, testified that she purchased the land from Amos Huffstедler, and that he pointed out the lines to her which inclosed this five-acre tract; also, that after she had entered into the contract of purchase, and had paid the first payment, he for the first time mentioned this five acres, and then only remarked that he had been in the uninterrupted possession thereof for thirteen years, and had never been disturbed therein, and that he was satisfied that she had a perfect title thereto. And Huffstедler does not contradict her in that regard except what he says he told Tribble in her presence regarding this five acres; and it should be observed that he did not state that she heard, or had the opportunity of hearing, what he said upon that occasion. She testified that, if he made any such statement to Tribble, she never heard it. But, be that true or false, it cannot be said she was not in the actual, exclusive, notorious, and adverse possession of this land for some 12 or 14 years before the institution of this suit, nor do I think it can seriously be contended but what she was claiming under color of title when we consider her testimony in connection with that of Meeks, respondent's attorney, Huffstедler, a witness for respondent, and that of William Miller and Joseph Rizeman, witnesses for appellants. In fact, their evidence shows conclusively that she

was claiming title thereto, and actually dispossessed Payne, the real owner, a year or so after she purchased the land from Huffstедler. Moreover, the uncontradicted evidence shows that she was claiming title to the land all this time, not only by dispossessing Payne, but there was some kind of a proceeding had in court touching this land, in which it was shown that she was then claiming the title thereto, and that the remarks of Judge Evans made during the trial of that case shows that he not only knew she was claiming the title, but also that he thought her claim was well founded. She also consulted Mr. Meeks, the attorney for respondent, about this claim, and, while he is not clear just what his advice was, nevertheless it shows she was claiming title thereto. So, under this evidence, we are satisfied that there was an abundance of evidence tending to show that defendants were, during all the years they were in possession of the land, claiming adversely under color of title.

For the reasons stated, we are of the opinion that the instruction should have been given.

[3] And the fact that the case was tried before the court without a jury does not change the rules of law governing the giving and refusing instructions in actions at law. *Crossett v. Ferrill*, 209 Mo. 704, loc. cit. 707, 108 S. W. 52. We are therefore of the opinion that the court erred in refusing to give instruction numbered 2.

[4] 2. This brings us to the consideration of the second error assigned by counsel for defendants, namely, that upon all the evidence the findings and judgment of the court should have been for the appellants. If this had been a case in equity, there might have been much force in this contention, for the reason that then we would have had the right to review and weigh the evidence, and render such judgment or decree here as justice and equity might demand. *Gibbs v. Haughwout*, 207 Mo. 384, 105 S. W. 1067. But, this being an action at law, we have no such authority. The facts in such a case are triable before a jury, who are the sole judges of the credibility of the witnesses, and the weight to be given to their testimony.

Because of the error before mentioned, the judgment is reversed and the cause remanded to be proceeded with in conformity to the views herein expressed. All concur.

HUNTER v. GARANFLO.

(Supreme Court of Missouri, Division No. 1.
Nov. 30, 1912.)

1. CORPORATIONS (§ 376*)—PURCHASE OF CORPORATE STOCK—POWER OF CORPORATION.

In view of Const. art. 12, §§ 7, 8, respectively providing that no corporation shall issue stock except for money, labor done, or property

actually received, and that it shall engage in no business other than that expressly authorized, and Rev. St. 1909, §§ 3339, 3354, providing that at least one-half of the funds represented by the capital stock of a business corporation shall consist of lawful money and that it can only be diminished by certain formalities, a business corporation whose capital was \$20,000 is without authority to purchase one-half of its shares at a premium, and hence a deed of trust given for that purpose is void.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. § 1530; Dec. Dig. § 376.*]

2. CORPORATIONS (§ 484*)—POWERS OF CORPORATIONS—ACTING AS SURETY.

As business corporations are expressly forbidden by Const. art. 12, § 7, to engage in business other than that authorized by their charters, such a corporation has no power to act as surety of its stockholder and pledge its credit for his purchase of its stock, and therefore a deed of trust executed by it in pursuance of such a plan is void and unenforceable.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. § 1815; Dec. Dig. § 484.*]

Appeal from Circuit Court, Ste. Genevieve County; Chas. A. Killian, Judge.

Action by Lee Hunter against W. H. Garanflo, as assignee. From a judgment for defendant, plaintiff appeals. Affirmed.

John A. Hope, of St. Louis, for appellant.
W. H. Miller, of Cape Girardeau, for respondent.

BROWN, C. This is a suit by appellant against the respondent as assignee under the insolvent laws of the state of Missouri of the Mathewson Mercantile Company, a Missouri business corporation, engaged in the business indicated by its name. Its object is to enforce the lien of a mortgage executed by the corporation February 17, 1902, in which A. G. Mathewson, Lizzie Mathewson, and Mabel Mathewson join, conveying the real estate of the corporation to secure the payment to the plaintiff of three notes aggregating \$11,700, of the same date and signed by the same parties, and also other notes of the same parties to the People's Bank, aggregating \$5,947.28. This bank was a private bank owned by plaintiff and one Albert Hunter. This suit involves the three Hunter notes only.

[1] The Mercantile Company was incorporated in 1901 with a capital stock of \$20,000, \$10,000 of which was subscribed by the plaintiff, \$9,000 by A. G. Mathewson, and \$1,000 by his wife, who is one of the makers of the notes and mortgage in question. The grantors in the mortgage, other than the corporation, are described as "all the stockholders of the said corporation." The Hunter notes were given in payment for the \$10,000 of stock subscribed and owned by Hunter, and which were in this transaction transferred to A. G. Mathewson. Although other questions of interest were raised upon the trial, the case is submitted here upon the sole question as to whether or not the mortgage constitutes a valid lien upon the real estate of the corpo-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

ration for the security of the Hunter notes, so that, if that question can be answered in the affirmative, this judgment should be reversed, and such judgment entered here as should have been entered in the trial court, or the cause remanded for further proceedings. If it be answered in the negative, the judgment should be affirmed.

The object and effect of the Constitution and laws of this state with reference to corporations seem to be to permit and encourage the investment of the money of the people in business enterprises under corporate management, without the incurring of any personal liability beyond the full payment for the stock subscribed or otherwise owned by the members of the association. That this plan has been of great benefit to the state, permitting as it does the free employment of the private means of all, including the helpless classes, in active business operations without the danger of other loss than of the capital invested, will be disputed by none. That the state should carefully safeguard such investments made with its encouragement, so that the fund which it permits to be substituted for personal liability, will be carefully preserved and scrupulously devoted to that purpose is equally evident. To this end, it is provided by the Constitution that "no corporation shall issue stock or bonds, except for money, labor done or property actually received" (article 12, § 8), and that "no corporation shall engage in business other than that expressly authorized in its charter or the law under which it may have been or hereafter may be organized" (Id. § 7). It is futile to say that these provisions are for the benefit of stockholders exclusively. They are both directed against the stockholders and are primarily intended for the benefit of the public by securing, as far as possible, the integrity of the fund for the protection of those who may deal with it, as well as those who may become the purchasers of its stock upon the faith of the representations made in the act of its incorporation. The withdrawal of this fund, or any part of it, by the stockholders, otherwise than under the sanction of the law in conformity with which it is created, or its application to other uses than those authorized by the laws under which the corporation exists, is a clear violation of the policy of the state as expressed in its Constitution. In this case the plaintiff is asking the aid of the court to enable him to appropriate to himself more than half the entire property of an insolvent mercantile corporation under a mortgage given by it to secure its note for \$11,700, given him in consideration of the purchase of half its own capital stock of the par value of \$10,000. This note and the mortgage securing it are signed by the stockholders owning the other half, and the evidence seems to indicate that one of them is the real purchaser.

The laws enacted in pursuance of the constitutional provisions we have quoted require that the fund represented by the capital stock of the business corporation shall have been provided at the time of its incorporation, and that at least one-half of it shall consist of lawful money of the United States in the custody of the persons constituting its first board of directors. Revised Statutes 1909, § 3339. This may only be diminished in the manner prescribed (Id. § 3354), which describes definitely the precautions which shall be taken to preserve the integrity and sufficiency of the remaining capital, and the publicity to attend the change. The condition of its capital at the time of such change must be spread upon the public records as fully as in the original organization and incorporation. If the corporation was the purchaser in this case, the effect of the transaction will be not only to reduce the capital stock of the company by one half, but to withdraw from it property greater in value than one-half its original capital, if the plaintiff's lien should be enforced. This would be in violation of both the letter and the spirit of the provisions of the Constitution and statutes to which we have referred, and is contrary to the sound public policy clearly indicated by these laws. An executory contract of such a character ought not to find favor in our courts. The question is not now before us as to whether a corporation may not, under some circumstances, lawfully become the owner of shares of its own capital stock, but no such circumstance enters into this case. This general question has been frequently presented to the courts for adjudication, both in this country and in England, and its decision has most frequently turned upon the force and effect of controlling statutory provisions in the several jurisdictions. Much learning has been collected upon the subject in a note to the Alabama case of *Hall v. Henderson*, 126 Ala. 449, 28 South. 531, 61 L. R. A. 621, 85 Am. St. Rep. 53, as well as in the briefs of the several counsel in the principal case, which the writer has read with much interest and profit, and the general tendency of which is in accordance with the conclusion to which we have arrived; but we are controlled alone by the terms of our own Constitution and statutes which it is our peculiar duty to enforce.

[2] The plaintiff is in no better situation if, as indicated by some of the evidence, Mr. A. G. Mathewson, its president, was the purchaser of the stock for which the corporation is called upon to pay. It was forbidden by the Constitution to engage in any business not expressly authorized by the law under which it was organized, and the purchase of its own stock under the circumstances of this case was not expressly authorized by the law of its existence, but was expressly forbidden; so that the contracts in contro-

very would constitute an attempt to pledge the assets of the corporation in a transaction entirely beyond its corporate powers. If it be said that the power of the corporation in such a case does not depend upon its power to do the thing which is the ultimate object of the transaction, but upon its power to become a surety for its stockholder, regardless of the nature of the transaction which is the subject of the suretyship, we find it equally well settled that it has no authority to so use its credit for the benefit of others. 2 Beach on Private Corporations, § 391.

The mortgage which constitutes the foundation of this proceeding being ultra vires the corporation and void, it results that the judgment of the New Madrid circuit court should be affirmed, and it is so adjudged.

PER CURIAM. The foregoing opinion of BROWN, C., is adopted as the opinion of the court. All concur.

In re SELLECK.

(St. Louis Court of Appeals. Missouri. Dec. 3, 1912. Rehearing Denied Dec. 14, 1912.)

1. ATTORNEY AND CLIENT (§ 57*)—PROCEEDINGS FOR DISBARMENT—FINDINGS OF COMMISSIONERS—CONCLUSIVENESS.

Where, in proceedings to disbar an attorney, the evidence is conflicting, the court will defer to the findings of the special commissioners appointed to hear the testimony, and report findings of fact and conclusions of law.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 81, 82; Dec. Dig. § 57.*]

2. ATTORNEY AND CLIENT (§ 45*)—DISBARMENT—MISCONDUCT OF ATTORNEY.

An attorney who devised a scheme resulting in the execution of a false bill of sale and notes, and who directed a party thereto to give perjured testimony in litigation involving the validity of the instruments, and who unlawfully obtained possession of papers of a decedent and converted them to his own use with the intention of depriving the true owners of their property, was guilty of misconduct justifying disbarment.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. § 63; Dec. Dig. § 45.*]

Proceedings for the disbarment of Ellroy V. Selleck, an attorney. Judgment of disbarment.

Walter H. Saunders, Thomas B. Harvey, and McDonald & Taylor, all of St. Louis, for relator. John Talty, of St. Louis, for respondent.

NORTONI, J. This is an original proceeding for disbarment of the respondent, Ellroy V. Selleck, Esq., instituted in this court at the instance of the St. Louis Bar Association, acting through its committee on grievances. Upon the respondent's appearing at the bar in person and by counsel, after notice and citation were duly served upon him, the court appointed Charles W. Bates, Esq., and

George E. Smith, Esq., members of the St. Louis bar in good standing, as special commissioners to sit together, hear the testimony, and make report of their findings of fact and conclusions of law thereon with respect to the several charges preferred. The commissioners were duly sworn and qualified to act in that behalf, and in due time proceeded upon the discharge of the duties as such.

It appears that all parties interested appeared before the special commissioners in person and by counsel and introduced volumes of evidence, both oral and documentary. The special commissioners sat 18 days hearing testimony, and there were examined before them in all 85 witnesses. The record accompanying their report to this court consists of 4 volumes, containing in all 1,843 pages, besides an additional volume of documentary evidence alone in the form of exhibits introduced at the hearing. Together with this voluminous record the special commissioners filed here the following report, setting forth their findings of fact and conclusions of law:

"State of Missouri, City of St. Louis—*as*:

"In the St. Louis Court of Appeals, March Term, 1912.

"In the Matter of Ellroy V. Selleck.
No. 13,209.

"Special Commissioners' Report.

"George E. Smith and Charles W. Bates, special commissioners appointed by this honorable court on November 20, 1911, to jointly take the testimony offered by the parties, relator and respondent, and to report the same, together with findings of fact and conclusions of law, as more fully appears by the copy of the order of appointment hereto attached and made a part hereof, after duly taking the oath of office on said day, which oath is hereto attached and made a part hereof, did by consent of parties, Messrs. Thomas B. Harvey and Walter N. Saunders appearing for relators, and Mr. John A. Talty appearing for respondent Selleck, after due notice and by consent of parties, begin the hearing of said cause on the 27th day of December, 1911, and continued to hear the same from time to time and from adjournment to adjournment as by consent of all parties until the 5th day of July, 1912, when both parties concluded the testimony desired to be heard by them, respectively. That your commissioners held sixteen (16) sessions of entire days and two (2) sessions of half days, and heard the testimony of eighty-five (85) witnesses.

"Your commissioners further report that they file herewith and make a part hereof transcript of the proceedings had before them, the testimony appearing in eighteen hundred and forty-three (1,843) pages, and the written documents in evidence as ex-

hibits appearing in a large separate volume. After hearing counsel, Messrs. Harvey and Saunders on behalf of relators, and Mr. Talty on behalf of respondent, your commissioners report as follows:

"The charges against respondent Ellroy V. Selleck are presented by the Bar Association of the city of St. Louis, seeking the disbarment of said Selleck. These charges are five in number, as appears from the charges filed in this court on the 30th day of September, 1911.

"Charge First.

"Your commissioners find the issues in favor of respondent, Ellroy V. Selleck, upon this charge.

"Charge Second.

"Your commissioners find the issues in favor of respondent, Ellroy V. Selleck, upon this charge.

"Charge Third.

"Your commissioners find the issues in favor of respondent, Ellroy V. Selleck, on this charge.

"Charge Fourth.

"Your commissioners find the issues against Ellroy V. Selleck on this charge, and find him guilty as charged. Further upon this charge your commissioners find: That said Ellroy V. Selleck was in the year 1908 duly admitted to practice law and licensed to practice law in the courts of the state of Missouri by the Supreme Court of Missouri, and from that time continuously up to the present time he has been engaged in the practice of law as an attorney and counsellor. That in the months of November and December, 1908, one Charles Mathew Kotzaurek was conducting two hat stores in the city of St. Louis, one at 603 Pine street and one at 907 Pine street, and that the said Kotzaurek was indebted to various persons for rent of the said stores and for hats purchased and contracted for. That in his employ at that time was one Bertha Henkel. That at that time and prior thereto the said Ellroy V. Selleck was and had been the attorney and counsel for said Bertha Henkel. That some time in the month of November or December, 1908, said Bertha Henkel introduced the said Kotzaurek to her attorney, the said Ellroy V. Selleck. That, under the advice and direction of said Selleck, he conspiring with the said Kotzaurek and the said Henkel, a scheme was devised by said Selleck for this purpose, and said Kotzaurek and said Henkel directed by the said Selleck in his capacity as their counsellor and attorney to execute falsely bills of sale and promissory notes, and to authorize the said Selleck to execute certain checks to apparently consummate a sale of the stock of hats by said Kotzaurek to said Henkel. That said papers were executed and delivered, although in truth and in fact no such transaction took place as purported to be set forth by said papers. That

litigation ensued, involving those transactions, and as a part of the conspiracy and plan devised by said Selleck to carry out said fraudulent scheme he, the said Selleck, directed and instructed the said Henkel to give false and perjured testimony, in pursuance of which plan and scheme said Henkel did knowingly, willfully, and intentionally in the trial of said litigation give false and perjured testimony under the direction and at the suggestion of said Selleck, and the said Selleck, in said litigation, did knowingly, willfully, and intentionally give false and perjured testimony.

"Charge Fifth.

"Your commissioners find against the respondent Ellroy V. Selleck on this charge, and find that the allegations in said charge are true: Further, your commissioners find: That said Selleck, being a licensed attorney as heretofore stated, and practicing his profession in the city of St. Louis, was for some months prior to July 20, 1910, employed by one John Link as attorney and legal advisor. That said John Link died on the 20th day of July, 1910, and that letters testamentary were issued by the probate court of the city of St. Louis to his widow, Minna Link, on July 23, 1910. That during his lifetime the said John Link was the owner, among other things, of the following notes, secured by deeds of trust, to wit: One principal promissory note, dated April 1, 1906, executed by one John Schmittlel for the sum of \$3,500, which note, prior to the times hereinafter referred to, had been reduced by payments to \$2,750, said note was payable to B. C. Stephens of Clayton, Mo., three years after its date, and by him indorsed without recourse. Said note had been purchased by said John Link, and time had been extended on said note and new interest notes for \$150 each given therefor. Said notes were secured by deed of trust on lot No. 2 of Human place, being a subdivision of the W. ½ of the W. ¼ of the N. W. ¼ of section eight (8), township forty-five (45) N., range six (6) E., in St. Louis county, Mo. Also a principal promissory note for \$4,500, executed by one Ellen A. Manion, dated April 1, 1910, payable three years after date to August J. Kuhs, Jr., and by him indorsed; also six (6) interest notes accompanying the same, each for the sum of \$123.75, all secured by deed of trust on lot eighty-two (82) of Tower Grove Heights amended subdivision, in block 4114 of the city of St. Louis, Mo. That after the death of John Link said Ellroy V. Selleck was employed by Mrs. Minna Link as her attorney to represent her and the estate of John Link, upon which she was administering. That shortly after the death of John Link, and before letters testamentary were issued on John Link's estate, the said Ellroy V. Selleck, either by impersonating John Link or otherwise, unlawfully obtained ac-

cess to the safety deposit box of the said John Link in the Mercantile Trust Company, where the said Link kept his papers, among others the said notes and deeds of trust. That the said Ellroy V. Selleck obtained possession of said notes and deeds of trust, and unlawfully, wilfully, and knowingly, with the intention of depriving the true owners thereof of their property, converted the same to his own use. That he has refused to account for same or their value to the said estate of John Link, deceased, or to the executrix of said estate or to the attorneys employed by the executrix after she discharged from employment the said Selleck. That the said Selleck falsely pretended that John Link in his lifetime had entered into a written contract with him as attorney for said John Link and one McGregor, whereby the said Schmittel notes and deed of trust were transferred to said Selleck, and falsely pretended that said contract was stolen from him (the said Selleck's) desk, whereas your commissioners find the fact to be that no such contract was ever executed, nor was any such contract ever stolen from said Selleck's desk or otherwise.

"Your commissioners find as a matter of law, upon the facts so found as above, that said Ellroy V. Selleck is not a fit or proper person to practice law in the state of Missouri, and that his license so to practice should be revoked.

"Respectfully submitted,

"Charles W. Bates,

"George E. Smith.

"Special Commissioners."

From the report of the special commissioners above copied it appears that the finding was for respondent on the first, second, and third charges laid against him, but against him on the fourth and fifth charges therein set forth and described. To this report the respondent filed exceptions, and those exceptions have been extensively argued by counsel at the bar, and the case duly submitted for determination. The two sitting members of the court have devoted more than a week's time in reading and comparing the mass of testimony and numerous documents contained in the record and considering the arguments in support of the respondent's exceptions. Having given the case most thoughtful and careful consideration, upon reviewing all of the evidence, we incline to the view expressed in the special commissioners' report above set forth. It is true that there is considerable testimony in the record tending to prove the innocence of defendant on both of the charges which the special commissioners found against him, but upon comparing this testimony with that of other witnesses and irrefutable dates and documents introduced, and the revelations made in some of the cross-examinations, we are fully persuaded that the special commission-

ers ascertained the truth with respect to the whole matter.

[1] Furthermore, when the evidence is conflicting, as it is here, it is proper for the court to defer to the finding of the special commissioners who have the witnesses before them face to face, and are thus afforded an opportunity through observing their demeanor on the stand to form a more accurate conclusion touching the matter of credibility and as to what testimony is and what is not true than is the reviewing court which sees only the cold record in print. See *State of Mo. ex rel. Gay v. Jones*, 158 Mo. App. 170, 138 S. W. 81.

[2] The evidence abundantly supports the findings of fact above set forth in the report of the special commissioners, and if the facts are properly found, as they appear to be, no one can doubt the soundness of the conclusions of law announced by the special commissioners thereon in their report. In this view the respondent's exceptions filed to the report should be overruled and the report of the special commissioners adopted in toto. It is so ordered. It is therefore the judgment of the court that the respondent, Ellroy V. Selleck, Esq., who, as appears from the records of this court, is an enrolled member of its bar, be and he is hereby debarred from the further practice of the profession of an attorney and counselor at law under the laws of this state in any of the courts thereof and especially from the bar of this court; that his license to practice law and as a member of the bar of this state be and the same is hereby canceled and annulled, and to be henceforth held as naught. Furthermore, that the relators have and recover the cost of this proceeding to be taxed by the clerk according to law of and from the respondent, Ellroy V. Selleck, and that execution issue. It is so ordered and adjudged.

CAULFIELD, J., concurs. REYNOLDS, P. J., not sitting.

MULLINAX et al. v. LOWRY et al.

(Kansas City Court of Appeals. Missouri.
Dec. 9, 1912.)

1. TRIAL (§ 252*)—INSTRUCTIONS—APPLICABILITY TO EVIDENCE.

Where the evidence showed that defendants knew that corn purchased from plaintiffs was wet and had been trampled on by cattle, and that there was nothing to prevent them from ascertaining the extent of the damage, although they claimed that it was so piled by plaintiffs as to conceal its extent, and they also saw its condition when delivered, and before shipment to market, an instruction that they could not recover on their counterclaim for the damages caused by being compelled to sell it at a reduced price, if they knew of its damaged condition, was not erroneous, on the

ground that there was no evidence that they knew of such condition.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 506, 598-612; Dec. Dig. § 252.*]

2. APPEAL AND ERROR (§ 1086*)—REVIEW—HARMLESS ERROR.

It was not prejudicial error to charge that a fact concerning which there was no dispute was admitted by defendants, although they had not in fact admitted it.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4220; Dec. Dig. § 1086.*]

3. APPEAL AND ERROR (§ 1083*)—REVIEW—HARMLESS ERROR—ERROR FAVORABLE TO APPELLANT.

Where the evidence did not show that a person suing for the purchase price of hay guaranteed it, an instruction that he did not guarantee that it was of any particular marketable grade, but only that it was of some value in some grade, was not prejudicial to defendant.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4052-4062; Dec. Dig. § 1083.*]

Appeal from Circuit Court, Mercer County; Geo. W. Wanamaker, Judge.

Action by George T. Mullinax and others against W. H. Lowry and others. Judgment for plaintiffs, and defendants appeal. Affirmed.

Wm. C. Forsee, of Kansas City, and J. C. Wilson, of Bethany, for appellants. A. G. Knight, of Trenton, and Orton & Orton, of Princeton, for respondents.

ELLISON, J. Plaintiffs' action is for the price of hay sold to defendants. They recovered judgment in the circuit court for \$27.79.

This is the second appeal. 140 Mo. App. 42, 124 S. W. 572. It is alleged in the petition that plaintiffs sold to defendants three-fifths of a certain crop of hay at \$9 per ton, baled and delivered on railway cars; that they delivered 50 tons and 419 pounds, on which defendants paid \$226.21, leaving a balance of \$227.79 due on such delivery. It is then charged that there remained of the whole lot sold 51 tons and 245 pounds, which defendants refused to receive; that at the date of refusal the hay (having fallen in price) was worth only \$5.80 per ton, by reason of which plaintiffs were damaged in the sum of \$170.75. The prayer was for judgment in the sum of \$398.54.

The answer, in the first count, alleges that they bought the hay, as well as 2,500 bushels of corn, of plaintiffs as agents of one Fox, and that plaintiffs knew it, and therefore they did not incur any individual liability to plaintiffs. The further answer was in the nature of a counterclaim, and alleges that at the time of the purchase of the hay they also bought the corn at 50 cents per bushel, to be delivered by plaintiffs; that Fox, their principal, became a bankrupt, and that they entered into a new contract individually, whereby they purchased the corn for the reduced price of 45 cents per bushel, on ac-

count of it having been piled on the ground and become wet and trampled on by cattle. But, as we understand the pleading, it is charged that plaintiffs so piled the corn as to greatly conceal the extent and nature of the damage, and that after the purchase, and before the delivery by plaintiffs, the latter allowed it to remain on the ground and become further injured; that when plaintiffs delivered it on the cars it was mixed with dirt and rubbish, but that defendants, relying upon it being in the same condition as when they bought, shipped to the market, and were compelled to sell at a greatly reduced price, whereby they were damaged in the sum of \$400.

[1] We do not see how the verdict, in view of defendants' testimony in their own behalf, could have been different. We will consider it as determining all matters of fact, and look only to the action of the court at the trial. The first instruction was that if defendants knew of the damaged condition of the corn by the cattle, etc., when they purchased they should not be allowed damages on that account. The objection is that there is no evidence of such knowledge. An examination of the evidence of one of the defendants shows they did know it—that is, they saw it was in a damaged condition—and nothing hindered them from ascertaining the exact extent of the damage. In addition, they further saw its condition before it was sent to market, and yet they shipped it. So the same may be said of objection to instruction No. 7. The testimony of defendant Lowry himself is enough to authorize the jury to believe that his present claim is not just.

Instruction No. 4 was to the effect that there could be no assignment of the \$200 paid to plaintiffs by Fox, and we see no objection to it.

[2] Instruction No. 5 was objected to on the ground that it states it was "admitted" by defendants that they received hay at \$9 per ton, amounting to \$227.29. It would have been better not to have stated that defendants had admitted it. But we do not see, in view of the patent fact, how any harm could have resulted.

[3] Instructions 8 and 9 were to the effect that plaintiffs did not guarantee that the hay was of any particular marketable grade, and they were not bound further than that it was of some value in some grade. Whatever bearing these instructions may have had was against plaintiffs, since, under the circumstances disclosed in evidence, we do not see how plaintiffs were to be held to have guaranteed anything.

There is a lengthy criticism of instruction No. 10, whereby the attempt is made to show where, as a whole, and in separate parts, it was prejudicial to defendants. We do not think it was. Other objections, un-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

tenable we think, are made to other instructions.

But when all, in connection with those given for defendants, are considered as a series, we think the jury could not have been misled. The only hurtful tendency we have discovered is their extreme length. Combined, they cover 19 printed pages; defendants having the greater part. We cannot discover a criticism to be made upon those for plaintiffs which could not be offset by a like offense committed by defendants. No error was made in the ruling upon the evidence. Considering the contest is over a verdict for \$27.79, great effort has been displayed—zeal worthy of a better cause. There is no reason for further protracting the case.

No error has been shown us which we can say substantially affected the merits of the cause; and hence we affirm the judgment. All concur.

TRACY v. BUCHANAN.

(Kansas City Court of Appeals. Missouri.
Dec. 9, 1912.)

1. EVIDENCE (§ 78*)—PRESUMPTIONS—SUPPRESSION AND SPOILIATION OF DOCUMENTARY EVIDENCE.

In an action for breach of a contract to sell corporate stock, defendant claimed that he merely acted as plaintiff's agent to procure the stock from other persons. It appeared that plaintiff executed a check for the down payment and notes for the deferred payments, together with a chattel mortgage, and delivered them to a third person, to be delivered to defendant upon receipt of the stock; and it was claimed by plaintiff that a bill of sale of the stock by defendant was also delivered to such third person. Defendant obtained possession of the papers from the third person, and destroyed the chattel mortgage. *Held*, every presumption being against the despoiler of documentary evidence, that it would be presumed that a bill of sale was delivered as claimed by plaintiff, and that if the papers had not been destroyed they would have shown a contract of sale by defendant.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 98, 100; Dec. Dig. § 78.*]

2. DAMAGES (§ 9*)—NOMINAL DAMAGES—AWARD IRRESPECTIVE OF ACTUAL DAMAGE.

The breach of a contract is an actionable injury, giving an absolute right to at least nominal damages; and hence an instruction that, unless defendant's breach caused plaintiff substantial damage, the jury should find for defendant was erroneous.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 7-15; Dec. Dig. § 9.*]

Appeal from Circuit Court, Moniteau County; R. A. Breuer, Special Judge.

Action by W. W. Tracy against Thomas J. Buchanan. Judgment for plaintiff, and defendant appeals. Affirmed.

R. M. Embry, of California, Mo., for appellant. Moore & Williams, Harry J. Libby, and E. T. Hockaday, of Shelbyna, Mo., for respondent.

JOHNSON, J. Plaintiff sued to recover damages for the breach by defendant of a contract for the sale and delivery of shares of stock in a telephone corporation. The answer is a general denial. A trial resulted in a verdict for defendant, but, on motion of plaintiff, the court set aside the verdict and granted a new trial, on the ground, stated in the order, of error in giving instructions B and C, asked by defendant. Dissatisfied with this action of the court, defendant brought the case here by appeal.

Defendant was the president and manager of the California Telephone Company, a corporation owning and operating a telephone exchange in the city of California. The capital stock of the company was \$9,000, divided into 90 shares of the par value of \$100 each. Defendant owned 20 shares, and the remaining stock was held by various persons residing in California. Plaintiff lived in Shelbyna, and was engaged in the business of buying and selling telephone exchanges. In July, 1910, the parties began negotiations for the purchase by plaintiff of a controlling interest in the stock of the company. The negotiations were conducted chiefly by correspondence, and the letters written by plaintiff were not preserved by defendant, and, as no copies of them were kept by plaintiff, their contents were the subject of a sharp dispute at the trial. Plaintiff testified that the proposals he made in them were for the purchase of the stock from defendant; while defendant testified that in the purchase of the stock it was understood he was acting as the agent of plaintiff as to all the shares except those owned by him, which were to be included in the sale.

It is conceded plaintiff did not offer to pay the full purchase price of the stock at the time of delivery. At first he offered to make a down payment of \$2,000, and to give defendant his notes for the remainder, secured by a chattel mortgage on all of the stock to be purchased. Later he found it would be inconvenient for him to pay more than \$1,500 on the purchase price, and he wrote defendant to that effect, and further objected to going into debt so deeply. Under date of July 16, 1910, defendant wrote plaintiff as follows: "Yours of the 15th inst. recd. Contents noted. You say you do not want to go in debt so much. Now if you want the exchange I will make you a proposition that you cannot afford to pass up for any trade. I will retain \$2,000.00 instead of \$1,000.00. You will have \$9,000.00 only invested. As to terms you can pay \$1,500 down and balance as you want to. Now if you want the chance of your life come at once as I am going to make a deal in a few days. In regard to your farm you can trade it for real estate here I think without any trouble. Let me hear at once."

On August 11, 1910, plaintiff, according to

his testimony, mailed an offer to defendant to purchase 70 shares for \$8,500, to pay down \$1,500, and to discharge the remainder of the purchase price in deferred payments. Defendant replied by letter, but his reply is not in the record, and we do not know its contents. Evidently it was favorable to the continuance of the negotiations, and evoked a response from plaintiff to the effect that he would go to California to close the deal in person. The record relating to the correspondence preceding plaintiff's visit to California, which occurred August 22, 1910, is very unsatisfactory, but we are able to say with certainty that the letters do not evidence a binding contract between the parties. Plaintiff himself testified that there were some "variations" between the terms of sale agreed upon in the letters and those in the contract finally made by the parties at the end of their personal negotiations. One of the conceded changes was an increase of the purchase price of the 70 shares from \$8,500 to \$8,554. The contract that was finally entered into was made at California, and the terms of that contract are a matter of controversy.

[1] We shall not go into the details of the evidence bearing on this subject. The evidence of plaintiff, to the effect that defendant undertook the sale and delivery on the first day of the following month of 70 shares of stock at the agreed price, is not only substantial, but, as we shall show, must be treated as conclusive. The day after the contract had been made, and after plaintiff had returned home, defendant telephoned him that the contract could not be carried out, and also wrote him a letter, in which defendant said: "Complications have arisen which cannot be adjusted. I am returning you papers as per agreement." The papers referred to were plaintiff's check of \$1,500 for the down payment and notes he had executed for the deferred payments. These papers, together with a chattel mortgage executed by plaintiff to secure the deferred payments, and which covered the stock to be transferred, had been placed by the parties in the hands of a banker at California, with the understanding that the check, notes, and mortgage were to be delivered to defendant on delivery by him to the banker for plaintiff of the 70 shares of stock. These deliveries were to be made on the first day of the following month, and the papers were to remain in the banker's hands until that time. But, finding that he could not procure the stock necessary to consummate the sale, defendant obtained the papers from the banker, destroyed the chattel mortgage, and sent the other papers to plaintiff. Plaintiff states that a bill of sale executed by defendant, conveying to him the 70 shares of stock, was placed in the hands of the banker with the other papers; but this statement is denied by defendant. The excuses offered by defendant for procur-

ing these papers from their custodian and destroying at least one of them are too flimsy to merit serious consideration. His conduct was high-handed and inexcusable; and, as it resulted in the destruction of important documentary evidence, we shall accept as proved the statement of plaintiff that there was a bill of sale among the papers deposited with the banker which, in form and substance, bound defendant, as vendor, to deliver the shares of stock to the banker for plaintiff's benefit. Every presumption is against the despoiler of documentary evidence. "His conduct is attributed to his supposed knowledge that the truth would have operated against him." 1 Greenleaf on Ev. § 37. It is said by our own Supreme Court, in *Pomeroy v. Benton*, 77 Mo. loc. cit. 87: "Numerous instances are given in the books of the like application of the rule, where it is held that spoliation of documentary evidence being proved against a defendant that thereby he is held to admit the truth of the plaintiff's allegations; and this upon the ground that the law, in consequence of the fraud practiced, in consequence of the spoliation, will presume that the evidence destroyed would establish the plaintiff's demand to be just."

To permit the despoiler to dispute his adversary's statement of the contents of the destroyed document would be to permit him to profit by his own wrong—to gain the very advantage his lawless act was designed to secure. Applying this rule, we must hold that, inasmuch as defendant admits the destruction of certain papers having an important bearing on the relation existing between him and plaintiff, we should assume, as a matter of law, that the papers deposited with the banker evidenced a contract of sale in which defendant was the vendor and plaintiff the vendee, and disproved the assertion of defendant that he was merely the agent of plaintiff.

With the case in such posture, i. e., with the contract of sale admitted, and with the breach of defendant indubitably established, there was only one issue of fact to go to the jury, viz., the quantum of plaintiff's damages. We find in the instructions given at the request of defendant that he was allowed the benefit of the defense of agency. This was prejudicial error for which a new trial should have been granted.

[2] The instructions of defendant which the court concluded were erroneous related to the measure of damages, and directed a verdict for defendant, unless the jury should find that plaintiff had suffered substantial damages from the breach. Regardless of whether or not he sustained actual damages, plaintiff was entitled to maintain an action for the wrong inflicted upon him. A breach of contract is a wrong, an injury, and the rule is fundamental that for every actionable injury there is an absolute right to damages.

If no actual damages are proved, the legal implication of damages remains, and nominal damages should be allowed. *Fulkerson v. Eads*, 19 Mo. App. loc. cit. 623; *Lampert v. Drug Co.*, 119 Mo. App. loc. cit. 693, 100 S. W. 659. The instructions were erroneous, and the error was sufficient to warrant the order allowing a new trial.

The point, made by plaintiff, of error in the ruling of the court that the wife of defendant was disqualified from giving testimony relating to certain issues in the case is not well taken. See *Fishback v. Harrison*, 137 Mo. App. 664, 119 S. W. 465, in which will be found an answer to the argument of counsel for plaintiff on this point.

We find no other error in the record. The judgment is affirmed. All concur.

DODGE v. CHILDERS.

(Kansas City Court of Appeals. Missouri.
Dec. 9, 1912.)

1. PARTNERSHIP (§ 5*)—EXISTENCE OF RELATION.

Where defendant, who had employed his brother, a lawyer, as agent, to procure a purchaser of his farm, employed plaintiff to advertise the property for a commission if a purchaser was procured, but the agency of the brother was not revoked, and it was agreed that plaintiff should turn over to him the answers received to the advertisements, and that the brother should thereafter conduct the negotiations with prospective purchasers, for which services he should receive a commission from defendant equal to that of plaintiff in the event their combined efforts produced a purchaser, plaintiff and defendant's brother were not partners in the transaction, but plaintiff was merely employed to render individual service, and he could sue in his own name for the agreed compensation.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 15, 16; Dec. Dig. § 5.*]

2. BROKERS (§ 7*)—CONTRACTS—JOINT CONTRACTS.

The testimony of defendant in an action to recover a commission for services performed by plaintiff in the sale of a farm of defendant that the obligation of defendant who had previously employed his brother to procure a purchaser was not to pay the commission to the two jointly, but to his brother alone, with the understanding that his brother would employ plaintiff, and divide the commission with him if he procured a purchaser, did not prove a joint obligation, though it disproved plaintiff's cause of action, and did not show that plaintiff and defendant's brother were joint contractors, but plaintiff could sue alone for the services rendered.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 5-8; Dec. Dig. § 7.*]

3. BROKERS (§ 9*)—CONTRACT OF EMPLOYMENT—REVOCATION OF AGENCY.

Where a contract employing a broker to procure a purchaser of real estate contained no provision limiting the duration of the agency, the law implied an agreement for the performance of the service within a reasonable time, after the lapse of which either party could terminate the contract on notice.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 10; Dec. Dig. § 9.*]

4. BROKERS (§ 88*)—EMPLOYMENT—LIABILITY FOR COMMISSION—EVIDENCE—INSTRUCTIONS.

Where, in an action by a broker for commissions for procuring a purchaser of real estate, the evidence showed that the contract of employment did not limit the duration of the agency, and it showed that prior to a sale he had revoked the agency, and plaintiff testified that he received no notice, and showed that the purchaser at first abandoning the idea of purchasing the property subsequently decided to purchase and actually purchased the property, instructions that defendant could revoke the agency if he acted in good faith, and not in furtherance of a purpose to deprive plaintiff of a fairly earned commission, fairly submitted the issue of revocation.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 121-130; Dec. Dig. § 88.*]

5. BROKERS (§ 44*)—EMPLOYMENT—RIGHT TO COMMISSIONS.

Where an owner employing a broker to procure a purchaser mailed his notice of revocation after receiving a proposal from a purchaser procured by the broker, the act of the owner was in bad faith, and did not deprive the broker of his commission.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 45; Dec. Dig. § 44.*]

6. BROKERS (§ 44*)—EMPLOYMENT—RIGHT TO COMMISSIONS.

Where an owner employing a broker to procure a purchaser of real estate mailed a notice of revocation before receiving the proposal of a purchaser procured by the broker, or knowledge of the proposal, he was not relieved of the imputation of bad faith, but his subsequent acceptance of the purchaser's offer entitled the broker to receive his commission on the theory that he had performed the contract while unrevoked.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 45; Dec. Dig. § 44.*]

Appeal from Circuit Court, Sullivan County; Fred Lamb, Judge.

Action by Thomas A. Dodge against Stephen L. Childers. From a judgment granting a new trial after verdict for defendant, he appeals. Affirmed.

John W. Bingham, Earl F. Nelson, and W. H. Childers, all of Milan, for appellant. D. M. Wilson and John W. Clapp, both of Milan, for respondent.

JOHNSON, J. Plaintiff sued to recover a commission for services performed in the sale of a farm owned by defendant in Sullivan county. The petition states that in the month of October, 1910, defendant "placed the said farm in plaintiff's hands to sell or exchange for him at and for the sum of not less than \$47.50 per acre, and agreed to pay plaintiff the sum of 50 cents per acre for selling or trading the same at that price per acre, and agreed, in addition, to pay him the one-half of all that said land brought over and above \$47.50 per acre; that the plaintiff found a purchaser in one W. O. Swearengen of said county, and that said farm of 700 acres was sold to said Swearengen for \$48 an acre, and that a deed was made by said defendant and his wife on the 6th day of March, 1911, for said 700 acres, and that the said Swearengen is now the

owner and in the possession thereof; that thereby the defendant became indebted to plaintiff in the sum of \$525, and that the said sum was and is justly due from defendant to plaintiff; but that, although the plaintiff has demanded of defendant the sum of \$525, the defendant has refused, and still refuses, to pay plaintiff the said sum of \$525 or any part thereof." The principal defenses interposed by the answer are, first, that plaintiff is not entitled to maintain the action as an individual plaintiff, for the reason that he was not employed in that capacity but as a member of a partnership; and, second, that defendant revoked the agency of the partnership before a purchaser ready, willing, and able to purchase the farm on the terms proposed had been procured. A reply in the nature of a general traverse of these affirmative defenses was filed by plaintiff, and the issues raised by the pleadings were tried and submitted to a jury. A verdict for defendant was returned, and in due time plaintiff filed a motion for a new trial which alleged errors in the rulings on questions of evidence and in the instructions given the jury, and further alleged that the verdict was against the weight of the evidence. The court sustained the motion and granted a new trial, but failed to state the ground of the ruling in the order. Defendant appealed.

Plaintiff is the owner and publisher of a newspaper in Milan, the county seat of Sullivan county. Defendant owned a farm of 700 acres 6 or 7 miles from Milan. Some time before the events in controversy, he had removed to Oklahoma, and resided on a farm in the vicinity of Helena, in Alfalfa county. He wished to sell his farm in Sullivan county, and visited Milan in October, 1910, partly for the purpose of effecting a sale. He had employed his brother, W. H. Childers, a lawyer in Milan, as his agent, but no purchaser had been found. During the visit to Milan he had an interview with plaintiff, in which, according to the testimony of the latter, he agreed to employ plaintiff to advertise the farm, and agreed that if a purchaser should be procured by such means who would buy the farm at \$47.50 per acre to pay plaintiff a commission of 50 cents per acre, and, if a higher price should be obtained, to pay an additional commission equal to one-half the excess of the purchase price over \$47.50 per acre. The agency of W. H. Childers was not revoked, and it was agreed that plaintiff should turn over to him the answers received by plaintiff to the advertisements, and Childers should, thereafter, conduct the negotiations with prospective buyers, for which service he should receive a commission from defendant equal to that of plaintiff in the event their combined efforts produced a purchaser.

The evidence of defendant contradicts that of plaintiff only as to the details of the

employment of the latter. The fact that plaintiff's services were enlisted is not disputed, but defendant says he employed his brother to sell the farm at the price stated, agreed to give him a commission of \$1 per acre if he procured a purchaser on the terms proposed, and that plaintiff was employed to assist his brother, and was to share his brother's commission in case their joint efforts proved successful. Neither party claims that plaintiff was to receive a commission if his services in advertising the farm did not procure a purchaser, and, as we understand defendant's version of the tripartite agreement, W. H. Childers would have been entitled to receive the full commission had he procured a purchaser without the aid of plaintiff's services in advertising the farm, and was required to share the commission with plaintiff only in the event of the purchaser being procured through the medium of plaintiff's services.

[1] Before proceeding further with the statement of the facts of the case, we shall pause to dispose of the contention of defendant that plaintiff was a partner of W. H. Childers, and therefore cannot maintain this action which is prosecuted for the enforcement of an individual demand. In the instructions to the jury given at the request of defendant, the learned trial judge treated the question of partnership or no partnership as involving an issue of fact, and authorized the jury to return a verdict for defendant on the hypothesis presented by defendant's evidence relating to that issue. We think this was an erroneous view to take of the evidence. The mere fact, if it be a fact, that plaintiff (if his services proved effective) was to share the commission with W. H. Childers, is not conclusive evidence of a partnership agreement. Plaintiff was employed to render a special service, and his employment was merely auxiliary to that of Childers. The agency of the latter was more general, of a wider scope, and was accorded rights in which the lesser agency had no participation. There was no mutual agreement between plaintiff and Childers to share all the profits that might be realized from the subject-matter of the agency of the latter, but only such profits as might accrue from plaintiff's service. Without an agreement to share the profits derived from both sources the contract lacked a fundamental element of a partnership agreement. Plaintiff was employed to render individual service, and the question of partnership or no partnership raised by the pleadings involves no issue of fact.

[2] It is suggested that, if plaintiff and Childers were not partners, nevertheless they were joint contractors with defendant. We do not think so. The obligation of defendant, as stated by himself, was not to pay the commission to the two agents jointly, but to his brother alone, with the understanding that his brother would employ

plaintiff and divide the commission with him if he procured a purchaser. Defendant testified that in reply to plaintiff's application for employment he said: "I will make arrangements with Hez (W. H. Childers) to sell the place, and anything that you and him does is all right with me." This tends to disprove the cause of action pleaded in the petition founded on the alleged employment of plaintiff by defendant on terms including a direct obligation of defendant to pay plaintiff a stated commission, but it does not tend to prove the existence of a joint obligation of the promisor to two or more promisees which is an essential element of a joint contract.

The evidence discloses that plaintiff advertised the farm in each issue of his paper, and turned over to W. H. Childers the answers received by him. Prompted by one of these advertisements, a Mr. Swearengen called on W. H. Childers in December, 1910, and inquired about the terms of sale. On being informed that the price was \$50 per acre, Swearengen refused to buy at that price, and exhibited no further interest in the subject until February 25, 1911, when he again called on Childers, and offered \$48 per acre for the farm on condition that a farm of 160 acres owned by him be accepted as part payment of the purchase price. Childers told him to put his offer in writing and mail it to defendant. Swearengen did so, and mailed the letter that evening to defendant at Helena, Okl. Two days later—i. e., February 27th—defendant mailed letters at Helena, addressed, respectively, to plaintiff and W. H. Childers, revoking the employment of each, and withdrawing the farm from the market. There is a sharp dispute between the parties over the fact of whether defendant mailed these letters before or after he received Swearengen's letter. Defendant says he had no knowledge of Swearengen's proposal at that time, and that he was prompted to withdraw the farm from sale on account of the near approach of another crop season and his decision to work the farm himself. In a day or two after he mailed the letters he went to Milan, and within a week after Swearengen had mailed his offer defendant accepted it in person, and afterward the sale was consummated.

[3, 4] The instructions given the jury at the request of defendant express the idea that defendant had the right to revoke the agency if he acted in good faith, and not in furtherance of a purpose to deprive plaintiff of a fairly earned commission. These instructions correctly state the rule applicable to one of the controverted issues of fact. There is evidence introduced by defendant to the effect that in the early part of February, perhaps two weeks before the reappearance of Swearengen with his offer, defendant mailed a letter to W. H. Childers, in which he withdrew the farm from the market and dismiss-

ed his agents. Childers testified that immediately after receiving that letter he advised plaintiff of its contents. Plaintiff denies this statement, and says he received no such notice of the termination of the agency. It was proper to send this issue of fact to the jury, with the direction to return a verdict for defendant on the acceptance of defendant's version of such notice of revocation. The contract of employment contained no provision limiting the duration of the agency, and therefore the law would imply an agreement for the performance of the service within a reasonable time after the lapse of which either party would have a right to terminate the relation by giving notice to the other. The rule recognized in this state thus is stated in *La Force v. University*, 108 Mo. App. loc. cit. 523, 81 S. W. 211: "The law is that even where there is no specific time named as limiting the agency, and a reasonable time elapses without a sale (circumstances considered), the owner may, in good faith, without design to avoid payment of commission, revoke the agency and sell to the party with whom the agent had been negotiating"—citing cases. To the same effect is the decision of the Supreme Court in *Loving v. Cattle Co.*, 176 Mo. loc. cit. 351, 75 S. W. 1095. At the time in question, Swearengen, though moved to inquire of Childers about the farm by the efforts of plaintiff, had apparently abandoned the idea of purchasing, and, when the notice of revocation was communicated to plaintiff, it could not be said that his services had been fruitful. He had not procured a customer ready, willing, and able to buy the farm on the terms proposed, or on terms acceptable to defendant. And a reasonable time for the performance of the contract having elapsed defendant had the right to revoke the agency, and thereafter, without incurring liability to his discharged agents, might sell the farm to any purchaser he could find, including Swearengen.

[5] But we think the instructions deal in an erroneous and prejudicial manner with the attempt of defendant to revoke the agency by his letter to plaintiff mailed at Helena on February 27, 1911, two days after Swearengen had mailed his proposal to buy the farm. On the hypothesis of plaintiff's evidence that this letter of defendant was his first expression of a purpose to terminate the agency, we do not perceive any just ground on which the notice contained in the letter may be used to defeat plaintiff's claim to a commission. If defendant mailed the letter after receiving Swearengen's proposal, such attempt to discharge his agent in the face of negotiations initiated by the agent and about to be successfully concluded could not be regarded otherwise than as an act of bad faith towards the agent, and, as such, would not be suffered to deprive the agent of his just reward.

[6] On the other hand, if defendant's letter

was mailed before he received Swearengen's letter or had knowledge of its contents, he would be relieved of the imputation of bad faith, but his subsequent acceptance of Swearengen's offer entitled plaintiff to receive his commission on the ground that he had fully performed the contract of agency at a time when it stood unrevoked and in full force. The transaction of the sale of the farm had its beginning in the offer of Swearengen to purchase on terms acceptable to defendant, and the acceptance of that offer by defendant marked the successful culmination of the transaction. The task plaintiff was employed to perform was to procure a purchaser ready, able, and willing to buy the land on the terms proposed or on other terms satisfactory to defendant. He had performed that task before the attempted revocation of the agency, and defendant will not be permitted to accept the fruits of the agency contract, and then to repudiate its burdens.

The errors in the instructions we have discussed justified the ruling sustaining the motion for a new trial, and we shall assume that the ruling was prompted by the considerations to which we have given expression. We deem it our duty to remind the court that in failing to comply with the request of counsel for defendant to state in the order the ground on which the new trial was granted the court disobeyed the express command of the statute (section 2023, Rev. Stat. 1909) that "every order allowing a new trial shall specify of record the ground or grounds on which said new trial is granted."

The judgment is affirmed. All concur.

CARSON v. ST. JOSEPH STOCKYARDS CO. et al.

(Kansas City Court of Appeals. Missouri. Dec. 9, 1912.)

EVIDENCE (§ 244*)—ADMISSIBILITY—DECLARATIONS OF AGENT.

In an action for false imprisonment, the declarations of defendants' agent, the day after the arrest, that defendant had plaintiff arrested, was incompetent, not being a part of the *res gestæ*, but merely an account of a past event.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 916-936; Dec. Dig. § 244.*]

Appeal from Circuit Court, Buchanan County; Wm. D. Rusk, Judge.

Action for false imprisonment by B. F. Carson against the St. Joseph Stockyards Company and another. Judgment for plaintiff, and defendants appeal. Reversed.

John E. Dolman, of St. Joseph, for appellants. Charles C. Crow, of St. Joseph, for respondent.

ELLISON, J. This action is based upon a charge of false imprisonment. There was

a judgment for plaintiff in the trial court. There was evidence tending to show that plaintiff was arrested by a policeman and detained for near six hours, charged by the policeman with stealing halters belonging to defendant company. Defendant Slack is the superintendent for defendant company; but there was no evidence that he instigated or caused the arrest, or that he ratified or adopted the act after it became known to him. The demurrer to the evidence, which was offered in his behalf, should have been sustained.

Plaintiff testified that, on the day following his arrest and release, Slack was talking with him about the halters, and stated to him that the defendant company had had him arrested, not that he had had anything to do with it. This was sufficient to support a verdict against the company if competent. Slack was the company's agent. What he said was next day after the arrest, and was therefore not a part of the *res gestæ*, and was therefore not competent on that ground. Neither was it competent on the ground of Slack being the company's agent, since, being spoken the next day, it was not a part of the *res gestæ*. It was an account of a past affair, and, being past, his agency, as to it, ceased so far as to disable him to bind his principal by admission, or by an account of the transaction. *Adams v. Hannibal & St. Jos. R. R. Co.*, 74 Mo. 553, 556, 41 Am. Rep. 333; *Bergeman v. Railway Co.*, 104 Mo. 77, 86, 15 S. W. 992; *Redmon v. Railway Co.*, 185 Mo. 1, 12, 84 S. W. 26, 105 Am. St. Rep. 558; *Prye v. Railway Co.*, 200 Mo. 377, 406, 98 S. W. 566, 8 L. R. A. (N. S.) 1069, *Roberts v. Railway Co.*, 153 Mo. App. 638, 644, 134 S. W. 89.

The judgment is reversed. All concur.

STATE v. LASLEY.

(Kansas City Court of Appeals. Missouri. Dec. 7, 1912.)

1. HUSBAND AND WIFE (§ 304*)—ABANDONMENT—NATURE OF OFFENSE.

A husband cannot be convicted of abandoning his wife and refusing to support her, where, although he has abandoned her, he has furnished means for her support.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 1102; Dec. Dig. § 304.*]

2. HUSBAND AND WIFE (§ 304*)—ABANDONMENT—INTENT.

Where a husband, who had abandoned his wife, made arrangements for her support, in which she had first acquiesced, the fact that she later became dissatisfied with the arrangement was not evidence of criminal intent on the part of the husband, necessary to the offense of abandoning his wife and refusing to support her.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 1102; Dec. Dig. § 304.*]

3. HUSBAND AND WIFE (§ 313*)—ABANDONMENT—EVIDENCE.

Where it was undisputed that a husband, prosecuted for abandoning his wife and refusing to support her, had made arrangements, in which the wife at first acquiesced, that she might live with her husband's brother and his wife, and purchase necessities on the husband's credit, and that with the husband's permission she received money from persons indebted to the husband, a verdict for defendant should have been directed, although the wife had become dissatisfied and left the brother's home.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. § 1110; Dec. Dig. § 313.*]

Appeal from Circuit Court, Nodaway County; William C. Ellison, Judge.

Clarence Lasley was convicted of abandoning his wife, and he appeals. Reversed, and defendant discharged.

Cook, Cummins & Dawson, of Maryville, for appellant. George Pat Wright and Marshall E. Ford, both of Maryville, for the State.

BROADDUS, P. J. The defendant was prosecuted and convicted of the offense of abandoning his wife. His punishment was assessed at one year's imprisonment in the county jail and a fine of \$500. After taking the necessary steps to obtain a new trial, he has appealed to this court. The issue raised by the appeal is that the verdict is not supported by the evidence.

The defendant and prosecutrix were married on the 27th day of December, 1910, in Nodaway county, Mo. They went to house-keeping soon thereafter. Defendant's mother lived with them for a short time, after which William Lasley, defendant's uncle, made his home with them. About the 1st day of July, 1911, the wife made a visit to her people, near Brookfield, Mo. She went away with the understanding that she would be gone two weeks, but returned in about one week, arriving at night. She did not find defendant at home, and sent him word to come home. He did so, and seemed to be mad, and did not speak to her for a while, but that when he did speak he said he did not aim for her to come back at all; that he was going to Dakota. It seems that he only furnished his wife with sufficient funds to make the visit to Brookfield, and she had to borrow money on which to come home.

In a few days after his wife returned from her visit, defendant announced that he was going in search of work and accordingly left. This was on Tuesday. On the following Friday he returned and said he was going to work on the railroad. On Monday following his wife went to Maryville and found defendant there. She asked him "if he aimed for her to stay up there [their home] with Uncle William all the time;" that he answered that she could either stay there "or go to Grandma's and stay." From that time on until August the wife stayed

part of the time at home with the uncle of defendant and partly with friends, during which period the defendant and uncle furnished the means for living. On the 11th day of August defendant removed his trunk and clothing from his home. At this time his wife was staying with Roland Lasley, defendant's brother. On the following day she went to Maryville and found defendant, who was employed there; but she testified that he would not speak to her. The next day she went to the home of her sister, Mrs. Baker. In two or three days she left and went to the home of Roland Lasley and remained there a while.

About the 1st of September she came back to her home. Roland Lasley and wife were there at the time. Defendant came during the night, but he did not see his wife until the next morning. At this time an arrangement was made between defendant and his brother Roland that the wife might go and live with the latter for a period of one year. As a consideration for the agreement, defendant turned over to his brother his furniture and paid, or was to pay, him in addition \$60. The wife acquiesced in the arrangement and went to the home of Roland Lasley, and remained there until she gave birth to a child. She was not required to perform any service, and had a separate room for herself. The defendant further directed his wife to purchase necessities for the child, and have them charged to him. She made some such purchases, and defendant paid for them. With defendant's permission, she was paid small sums of money by persons who were indebted to him. The wife became dissatisfied with the treatment she received at the hands of Mrs. Roland Lasley and left them, and since has been living with friends and relatives. She says that Mrs. Lasley treated her so contemptuously that she could not stand it, and for that cause left.

The evidence was to the effect that defendant was a hard-working, poor man, and with little or no means after paying his debts. The information was filed the 7th day of February, 1912, and the conviction was had on March 7, 1912.

[1] Although the evidence showed that defendant did abandon his wife, yet it is very positive to the effect that he did not fail or refuse her support. During the year within which defendant had made arrangements with his brother to keep and support his wife, this prosecution was begun, and he was convicted of the charge of abandoning his wife and refusing to support her. Perhaps the provisions defendant made for the support of his wife were not as ample as they might have been, yet, when we consider his means for doing so, we are satisfied that he practically made reasonable provisions for that purpose.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes 151 S.W.—48

The criminal intent which the statute requires in order to constitute the offense is wholly lacking. *State v. Doyle*, 68 Mo. App. 219. It is said that: "In a prosecution for wife abandonment, there can be no conviction where the evidence for the prosecution shows that at the date of the information the wife, although abandoned by defendant, was living upon his means." *State v. Fuchs*, 17 Mo. App. 458. This case and the one under consideration are exactly alike in principle.

[2] This prosecution was instituted during the year within which defendant had made arrangements for the wife's support. That she became dissatisfied with the arrangement has no bearing whatever as evidence of a criminal intent upon the part of defendant.

[3] We think there was no question whatever, upon the undisputed evidence, that defendant was not guilty of the crime charged, and that the court should have directed the jury to return a verdict for the defendant, as asked.

Reversed. Defendant discharged. All concur.

HODSON v. McANERNEY et al.
(Kansas City Court of Appeals. Missouri.
Dec. 9, 1912.)

1. APPEAL AND ERROR (§ 511*)—RECORD—BILL OF EXCEPTIONS.

Where the record proper does not show the filing of the bill of exceptions, the bill cannot be reviewed.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 2319-2321; Dec. Dig. § 511.*]

2. APPEAL AND ERROR (§ 501*)—BILL OF EXCEPTIONS—NECESSITY—MOTION FOR JUDGMENT ON PLEADINGS.

A motion for judgment on the pleadings can only be reviewed when there is an exception thereto duly preserved in a bill of exceptions.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 2300-2305; Dec. Dig. § 501.*]

Appeal from Circuit Court, Buchanan County; William D. Rusk, Judge.

Action by William S. Hodson against John J. McAnerney and others. Judgment for defendants, and plaintiff appeals. Affirmed.

A. Bowers, of St. Joseph, for appellant. Mytton & Parkinson, of St. Joseph, for respondents.

JOHNSON, J. This is a suit in equity to enforce the specific performance of a contract for the sale and exchange of real estate. The petition states a good cause of action, the answer pleads affirmative defenses which need not be stated in the view we take of the case, and the reply traverses all of the facts relating to the affirmative defenses save one, the truth of which is admitted.

On the theory that this admission precluded a recovery defendant filed a motion for judgment on the pleadings. The court sustained the motion and rendered judgment for defendant. Plaintiff appealed.

[1] The abstract of the record filed by appellant contains what purports to be a bill of exceptions, but in that part devoted to the record proper omits all reference to the record entries relating to the filing of the bill. It has been ruled time and again that a bill of exceptions cannot be allowed to prove itself by its own recitals, but must be authenticated by record entries which, in turn, must be shown in the abstract of the record proper. *Hutton v. Clark*, 145 Mo. App. 188, 129 S. W. 1050; *Redd v. Railroad*, 122 Mo. App. 93, 98 S. W. 89; *Woodward v. Insurance Co.*, 156 Mo. App. 244, 137 S. W. 638; *Thorp v. Railroad*, 157 Mo. App. 495, 138 S. W. 100; *Harding v. Bedoll*, 202 Mo. 625, 100 S. W. 638.

[2] We cannot consider the bill of exceptions, and therefore cannot review the action of the circuit court in sustaining the motion for judgment on the pleadings. A motion of this character and ruling thereon can only be brought to the attention of an appellate court by an exception to the ruling duly preserved in a bill of exceptions. In *Godfrey v. Godfrey*, 228 Mo. loc. cit. 513, 128 S. W. 971, it is held: "Such motion is no part of the record, unless made so by the bill of exceptions." *Mechanics' Bank v. Klein*, 33 Mo. 559; *Sternberg v. Levy*, 159 Mo. loc. cit. 629, 60 S. W. 1117, 53 L. R. A. 438. In the latter case we said: "A motion for judgment on the pleadings is not a demurrer. It partakes of some of the qualities of a demurrer, but it is not a demurrer, and hence it is not a part of the record. It is a matter of exception, and can only be made a part of the record by a bill of exceptions. The question therefore raised by this motion is not before the court."

Finding no error in the record properly before us, the judgment is affirmed. All concur.

WARRINGTON v. BIRD.

(St. Louis Court of Appeals. Missouri. Dec. 3, 1912.)

1. TRIAL (§ 191*)—INSTRUCTIONS—ASSUMING FACTS.

In an action for injuries from an automobile, where the only issue was as to ownership and control of the auto, and the evidence upon this issue was conflicting, an instruction declaring the rule of care with respect to the operation of automobiles in public streets, and directing that if "the defendant or his agent, in operating said automobile * * * at the intersection of said streets, on the day alleged in plaintiff's petition, operated the said car without observing the highest degree of care," and collided with plaintiff's horse and buggy, plaintiff could recover, was error, as assuming

defendant's ownership or control of the automobile.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 420-431, 435; Dec. Dig. § 191.*]

2. MUNICIPAL CORPORATIONS (§ 706*)—USE OF STREETS—RECKLESS DRIVING—ACTIONS FOR INJURIES—INSTRUCTIONS.

In an action for injuries from an automobile, where the main issue was as to its ownership and control, and the evidence on that issue was conflicting, an instruction that if "defendant or his agent, in operating said automobile, * * * on the day alleged in plaintiff's petition, operated said car without observing the highest degree of care," and collided with plaintiff's horse and buggy, plaintiff could recover, was erroneous, as permitting the jury to affix liability against defendant if it found that his agent was operating the machine at the time, without requiring a finding that the agent was operating it for him, or in the course of his employment.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1515-1517; Dec. Dig. § 706.*]

Appeal from St. Louis Circuit Court; George H. Shields, Judge.

Action by Noah Warrington against J. H. Bird. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

Bates H. McFarland and Jeffries & Corum, all of St. Louis, for appellant. Crittenden Clark, of St. Louis, for respondent.

NORTONI, J. This is a suit for damages accrued to plaintiff through the alleged negligence of defendant. Plaintiff recovered, and defendant prosecutes the appeal.

[1] It appears plaintiff was driving in a buggy north on Garrison avenue, in the city of St. Louis, when an automobile, at the crossing on Locust street, collided with his horse and inflicted serious injuries thereto. The buggy was slightly injured as well. The driver of the automobile did not hesitate, but went on with increased speed, supposedly for the purpose of concealing the identity of himself and the ownership of the machine. There is no controversy in the case with respect to the negligence of the driver of the automobile. The evidence all tends to prove that the machine was being operated at about 25 miles per hour, and no one contradicts it; whereas the speed ordinance prescribes a limit of 10 miles per hour. Neither is there a serious question in the case as it now appears touching the negligence of the plaintiff. In fact, the only issue pertained to the ownership or control of the automobile and the person operating it at the time of the injury. The evidence tends to prove that defendant owned the automobile on and before the 15th day of April. Indeed, so much is admitted. However, the collision occurred on July 24th of the same year, and defendant insists that he had sold the automobile therefore on April 15th, and no longer owned or controlled it, and that he had no knowledge of the collision whatever. The only evidence

introduced by plaintiff tending to prove the ownership of the automobile of defendant at the time of the injury is that it bore a license plate on the rear, numbered 2839, and the public records in evidence revealed that the license of this number was issued to defendant on the 14th day of April, or, as defendant says, one day before he sold the machine. The statute provides such license may not be transferred to another. Other than the fact the number on the license plate was identical with that issued to defendant several months before, and the admitted fact that defendant owned the machine until April 15th, there is naught in the record to suggest that either he or his chauffeur was operating it at the time of the injury. From what has been said, it appears that the only issue in the case pertained to the ownership or control of the automobile and the identity of the person operating it.

For plaintiff the court gave the following instruction, over defendant's objection and exception: "It is the duty of persons owning and operating automobiles upon the public streets to use the highest degree of care possible to avoid injuring other persons found on such streets; and if you believe and find from the evidence in this case that *the defendant or his agent, in operating said automobile in and upon the streets of Garrison and Locust, and at the intersection of said streets, on the day alleged in plaintiff's petition, operated the said car without observing the highest degree of care,* and that while so operating said automobile the said automobile ran into and against plaintiff's horse and buggy and injured plaintiff's horse and buggy, and that the plaintiff at the time was exercising ordinary care, then you will find a verdict for the plaintiff." (Italics are ours.)

It is argued that this instruction is erroneous, in that, rather than submitting to the jury the question as to whether defendant or his agent was operating the automobile, it assumes such to be the fact and proceeds accordingly. The words italicized in the instruction above copied are those complained of. Under prior controlling decisions, the argument seems to be sound, and should control the disposition of the appeal. The instruction first declares the rule of high care which obtains under our statute with respect to the operation of automobiles, and then tells the jury that if it believed from the evidence that the defendant or his agent, in operating said automobile, operated the same without observing high care, etc., plaintiff was entitled to recover, provided he was exercising ordinary care on his part. The words in italics, as employed in the context of the instruction with respect to the subject-matter of high care, seem to assume that defendant or his agent was operating the automobile at the time, and suggest to the jury

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

that such was the idea of the court. In view of the fact that the only issue in the case pertained to the ownership or control of the machine and the identity of the persons operating it, for upon this question the evidence was pro and con, this instruction is erroneous, in that it seems to remove that question from the province of the jury entirely. The court may, in its instructions to the jury, assume the truth of a proposition which is established by the undisputed testimony and appears not to be controverted; but it is manifestly improper to do so where there is a conflict in the evidence, and the issue is a vital one in the case, as here. See *Fullerton v. Fordyce*, 121 Mo. 1, 13, 25 S. W. 587, 42 Am. St. Rep. 516. See, also, *Linn v. Massillon Bridge Co.*, 78 Mo. App. 111. As the liability of defendant depended entirely upon the fact that he, or his agent for him, was operating the automobile at the time, this question should have been submitted in plain terms, and not tacitly assumed, as the instruction reveals.

[2] This instruction is criticised, too, for the reason that it permits the jury to affix liability against defendant if it found that defendant's agent was operating the automobile at the time, without requiring a finding that the agent was operating it for him, or in the course of his employment. Obviously, the criticism is a just one; for, though the automobile was being operated by defendant's agent, his liability does not depend upon the mere fact of agency alone, but depends as well upon as to whether plaintiff's injury was received while defendant's agent was acting about the master's business, or within the scope of his employment. Especially is this true in view of the evidence and the particular issue in this case; for defendant denied the ownership of the automobile and the control of it through himself or his servant, and, indeed, denied any knowledge of the collision whatever.

For the reasons above stated, the judgment should be reversed and the cause remanded. It is so ordered.

REYNOLDS, P. J., and CAULFIELD, J., concur.

STATE ex rel. ELRICK et al. v. ALLEN,
Circuit Judge.

(St. Louis Court of Appeals. Missouri. Dec. 3, 1912.)

1. EXCEPTIONS, BILL OF (§ 51*)—SIGNATURES—REFUSAL—GROUNDS.

That a bill of exceptions is not true is sufficient to justify a judge in not signing it.

[Ed. Note.—For other cases, see *Exceptions*, Bill of, Cent. Dig. §§ 74, 78; Dec. Dig. § 51.*]

2. EXCEPTIONS, BILL OF (§ 6*)—MOTIONS—CONTENTS.

When an appeal is taken from the overruling of a motion to set aside a default judg-

ment, matters that occurred at the time of the default are immaterial, and have no place in the bill of exceptions.

[Ed. Note.—For other cases, see *Exceptions*, Bill of, Cent. Dig. §§ 8, 12; Dec. Dig. § 6.*]

3. EXCEPTIONS, BILL OF (§ 6*)—CONTENTS—JUDICIAL NOTICE.

Matters of which the trial court took judicial notice are properly incorporated in a bill of exceptions.

[Ed. Note.—For other cases, see *Exceptions*, Bill of, Cent. Dig. §§ 8, 12; Dec. Dig. § 6.*]

Original application for mandamus by the State, on the relation of O. F. Elrick and another, against Charles Claffin Allen, Judge of the St. Louis Circuit Court. Writ granted.

Earl M. Pirkey, of St. Louis, for relators.
H. A. Loevy, of St. Louis, for respondent.

REYNOLDS, P. J. On application of relators an alternative writ of mandamus was issued against the Honorable Charles Claffin Allen, one of the judges of the circuit court of the city of St. Louis, requiring him to sign a certain bill of exceptions in a cause in which one O. E. Armstrong was plaintiff and the relator Elrick and one Rankin were defendants, or to show cause on a day named why he should not do so. Accompanying the petition for the writ of mandamus is a copy of the proposed bill of exceptions which had been tendered to the honorable judge of the circuit court within due time and which he had been requested to sign but which, as was averred, he had declined to sign. In due course respondent filed his return to the alternative writ, admitting that he had refused to sign the bill of exceptions which had been tendered. Something like eleven reasons are given for this refusal. The first reason is that he, as judge, had refused to sign the bill of exceptions because it was untrue. Summarizing the reasons which follow this general denial of the truthfulness of the return, it appears that the honorable circuit judge refused to sign this bill of exceptions because, first, it omitted to set out matters that had occurred at the time of the trial of the cause in the circuit court, more accurately, at the time when default was taken against the defendants, and because it included matters of which the learned trial judge claimed that the court took judicial notice.

The action which is at the foundation of this controversy was instituted by Armstrong against Elrick and Rankin before a justice of the peace of the city of St. Louis. It appears that on the trial before the justice there was a judgment against the defendants there, from which judgment the defendant Elrick appealed to the circuit court, giving the usual appeal bond, with Kidwell, the other relator here, as surety. This cause, on appeal, was docketed for trial in the circuit court in due course and being called for trial and the appellant Elrick not appearing, as is recited in the judgment, judgment went

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

against him and his surety, it being set out in the judgment that appellant Elrick, although duly called, failed to appear to prosecute his appeal, and that thereupon on motion of plaintiff the judgment of the justice was affirmed. It was thereupon adjudged that the plaintiff recover of the defendant Elrick and of Kidwell, the surety on his appeal bond, the amount sued for, with interest and costs and that execution issue therefor. In due time the relators here appeared in the circuit court and filed a motion to set aside the judgment and for a trial thereon, accompanying the motion with affidavits. The motion was resisted, Armstrong, the plaintiff in the cause filing counter-affidavits. All of these are set out in the bill of exceptions which was tendered. After the consideration of the motion to set aside the judgment and for trial it was overruled by the trial court. Whereupon Elrick and his surety against whom the judgment had been rendered in the circuit court prayed for an appeal to this court, paying the docket fee and filing an appeal bond, which was duly approved by the court and the appeal granted, the trial court at the same time granting an extension of time within which to tender a bill of exceptions. Within the time limited by the several extensions the relators tendered their bill of exceptions and asked that it be signed and filed in the cause. The honorable circuit judge declining to sign it, as before stated, the alternative writ was issued out of this court.

[1, 2] As before stated, the first reason assigned by the honorable circuit judge for refusing to sign the bill of exceptions is that it was untrue. This in itself is a sufficient reason, justifying a circuit judge in his refusal to sign a bill of exceptions tendered. If the return had ended with this statement it might have ended the matter. But the learned trial judge, with great frankness and propriety sets out wherein he deems it to be untrue, and sets out the matters omitted, and designates those which he claims are improperly embodied in the bill, and it was conceded at the argument of the cause that this denial of the truth of the bill was a general statement, more in the nature of a conclusion, and that the real reasons for the refusal of the honorable circuit judge to sign the bill of exceptions were, first, that it neglected to set out matters which had transpired in his court at the time of the rendition of the judgment by default against the relators, the honorable circuit judge contending that it was necessary to set these matters out in order to present a complete history of the case; second, that it set out matters of which the court took judicial notice. The question for our determination must therefore be, whether these reasons are good and sufficient in law.

Considering the first reason, we are unable to hold it valid. The sole matter presented

for the determination of the trial court was the motion of relators to set aside the judgment which had been rendered against them, and it was from the action of the court on this motion that the appeal was taken, not from the judgment which had been rendered in the cause. What occurred at the time the judgment by default was rendered was therefore, for the consideration of this motion, immaterial, and it was unnecessary matter to incorporate in the bill of exceptions seeking to review the action of the trial court on the motion.

[3] The other group of objections to the signing of the bill of exceptions which the honorable circuit judge makes is, that the bill tendered incorporates matters of which it is claimed the trial court took judicial notice. However that might be and however far the trial court might take judicial notice of matters occurring before it, as the case which was to be presented to the appellate court, we are unable to see how this latter court can take judicial notice of matters which are not in any manner presented to it and which did not occur before it but which occurred before the trial court, unless set out in the bill of exceptions.

Our consideration of the whole case is that the reasons given by the honorable circuit judge for his refusal to sign the bill of exceptions tendered, and a copy of which is attached to the petition for the mandamus in this case, are insufficient in law.

The alternative writ heretofore issued is made final and it is ordered that the Honorable Charles Claflin Allen, as judge of the circuit court of the city of St. Louis, sign the bill of exceptions as prepared and tendered by counsel for relators and as set out in the petition herein, changing however, the date of his signing thereof from July, 1911, to the date at which he actually signs it.

NORTONI and CAULFIELD, JJ., concur.

STATE v. WHITE.

(St. Louis Court of Appeals. Missouri. Dec. 3, 1912.)

1. LIBEL AND SLANDER (§ 141*)—CRIMINAL OFFENSES—ELEMENTS.

Under Rev. St. 1909, § 4817, providing that every person falsely or maliciously charging or accusing any female of adultery or whoredom by falsely speaking concerning her in the presence of others any false words imputing any such offense shall be guilty of a misdemeanor, the words must impute lack of chastity, and if it appears from the circumstances under which they were uttered that they were not intended or to be understood as imputing lack of chastity, but were intended and to be understood as terms of abuse or vituperation, the uttering of them does not constitute the offense, and hence, where the evidence tended strongly to show that they were used as terms of abuse, an instruction to this effect was improperly denied.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. § 402; Dec. Dig. § 141.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

2. LIBEL AND SLANDER (§ 143*)—CRIMINAL OFFENSES—ELEMENTS.

In cases of criminal slander, the gist of the action is defendant's intention in uttering the words.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. § 406; Dec. Dig. § 143.*]

Appeal from Circuit Court, Mississippi County; Henry C. Riley, Judge.

Mary E. White was convicted of crime, and she appeals. Reversed and remanded.

Boone & Lee and H. C. O'Bryan, all of Charleston, Gresham & Moore, of Silkeston, and Luther Ely Smith, of St. Louis, for appellant. J. M. Haw, of Charleston, and Geo. H. Traylor, of New Madrid, for the State.

CAULFIELD, J. [1] The defendant appeals from a conviction and fine of \$500 under section 4817 of the Revised Statutes of Missouri 1909, which provides that "every person who shall falsely and maliciously charge or accuse any female of * * * adultery or whoredom, by falsely speaking of and concerning such female, in the presence and hearing of any other person or persons, any false and slanderous words which shall impute to her any such offense, * * * shall be deemed guilty of a misdemeanor." The evidence tended to prove that the defendant and Mrs. Walker occupied adjoining farms, and on several occasions the latter's cattle had gotten into defendant's wheat field. On the last one defendant's father and hired man undertook to put the trespassing cattle into defendant's lot near her house. Mrs. Walker, with her little 10 year old girl, arrived on the scene about the time the men were driving the cattle into defendant's back lot. This back lot had three gates, one from the field, another into another lot, called the front lot, and another out into the public road. Mrs. Walker stood at the gateway leading into the road, and asked defendant's father to turn the cattle out, and let her take them home. This he refused to do, and proceeded to drive them on through the back lot into the front lot. About this time Mrs. Traylor, the other prosecuting witness, came along with her little girl, and, ascertaining the trouble, advised Mrs. Walker to go in and get her cattle. Both the women and Mrs. Walker's little girl then went into the defendant's back lot, and Mrs. Walker opened the gate leading into the defendant's front lot where the cattle were. Then Mrs. Walker and her little girl went into the front lot, and commenced to drive the cattle out, while Mrs. Traylor stood at the gate. Mrs. Walker's version, on direct examination, of what happened about this time, is as follows: "A. Mrs. White said: 'Don't open that gate.' I said: 'All right. Come on Sarah, we will let them alone.' Q. Sarah, who is that? A. My girl. So Sarah started, and Mrs. White came running to the door—came running out of the door, say-

ing, 'Don't open that gate; don't you open that gate; I will shoot you. I will set my dogs on you, you dirty whoring—' Q. State the very words. A. 'You dirty, whoring bitches you. I will shoot you. I will set my dogs on you.' Hair flying, and she came running towards us. She stooped on her right side and pulled up her clothes something near her knee, and pulled a pistol from her clothes, and came running, and, when she put her hand to the gate, is when I saw it was a pistol; and I was waiting for my girl to come out and get in front of me before I started. She said, 'Get out of here.' I said, 'All right, Mrs. White.' My girl runs, crying, saying, 'Run, Mama—' Judge O'Bryan: Object to her telling about what the girl did. A. She said, 'Yes, sir; you get, run.' I said: 'Mrs. White, give me time. I am going.' And she said, 'Get,' and was hissing the dog, calling us bad names every few words she spoke, saying, 'You dirty whoring bitches.' She said she would shoot the hair off of our head. She would call us 'You dirty, whoring bitches.'" On cross-examination she said that defendant had called her and Mrs. Traylor "whoring bitches" as many as seven or eight times; that defendant talked so fast witness could not say how many times; that witness was badly frightened; that defendant said, pointing her finger, "I mean you, Mrs. Walker, and Mrs. Traylor, both of you," and also said that the Walkers, Foresters, and Traylor had been running over her; that defendant talked and fussed so much that witness could not tell all she said. Mrs. Traylor added that defendant also called them "dirty low down dogs," and said that the Foresters and Traylor "had run over her, and now the Traylor and Walkers were trying to run over her, but they couldn't do it."

We think the foregoing is fairly indicative of the circumstances and manner in which the alleged slander occurred according to the state's theory. Mrs. Walker was corroborated by Mrs. Traylor and the two little girls. The defendant and her hired man, Ben Chandler, the latter by deposition, testified in her behalf as to the particular incident in question. Their testimony tended to prove that the defendant did not have a pistol or urge the dog on the two women and children, and did not use the language attributed to her. According to Chandler: "Mrs. White said, 'Get out of the lot and let the cattle alone.' Mrs. Walker made the remark that she was going to take the cattle. Mrs. White told her she wouldn't get them and said, 'Get out of the lot and stay out.' Mrs. Walker said, 'All right, Mrs. White,' and she went out; and Mrs. White said, 'You had better be at home tending to your own business and cleaning up your filthy house, instead of being up here trying to attend to mine;' and they went off." The defend-

ant's testimony is to much the same effect. There was also considerable uncontradicted testimony to the effect that four or five years before defendant had suffered such a serious mental derangement as to necessitate her removal to the state insane asylum. A physician testified that her mental derangement was of the periodical type; that is, was liable to recur from time to time.

The defendant was refused an instruction to the effect that "if the jury from the evidence and circumstances in evidence believe that the words spoken by the defendant were uttered by her in anger, as terms of abuse and reproach to the said Susie Walker and Sadie Traylor, and was not intended as the truth, and was understood by the hearers as being mere terms of abuse and uttered in anger, and not intended to charge them with whoredom, then the jury should find for the defendant." In our opinion such instruction should have been given.

[2] In cases of criminal slander the gist of the action is the intention of the defendant in uttering the words. *State v. Boos*, 66 Mo. App. 537. The words used must have imputed lack of chastity to the woman or women mentioned. *State v. Collins*, 117 Mo. App. 658, 93 S. W. 325. If it is apparent from the circumstances under which the words were uttered that they were not intended or to be understood as imputing such lack of chastity, but were intended and to be understood only as mere terms of abuse or vituperation, then the uttering of them does not constitute criminal slander. See *Bridgman v. Armer*, 57 Mo. App. 528. Though we are not quite prepared to say that the evidence on the part of the state showed conclusively that the words complained of were used as mere terms of abuse and not to impute lack of chastity, it had, to say the least, a strong tendency in that direction, and amply justified the giving of the instruction asked.

The judgment is reversed, and the cause remanded.

REYNOLDS, P. J., and NORTONI, J., concur.

CUSTER et al. v. CITY OF SPRINGFIELD et al.

(Springfield Court of Appeals. Missouri. Dec. 2, 1912.)

1. MUNICIPAL CORPORATIONS (§ 330*)—PUBLIC IMPROVEMENTS — CONTRACTS — USE OF PATENTED ARTICLES.

Where a city charter provides that public work and material purchased therefor shall be let to the lowest and best bidder, there must as a general rule be an opportunity for active competition; but where a patented article, or one held in monopoly, is in the bona fide opinion of the public authorities of such exception-

al superiority that it would be a public injury not to use it it may be required to be used.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 854, 855; Dec. Dig. § 330.*]

2. PLEADING (§ 8*)—CONCLUSIONS.

In a proceeding to enjoin municipal officers from entering into a contract for paving on the ground of its illegality, the facts constituting such illegality must be pleaded; and an allegation that the patenting of a paving material was a subterfuge to prevent competitive bidding is more a general expression than an allegation of fact.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. §§ 12-28½; Dec. Dig. § 8.*]

3. MUNICIPAL CORPORATIONS (§ 294*)—PUBLIC IMPROVEMENTS—PRELIMINARY RESOLUTION—DESCRIPTION OF MATERIALS.

Cities of the third class are required to publish a resolution as a preliminary to a public improvement, which shall state, directly or by reference, the nature and character of the improvement, a patented article furnishing its own standard in such case; otherwise the proceedings are without jurisdiction.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 776-788, 791; Dec. Dig. § 294.*]

4. MUNICIPAL CORPORATIONS (§ 297*)—PUBLIC IMPROVEMENTS—REMONSTRANCE.

Property owners, upon notice of a proposed public improvement by publication of the preliminary resolution, may prevent the improvement by filing remonstrance within a certain time.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 797, 798; Dec. Dig. § 297.*]

5. MUNICIPAL CORPORATIONS (§ 323*)—PUBLIC IMPROVEMENTS—PRELIMINARY PROCEEDINGS—SPECIFICATION AS TO MATERIALS.

A city council acting in good faith in selecting a patented paving material not shown to be fraudulent or inferior to other paving materials in common use and less expensive will not be restrained in a suit by property owners who have made no preliminary remonstrance, since that would be to substitute the judgment of the court for the discretion of the council.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 842-846; Dec. Dig. § 323.*]

Appeal from Circuit Court, Greene County; Guy D. Kirby, Judge.

Injunction by Sallie R. Custer and others against the City of Springfield, James H. Langston, city clerk, and Harry G. Horton, city engineer. Judgment for defendants, and plaintiffs appeal. Affirmed.

Wright Bros., of Springfield, for appellants. Leonard Walker, Fred Moon, and Frank B. Williams, amici curiæ, all of Springfield, for respondents.

GRAY, J. This is an appeal from a judgment of the circuit court of Greene county sustaining a demurrer to the plaintiffs' petition. The suit is one in equity against the city of Springfield, James H. Langston, city clerk of said city, and Harry G. Horton, city engineer. The plaintiffs are the owners of real estate on Center street, in said city, and seek to enjoin the defendants from entering into any contract for the construc-

tion of a pavement on said street, and to have a certain ordinance authorizing the paving adjudged null and void. On the 17th day of October, 1911, the city council passed an order directing the city engineer to prepare and file specifications for the construction of "Hassam pavement, patented (class B), on Center street from Benton avenue to the National boulevard." Having adopted the preliminary statutory resolution and no remonstrance having been filed, the council on the 2d day of January, 1912, passed an ordinance for the improvement. Section 1 of that ordinance reads: "That there is hereby ordered constructed on Center street from the center line of Benton boulevard to the west curb line of the National boulevard Hassam pavement, patented (class B)." The petition alleges: "Plaintiffs state that by the terms of said ordinance Hassam pavement, patented (class B), is designated as the pavement required to be constructed on said Center street and plaintiffs say that the method of application of the material in the construction of said pavement is patented and the patentee or his assigns owns and controls the patent and the said method of construction. Plaintiffs aver and say that such patent is a subterfuge created for the purpose of endeavoring to prevent competitive bidding for the construction of street paving as required by the statutes of the state of Missouri and charter of said city, and thereby cause a fraud to be wrought upon the plaintiffs and the owners of property abutting on said street. Plaintiffs aver that the arbitrary selection of said Hassam pavement, patented (class B), by the city council, will prevent and stifle competitive bidding as required by the statutes of the state of Missouri and the charter of said city, and the plaintiffs say that in the said city of Springfield streets have been paved with material of as equally good quality as the Hassam pavement, patented (class B), and of the same general character and equal in all respects thereto and such material is now so used in constructing pavements in said city and are known as 'concrete paving,' 'asphaltic concrete paving,' and other kinds, and said concrete paving is composed of practically the same material as the said Hassam pavement, patented (class B), and composed of the same kind of material and of the same general character and value. Plaintiffs aver there is no good or sufficient reason for the city of Springfield by ordinance or otherwise to direct the construction of the pavement on said Center street with Hassam pavement, patented (class B), to the exclusion of other material of an equally good quality, and of the same general character and value and to the exclusion of said pavement known as 'concrete paving,' 'asphaltic concrete paving,' and other kinds, all of which are of an equally good quality as the said Hassam pavement, patented (class B), and of the same general character and

value, and, when constructed, the pavement is of the same general character as said Hassam pavement, and makes an equally good pavement and is less expensive to construct. By so limiting the construction of the pavement on said Center street to the said Hassam pavement, patented (class B), the constructing of said pavement will be placed in the hands of the patentee or his agents in said city which will result in the plaintiffs and the other property owners being required to pay a larger price for such construction than they would be required to pay if the pavement required to be used were not limited to said Hassam pavement, patented (class B), and would enable the contractor to obtain an excessive and exorbitant price and compensation for the construction of said pavement. Plaintiffs say that said ordinance is null and void, because repugnant to the provision of the charter of said city and the statutes of the state of Missouri which require that contracts shall be awarded to the lowest and best bidder, and because it arbitrarily precludes the use of any material or pavement other than Hassam pavement, patented (class B), although other material and pavement exists as hereinbefore stated, and arbitrarily deprives the landowners of whom plaintiffs are a portion of the benefits of full and fair competition."

[1] It is well settled by the authorities of this state that as a general rule, where the charter of a city provides that public work and material purchased therefor shall be let to the lowest and best bidder, there must be an opportunity for active competition. *Shoenberg v. Field*, 95 Mo. App. 241, 68 S. W. 945; *Curtice v. Schmidt*, 202 Mo. 708, 101 S. W. 61, 10 Ann. Cas. 702; *Swift v. City of St. Louis*, 180 Mo. 80, 79 S. W. 172. There is an exception to this general rule based on the supposed necessity of the situation. This exception is that where there is a patented article, or one held in monopoly, which in the eye of the authorities is of such exceptional superiority that it would be a public injury to be deprived of it, it may be required to be used. *Barber Asphalt Pav. Co. v. Hunt*, 100 Mo. 22, 13 S. W. 98, 8 L. R. A. 110, 18 Am. St. Rep. 530; *Verdin v. City of St. Louis*, 181 Mo. 28, 33 S. W. 480, 36 S. W. 52; *Swift v. City of St. Louis*, supra; *Paving Co. v. Field*, 188 Mo. 182, 86 S. W. 860; *Cleveland Trinidad Paving Co. v. McLord*, 145 Mo. App. 141, 130 S. W. 371. From these cases the rule is firmly announced that the city council, acting in good faith, has the right to designate a patented article to be used for the improvement of its streets. It therefore necessarily follows that the ordinance in question is not void simply because it designates a certain patented article, and, if it is void, it must be because of certain other allegations in plaintiffs' petition relating thereto.

We will now examine these allegations. The first one is that the pavement is patent-

ed and the patentee or his assigns owns and controls the patent and the method of construction. This is true of every patented article, and the prime reason for securing a patent is to secure to the patentee a privilege and exclusive right.

[2] It is next alleged that said patent is a subterfuge created for the purpose of endeavoring to prevent competitive bidding. This can hardly be said to be an allegation of fact, but rather a general expression and insinuation. In *Paving Co. v. Field*, 188 Mo. loc. cit. 203, 86 S. W. 865, our Supreme Court says: "It is absolutely essential to a valid charge of this character to plead the acts which constitute the fraud." The only allegation regarding the bad faith of the patentee in securing a patent for his pavement is that it was secured for the purpose of preventing competition. We have just said this is the purpose of all patentees. This leaves for consideration the only other allegation, stating that at the time the ordinance was passed, and for some time prior thereto, there was in general use in the city, certain other material used in constructing pavements, known as "concrete paving," "asphaltic concrete paving," and other kinds of concrete paving, composed of practically the same kind of material as the Hassam pavement, and of the same general character and class, and making equally as good pavement, but less expensive to construct; that by so limiting the construction of the pavement to said patented article the plaintiffs and other property owners would be required to pay an exorbitant price and compensation for the improvement. It is not alleged that the council acted in bad faith in selecting the patented article, nor is there any direct charge that the council acted arbitrarily. It is a matter of common knowledge that there is much difference of opinion regarding the kind and character of material to be used in paving public streets, and much discretion must be left to the city council of the cities in selecting the material, and where they have acted in good faith, courts are generally slow, indeed, to interfere with their discretion. The veto power is given to the property owners, and they can defeat the improvement, no matter how much it may be needed, by filing the required remonstrance.

[3] Under the laws governing cities of the third class, the municipal authorities are required to publish a resolution as a preliminary to the public improvement. In *City of Poplar Bluff v. Bacon*, 144 Mo. App. 476, 129 S. W. 466, we said: "It has been decided several times in this state that the resolution should state directly or by reference the nature and character of the improvements; otherwise the proceedings are without jurisdiction. The resolution, declaratory of the necessity of the improvement provided by the statute to be published in the official paper, is for the information and benefit of

owners whose property is to be taxed to pay for the proposed improvement. When this notice is published, property owners are supposed to be notified thereby of what the council propose to do." And in *Webb City v. Aylor*, 163 Mo. App. 155, 147 S. W. 214, Judge Cox says: "The property owner must look to the resolution and to the sources of information therein pointed out, in order to ascertain what the city council proposes to do. Since the publication of this resolution is the only provision of the statute for notifying the property owner of what the council proposes to do, it should either be explicit in itself, or inform the property owner where he can ascertain exactly what is proposed."

[4] As above stated, the law provides that the property owners may prevent the improvement by filing a certain remonstrance within a certain time after the publication of the resolution.

From these provisions it is apparent that the council in its resolution should notify the property owner exactly what is proposed to be done. If the council should specify several different kinds of paving in one resolution, how are the property owners to know exactly what the council proposes to do? Of course, where the article is not patented, the council can designate a standard, but the patented article furnishes its own standard. As we read the decisions of this state, they hold that the city councils, acting in good faith, have the right to designate a patented article for paving streets, and also the right to select any article not patented, providing it appears that there are no other materials of the same general character which can be brought into competition. In *Taylor v. Schroeder*, 130 Mo. App. 483, 110 S. W. 26, and in construing *Swift v. St. Louis*, 180 Mo. 80, 79 S. W. 172, the Kansas City Court of Appeals said: "Under the authority of the case last referred to, in order to justify the selection of any article not patented for paving streets, it must appear that there are no other material of the same general character which can be brought into competition."

[5] We do not wish to be understood as holding that city councils have the unlimited power to designate a patented article for public improvement. We are only passing upon the sufficiency of plaintiffs' petition relating thereto. If plaintiffs had alleged facts tending to show that the patent was a fraud and not superior to paving material in common use, and that the city council had acted arbitrarily, or in bad faith, in selecting it, then the petition would have stated a cause of action, but, as we read the petition, it simply alleges that the city council has selected a certain patented article, and that there are other kinds of pavements equally as good that can be constructed for less money. In other words, it simply asks the court to substitute its judgment for the judgment of the

city council, acquiesced in by the property owner as to the character of the pavement to be constructed on Center street.

The judgment will be affirmed. All concur.

ALLEN v. ST. LOUIS & S. F. R. CO.

(Springfield Court of Appeals. Missouri, Dec. 2, 1912.)

1. APPEAL AND ERROR (§ 977*)—NEW TRIAL (§ 6*)—DISCRETION OF LOWER COURT.

Trial judges have a wide discretion in granting new trials to accomplish justice; and their order will not be reversed, unless an abuse of discretion plainly appears.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3860-3865; Dec. Dig. § 977.* New Trial, Cent. Dig. §§ 9, 10; Dec. Dig. § 6.*]

2. APPEAL AND ERROR (§ 977*)—REVIEW—ORDERS RESPECTING NEW TRIAL.

Appellate courts are less disposed to reverse orders granting new trials than orders refusing them.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3860-3865; Dec. Dig. § 977.*]

3. NEW TRIAL (§ 103*)—NEWLY DISCOVERED EVIDENCE — DISCRETION OF COURT — EVIDENCE.

In an action for personal injury alleged to have been received by the sudden stopping of a train, a grant of defendant's motion for new trial on the ground of newly discovered evidence was proper, where the evidence of defendant tended to establish that there was no sudden stop, as contended by the plaintiff, and the new evidence was that of the sister of the plaintiff, and tended to show that the plaintiff took the trip on which she was injured with intention of getting hurt, and afterwards feigned injury, as such evidence was material; and because of the relation of the witness to the plaintiff it cannot be considered that there was lack of diligence in its procurement.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 215-217; Dec. Dig. § 103.*]

Appeal from Circuit Court, Oregon County; W. N. Evans, Judge.

Action by Ollie Allen against the St. Louis & San Francisco Railroad Company. From an order granting the defendant a new trial on a judgment for plaintiff, plaintiff appeals. Affirmed.

E. P. Dorris, of Alton, and Orchard & Cunningham, of Eminence, for appellant. W. F. Evans and W. J. Orr, both of St. Louis, Green & Wayland, of West Plains, and George Milley, of Thayer, for respondent.

NIXON, P. J. This is an action to recover damages for personal injuries, which the appellant claims to have suffered by reason of the negligence of the agents and servants of the defendant railroad company while she was about to leave defendant's passenger train at the town of Koshkonong, Mo.

The portion of the petition charging negligence is as follows: "That on said 3d day of December, 1911, this plaintiff purchased a ticket from the station agent at Thayer, Missouri, good for one passage from Thayer,

Missouri, to Koshkonong, Missouri; that on said date she boarded defendant's passenger train at the city of Thayer to ride to the town of Koshkonong; that the porter of said train, who was employed by said defendant company, came into the car in which plaintiff was seated and riding therein as such passenger, as aforesaid, and called out the station of Koshkonong and picked up the step which is set down in front of the steps of the car and started out with it; that soon thereafter the said train stopped, and quite a number of passengers who were riding thereon started towards the door to alight from said train, and went as far as the platform; that this plaintiff, believing said train had stopped for the station, and plaintiff, acting on the information given by said porter, as aforesaid, and believing said train had stopped at the platform at the station of Koshkonong, went out on the platform of the passenger coach in which she was riding, as aforesaid, for the purpose of alighting therefrom; that several parties were in front of her on the platform, and she was unable to alight at that time; that while she was standing on said platform, waiting for an opportunity to alight from said train, said train started to move, either backward or forward (and plaintiff is not sure which), with a sudden and violent jerk, without any warning whatever from any source to this plaintiff that said train was about to move, the force of which caused this plaintiff to be thrown violently backward into the door of the passenger coach, her head striking the door a violent blow, and her body being thrown violently to and upon the floor of the passenger coach, whereby and by reason thereof she received serious injuries in her head, back, spine, side, and breast; that the injuries suffered by this plaintiff, received in the manner aforesaid, were caused solely by the gross neglect of the defendant company in calling out the station by its said porter in the manner and at the time aforesaid, and in failing to warn plaintiff of the danger in attempting to alight at the time and place aforesaid, and in starting said train backward or forward, as the case may be, with a violent and sudden jerk, without warning to this plaintiff."

Immediately after the accident (on December 3, 1911, at about 2 or 3 o'clock a. m.) plaintiff was removed to her home at her father's house in Koshkonong, where her sister, Mrs. J. E. Dewberry, also resided.

At the trial plaintiff stated as a witness that as a result of the fall she received injuries to her head, and back in her spine, and that there was a contusion or bruised place on her head; that about 8 o'clock a. m. after the accident she called a physician (Dr. Barnes) to wait on her on account of the injuries she had received. She testified he did not examine her very much. On cross-examination, this question was asked, "You

did not call his attention to this bruised place?" The answer was: "I said I don't know whether I did or not. I was sick." About a month later she called another physician on account of her injuries, named J. K. Cantrell, and she testified that she showed the bruised place to him, and that at that time it had not healed. She testified that she could not state that it left a scar, as it was in her hair. Dr. Barnes was not called as a witness in behalf of the plaintiff. Dr. Cantrell testified for the plaintiff that he made a physical examination of her person about the 5th day of January, some 30 days after the accident, and for that purpose removed her clothing; that in this examination he found no abrasion or bruise about her head; that he found only a little bruise on the left side of her back; that she complained of a pain or pressure of the spine in the muscles of her back when he pressed her lumbar muscles; that she also complained about her head; that when under pressure it produced pain.

Plaintiff also introduced three witnesses who were on the train or at the depot at the time the accident is alleged to have occurred. None of these corroborated her version of the accident as to the train having stopped and then started again with a jerk. Anse Owens testified that he was on the train the night she fell; that at the time she was back of him, and he did not see the fall, but heard it, and that she was at that time about halfway out; that she "just kinda slipped down again when he saw her, and it seemed like she fainted." He did not see her lying on the floor. He stated that when they arrived at Koshkonong he did not notice any jerking of the train; that the train may have given a jerk and the witness not have noticed it. Charles Thoman testified for the plaintiff that he was at the depot at the time the accident is said to have happened. He stated that the chair car of that train usually stopped at the end of the station, but that on this night they ran down to the other end of the depot and stopped very suddenly, but that after the train stopped it did not start up until it pulled out. He testified, in part, as follows: "At the time I saw the woman, she was lying down in the car, with her limbs out on the platform and her body back in the car. I could not see her face; but I did see her after they took her off the train, at which time she acted as though she was hurt. She did not seem to be conscious, but kind of dazed, and complained about her head. I first thought she was under the influence of liquor until she complained about her head." Adam Bledsoe testified for the plaintiff that he was up at the baggage car at work, and when he got down they were helping the plaintiff out of the waiting room, at which time she was complaining about her head; that he helped take her home, and that when he left her she was

complaining about her head; that he did not know whether the train stopped more than once or not.

The plaintiff also introduced evidence tending to show that she was kept in her bed some four or five weeks, and had been under treatment and unable to do any work by reason of the injuries she had received. Several witnesses testified in her behalf that during this time she was complaining of injuries in her neck and back; but these persons saw no injuries, and knew nothing as to her having been injured except what she stated.

The defendant introduced several witnesses, who testified that they were on the train at the time the injury took place, and that the train made the usual stop in the usual manner, and that there was no sudden jerking, either in stopping or starting the train. R. J. Capshaw and Sherman Tolliver were the only ones who saw the plaintiff on the train at the time she fell, and they testified that they saw her fall, and that there was another passenger behind her named Hosea Pate, and that plaintiff, at the time the train came to a stop, staggered against Hosea Pate, and her head struck against the man, and she went to the floor, and that there was no jerking of the train.

The defendant also put in evidence the plaintiff's general reputation for virtue, and no effort was made by the plaintiff to contradict the evidence of these witnesses that her reputation for virtue was bad.

The verdict of the jury was for the plaintiff in the sum of \$500.

The defendant moved for a new trial and, among other grounds, set up the newly discovered testimony of Mrs. J. E. Dewberry, the plaintiff's sister. Her affidavit was produced and filed with the motion for a new trial, in which affiant stated that about a year prior to the time plaintiff claims to have been injured a Mrs. Arnold, who resided near the place where the plaintiff resided at that time, got hurt on one of the trains of the defendant and was paid damages by the defendant company; that the plaintiff, upon learning that Mrs. Arnold had received some money from the railroad company, said that she (the plaintiff) was going to get hurt on the train and sue the defendant for big damages; that on Friday prior to December 3, 1911, the plaintiff went to Thayer to visit Mrs. Lina Allen, and before plaintiff left Koshkonong she told her sister (the said Mrs. Dewberry) to write to her (the plaintiff) the next day, telling her to come home at once, and to use as a reason that the son of the plaintiff, named Willie, was sick and was worse, when, as a matter of fact, said boy Willie was not and had not been sick at that time, and that before plaintiff left the town of Koshkonong to go to Thayer at that time she gave to said witness (Mrs. Dewberry) a stamped postal card on which to write

said message; that said Mrs. Dewberry did write said postal card the next day, saying, in substance, what the plaintiff had directed her to say, and said witness requested said son of plaintiff to mail said card to his mother, but said boy refused to do so, and that the father of plaintiff did mail said postal card; that plaintiff told said witness to have said card mailed as aforesaid; that plaintiff was brought home on the morning of December 3, 1911, at 2 or 3 o'clock, by Isaac Ammerman, who is married to a cousin of plaintiff, and Ollie Bledsoe, who is a second cousin of plaintiff; that after they had left plaintiff at the house plaintiff sat by the stove a while talking to said witness, and that plaintiff told said witness about what a good time she had at Thayer on that trip, and that after talking for a considerable time plaintiff took off her clothes and went to bed without any assistance, and did not complain of any injury; that said witness at that time remarked to plaintiff, "You are not hurt," and that plaintiff laughingly replied, "You cannot always tell;" that the next morning plaintiff said to witness, "I guess I had better stay in bed and send for Dr. Barnes;" that after Dr. Barnes had come and gone plaintiff did not return to bed again; and that plaintiff said to witness at that time that she wanted witness to wait on her, and she would fix her up all right for it, saying, "If there is a chance to get a stake, let me go to it." The said witness will testify (so the affidavit reads) that plaintiff was not hurt by the alleged accident, but was only pretending to be hurt, for the purpose of getting money or damages from the railroad company; that plaintiff stayed at home for two weeks after the alleged accident, during which time she stayed up around the house as well as she ever did, excepting when visitors would come to the house, and then she would get in bed and complain of pain, but would get out of bed again as soon as such visitors were gone.

It is apparent from reading her affidavit that the testimony of Mrs. Dewberry is material evidence for the defense. The only serious objection urged is that no diligence is shown by the defendant in obtaining the evidence of this witness. In its affidavit accompanying the motion for a new trial, defendant stated that no knowledge of the facts referred to in the affidavit of Mrs. Dewberry came to the knowledge of the defendant or any of its agents or attorneys or officers until since the trial of the case, and that it was not due to any lack of diligence on the part of the defendant that it was not learned sooner. When it is considered that this newly discovered evidence came from the plaintiff's own sister, a reason is apparent why the defendant should not have sooner discovered it; and it may be said that the defendant would not be expect-

ed to invade the plaintiff's own home and to interview the members of her own household to procure evidence against her.

[1, 2] The rule has been announced in Missouri with wearisome repetition that trial judges have a wide discretion in granting new trials, in order to accomplish justice; that the duty of granting a new trial rests peculiarly and specially within the sound discretion of the trial judge; and that when a new trial has been granted the appellate court will reluctantly interfere, unless it is manifest and apparent that the judicial discretion of the trial judge has been abused, or that injustice has been done. *Parker v. Britton*, 133 Mo. App. loc. cit. 274, 113 S. W. 259; *Lee v. Knapp & Co.*, 137 Mo. 385, 38 S. W. 1107; *Kuenzel v. Stevens*, 155 Mo. 280, 56 S. W. 1076; *Iron Mountain Bank v. Armstrong*, 92 Mo. 265, 4 S. W. 720; *Ensor v. Smith*, 57 Mo. App. 584. Where a new trial is granted by the court below, an appellate court will look at it with less scrutiny than if it had been refused. *Bloch Queensware Co. v. Smith, Saxton & Co.*, 107 Mo. App. 13, 90 S. W. 592; *Udden v. O'Reilly*, 180 Mo. 650, 79 S. W. 691.

[3] After an examination of the whole record in this case, we are unable to say that the learned trial judge who saw the witnesses, and who knew all the circumstances leading up to and surrounding the trial, abused his discretion in granting a new trial.

The order granting a new trial is accordingly affirmed. All concur.

GRIGGS v. BRIDGWATER.

(Springfield Court of Appeals. Missouri. Dec. 2, 1912.)

1. APPEAL AND ERROR (§ 1011*)—REVIEW—FINDINGS—TRIAL WITHOUT JURY.

A judgment for a defendant in unlawful detainer given by a court without a jury upon conflicting evidence as to whether the rights of the defendant under a lease extended to the whole or only a part of a tract is conclusive as to such question on appeal, unless, under the law and the facts, the defendant could not acquire such an interest.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983-3989; Dec. Dig. § 1011.*]

2. LANDLORD AND TENANT (§ 75*)—ASSIGNMENT OF LEASE—TERM.

A lease which was executed September 23, 1909, provided that all land cleared by the lessee in the year 1908 and 1909 should be delivered to the lessor in 1912, free of sprouts, and all land cleared in 1910 and 1911 should be delivered on January 1, 1913, free of sprouts. Rev. St. 1909, § 7880, provides that no tenant for a term not exceeding two years or at will or by sufferance shall assign or transfer his term or interest or any part thereof without the written assent of the landlord. Held that, as the lease extends for a period of more than two years, the statute is inapplicable, and an assignment was valid.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 222-224, 229; Dec. Dig. § 75.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

3. LANDLORD AND TENANT (§ 79*)—ASSIGNMENT OF LEASE—EFFECT OF DEATH OF ASSIGNOR—LESSEE.

The rights of an assignee of an interest in a lease would not be affected by the subsequent death of the assignor-lessee, even though the personal representative of such assignor refused to take charge of the lease, and for that reason it became the duty and the right of the lessor to take it.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 235, 244-253; Dec. Dig. § 79.*]

4. LANDLORD AND TENANT (§ 291*)—UNLAWFUL DETAINER—PETITION—CONFORMITY TO NOTICE TO QUIT.

The fact that the notice and demand for possession in unlawful detainer embraced more land than the amended petition on which the cause was tried would not justify a finding in favor of the defendant.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 1217-1241, 1243-1269; Dec. Dig. § 291.*]

5. APPEAL AND ERROR (§ 854*)—REVIEW—FINDINGS OF COURT WITHOUT JURY.

The finding of a court sitting without a jury must be upheld on appeal if justified on any ground, where there was no finding of facts and no declarations of law given or refused, and the record does not otherwise indicate the ground on which the court based its finding.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3403, 3404, 3408-3424, 3427-3430; Dec. Dig. § 854.*]

Appeal from Circuit Court, Shannon County; W. N. Evans, Judge.

Unlawful detainer by Edson Griggs against Charles Bridgwater, commenced before a justice. From a judgment of the circuit court for defendant on an appeal, plaintiff appeals. Affirmed.

Orchard & Cunningham, of Eminence, for appellant. L. B. Shuck, of Eminence, for respondent.

COX, J. Action of unlawful detainer begun before a justice of the peace, appealed to the circuit court, and there tried by the court and issues found for defendant. Plaintiff has appealed.

[1] Plaintiff leased 14 acres of land to one Marie Hardcastle. By the terms of the lease Hardcastle was required to clear and cultivate the land. Afterward Hardcastle, with the consent of plaintiff, made an agreement with this defendant by which defendant acquired some interest in the lease of the land, and on the extent of that interest this controversy hangs. Plaintiff contends that defendant only acquired the right to occupy and cultivate a part of the tract covered by the lease, while defendant contends that his rights extend to the whole tract. The testimony was conflicting as to that question, and, the court sitting as a jury having found in defendant's favor, the judgment of the trial court is final, unless, under the law and the facts, defendant could not acquire an interest in the whole tract. *Nickey v. Leader*, 235 Mo. 30, 138 S. W. 18 loc. cit. 41.

[2] The first point made by appellant is

that Hardcastle could not assign the lease or any part of it without the written assent of plaintiff under section 7880, Stat. 1909. That statute by its terms only applies to leases not exceeding two years or tenancies at will or by sufferance. This lease was executed September 23, 1909, and contained the following provision: "All land cleared by Hardcastle in the year 1908 and 1909 is to be delivered to Griggs in the year 1912 free of sprouts and all land cleared by Hardcastle in 1910 and 1911 is to be delivered to Griggs January 1, 1913, free of sprouts." It will thus be seen that the lease extended from September 23, 1909, to January 1, 1913, a period of more than two years; hence the statute does not apply.

[3] Hardcastle, the lessee, died in September or October, 1910, and appellant contends that the lease then went to his personal representative, but the administrator of Hardcastle refused to take charge of it, and, for that reason, it became the duty and the right of plaintiff to take it. However this may be, no one could interfere with the rights of defendant, and, since his rights were acquired before the death of Hardcastle, he is not affected thereby.

[4, 5] The suggestion is made in brief of counsel for appellant that the trial court based his finding upon the ground that the notice and demand for possession served by plaintiff on defendant covered more land than the amended petition on which the case was tried, and, that being true, the finding was wrong. There was no finding of facts and no declarations of law given or refused, and there is nothing in the record before us to indicate the ground upon which the court found for defendant; hence, if the finding is justified upon any ground, we must uphold it.

As we view this record, the only question for the trial court to pass upon was a question of fact, and, there being evidence on both sides of that issue, his finding is binding upon us, and the judgment must therefore be affirmed. All concur.

ROENNIGKE v. ESSIG.

(St. Louis Court of Appeals. Missouri. Dec. 8, 1912.)

1. MECHANICS' LIENS (§ 313*)—INDEMNITY BOND—SURETY'S LIABILITY ON BOND.

Where a builder's contract appeared on one side of a printed sheet, and the bond for performance on the other, each instrument aptly referring to the other, and contemplating that the contract by its terms should be parcel of the bond, but the principal, who signed the contract, did not sign the bond, the surety, signing the bond, was bound thereby, since the principal was bound in the first instance by the contract, and the bond showed that it was a complete instrument when executed by the surety alone.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. § 656; Dec. Dig. § 313.*]

2. PRINCIPAL AND SURETY (§ 112*)—BUILDER'S BONDS—DISCHARGE OF SURETY.

Where a building contract stipulates that the owner shall withhold from the contractor a percentage of the price as a security against possible liens, and, until such lien claims are settled, the surety is discharged if the owner surrenders this security without his consent, but where a contract containing such stipulation was, in all its terms, made part of the contractor's bond, and the owner made the final payment 10 days after completion as he was also required to do by the contract, the surety was not thereby discharged, since, in effect, he had consented to such payment.

[Ed. Note.—For other cases, see *Principal and Surety*, Cent. Dig. §§ 226-234; Dec. Dig. § 112.*]

Appeal from St. Louis Circuit Court; George H. Williams, Judge.

Action by Edward Roennigke against Louis Essig and another. Judgment for plaintiff, and defendant Essig appeals. Affirmed.

Eugene Buder, of St. Louis, for appellant. Carl Otto, of St. Louis, for respondent.

NORTONI, J. This is a suit on a builder's bond. The finding and judgment were for plaintiff, and defendant surety on the bond alone prosecutes the appeal.

Henry A. Christophel and W. H. Pearson contracted in writing with plaintiff to furnish the materials and erect a building for him at the agreed price of \$6,200. Among other things, the contract stipulated the building was to be completed and delivered to plaintiff free of all liens, etc. In connection with this contract and in assurance of its fulfillment, defendant Essig, as surety, executed the bond in suit in the amount of \$6,200, whereby he bound himself to answer for the default of Christophel and Pearson in respect of any matter stipulated for in the contract. After settling with the contractors on the certificate of the architect, plaintiff was required to expend \$516.87 in liquidation of lien claims against the building and prosecutes this suit upon the bond to recover therefor.

[1] It is first argued the court should have directed a verdict for defendant Essig, the surety, for the reason that the names of Christophel and Pearson, principals, were not affixed to the bond. It appears the building contract and the bond in suit were executed by the use of printed forms both on the same sheet of paper. In other words, the builder's contract is printed on one side of a sheet of paper and the bond for the faithful fulfillment of the contract on the reverse side thereof. Each of these documents in apt terms refers to the other. Christophel and Pearson, the contractors, together with the plaintiff, signed and executed the contract. The bond on the reverse side of the sheet, however, is not signed by Christophel and Pearson, but they are referred to in the body thereof as the contractors and as the principals who signed the above contract the

provisions of which the bond undertakes to assure. However, it is obvious from the form of the bond that it was not contemplated that the contractors, Christophel and Pearson, should do more than sign the contract which by the terms of the two writings became parcel of the bond. In other words, it appears from the papers themselves that it was not contemplated the principals should affix their signatures to the bond, provided they signed, as they did, the builder's contract on the reverse side of the sheet. Some of the authorities declare that, where the principal omitted to sign a common-law bond when it clearly appeared that the parties contemplated that he should so sign it, the sureties are not bound, though they had affixed their signatures thereto. The theory with respect to such cases is that, as the contract of suretyship is secondary in its nature, there is no obligation entailed against the surety, unless the principal is bound in the first instance. But the rule is without force here, for it is obvious that the principals, Christophel and Pearson, were bound to the faithful execution of the contract, and the contract is parcel of the bond. This contract stipulates the full and identical obligation which the surety undertook to assure. From this it appears the principals, Christophel and Pearson, were bound in the first instance, and therefore Essig, the surety, was bound by signing the bond to the secondary obligation. The bond, printed on the same sheet with the contract, reveals that it was a completed instrument when executed by the surety alone.

The precise point has been heretofore determined in a case involving a like contract, as will appear by reference to *North St. Louis Planing Mill v. Essex*, 157 Mo. App. 18, 137 S. W. 295. There can be no doubt that on the face of the bond the surety's obligation was valid and complete.

[2] The builder's contract provides, among other things, that the plaintiff should pay during the course of construction to the builders not to exceed 75 per cent. of the contract price and retain a balance of 25 per cent. thereof as security against possible liens, etc., and that the final payment of this 25 per cent. should be made 10 days after the building was completed and on its acceptance by plaintiff. All payments were to be made on the certificate of J. L. Wees, architect and superintendent of the building. It appears that plaintiff made payments on the contract in accordance with this agreement on the certificate of the architect and retained 25 per cent. of the contract price until 10 days after the building was completed, when, upon its acceptance, the remaining 25 per cent. of the contract price was paid to the contractors on the certificate of the architect. It is argued the court should have

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

directed a verdict for defendant surety on the grounds that plaintiff released the security in his hands by paying out the remaining 25 per cent. of the contract price without regard to the probable liens that might be run upon the building. There can be no doubt that, when the contract stipulates the owner shall withhold from the contractor a percentage of the contract price as a security against probable liens and until such lien claims are settled without more, the surety is discharged if the owner surrenders this security without the consent of the surety on the bond. Such is the doctrine of *Evans v. Graden*, 125 Mo. 72, 28 S. W. 439; *Harris v. Taylor*, 150 Mo. App. 291, 129 S. W. 995. But the rule invoked is wholly without influence here, for it appears conclusively that the surety consented to the payments being made by plaintiff, for the contract stipulates the course to be pursued. It cannot be said that the surety, Essig, did not consent to the payment of the final 25 per cent. of the contract price 10 days after the completion of the building upon the certificate of the architect, Wees, for the contract in plain and pointed terms stipulates that the final payment should be made upon such certificate, and that such payment was authorized when such certificate was given. Obviously the surety consented to this, for the contract, in all its terms, is parcel of the obligation between the parties, and it was the course prescribed for plaintiff to pay the balance of the contract price in accordance with the contract on the certificate of the architect as he did. Though by so doing plaintiff released a security in his hands, it is entirely clear that this security was released with the consent of the surety and in full accord with the terms of the contract and bond, for he was authorized to pay out this fund upon the certificate of the architect.

The judgment should be affirmed. It is so ordered.

REYNOLDS, P. J., and CAULFIELD, J., concur.

McDONNELL v. COLUMBIA TAXICAB CO.
(St. Louis Court of Appeals. Missouri. Dec. 8, 1912.)

1. MUNICIPAL CORPORATIONS (§ 706*)—INJURIES IN STREETS — INSTRUCTIONS — NEGLIGENCE.

In an action for injuries by being struck by defendant's taxicab in a street, in which plaintiff alleged specific acts of negligence, such as excessive speed and approaching without warning, it was error to instruct that the jury should find for plaintiff if the taxicab driver was running at greater than a reasonable speed, or "was not using the highest degree of care that a very careful or prudent person would use under like circumstances, * * * and that by reason thereof the plaintiff was struck;" it being necessary for the instructions to submit the

specific acts of negligence charged, and not the question of negligence in general.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1518; Dec. Dig. § 706.*]

2. APPEAL AND ERROR (§ 1064*)—HARMLESS ERROR—INSTRUCTIONS.

Such error in the instruction was reversible.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4219, 4221-4224; Dec. Dig. § 1064.*]

Appeal from St. Louis Circuit Court; George H. Williams, Judge.

Action by Edward McDonnell against the Columbia Taxicab Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

This is a suit for damages accrued to plaintiff on account of personal injuries received through the alleged negligence of defendant. Plaintiff recovered, and defendant prosecutes this appeal. The place of the injury was at the crossing over Broadway on the north side of Chouteau avenue, in the city of St. Louis; the time about 8:25 o'clock p. m., after dark. Plaintiff's evidence tended to prove that the place was one where street car passengers transferred from one car line to another; that there was a great deal of traffic there; that it was customary for the Broadway cars to stop at that particular crossing to let passengers off; that there was an electric street lamp near; that while plaintiff was attempting to pass from the front end of a south-bound Broadway street car, which had stopped to let him off, to the west curb of Broadway, he was run down and injured by defendant's automobile, which was then being driven by defendant's employé acting within the scope of his employment. Plaintiff testified that after alighting, and before starting toward the curb, he took the precaution to glance to the north (whence the automobile came), and saw no vehicle coming, though there was nothing to obstruct his view. The first plaintiff knew of the automobile was when it struck him; there having been no warning sound of its approach, though it seems to have had its lights burning. It was coming south in the same direction with the car, and attempted to pass along between the car and the curb, a space some 18 feet in width, and was running along within 2 feet of the side of the car, when it struck plaintiff. As to the speed of the taxicab, the motorman on the street car testified that it was running at a "pretty good speed"; and another witness for plaintiff estimated its speed at 15 miles an hour. The testimony of other witnesses tended to prove that plaintiff was paying no attention to vehicles, but looked straight ahead of him as he went toward the west curb. The driver of the automobile testified that before he neared the crossing he was going about 12 miles an hour, and that when

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

he got to the car he was only traveling between 3 and 4 miles an hour; that it was customary for south-bound cars to stop on the south side, and not on the north side, of cross streets, and that he had no idea, and there was nothing to indicate to him, that anybody was going to get off of that car at that place at that time; that, seeing plaintiff step off the front platform of the street car, he tried to stop the automobile by shutting off the power and putting on the brakes, but that it was then too late to avoid injuring plaintiff.

The portions of plaintiff's petition relied upon as charging defendant with negligence are, in substance, as follows: It first states that "one of the defendant's said vehicles, going at a great rate of speed, to wit, at a speed of 15 miles per hour, * * * was negligently and carelessly, and without warning, run against and over the plaintiff, knocking him down." It then states "that the said Broadway and Chouteau avenue are, and have been for many years last and past, public streets and thoroughfares in the city of St. Louis; that the said Broadway runs in a southerly direction, and that the said Chouteau avenue runs east and west, and crosses said Broadway at right angles, and at the intersection of said Broadway and Chouteau avenue is a public business place, where numerous people pass and repass, especially during the evening hours at about the hour when the plaintiff was injured." The petition then pleads that there were then in full force and effect in the state of Missouri certain statutory provisions, sections 8519 and 8523 of the Revised Statutes of Missouri, 1909:

Section 8519 provided, in pertinent part, that: "No person shall operate a motor vehicle on any public highway at a greater rate of speed than is reasonable, having regard to the traffic and use of the highway, or so as to endanger the life and limb of any person, or the safety of any property, and shall not in any event, while upon any public highway, run at a greater rate of speed than fifteen miles an hour; * * * and within the limits of all cities, towns and villages the rate of speed shall not be greater than eight miles per hour in the business portion of any city, town or village, and not greater than ten miles per hour in all other portions thereof."

Section 8523 provided that: "All persons owning, operating or controlling an automobile running on, upon, along or across public roads, streets, avenues, alleys, highways or places much used for travel, shall use the highest degree of care that a very careful person would use under like or similar circumstances to prevent injury or death to persons on, or traveling over, upon or across such public roads, streets, avenues, alleys, highways or places much used for travel. Any owner, operator or person in control of

an automobile, failing to use such degree of care, shall be liable in damages to a person or property injured by the failure of the owner, operator or person in control of an automobile to use such degree of care, * * * unless the injury or death is caused by the direct negligence of the injured or deceased person contributing directly thereto."

The petition then proceeds as follows: "Plaintiff further states that said striking, running over, and injuring him by said automobile or taxicab of the defendant was directly due to and caused by the negligence on the part of the employé of the defendant operating and running said vehicle, and was a direct violation of said act, while running said vehicle upon, along, and across said public streets in the city of St. Louis, Mo., which public streets were at said time, and for years had been, highways and places much used for travel; and the defendant, through its said employé, failed to use the highest degree of care that a very careful person would use under like circumstances to prevent injuring all persons on or traveling over, upon, or across said public streets in the following particulars, to wit: (1) That the defendant, through its said employé, did negligently operate said automobile or taxicab along said Broadway, going south, and at the time it struck the plaintiff, in a reckless manner and at a dangerous rate of speed. (2) That defendant, through its said employé, did negligently operate said motor vehicle on said Broadway, going south, at and before the time it struck the plaintiff, in a reckless manner and at a rate of speed exceeding 15 miles an hour, and when approaching this said crossing on Broadway north of Chouteau avenue failed to check the speed of the taxicab or give warning of its approach whatsoever, and by reason thereof plaintiff was run over by the defendant's said taxicab, receiving the injuries herein complained of."

The answer, in addition to a general denial, contains a plea of contributory negligence. The reply was a general denial. The only reference to the question whether the collision occurred in the "business portion" of the city occurs in the cross-examination of plaintiff, as follows: "Mr. Morrow (Defendant's Counsel): Q. Mr. McDonnell, that point there isn't what is known as a business point, I understand—business part of the city—not like downtown here; that is just simply a point where the people transfer there? A. Well, go ahead. Mr. Young (Plaintiff's Counsel): Answer the question. A. Well, yes; yes."

At the instance of the plaintiff the court gave an instruction to the jury, as follows: "(1) The court instructs the jury that if they believe and find from the evidence that on the 5th day of March, 1910, at about the time charged in the petition, the plaintiff,

while passing from a street car at the north crossing of Broadway and Chouteau avenue, in the city of St. Louis, was run against and over by one of the defendant's taxicabs, driven by one of its employes, going at the time at a greater rate of speed than eight miles per hour, or that the driver of said taxicab was running the same at a greater rate of speed than was reasonable, having regard to the traffic and use of said streets at said point, or that said driver of said taxicab at said time was not using the highest degree of care that a very careful person would use under like or similar circumstances in running said taxicab, and that by reason thereof the plaintiff was struck and injured by said taxicab, then the jury will find for the plaintiff."

There were other instructions; but, as they do not have any tendency to cure the alleged errors in the foregoing one of which defendant complains, we will not incur this opinion by setting them forth.

Morrow & Kelley, of St. Louis (Charles E. Morrow, of St. Louis, of counsel), for appellant. Johnson & Young, of St. Louis, for respondent.

CAULFIELD, J. (after stating the facts as above). [1] The defendant contends that the giving of plaintiff's instruction No. 1 was reversible error, and we are constrained to hold such contention good. Though in his petition plaintiff relies on specific acts of negligence to entitle him to recover, this instruction omits to hypothesize the facts with respect to the alleged negligence of the driver of the taxicab, and leaves the jury to find for the plaintiff if they find "that said driver of said taxicab at said time was not using the highest degree of care that a very careful person would use under like or similar circumstances in running said taxicab." It is true that in the prior part of the instruction the question of the speed of the automobile is specifically submitted to the jury; but the portion we are considering is stated in the alternative, to the end that, even though the jury might have found the driver guiltless in the matter of unlawful or negligent speed, it might still find for plaintiff if the driver failed in any manner whatever to use the highest degree of care in running the taxicab. As the Supreme Court said in condemning a similar instruction, this one was "equivalent to authorizing the jury to return a verdict for the plaintiff under any theory of negligence which they could construct or evolve out of their own minds." *Allen v. St. Louis Transit Co.*, 183 Mo. 411, 432, 81 S. W. 1142.

[2] In this respect the giving of this instruction constituted reversible error. Where, as here, specific acts of negligence are relied upon, the instructions should require the jury to find whether the defendant

was guilty in the respect charged, and not submit the question in such general terms. See *Miller v. United Railways Co.*, 155 Mo. App. 528, 134 S. W. 1045. Another objection made to this instruction is that it, in effect, declares the defendant guilty of negligence, as matter of law, if the automobile was going at "a greater rate of speed than eight miles an hour," without requiring a finding that the place was in the "business portion" of the city, as the statute invoked contemplates (*R. S. Mo. 1909*, § 8519), or that that rate of speed was negligent under the circumstances. As the judgment must be reversed and a new trial had for the reason first above mentioned, we need not pass upon this second objection, which is one that can easily be avoided upon a retrial. For the same reason we do not now notice other matters of alleged error.

The judgment is reversed and the cause remanded.

REYNOLDS, P. J., and NORTON, J., concur.

BARTH v. BARTH.

(St. Louis Court of Appeals. Missouri. Dec. 3, 1912.)

1. DIVORCE (§ 184*) — APPEAL — REVIEW — FINDING OF FACTS.

The Supreme Court in divorce cases will review the evidence and come to its own conclusion as to the facts, to see that a union was not dissolved on slight testimony nor for trivial cause, although great deference will be paid to the conclusions of the trial judge.

[Ed. Note.—For other cases, see *Divorce*, Cent. Dig. §§ 570-573; Dec. Dig. § 184.*]

2. DIVORCE (§ 55*)—CONSTRUCTION OF STATUTES — COMPARATIVE FAULT — "INJURED PARTY."

Rev. St. 1909, §§ 2370, 2372, allowing a divorce to the "injured party," are given the same construction as Rev. St. 1845, c. 53, allowing the "innocent and injured party" a divorce; and where both parties are in fault the court will not attempt to find which is the most in fault, but will award neither the relief sought.

[Ed. Note.—For other cases, see *Divorce*, Cent. Dig. § 197; Dec. Dig. § 55.*]

For other definitions, see *Words and Phrases*, vol. 4, p. 3614.]

3. DIVORCE (§ 130*)—EVIDENCE—FAULT OF BOTH PARTIES.

In an action by a husband for divorce on the ground of indignities rendering his condition intolerable, evidence held to show that he was not an injured party, as required by Rev. St. 1909, §§ 2370, 2372, allowing such a party a divorce; he having been also guilty of improper treatment.

[Ed. Note.—For other cases, see *Divorce*, Cent. Dig. §§ 442-445; Dec. Dig. § 130.*]

Appeal from St. Louis Circuit Court; Edwin W. Lee, Judge.

Action by John Barth against Katie Barth. Judgment for plaintiff, and defendant appeals. Reversed and dismissed.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep't Indexes 151 S.W.—49

John B. Dempsey, of St. Louis, for appellant. Edward W. Foristel, of St. Louis, for respondent.

REYNOLDS, P. J. The respondent here instituted an action for divorce against his wife, the appellant, on the 19th of May, 1910. It is alleged in the petition that the parties were married in the city of St. Louis, in May, 1895, and lived together as husband and wife until April, 1910. Following the usual averment that during all of the time plaintiff had treated defendant with kindness and affection, plaintiff charges that defendant offered him such indignities as to render his condition intolerable. The indignities set out are that after the first year of the marriage defendant developed a violently jealous disposition and on divers occasions accused plaintiff of infidelity; that after the third year of the marriage on numerous occasions, "the exact dates of which are unknown to this plaintiff, which plaintiff believes to have been about once each month," defendant quarrelled with plaintiff and during the quarrel used foul and profane language toward him, on numerous occasions breaking various articles about the house and throwing dishes at plaintiff. Averring that plaintiff was a merchant engaged in the retail meat and provision business, it is charged that on divers occasions too numerous to mention, defendant would appear at plaintiff's place of business and without reasonable cause abuse the women patrons who happened to be present in plaintiff's place of business at the time and would accuse them of being intimate with plaintiff; that during the second year of the marriage, "the exact date being unknown to plaintiff," defendant without reasonable cause and while in a violent fit of temper, threw a meat axe through the front window of plaintiff's place of business; that thereafter during the year 1904 plaintiff was compelled to dispose of his business by reason of the habits, acts and practices of defendant as aforesaid. It is further averred that during the year 1909, a sister of defendant came to live with plaintiff and defendant, and defendant, without reasonable cause, accused plaintiff of being intimate with the sister; that for a period of three years next before the filing of the petition, "on occasions too numerous to mention," defendant, in the presence of others, threatened to kill plaintiff, on one occasion threatening to cut plaintiff's throat while asleep; that during the month of March, 1910, defendant was continually quarrelling with an employé of plaintiff and on one occasion threatened to throw carbolic acid in his face; that on the 15th of March, 1910, defendant at the breakfast table and in the presence of the children of plaintiff and defendant, without reasonable cause, accused plaintiff of being intimate with some Spanish

ladies who lived in the neighborhood; that thereafter, on or about the 1st of April, 1910, defendant "forbids the women patrons of plaintiff to talk to plaintiff or to come into his place of business on any purpose." Stating that by reason of the habits, acts and practices of defendant, as before set out, he has suffered great anguish of mind and cannot live in peace and happiness with defendant and that there were born of the marriage two children, John aged fourteen, and Harry aged twelve, and that the defendant is an unfit person to have the care and custody of the children, plaintiff prays for divorce and that he be awarded the care and custody of the children, the petition containing the proper averment of residence in this city and state.

Admitting the marriage and birth of the children, defendant by her answer denies every other allegation in the petition.

The trial of the cause was quite lengthy and terminated in a finding and judgment in favor of plaintiff, the court also awarding him the custody and control of the children and adjudging the costs of the proceeding against defendant.

[1] We have read all the testimony as presented by the abstract of the appellant with very great care. While conceding that very great deference is to be paid to the conclusions of the learned trial judge on the evidence in a case of this character, he having the witnesses before him and hearing their testimony and being able to determine from the manner of giving the testimony and appearance of the parties and witnesses, the weight to be given to it, the duty is imposed upon us by the law to pass on the evidence and to determine the case on our own view of that evidence as presented to us by the record, a duty which we cannot shirk, even if we had the disposition to do so. This rule of decision was very distinctly announced by our court in *Torlotting v. Torlotting*, 82 Mo. App. 192, and, while stating the rule with great distinctness the decision of the trial court was not there followed, a divorce which it had adjudged in favor of the husband as against the wife being set aside and the case dismissed. It is true that that was done more on the application of the principles of law to the facts than on the facts themselves. Nevertheless it is a very clear example of the appellate court refusing to follow the conclusion of the trial court on the facts. That this has always been the rule of decision in this state is shown by the many cases cited in the *Torlotting Case*.

[2] It may appear somewhat banal to call attention to the importance of the marriage contract, a civil contract, it is true, under our constitution and laws, but a contract that lies at the very foundation of society and, in a measure, of government itself. When it becomes apparent that the true aims of

the union of a man and woman can no longer be achieved by continuing the marital tie, it can hardly be that the interests of society demand that the union be preserved by mere force of law; but it is for the courts to see to it that that union is not dissolved on slight testimony, nor for either light or trivial causes. Nor is it to be dissolved, however galling its bonds may have become, if neither of the parties to it come into court with clean hands. It is of the very essence of our statute governing divorce that the party to whom it is awarded is the innocent and injured party. Where both parties are in fault the court, not attempting to weigh with nicely adjusted scales which of the two is the most or the least in fault, will award to neither the relief sought.

Section 2370, R. S. 1909, the section which enumerates the causes for divorce, concludes thus: "The injured party, for any of the causes above enumerated, may obtain a divorce from the bonds of matrimony." This rule, that the divorce is only to be granted to the injured party is further emphasized by the provisions of section 2372, authorizing a divorce in favor of the defendant, it being there provided that "Upon the hearing of the cause, if the court shall be satisfied that the defendant is the injured party, it shall enter judgment divorcing the defendant from the said plaintiff, as prayed in the answer." These provisions have not always been in our statutes regulating the matter of divorce in their present wording. Prior to the Act of March, 12, 1849, (Session Acts 1849, p. 49; chapter 55, 1 R. S. 1855, p. 662, § 1), our law provided that "the innocent and injured party" may obtain a divorce. R. S. 1845, c. 53, p. 426. But our Supreme Court in *Hoffman v. Hoffman*, 43 Mo. 547, held (loc. cit. 549), referring to the change in the wording of the law, that "the statute should receive the same construction in this respect as before the change; at least no better character should be required of a party seeking a divorce, and we are not inclined to allow it to a person sustaining a worse one." One of the earlier, if not the first, of the cases on our statute relating to divorce is *Ryan v. Ryan*, 9 Mo. 539, decided in 1845. *Ryan v. Ryan* is referred to with approval in *Nagel v. Nagel*, 12 Mo. 53, decided in 1848. In this latter case, referring to the statute, it is said (loc. cit. 55): "Thus it is seen that a party applying for a divorce must show that he or she is the innocent and injured party; otherwise the court should not grant the divorce." This construction of the statute, a construction placed upon it at a very early period in our history as a state, has been adhered to by our courts from that day to this, notwithstanding the change in its phraseology, as we have seen. It has always been held, as said by the court in *Hoffman v. Hoffman*, *supra*, loc. cit. 549, that "the least that can

be required, * * * would be to compel parties to come into court with hands so far clean, at least, that the opposite party is not entitled to the same redress from them."

[3] Reviewing the testimony in this case, we have no hesitancy in saying that we agree with the finding of the trial court that the defendant in this case is guilty of the perpetration of sufficient of the acts charged by plaintiff in his petition to have entitled plaintiff to a divorce, provided he was without fault himself. We are not to be understood as finding that plaintiff has sustained all of his charges; we do not think he has sustained the most serious of them. That defendant used violent language toward plaintiff, was quarrelsome on occasions, is fairly well proven; so also there is evidence tending to show that on at least one occasion she charged him with too much familiarity with other women. These facts appear in evidence, although it must be said the evidence as to them is slight.

But there is just as much evidence presented in this record before us of unjustifiable acts by the plaintiff during the married life of the parties as of like acts by defendant. There is no substantial evidence that defendant's acts caused plaintiff to close up his business. On the contrary the evidence tends to prove that defendant had always helped plaintiff in his business and that without any apparent cause to do so plaintiff closed up his business as a merchant and practically without any notice whatever to his wife of his intention so to do, left her and the two children born of the marriage, alone in St. Louis, and visited his native land, leaving with his wife, for the support of herself and children during his absence of some two months, the sum of \$100. He did not inform his wife, according to her testimony, and it is uncontradicted, of his intention to leave her and the family and make this long visit to a foreign land, until the very morning that he left. When he did leave he did not kiss either his wife or his children good-bye, and at five o'clock of the morning of the day he left, he for the first time told his wife of his intended departure. When he returned from his visit to his native land, it appears, according to his own testimony, that it was three days after his return before he entered the home. He testifies that when he came back from Germany he went home and there was no one about the house; that the shutters were shut, the doors locked and he went back to a friend of his and stayed there for another day; went back home again and it was still closed and it was the third day after his return when, as he says, he went to work and broke in the door and went inside, and his wife was not there. He is without any corroboration as to this. His wife's testimony as to the matter, and in this she is corroborated by other witnesses, is, that dur-

ing these three days when he was in the city she was occupying the house with her children and that on the third day, that is the day upon which plaintiff broke into the house as he said, she had been staying for part of the day with her children at her mother's, a short distance away from the home and when she returned to her home she found her husband sitting on the doorstep. In all material matters connected with the relations between them the wife emphatically denied every one of the accusations contained in the petition or testified to and in a very great many of them she is corroborated in her denial by the testimony of others. According to his own testimony the quarrelling between these parties commenced a year after their marriage. They were married in May, 1895, and the plaintiff testifies that within a year after that and continually from then on the differences commenced between them and that they had been kept up ever since. But they lived together from May, 1895, to May, 1910—were even at the time of the trial living in the same house. Two sons were born to them of the marriage. That they quarrelled is beyond question; that he was sullen and sulky when at home with his wife and family is testified to, not only by his wife but by his own witnesses. Viewing this case throughout and considering all of the testimony in it, we have concluded that plaintiff is not an innocent party within the meaning of the statute and is not entitled to a decree. Moreover, we see no reason to prevent them renewing their marital relations and uniting in the upbringing of the two sons, both young, born to them of the marriage.

The judgment of the circuit court is reversed and the cause remanded with directions to that court to dismiss it at the cost of the plaintiff

NORTONI and CAULFIELD, JJ., concur, the latter only in the result.

MARKEL v. PECK et al.

(St. Louis Court of Appeals. Missouri. Dec. 3, 1912.)

1. EXECUTION (§ 41*) — REACHING TRUST PROPERTY—REMEDY AVAILABLE.

Trust property cannot be reached in an action at law for damages for breach of an executory contract, and it can only be reached in equity.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 89-91, 94; Dec. Dig. § 41.*]

2. TRUSTS (§ 265*)—LIABILITY OF TRUSTEES—PERSONAL LIABILITY.

The only judgment which may be rendered in an action at law against defendants as trustees under a testamentary trust is one based on their personal liability.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 374; Dec. Dig. § 265.*]

3. TRUSTS (§ 240*)—LIABILITY OF TRUSTEES—PERSONAL LIABILITY.

A minority trustee is not personally liable on a contract which he did not personally make merely because a majority of the trustees authorized it.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 347; Dec. Dig. § 240.*]

4. TRUSTS (§ 240*) — POWER OF TRUSTEE — MANAGEMENT OF ESTATE.

The provision in a will creating a trust and giving trustees power to sell or lease the property that a majority of the trustees shall govern concerns only the matter of binding the estate, and does not render the minority personally liable on contracts made or authorized only by the majority.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 347; Dec. Dig. § 240.*]

Appeal from St. Louis Circuit Court; Walter B. Douglas, Judge.

Action by Louis Markel against Stephen Peck and another. From a judgment for defendants, plaintiff appeals. Affirmed.

The appeal in this case was prosecuted to the Supreme Court, by which it was transferred to this court. Thereafter it was transferred by this court to the Springfield Court of Appeals, where an opinion was rendered therein. See Markel v. Peck et al., 144 Mo. App. 701, 129 S. W. 243. Subsequently the Supreme Court declared the legislative act which purported to authorize the transfer of cases from this court to the Springfield court to be unconstitutional, and the cause was transferred back to this court on the theory that the jurisdiction of the appeal continued to reside here and the proceedings in the Springfield court were coram non judice. The case has been argued and submitted here, and upon due consideration we prefer to dispose of it upon the same theory as did the trial court; the parties by their counsel, in the argument before us, seeming to concede that our decision should depend upon the correctness or incorrectness of that theory.

This is an action at law against certain persons as trustees under the last will of Charles H. Peck, deceased, wherein the plaintiff seeks to recover damages for breach of an executory contract for future leases of real property forming part of the trust estate. Under the will the trustees are given "full power subject to the exceptions and limitations hereinafter named, to manage, rent, lease, sell and dispose of" the property belonging to the trust estate. The exceptions and limitations named do not pertain to the renting or leasing of property. The will provides that "in all cases where said trustees are by this will, empowered or required to do anything, the majority of them, except where otherwise specified shall govern, and the act of such majority shall be valid," etc. The trust is limited to continue until the expiration of 15 years next after the death of the last surviving one of the testator's descendants living at the time of his death, at which

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

time the corpus is to be divided equally per capita between the testator's descendants then living. In the meantime the trustees are to pay the income in divers parts and proportions to some twenty-two or more persons, including the defendants, and their descendants. The contract in suit was made and entered into under date of March 6, 1903. It was not signed by the defendants, but by "Stephen Peck & Bro., Agents." By its terms said Stephen Peck & Bro., purporting to act "as agents of the estate of Chas. H. Peck, deceased," agreed to deliver to plaintiff two leases, one for a term to begin April 1, 1903, and the other for a term to begin September 1, 1907. The petition alleges that defendants entered into said agreement "through their lawfully authorized agents, Stephen Peck & Brother." The defendants denied the execution of the contract by answer, verified by affidavit. It is conceded that Stephen Peck, who is one of the trustees and a member of the firm of Stephen Peck & Bro., signed the contract in the name of said firm, and there was evidence pro and con as to whether the other three trustees authorized him or his said firm to do so. An instruction given at the instance of plaintiff permitted a verdict for the plaintiff if the defendants, or "a majority of them," authorized the firm of Stephen Peck & Bro., to execute the contract. The verdict was in favor of the plaintiff and against all of the defendants. The trial court sustained defendants' motion for a new trial on the ground that the giving of said instruction was error. The plaintiff has appealed, assigning as error the action of the court in granting a new trial.

Taylor R. Young, Frank H. Haskins, and Benjamin Schnurmacher, all of St. Louis, for appellant. S. T. G. Smith and Thos. S. Meng, both of St. Louis, for respondents

CAULFIELD, J. (after stating the facts as above). At the time of sustaining the motion for a new trial the learned trial judge, in a memorandum filed, stated the legal theory influencing his action, as follows: "This is an action at law against certain persons as trustees under the last will of Charles H. Peck, deceased. Though the case was tried on the theory that a judgment was sought against the trustees as such, yet neither the petition nor the judgment so limit the case. In both the petition and the judgment the word 'trustees,' when used as descriptive of the parties, is properly to be taken as merely designatio personarum. That no recovery could be had in this action against the trust estate is, I think, unquestionable. The plaintiff's case is against the individuals who wronged him. If he be unable to obtain satisfaction from them, after obtaining a judgment, he may in a proper proceeding and upon a prop-

er showing have his judgment made a charge against the trust property. Notwithstanding the fact that the parties may have had in their minds an erroneous theory of the case, if the pleadings, instructions, and judgment make a case when tested by the proper theory, the judgment should stand. As I have stated above, there is nothing in the pleadings or the judgment which would justify the claim that this action, or its result, in any way exceeded the power of the court. A judgment in effect against the trust property would exceed that power. Proceeding to an examination of the instructions, I find that the first instruction tells the jury that all of the defendants are bound by the acts of a majority of them. The pleadings show no relation between these defendants other than that of cotrustees. There is no law which authorizes the majority of a set of trustees to bind the minority in such a way as to render them or him liable de bonis propriis in a case such as this. This instruction, therefore, must necessarily be based upon the theory that the act of the majority was binding upon the trust fund in this action. That theory being clearly erroneous, the court erred in giving the instruction marked 1, and because of such error the defendants' motion for a new trial must be sustained."

[1] We agree with the conclusions so stated by the learned trial judge. Trust property cannot be reached in an action at law to recover damages for breach of an executory contract. It can be reached solely in equity. *Moore v. Stemmons*, 119 Mo. App. 162, 95 S. W. 313.

[2, 3] This being so, the only judgment, if any, which could be rendered in this action, would be one based on the personal liability of the trustees, and, of course, a minority trustee or trustees could not be rendered personally liable on a contract which he or they did not personally make, authorize, or adopt merely because others, composing a majority of the trustees, did authorize it.

[4] The provision of the will that a majority shall govern, etc., clearly concerns only the matter of binding the estate, and cannot be given the effect of rendering the minority personally liable on contracts made or authorized only by the majority. Whether then this instruction allows recovery against the trustees solely in their representative capacity, or allows a recovery against all if a mere majority authorized the contract sued upon, in either event it was erroneous, and the trial court was right in granting a new trial on that account.

The judgment is affirmed and the cause remanded.

REYNOLDS, P. J., and NORTONI, J., concur.

POLLACK v. NATIONAL BANK OF COMMERCE IN ST. LOUIS.

(St. Louis Court of Appeals. Missouri. Dec. 3, 1912. Rehearing Denied Dec. 14, 1912.)

1. BANKS AND BANKING (§ 140*)—PAYMENT OF CHECK.

A check is payable on demand, and where nothing more appears the bank on which it is drawn must either pay or reject it on presentment.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 390-392, 394-397; Dec. Dig. § 140.*]

2. BANKS AND BANKING (§ 126*)—CHECKS—PAYMENT—AGREEMENT OF PARTIES.

Where a depositor presented to the bank a check for deposit, he and the bank could agree that payment should be deferred for a reasonable time until the bank ascertained whether there were sufficient funds of the drawer to pay it.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 305, 309; Dec. Dig. § 126.*]

3. BANKS AND BANKING (§ 126*)—DEPOSIT OF CHECKS—CUSTOM.

Where a depositor of a bank presented to it a check for deposit, with knowledge of the custom of the bank to take checks and defer payment for a reasonable time until the bank ascertained whether there were sufficient funds of the drawer to pay it, the depositor was estopped from asserting that the bank giving him credit for the deposit could not, on finding insufficient funds to pay the check, charge the depositor's account with the amount thereof.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 305, 309; Dec. Dig. § 126.*]

Appeal from St. Louis Circuit Court; James E. Withrow, Judge.

Action by Phil Pollack against the National Bank of Commerce in St. Louis. From a judgment of dismissal, plaintiff appeals. Affirmed.

George E. Smith and Phil Pollack, both of St. Louis, for appellant. Edward D'Arcy, of St. Louis, for respondent.

NORTONI, J. This is a suit to recover the amount of a deposit made by plaintiff in defendant bank. Upon the court overruling a demurrer to defendant's answer, plaintiff declined to proceed further and suffered a judgment of dismissal to go against him. From this judgment he prosecutes the appeal.

It is alleged in the petition that on September 30, 1910, and for a long time prior thereto, plaintiff was a depositor in the defendant bank, the National Bank of Commerce in St. Louis; that on said day he indorsed and deposited in defendant bank a check on said bank, drawn by the Noonan Real Estate Company to his order, directing it to pay him \$427.12; that the defendant bank received the check and entered the amount therefor in his passbook as a deposit and stamped the check with the receiving

stamp, marked it "O. Z.," and passed it to its bookkeeper, who thereupon entered the same to his credit in the books of the bank; that on the next day defendant requested plaintiff to reimburse it for the amount of the check, as the drawer thereof, Noonan Real Estate Company, did not have sufficient funds in the defendant bank to cover the same; and that this the plaintiff refused to do. Thereupon defendant, against plaintiff's objection, wrongfully charged plaintiff's account with said sum of \$427.12. On this state of facts, plaintiff seeks judgment, on the theory that defendant bank became his debtor upon receiving the check and crediting it in his passbook and the books of the bank as though the same were a cash transaction.

Defendant bank, by its answer, denies the demand for reimbursement and the charging back were made on the day following the alleged deposit, but admits that both plaintiff and the Noonan Real Estate Company, drawer of the check, were its customers, and had for a long time theretofore each kept checking accounts therewith. It further pleads that there then was, and for many years theretofore had been, a usage and custom in the defendant bank, and in all of the banks of the city of St. Louis, which is and was well known by their depositors and to plaintiff, Pollack, to the effect that, notwithstanding checks may be received by the bank and credited in the passbook of the customer and the books of the bank upon presentation, whether drawn on that or any other bank, the transaction is in every instance subject to the right of the bank to reject the deposit and charge the amount back to the depositor at any time during the same day, if the bank discovers the drawer of the check has not sufficient funds on deposit to pay the same. In other words, it is alleged in the answer that all transactions of this character are had between the bank and its customers subject to this custom and usage, which obtains in defendant bank and in all of the banks of the city of St. Louis, and is and was at the time well known to depositors of each bank, and is and was at the time well known to plaintiff. The answer further sets forth that the Noonan Real Estate Company was without funds on deposit in defendant bank at the time of the presentment of the check, and that this fact was discovered during the same day; that upon the discovery of the want of funds of the drawer of the check the bank immediately notified plaintiff thereof and charged the amount of the check back to him, under the custom and usage above mentioned.

Plaintiff interposed a demurrer to that portion of defendant's answer setting forth the custom and usage referred to, on the theory that, though such custom and usage obtained, and that, notwithstanding his

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. D.g. Key-No. Series & Rep'r Indexes

knowledge of the fact at the time the deposit was made, it constituted no defense at law. The court entertained a different view of the question, however, and overruled the demurrer as if such custom or usage, so known to plaintiff at and before the time of the transaction, justified the course of the bank in charging the amount of the check back to plaintiff during the same day.

[1] It is argued defendant ought not to be permitted to introduce evidence tending to prove such custom and usage and plaintiff's knowledge thereof, for the reason that, if established in the proof, such custom or usage would infringe the law of commercial paper, which renders checks payable on demand. No one can doubt the essential characteristic of a check is that it shall be instantly payable on demand. In this respect a check is distinguishable from a bill of exchange; for the drawee of a bill is entitled to a reasonable time, at least one day, to determine whether he will pay or accept it. But, as before said, a check is payable on demand, and if nothing more appears the bank upon which it is drawn should either pay or reject it upon presentment. See Morse, Banks and Banking (4th Ed.) § 369; *Obitty on Bills and Notes* (11th Ed.) § 1, c. 21, p. 353; 2 Daniel, *Negotiable Instruments* (5th Ed.) § 1566; *McIntosh v. Lytle*, 26 Minn. 336, 3 N. W. 963, 37 Am. Rep. 410; *State v. Vincent*, 91 Mo. 662, 666, 667, 4 S. W. 430.

[2] But, be this as it may, no one will contend for a moment that it is not within the province of the depositor presenting the check and the bank on which the check is drawn to expressly agree that the payment shall be deferred for a reasonable time until the bank may ascertain whether or not there are sufficient funds of the drawer of the check in its hands to pay it. Such an agreement, instead of operating an infringement of the established rule of law above stated, amounts to no more than a reasonable modification of its application in the interests of justice. If it were competent for the parties to thus expressly agree with respect to the matter, it would seem to be competent, too, for them to tacitly do so under the established custom, well known to both, which obtained, in good faith, throughout an extended course of dealing. It is unnecessary to determine the force and effect of the usage or custom set forth, generally speaking; for the allegation of the answer is that plaintiff well knew it.

[3] The precise question with which the court is concerned and in judgment here, therefore, is this custom and usage, which was well known to plaintiff and necessarily acted upon by him in dealing with the bank. If, at the time the check was presented, plaintiff knew of this custom, as alleged in

the answer, and notwithstanding presented the check for deposit in the usual course, it would seem that the precepts of natural justice alone suggest that he should be bound thereby as if an express agreement to that effect were entered into; for otherwise grievous loss might be entailed upon the bank dealing with him on the faith of the usage and his knowledge of it. In such circumstances the principle of estoppel intervenes to preclude plaintiff and save harmless the bank dealing with him in the utmost good faith; and this is true though the check presented for deposit is drawn upon the same or depository bank, as is the case here. Touching the question of an express agreement or usage in such cases, Mr. Morse, in his work on Banks and Banking (4th Ed.) vol. 2, § 569, says as follows: "When a check is presented for deposit drawn on the depository bank, the bank may refuse to pay it, or take it *conditionally by express agreement*, or by usage, if such a one exists, as in California; but otherwise, if it pays the money, or gives credit to the depositor, the transaction is closed between the bank and the depositor, unless the paper proves not to be genuine, or there is fraud on the part of the depositor. The giving of credit is practically and legally the same as paying the money to the depositor and receiving the cash again on deposit. *The intent of the parties must govern*, and presenting a check on the bank, with a passbook in which the receiving teller notes the amount of the check, is sufficient indication of intent to deposit, and to receive as cash." (The italics are our own.) See, also, *State v. Salmon*, 216 Mo. 466, 522, 523, 115 S. W. 1106. From what is said by Mr. Morse, it is obvious that an express agreement between the parties should prevail, and that the *intent* of the parties must govern in every instance. As before said, it is unnecessary to rule here with respect to a general custom in the banks of St. Louis; for the case presents more than that, in that the answer avers plaintiff was fully informed as to such custom. This being true, the matter of the intention of the parties is one for the jury to determine; and if it were found as a fact that plaintiff knew of the custom at the time the check was presented for deposit it is competent to find, too, from this fact that an agreement accordingly, equivalent to an express one, existed between the parties at the time. Touching this matter, the answer tendered a question of fact, which, if established, would constitute a valid defense, and the demurrer was properly overruled.

The judgment should be affirmed. It is so ordered.

REYNOLDS, P. J., and CAULFIELD, J., concur.

HIGHT v. AMERICAN BAKERY CO.

(St. Louis Court of Appeals. Missouri. Dec. 8, 1912.)

1. APPEAL AND ERROR (§ 171*)—THEORY OF CAUSE—CONCLUSIVENESS.

Where complainant constructed his petition on the turntable doctrine of negligence, and so tried and submitted the case to the jury, he was bound by such theory on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1063-1060, 1066, 1067, 1161-1165; Dec. Dig. § 171.*]

2. NEGLIGENCE (§ 23*)—INJURIES TO CHILDREN—"TURNTABLE DOCTRINE."

In order that an action for injuries to a child may be maintained under the "turntable doctrine," it is necessary that the machinery or appliance, the operation of which was the direct cause of the injury, shall be a dangerous appliance in itself when set in motion, or that it shall be of a kind liable to become dangerous from the position or condition in which it was left if set in motion, and defendant must have been negligent in leaving the appliance or thing causing the injury unguarded, unsecured, or unattended in an open place frequented by children, so as to allow of the appliance being put in motion by the children who had access thereto.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 33, 84, 129; Dec. Dig. § 23.*]

3. NEGLIGENCE (§ 1*)—"ACTIONABLE NEGLIGENCE"—DUTY TO USE CARE.

"Negligence" and "actionable negligence," even under the turntable doctrine, are distinguishable terms, since carelessness does not always involve liability, which attaches only when there has been a violation of duty by the party charged toward the party injured.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 1; Dec. Dig. § 1.*]

For other definitions, see Words and Phrases, vol. 1, pp. 148, 149; vol. 8, p. 7563; vol. 5, pp. 4743-4763; vol. 8, pp. 7729-7731.]

4. PLEADING (§ 418*)—COMPLAINT—CONSTRUCTION AFTER VERDICT.

Where defendant pleaded over after the overruling of a demurrer, the fact that the petition did not state a cause of action would not be ground for setting aside a verdict, or arresting judgment, if it was supported by the evidence.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1399, 1403-1406; Dec. Dig. § 418.*]

5. NEGLIGENCE (§ 23*)—INJURIES TO CHILDREN—WAGON—DANGEROUS APPLIANCE—EVIDENCE—TURNTABLE RULE.

Defendant caused one of its wagons to be driven through a city street at a walk, from which wagon its servants discharged certain advertising whirligig toys, or aeroplanes. Plaintiff, a boy of 10, and other children, followed the wagon in an attempt to procure the toys when they fell to the earth after their power was spent. One of the toys falling under the wagon, plaintiff reached between the wheels for it; but, before he could escape, the hind wheel passed over his arm, causing the injury complained of. *Held* that, there being no proof that the wagon was driven negligently, or that defendant's servants had knowledge of plaintiff's dangerous position, and plaintiff never having been in front of the team, they owed no duty to him to keep a lookout to see that he did not get under the hind wheels, and, there being no evidence of actionable negligence on defendant's part, plaintiff was not entitled to recover under the turntable doctrine.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 33, 84, 129; Dec. Dig. § 23.*]

6. NEGLIGENCE (§ 85*)—INJURIES TO CHILDREN—CONTRIBUTORY NEGLIGENCE.

Where a boy of 10 placed his arm between the wheels of a moving wagon to seize a toy that had fallen under the wagon, knowing that if the wagon did not stop, and he did not get his arm out in time, he would be hurt by the wheel passing over it, and he was so injured, he was guilty of contributory negligence.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 121-128; Dec. Dig. § 85.*]

7. NEGLIGENCE (§ 82*)—INJURIES TO CHILDREN—PROXIMATE CAUSE.

Where a child placed his arm between the wheels of a slowly moving wagon, from which a toy had been thrown by defendant's servants in the wagon, in order that he might seize the toy, but before he could do so the wheel caught his arm and he was injured, the placing of his arm between the wheels, and not the attractiveness of the toy, was the proximate cause of the injury.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 112-114; Dec. Dig. § 82.*]

Appeal from St. Louis Circuit Court; Hugo Muench, Judge.

Action by Alex Hight, by his father and next friend, Max Hight, against the American Bakery Company. Judgment for plaintiff, and defendant appeals. Reversed.

Action by an infant for damages alleged to have been sustained by him by reason of a wagon of the defendant, appellant here, running over and injuring his arm, the infant suing by his father as next friend. The action was brought against the American Bakery Company and the Heydt Bakery, alleged to be a branch of the company. After a recital of the minority of plaintiff and the appointment of his father as his next friend, the amended petition upon which the cause was tried avers that plaintiff, then being a minor under the age of ten years, on Saturday, the ninth of July, 1910, was playing with other boys, mostly older than himself, on Dickson street in the city of St. Louis near his home, and while so playing the defendants caused a large wagon, similar to a transfer wagon, to be driven through Dickson street in the locality where plaintiff was playing, from which wagon defendants caused to be thrown into the air, large numbers of toys consisting of whirligigs, on which defendant advertised certain of the commodities it had for sale; that said whirligigs were whirled into the air and would come down in different directions as they were carried by currents of the air; that it was the purpose of defendants in causing the large wagon to pass through Dickson street and causing the whirligigs to be thrown into the air to attract the attention of children thereto, and that the whirligigs were exceedingly attractive to children and in this way defendants sought to advertise and did advertise their commodities; that on the occasion mentioned while numerous children were attracted to the place where defendants' employes were driving the wagon and whirling the whirligigs into the air, many boys were attracted thereto and

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Index

struggled with each other to obtain the whirligigs as they fell through the air to the street and around and under the heavy wagon; that plaintiff being a child under ten years of age and not having the discretion of a larger boy or adult, saw one of these whirligigs fall under the wagon and rushed to obtain it, placing his hand and arm under the wagon to get the whirligig, and defendants' employes who were driving the wagon then and there carelessly and negligently caused the hind wheel of the wagon to pass over plaintiff's right arm, crushing the bone and flesh above the elbow so as to maim and cripple plaintiff for life. It is further averred that the defendants and their employes in driving the wagon and throwing the whirligigs into the air knew or by the exercise of ordinary care could have known that these toys would attract plaintiff and other children of immature understanding into a place of danger of being injured by the wagon and cause them to rush to obtain such of the whirligigs as would fall under the wagon and that in doing so they were likely to maim or kill such children by running over them; "that the act of so driving over the streets with such heavy wagon, throwing such whirligigs into the air, as aforesaid, and thereby enticing children to struggle to obtain the whirligigs, and to place their hands and arms under the wagon to obtain the same, and driving heedlessly, without noticing a child who had put his hand and arm under the wagon to obtain such whirligig, and passing over and crushing and breaking his arm, was an act of negligence on the part of defendants." Averring that in consequence of the injuries plaintiff had suffered great physical pain and mental anguish and will continue to suffer the same for many years and that he is injured, crippled and maimed for life and his earning capacity, after he attains the age of twenty-one years, will be greatly diminished in consequence of his injury, plaintiff prays judgment for \$7,500, with interest and costs.

The American Bakery Company, in its answer, after denying each and every allegation in the amended petition, sets up a plea of contributory negligence on the part of plaintiff, the contributory negligence alleged being that plaintiff had carelessly and negligently crawled under the wagon and between the front and rear wheels thereof while the wagon was in motion and proceeding along the street, and in so doing carelessly and negligently allowed his right arm to get under the rear wheel of the wagon.

A reply denying this was filed.

The trial coming on before the court and a jury, plaintiff dismissed as to the defendant Heydt Bakery and thereafter the trial proceeded against the American Bakery Company alone and resulted in a verdict and judgment in favor of plaintiff and against that defendant in the sum of \$600, from

which after interposing a motion for new trial as well as a motion in arrest of judgment and saving exception to the overruling of these motions, the American Bakery Company duly perfected its appeal to this court.

The learned counsel for appellant, in their printed argument upon which the cause is submitted, state that errors are assigned in only two respects in this case, aimed at the foundation of respondent's right to recover, and that question, counsel frankly state, is the only one they present for the consideration of the court; and whether error exists in the matter of giving or refusing instructions, save as to the instruction in the nature of a demurrer to the evidence, is a question which counsel say they will not discuss "for the reason that if respondent is entitled to recover under the theory pleaded and the evidence offered, we have no fault to find with the verdict and we see nothing to be gained by another trial." This very frank statement of counsel leaves as the only matters for our consideration the evidence and the action of the trial court in overruling the demurrer thereto. It is the contention of counsel for appellant that there is an entire failure of proof in the case entitling plaintiff to a recovery, and that the evidence in the case proves that under the law, plaintiff cannot recover.

The determination of these points involves a careful consideration of the testimony in the case.

Preliminary to taking up the testimony as to the accident, it is as well to say that the appliance referred to as a whirligig in the petition was also called an aeroplane by those who testified. One of these whirligigs was in evidence and a photograph of it is in the abstract. We shall hereafter designate it as the toy. Without reproducing the photograph, it is sufficient to say of the toy that it appears to have been composed of a pasteboard stem about eight inches long and about five-sixteenths of an inch in diameter. The stem is about the size of an ordinary lead pencil. It is hollow in the center. At either end two small wires about as large in thickness as a very small pin extend out at right angles from the stem for a distance of four inches and then each wire bends, forming practically a right angle with the balance of the wire, and extends then about two inches. On each of these wires thus shaped a piece of very thin glazed paper is pasted so that each piece of paper is triangular in shape. These pieces of paper constitute what may be called "wings." By taking hold of the stem and holding it stationary and winding the two wings at the bottom, and then letting go of the stem, this toy will sail through the air until the two wings, thus wound up, unwind, when the toy will drop to the ground. Small rubber bands extend from the wires, through the hollow part of the stem, and the winding process consists of simply twisting these rub-

ber bands around each other until they are tight, the unwinding of these bands causing the wings of the toy to revolve, thus keeping the toy in the air as long as that continues, dependent also on the velocity of the wind. There was no controversy over the fact that this toy was an advertising device, having printed on the wings matter calling attention to defendant's products. When sent up from the wagon by whoever was manipulating it in the manner before described, the toy will sail in whatever direction the wind happens to carry it.

Turn now to the testimony as to the happening of the accident.

Alexander Hight, the plaintiff, offered as a witness, was questioned by the court as to his conception of the obligation of an oath. Plaintiff, being accepted as a competent witness, said he was ten years old; had been going to school for four years. He testified that he was ten years of age in August following the accident, which had occurred on Saturday, July 9, 1910; that about eight o'clock on the morning of the day of the accident he was on the corner of Dickson street and Garrison avenue, playing with three other boys; saw the wagon around the corner. The people on the wagon threw out one of these toys and the boys ran after it and it flew under the wagon. He (plaintiff) thought the wagon was stopping. He stuck his hand under the wagon to get the toy which had fallen there or which had been carried there. The wagon then began to go faster and ran over his hand, or more properly, the arm, and crushed it. He did not remember how many of these toys had been thrown out before he was hurt. One of the boys on the wagon took the toy from under the seat and wound it up and it began flying around the wagon. After it flew under the wagon he (plaintiff) went to get it. When he undertook to do that he did not think of the wagon going over his arm; that when one of these toys had been thrown up before, the boys all began running after it. Plaintiff exhibited his injured arm to the jury.

On cross-examination plaintiff testified that his home was on the north side of Dickson street, about eight houses east of Garrison avenue; had lived in that house about four years, during all of which time he had attended the Divoll School, which is about a block south of where plaintiff lived. On the morning of the accident he was playing on the corner of Dickson street and Garrison avenue; was playing on the south side of Dickson street in front of the house in which one Charles Barnett lived; was on the south side of Dickson street when he first saw the wagon. He and the other boys were playing with some pictures and after awhile the wagon came around the corner and they were throwing out these toys and he and the other boys all ran after them and one of the toys flew under the wagon and began whirl-

ing around. He did not remember how many toys he saw thrown out that morning; had seen some others thrown out but did not know where they went. When the one was thrown out which he tried to get, the wagon and team were two or three houses east of Garrison avenue; that before the wagon got around the corner he (plaintiff) was in front of Charles Barnett's house; when the whirligig was thrown out he (plaintiff) went further down the street, all the time on the south side of the street. The people on the wagon threw out the toy on the north side and it began going around on the north side. He ran around the back end of the wagon to the north side of it, got on his knees and reached between the front and rear wheels on the north side of the wagon. When he got on the north side of the wagon he was within fifteen or twenty feet from the car track. During all this time the team was moving, the driver of it sitting on the south side of the wagon. There were milk cans on the wagon, piled up about two feet or more, the highest part of the load being in the middle of the wagon. The top of the row of cans in the center of the wagon came above the top of the seat about a foot. The driver was sitting on the south side of this row of cans, sitting on the seat of the wagon. After the wagon ran over his arm it went about four houses and then stopped. The team was walking all the time, going very slowly. When plaintiff started for the south side of the street to run around the rear end of the wagon, he did not notice what the driver was doing. The remainder of his testimony related to the extent of his injury. On being recalled for further cross-examination, plaintiff testified that the wagon referred to was a large wagon and that he did not think at the time that if he got his arm under the wheel he would be hurt; he thought the wagon had stopped; he knew if he got in front of a moving wagon or got his hand under the wheel and the wheel ran over it, he would be hurt but he "thought this wagon would stop and wouldn't go for a long time." This is substantially all the testimony of plaintiff himself relating to his injury.

A witness named Blum, testifying for plaintiff, said in direct examination that he was a shoemaker by trade, living at 2933 Dickson street. He was on the front stairway of his house on the day of the accident examining his mail. He saw a team and wagon, the latter loaded with fancy milk cans and one man standing in the center of the wagon throwing off some toys and two men sitting on the wagon; that the toys that he saw were similar to one shown at the trial; saw one of them fly around the wagon and around the horses and eight or ten boys were running after it to get hold of it. Witness looked back at his mail and in half a minute heard something and looking again saw plaintiff being pulled from

under the wheels of the wagon; saw the children running to get these toys; after the accident, had assisted in carrying plaintiff to his home, he living in the same apartment with plaintiff and knowing him before he was hurt. On cross-examination he testified that he saw the team come from the south side of Garrison avenue and turn east on Dickson street, keeping on the south side of that street. There was a single car track on Dickson street and the wagon was on the south side of the car track and going east. It was about three doors away from the corner of Garrison avenue on Dickson street that he saw them take plaintiff from under the wagon. When the accident occurred witness was three or four houses east of where the accident occurred and when it occurred the wagon was going toward the east. The horses were proceeding at a walk. The boys were taking plaintiff from back of the rear wheel; the rear wheel had gone over plaintiff. They were taking him out on the north side of the wagon; that he (witness) "is not quite sure whether there were three people on the wagon because he got excited"; that the wagon was loaded with some new milk cans piled like steps, the row in the center being the highest. They were about four and a half feet high from the bed of the wagon and eight or ten inches higher than the seat on which the driver was sitting. After the accident happened the wagon and team continued on east on Dickson street. The accident happened about 8:30 o'clock in the morning and he saw plaintiff before the wagon came along. Plaintiff was then on the corner of Garrison avenue, playing with some other boys on the sidewalk on the north side of the street. He saw plaintiff when he left to go toward the wagon. Plaintiff and six other boys ran out when they saw the team coming and started to run after the toys; that there were one or two toys sent up before the wagon passed the boys and then the wagon turned in on to Dickson street and some more were thrown out. The wagon was some ten or twelve feet from the corner before plaintiff ran out from the sidewalk, he being on the north side of Dickson street and on the east side of Garrison avenue, on the northeast corner of Garrison and Dickson. On re-direct examination this witness testified that he thought there were three persons on the wagon; could not tell how large they were; they were the men or boys who were managing the wagon.

Charles Barnett, sixteen years old, a witness on behalf of plaintiff, testified that at the time plaintiff was injured he (witness) was standing on the steps of his home, which was the corner house on the southeast corner of Dickson and Garrison; saw four or five boys there on the street; saw defendant's wagon coming down Dickson street; that when it was in front of his house the people on the wagon let one of the toys go and it went in the street. A little further

down they let out another one of these toys which went to the north of the wagon and then between the front and back wheels. "The boys were out there trying to get this whirligig." Plaintiff got down on his knees and reached under the wagon, which was going slow and reached between the two wheels and the back wheel passed over plaintiff's arm. The people on the wagon had thrown out one of these toys before they threw the one out which plaintiff was trying to get when he was injured; that this latter toy did not go up very far, went about fifteen feet and he "guessed" the wind carried it between the two wheels. There were two men on the wagon. Plaintiff had been playing around there for some fifteen minutes. The wagon was going pretty slow and the horses were in a slow walk. On cross-examination this witness repeated that when the wagon passed witness and when the accident happened the horses were going in a walk. There were two boys or men on the seat of the wagon. The seat was on the front part of the wagon and one of these people was driving and one of them was giving out these toys; that the one driving was on the right hand or south side of the seat and the one throwing out the toys was sitting on the north side of the seat. Witness saw plaintiff run out to get the toy and get down on his knees on the north side of the wagon between the front wheel and the rear wheel of the wagon and reach under the wagon and between the wheels to get the toy and while reaching in there the rear wheel on the north side of the wagon ran over his arm. Some man came along the street and called to those in the wagon, "Stop, you have hurt a boy." They immediately stopped. Those on the wagon had been looking ahead of them; did not notice either of them turning around at any time. Plaintiff ran out from the sidewalk from behind the wagon. The team and part of the wagon had gone on by plaintiff. Three boys started out toward the wagon with plaintiff; they all seemed to be in a hurry but witness had not noticed whether they were running or not; they were all together ready to get the toy, but they didn't get down after it.

Julian Hight, an older brother of plaintiff, testified that he was with plaintiff at the time of the accident. Before it happened he and plaintiff had been playing on the sidewalk on Dickson street. They saw the wagon coming over and one man was winding up the toy which was thrown into the air and they all ran after it. Plaintiff ran after it and it went under the wagon and plaintiff stuck his hand under between the two wheels and went to jerk his hand out when the wheel went over his arm. The wagon was going very slow. There were two persons on it, one of them driving and the other throwing out the toys. When the toys were thrown out the children ran after

them. All the boys ran after them and tried to get them.

On cross-examination this witness testified that they were all playing on the south side of Dickson street; that they started from that side when they ran after the toy; they saw the wagon and ran across the street and stopped and ran toward the west to come up with it; ran across the street in front of the wagon, running on the north side of Dickson street, then turned and ran back on Dickson street; when the toy was thrown out they (the boys) were on the south side of the street and the toy went toward the north and then south under the wagon; the boys all chased it from the south side across to the north side and until it went under the wagon between the front and rear wheels on the north side. The wagon was going all the time. His brother reached under the wagon to get the toy from between the front and rear wheels. There were milk cans on the wagon and banners on the side of it with the name of the brand of bread manufactured by defendant.

Beyond the testimony of the surgeon and of a sister-in-law of plaintiff as to the extent of plaintiff's injury and his suffering, this was all the testimony in chief for plaintiff.

Defendant at the close of the testimony in chief asked an instruction that under the pleadings and evidence plaintiff was not entitled to recover. This was refused and exceptions saved.

Defendant put on a witness who testified that he lived on Dickson street at the time of the accident; was on the corner of Dickson and Garrison waiting for a car. Defendant's wagon turned the corner to go east on Dickson street; as the wagon came down a hundred feet from the corner a man on it threw out one of these toys. The boys were near the northeast corner of Garrison and Dickson. They ran toward the back of the wagon and one little boy ran ahead of the rest of them, laid on his stomach, reached his arm under the wagon between the first and second wheel and his arm was run over. A street car coming along, witness got on it and as the car caught up to the wagon, witness called to the driver to stop that he had ran over a boy. The driver had not known it. There were two people on the wagon on the front seat. The wagon was loaded with milk cans, three rows high, the highest part of the load of cans being in the center. The person driving the team was a young man between twenty-two and twenty-five years old. He was sitting on the right hand side of the wagon to the south of the row of cans that was highest. Witness saw plaintiff before he ran out into the street. He (witness) was then standing at the second door from the corner of Dickson and Garrison on the north. The team was going very slowly; it went about fifty feet after

running over plaintiff before it stopped. Plaintiff had left the sidewalk as soon as this advertising toy was thrown out and was about ten feet from the rear end of the wagon before he started to crawl under. On cross-examination this witness testified that he stood four or five minutes waiting for a car; that in the meantime this wagon had gone about a hundred or a hundred and fifty feet east of where he was standing; that nobody picked plaintiff up. That after it ran over the plaintiff's arm, the wagon went on about fifty feet, when witness called to the people on the wagon to stop. He did that because the driver had not seen the accident. Plaintiff was about seventy-five feet from witness when he was run over; he was run over about a hundred feet from the corner and witness was about twenty-five feet from the corner, which he deemed about seventy-five feet between him and plaintiff, when plaintiff was run over. This is all the evidence offered by defendant.

This is substantially all the testimony in the case as before stated, except that relating to the extent of the injury and the length of confinement of the plaintiff. As counsel make no point on the amount of the verdict, provided one is to be returned at all, it is unnecessary to set out this part of it.

Merritt U. Hayden and H. H. Scott, both of St. Louis, for appellant. Seneca N. Taylor, of St. Louis, for respondent.

REYNOLDS, P. J. (after stating the facts as above). Beyond all question this case was pleaded by plaintiff and tried on the theory that it was one involving what is sometimes called "the turntable," or "attractive nuisance," or "attractive appliance" law.

Referring to that doctrine as applied to cases of injuries to children sustained by playing around or resorting to such appliances, and without any desire to go into a full discussion of it or pedantically to go over its history, it is not improper to say that it is generally conceded to have had its origin in the decision by the Court of Queen's Bench in the case of *Lynch v. Nurdin*, 1 Adolphus & Ellis (N. S.) 422, also reported 41 E. C. L. 422. It is rather curious to note the various constructions that have been placed upon *Lynch v. Nurdin*, a decision announced by Lord Denman, Chief Justice of the Court of Queen's Bench, in 1841, by the several courts, not only of our country but of Great Britain. Great diversity of opinion has been shown as to the exact meaning and scope of that decision. A very full citation and careful analysis of the decisions of the various courts on this much vexed question is in *Bottum's Adm'r v. Hawks*, 84 Vt. 370, 79 Atl. 858, 35 L. R. A. (N. S.) 440. We refer those desirous of going into this question to the opinion of Judge Powers in that case.

Whatever diversity of opinion there may

have been in the courts of Great Britain as to what was really decided in *Lynch v. Nurdin*, so far as the courts of that country are concerned its interpretation seems to have been definitely settled by the decision of the House of Lords in *Cooke v. Midland Great Western Railway of Ireland*, L. R. App. Cases (1909) 229, in which latter case *Lynch v. Nurdin* is expressly approved and applied in a turntable case.

Sioux City & P. R. R. Co. v. Stout, 17 Wall. 657, 21 L. Ed. 745, is the first case in the United States Supreme Court in which the turntable question arose and in which it was recognized in connection with injury to a child, who had played about it. It reached the Supreme Court on error to the Circuit Court of the District of Nebraska, in which court the case had been tried before Judges Dillon and Dundy. See 2 Dill. 294, Fed. Cas. Nos. 13,503 and 13,504. Mr. Justice Hunt, who delivered the opinion, of the Supreme Court, an opinion concurred in by all the Justices, cites *Lynch v. Nurdin* as authority in support of the claim of liability for injuries to a child sustained while playing with a turntable. There has been very great discussion of and disagreement as to the *Stout* Case in the decisions of the state courts which followed after that case had been determined, the applicability of *Lynch v. Nurdin* to a turntable case being sharply challenged. That its principle was to be applied to such cases in the national courts was finally and definitely determined by the Supreme Court of the United States in *Union Pacific Railroad Co. v. McDonald*, 152 U. S. 262, 14 Sup. Ct. 619, 38 L. Ed. 434.

Turning to the decisions in our own state, it will be found that the rule invoked in the turntable cases has been under consideration by our court as well as by the Supreme Court in several cases. As said by Judge Lamm in *Kelly v. Benas*, 217 Mo. 1, loc. cit. 11, 116 S. W. 557, 20 L. R. A. (N. S.) 903, referring to the turntable rule: "It is established in our law, and doubtless on principle ought to be applied (in those jurisdictions asserting the doctrine) to other cases coming strictly within the limits of the doctrine and presenting every ear-marking element upon which liability is predicated in the principal case. While this is so, the manifest distress and injustice flowing from unnecessarily extending the doctrine, or loosely applying it to many conceivable cases, has caused those courts accepting it to restrict its application to the narrowest bounds." Citations of numerous cases from our Supreme Court illustrating this follow. See particularly *Witte v. Stifel*, 128 Mo. 295, 28 S. W. 891, 47 Am. St. Rep. 668; *Barney v. H. & St. J. Ry. Co.*, 126 Mo. 372, 28 S. W. 1069, 26 L. R. A. 847. The last reported decision of our Supreme Court on the question to which our attention has been called or which has come under

our observation is the case of *O'Hara v. Laclede Gas Light Co.*, not yet officially reported but to be found in 148 S. W. 884. In this latter case Judge Graves, who delivered the opinion of the court, quotes at length from the decision in *Brown v. Salt Lake City*, 33 Utah, 222, loc. cit. 236, 93 Pac. 570, 14 L. R. A. (N. S.) 619, 126 Am. St. Rep. 828, 14 Ann. Cas. 1004, and following, as stating the position of the several courts throughout the country on this rule. We refer to that case and to the quotation from it made by Judge Graves. Among other cases cited in *Brown v. Salt Lake City* is the case of *Overholt v. Vieths*, 93 Mo. 422, 6 S. W. 74, 3 Am. St. Rep. 557. Following the quotation above mentioned, Judge Graves refers for a full review of all the cases of our Supreme Court beginning with *Overholt v. Vieths*, supra, to the recent case of *Kelly v. Benas*, supra, quoting at length from that case. Discussing the facts in *O'Hara v. Laclede Gas Light Company*, supra, Judge Graves says: "In fact, the turntable cases are anomalous, and it is the practice of the courts to carry their doctrine no further than the previous decisions compel." So it is held by our court in *Houck v. Chicago & A. R. Co.*, 116 Mo. App. 559, loc. cit. 568, 92 S. W. 738; *Marcheck v. Klute*, 133 Mo. App. 280, loc. cit. 291, 113 S. W. 654. The conclusion in the *O'Hara* Case is that the theory of the turntable or attractive nuisance cases was not applicable to such a case as the one then before the court.

[1-3] It is further said by the court in that case that the plaintiff had constructed her petition on the turntable doctrine of negligence and that so constructing it and submitting the case to the jury on that construction of it, it was unnecessary for the court to concern itself in an endeavor to arrive at the proper construction to be given to the petition; that "by the theory adopted below she (plaintiff) is bound here." This applies to the case now before us. That this case is distinctly presented by the petition and by the evidence as one in which the doctrine of the turntable, attractive nuisance or attractive appliance cases is sought to be invoked, is clear. Whatever diversity of views may be held by the courts as to the application of the doctrine, or even as to whether it can be sustained at all, it is fairly clear that these factors are held by all the courts recognizing the doctrine as necessary to its application: First, the machinery or appliance, the operation of which was the direct cause of the injury, must have been a dangerous appliance in itself when set in motion, as is a turntable; or it was of a kind liable to become dangerous from the position or condition in which it is left, if set in motion, this latter seeming to fall in with *Lynch v. Nurdin*. There the dangerous appliance, if we may call it so, was a horse and cart, articles neither in themselves or in combination

dangerous. Second, negligence by the defendant in leaving these appliances or things so unguarded, unsecured or unattended, in an open place frequented by children, as to allow of their being put in motion by the children who obtain access to them. It is to be noted that the doctrine is applied only in those cases in which the person injured is a child, one of tender age; on the borderland, as to years, between the irresponsibility of childhood and the responsibility of those of mature years. No case assumes to apply the doctrine to an adult. It is clear from all the cases, that at the very foundation of liability for the injury is the negligence of the defendant. Unless that is proven, the doctrine, the benefit of the rule, cannot be invoked. It seems pretty well settled, on analyzing the cases, that the rule is to be invoked, not as a foundation for the liability of the defendant, but to meet the defense of contributory negligence on the part of the plaintiff, a child, injured. It is applied, not as a weapon of attack or as a ground for liability, but as a defense on the part of the plaintiff, a minor, one of tender years, against liability for his own acts of negligence, carelessness or even trespass in going upon the premises where the appliance is maintained. This is made very clear by *Bottom's Adm'r v. Hawks*, supra, even though Judge Powers, speaking for the Supreme Court of Vermont in that case, says that it seems "from a patient consideration of the whole subject in the light of all the cases at hand, that it is impossible to justify the doctrine on common-law principles." As is well argued in that case, while suffering a dangerous appliance, which in itself or in its position was a menace to children to remain unguarded, was an act of deliberate carelessness, "It does not necessarily follow that this action will lie. 'Negligence' and 'actionable negligence' are distinguishable terms; carelessness does not always involve liability. Before liability attaches, a duty must arise—a duty on the part of the party charged toward the party injured. So," says Judge Powers, "our discussion begins with the question: Did the defendant owe the intestate a duty, and, if so, was it the duty of active care? If the answer to both branches of this question is affirmative, then, so far as the main question is concerned, liability is stated in this declaration."

[4] In the case at bar we do not think it necessary to place our decision upon the construction of the petition to determine whether it states any cause of action. There is a verdict and judgment in this case, so that if a cause of action is stated, although imperfectly, the defendant having pleaded over after demurrer, there would be no cause for setting aside the verdict or arresting the judgment. That the petition in this case states a cause of action is not challenged. That it distinctly proceeds upon the theory of an at-

tractive appliance and is distinctly bottomed on the doctrine of the turntable cases and that the case was tried upon that theory in the circuit court, admits of no doubt, as we have before remarked. What is claimed by counsel for appellant is a failure of proof of the material averments of the petition.

Returning to a consideration of the evidence in the case, substantially all of which we have set out, we are confronted with the question as to whether that evidence entitled the plaintiff to go to the jury: whether it shows actionable negligence on the part of defendant.

[5] It is averred that plaintiff, a child, saw one of these toys fall under a wagon being driven by employes of defendant and rushed out to obtain it, placing his hand and arm under the wagon to get it. The actionable negligence then here charged is that defendant's employes driving the wagon "did then and there carelessly and negligently cause the hind wheel of said wagon to pass over plaintiff's right arm." Again it is averred, that defendants and their employes "in driving said wagon, and throwing said whirligigs into the air, knew, or by the exercise of ordinary care could have known that said toys would attract plaintiff and other children of immature understanding into a place of danger of being injured by said wagon, and cause them to rush to obtain such whirligigs as would fall under the wagon, and that in doing so they were likely to maim or kill such children by running over them," and it is charged "that the act of so driving over the streets and with such heavy wagon, throwing such whirligigs into the air, as aforesaid, and thereby enticing children to struggle to obtain said whirligigs, and to place their hands and arms under the wagon to obtain the same, and driving heedlessly, without noticing a child who had put his hand and arm under the wagon to obtain such whirligig, and passing over and crushing and breaking his arm, was an act of negligence on the part of the defendants." It is furthermore averred in the petition that "it was the purpose of the defendants in causing said large wagon to pass through said Dickson street, and in causing said whirligigs to be thrown into the air, to attract the attention of children thereto, and that said whirligigs were exceedingly attractive to children, and in this way defendants sought to advertise, and did advertise their commodities."

Taking up this last assignment first, it is to be said of it that it is entirely unsustained by any evidence in the case. There is not a syllable or line of testimony tending to show that it was the purpose of defendant to attract the attention of children to the whirligigs, the wagon or the products of the defendant. Nor is there any evidence in the case from which any such purpose may be said to have been proven. It is not to be inferred that the children residing on the

streets along which this wagon was driven and the toys turned loose were prospective customers. The advertising of the product undoubtedly was intended to reach housekeepers; the toys and the piled up cans, the banner on the wagon, were all parts of an advertising scheme. But it is a far cry to say that by attracting the attention of the children to the toys the attention of the consumers would be attracted to the product. Yet this is the argument that must be relied on to sustain this averment of the petition. It is argued by counsel for appellant that this is a material averment in this petition. Those counsel argue that if the purpose of sending up these whirligigs or toys was to invite the attention of children and to cause them to congregate around the wagon of the defendant for the purpose of increasing the business of defendant, it would seem that defendant owed respondent a very different duty from that which it owed him if he got in the way of the wagon through some impulse of his own and without appellant's knowledge or consent. We think this is a sound argument. We further agree that the burden of proof of this averment was on the plaintiff, respondent here. We hold he has failed to make any proof of it.

Recurring to the other allegations of negligence, careful consideration of the testimony in the case forces us to the conclusion that it fails to establish any actionable negligence on the part of defendant's employes. It appears by the evidence that defendant's employes were driving the team and wagon through the public streets of the city of St. Louis. This they had an undoubted right to do; the right of access to and user of those streets. That the team was being driven at a slow walk, is the unvarying and contradicted testimony of every witness in the case, witnesses produced and introduced by plaintiff. Even the plaintiff himself so testified. There were two persons on that wagon in charge of the team and of the appliances, one of them, the driver, the other a young man who was turning loose these toys. It is true that one of plaintiff's witnesses testifies that he thought he saw three people there, one of them standing in the center of the wagon throwing out these toys. This witness did not state that as a positive fact but stated it as a matter of opinion about which he admitted he was not certain. He is contradicted in this by every other witness of the plaintiff, all of whom were much nearer to the wagon at the time the accident happened than that witness. He was some distance from it and at the time, as he himself testifies, was engaged in opening and examining his mail, which he had in his hand. He says he looked up in a very casual way at the wagon as it passed him. Obviously he paid no particular attention to it or as to who was on it, until he saw his neighbor, the plaintiff, being picked up after the

wagon had passed over his arm. He is contradicted in his assertion of there being three people in this wagon by material facts in the case. He says that he thought this third person was standing in the center of the wagon, while the evidence of every other witness in the case is that the center of the wagon, the bed back of the seat, was filled by tin cans which were piled up in the shape of a pyramid or steps, the apex of the pyramid directly over the center of the wagon and above the seat upon which the two occupants in charge of the wagon were seated. We can assume that there were two persons in charge of this wagon and seated at the proper place in the wagon on the seat. The driver was attending to the team, the other person, apparently a boy or young man, in front of this pyramid or pile of tin cans and of the seat, taking these toys from under the seat, winding them up and throwing them into the air. Both were looking to the front. Beyond question these were guilty of no actionable negligence in driving this wagon. They did not know that they had run over any one until after the wagon had gone some distance and were then told of it by a bystander. It would be a hard rule to say that those in charge of a team were required to look behind them to see if any accident was liable to happen after their vehicle had passed. All of our courts which have passed on the question of the duty of those driving a team or an engine, have, so far as we have read, confined the duty of the driver to "looking ahead," according to whether he was advancing or backing with his vehicle. We know of no case laying down any duty upon these to look behind and watch to see what has happened after the vehicle has passed. There is an exception to this rule, in so far as automobiles are concerned. See section 12, p. 329, Acts 1911. Their attention is and must be to the front. They were liable if they run over any one who was in front or could be seen in front of them, or were going at such speed as to endanger those who might also be using the public ways.

The evidence is without contradiction that these toys were thrown out toward the front of the wagon, or toward the side. If any of them passed behind the wagon they, and any one running after them, were out of the vision of the persons in charge of the wagon and who were sending the toys into the air. Nor can it be said to be an act of negligence on the part of these persons that they did not watch the flight of these toys to see what happened in connection with loosening them on the public street. There is not a particle of evidence tending to show that any boys followed any one of these toys except the boys who followed this particular toy and which this plaintiff endeavored to secure. Plaintiff and these boys did not go in front of the team. They went behind it.

There is evidence that other of these toys were set flying, but as to where they flew, what became of them, is without any evidence. Nor is there any evidence in the case that any children, or any other person for that matter, attempted to secure them or ran out into the street to get hold of them. That the toys were attractive to children is beyond question. But conceding that, is far from admitting that it proved or even tended to prove that those setting them off had any reason to apprehend that children would follow them under the wagon, especially go between the wheels of the wagon while it was in motion for the purpose of getting one. In fact plaintiff was the only boy who did reach under the wagon. It cannot be held that the law would require those in charge of this wagon, when they threw out one of these toys, to watch its flight, and to stop the team until they saw what had become of it; such requirement would be unreasonable. There was nothing therefore about the manner in which these toys were set free by the employes of defendant, or from the actions of the boys on the street, to warn them that setting the toys free was liable to inflict any injury whatever upon anybody. It was not actionable negligence, as we hold, to set loose these toys.

[6] As every witness testifies, even as this plaintiff himself testifies, when the boy, the plaintiff here, put his arm under the wagon to get hold of this toy, to reach it, he knew that the wagon was moving, that the wheels were turning. He was old enough to know that if he put his arm in front of a moving wheel and left it there, that he was going to be hurt; he was of sufficient discretion to know that; he says he did know it. His excuse is that he thought the wagon had stopped or was going to stop. It is not likely, from the facts in evidence in the case that he thought anything about this. Like any other boy of his age, the chances all are that at the time, if he thought at all, he thought he would be quick enough to get the toy from under the wagon before the wheel would reach him. He took that chance and lost. The doctrine of attractive appliances, of the turntable cases, is therefore inapplicable here and cannot relieve plaintiff of the charge of contributory negligence; cannot be used to put the responsibility for the injury, which he undoubtedly sustained upon this defendant.

[7] Furthermore, the alleged attractiveness of the toy was not the causa causans of the injury. That was a remote cause. The immediate cause was plaintiff placing his arm between the front and rear wheels of a moving vehicle; one that he knew was moving and which he had no reason to believe would stop.

For all these reasons, we are of the opinion that plaintiff cannot recover and that

the learned trial court erred in sending the case to the jury. The judgment of the circuit court is accordingly reversed.

NORTONI and CAULFIELD, JJ., concur.

BIRCH TREE STATE BANK v. DOWLER.
(Springfield Court of Appeals. Missouri. Dec. 7, 1912.)

1. TRIAL (§ 253*)—INSTRUCTIONS—IGNORING ISSUES.

Where, in an action on a note given by defendant for kitchen cabinets for resale in a designated county, defendant pleaded failure of consideration and fraud, and testified that before giving the note the payee informed him that he had never sold kitchen cabinets in the county, while in fact he had canvassed part of the county with a similar, but cheaper, cabinet, and had sold about 65, an instruction that, if the payee falsely and fraudulently represented to defendant that the county had not been canvassed, and defendant, relying on the representation, gave his note, and the county had been worked by the payee and others, the representation was false, defeating a recovery, was erroneous, because declaring as a matter of law that the representation was actionable, leaving out of consideration the question of its materiality or injury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 613-623; Dec. Dig. § 253.*]

2. CANCELLATION OF INSTRUMENTS (§ 4*)—GROUNDS—FRAUD.

One seeking to annul an instrument, on the ground that it was obtained by fraud, must show that the representations were as to a material fact, and that they contributed to the injury.

[Ed. Note.—For other cases, see Cancellation of Instruments, Cent. Dig. § 1; Dec. Dig. § 4.*]

3. FRAUD (§ 18*)—ACTIONS FOR DAMAGES—EVIDENCE.

One suing for damages from fraudulent representations, inducing the execution of an instrument, must show that the representations were as to a material fact, and that they contributed to the injury.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. § 18; Dec. Dig. § 18.*]

4. FRAUD (§ 20*)—ACTIONS FOR DAMAGES—EVIDENCE.

A representation, to be actionable as a fraudulent representation, must be one on which the complaining party relied, and by which he was actually misled, to his injury; but the party complaining need not testify directly that he was influenced by and relied on the representation, but such fact may be established by other circumstances.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. §§ 17, 18; Dec. Dig. § 20.*]

Appeal from Circuit Court, Shannon County; W. N. Evans, Judge.

Action by the Birch Tree State Bank against T. H. Dowler. From a judgment for defendant, plaintiff appeals. Reversed and remanded.

See, also, 163 Mo. App. 65, 145 S. W. 843.

Lew R. Thomason, of Poplar Bluff, and L. B. Shuck, of Eminence, for appellant. Green & Wayland, of West Plains, and Orchard & Cunningham, of Eminence, for respondent.

GRAY, J. This was an action by the plaintiff, Birch Tree State Bank, a corporation, against the defendant, upon his negotiable promissory note, which was drawn in the usual form for the payment of the sum of \$225. The note was originally executed by defendant T. H. Dowler, to W. H. Hurt for 112½ kitchen cabinets. The note was subsequently assigned for value to the Birch Tree State Bank, and, not being honored when it became due, the present suit was brought by the assignee.

The note was executed under the following circumstances: W. H. Hurt was the agent for the Mound City kitchen cabinets, and sold to the defendant, as we have stated, 112½ of these cabinets, for which the defendant was to pay him \$12 each, upon the following terms: Four dollars was to be paid by note for each of the cabinets, and the balance of the purchase price, \$8, for each of the cabinets f. o. b. St. Louis, was to be paid when they were ordered, and the defendant was to have the option of ordering as many of the cabinets as he chose upon payment of this additional \$8, but by the contract of the parties the sale was restricted to Howell county, and all sales were to be made within one year from the date of the contract. Under the agreement the defendant executed to W. H. Hurt these two promissory notes, each for \$225. Subsequently the defendant ordered under his contract 4 of these kitchen cabinets, which he sold. He thereafter sent an order for more cabinets, but for some reason the order was not delivered, but returned.

Owing to the condition of the record in this case, we do not feel justified in passing on all the issues that are really presented by the evidence. While both parties have filed what they style "abstract of the record," the pleadings are not set out in either. In the appellant's abstract, it is said: "Petition of the plaintiff in the usual form; action on the following promissory note." As to what is contained in the answer, only the following appears in the abstract: "The answer admits the execution of the note, and pleads, in defense of plaintiff's action, failure of consideration, and fraud in the procurement of the note by the payee, and a knowledge of said fraud by the plaintiff." But there is enough in the record, however, properly preserved by appellant, to convince us that appellant's complaint against respondent's instruction No. 1 is meritorious.

[1] The defendant testified that, prior to the time he gave the note sued on, he inquired of the payee if he had ever sold kitchen cabinets in Howell county, and that the payee said he had not, and that he had never been west of the Mississippi river. The evidence shows that in 1901 the payee had canvassed a part of Howell county with a similar, but cheaper, cabinet, and had sold about 65 in the county. The defendant gave the following testimony: "Q. Did you try

to sell these kitchen cabinets in Howell county? A. Yes; but I found they had sold something up there about the same. Q. And you tried to sell these kitchen cabinets there? A. Yes, sir. Q. Why couldn't you sell them? A. They said that was more than they were worth."

Defendant's instruction No. 1 reads: "The court instructs the jury that if you find and believe, from the evidence, that W. H. Hurt sold kitchen cabinets to the defendant, T. H. Dowler, and gave him the exclusive right to sell such kitchen cabinets in Howell county, Mo., for one year or less, and falsely and fraudulently represented to him that Howell county had never been worked, and that the defendant, relying on said representations, gave his two notes to W. H. Hurt for \$225 each, and that he, the defendant, relied on said representations made by Hurt, and that said county had been worked by Hurt and others, or by Hurt alone, in the sale of such kitchen cabinet, then such representations would be false; and if you find that said false and fraudulent representations were made as above stated, then and in such event, before the plaintiff would be entitled to recover, it must show by a greater weight of the evidence the following facts: (1) That it is the bona fide owner of the note in suit. (2) That it purchased said note for value before maturity. (3) That it had no knowledge of any fraud perpetrated by W. H. Hurt, as an inducement to the defendant to sign said note." There was not a word of testimony that the kitchen cabinet had ever been sold in Howell county. As we have stated, there was testimony that several years before a cheaper, but somewhat similar, cabinet had been sold in West Plains, Howell county; but there was no testimony that the cabinet defendant had purchased had ever been sold in that county.

[2, 3] The instruction is highly prejudicial, under the testimony, for another reason: By it the jurors were told that if Hurt falsely and fraudulently represented to defendant that Howell county had not been canvassed, and that the defendant, relying on said representation, gave his notes, and that said county had been worked by Hurt and others, then such representation would be false, etc. This instruction declares as a matter of law, that such a representation is actionable, and leaves out of consideration entirely the question whether it was material or injurious. The law is well settled that where it is sought to annul an instrument, the execution of which was obtained by false and fraudulent representations, or where it is sought to recover damages for such representations, it must be shown that the representations were as to a material fact, and that they contributed to injury. *Brownlee v. Hewitt*, 1 Mo. App. 360; *Smith v. Dye*, 88 Mo. 581; *Feller v. McKillip*, 100 Mo. App. 660, 75 S. W. 379; *Thompson v. Newell*, 118

Mo. App. 405, 94 S. W. 557; *Champion Funding & F. Co. v. Heskett*, 125 Mo. App. 516, 102 S. W. 1050.

[4] Since the case is to be retried, we call attention to the fact that the evidence does not show that the defendant relied on the statement of Hurt that Howell county had not been worked, and that he would not have entered into the contract, had he known that fact. In order to make a misrepresentation fraudulent, it must be one upon which the complaining party relied, and by which he was actually misled to his injury, and in a legal sense a person is not damaged by a false representation by which he is not influenced, and it is incumbent upon the party, attempting to recover for fraud or deceit found upon false representations, to show that he was influenced by them, and in all cases it is a fact which should be averred and must be maintained by evidence. *Wannell v. Kem et al.*, 57 Mo. 478; *Noble v. Buddy et al.*, 160 Mo. App. 318, 142 S. W. 438; *Bailey v. Smock*, 61 Mo. 213; *Webb v. Rockefeller*, 195 Mo. loc. cit. 74, 93 S. W. 772, 6 L. R. A. (N. S.) 872; *Sioux Banking Co. v. Kendall*, 6 S. D. 543, 62 N. W. 377, and cases therein cited; *Halliwell Cement Co. v. Stewart*, 103 Mo. App. 182, 77 S. W. 124.

It is not necessary for the complaining party to testify directly that he was influenced by and made the contract relying on the representation as such fact may be established by other facts and circumstances in the case. *Chilson v. Houston*, 9 N. D. 498, 84 N. W. 354. In a case where a person was induced to trade for land, and the seller represented that the tract contained a certain number of acres, which was false, it may well be said that, when the complaining party has proven that there was a material difference between the number of acres represented and the number actually contained in the tract, and that he paid a valuable consideration for the property, he has made a question for the jury on the issue as to whether he relied on the false statements concerning the number of acres, and that proof of any shortage in the number of acres would be proof of injury and damage by the representation. But in this case, the misrepresentation was that Howell county had not been worked, and the evidence shows that several years before a part of the county had been canvassed for a similar, but cheaper and inferior, article. From the proof of these facts alone, how can a court or jury say that the defendant would not have entered into the contract, had Hurt told him that 10 years before he had, in a part of the county, sold an inferior and cheaper article. In *Bailey v. Smock*, supra, it is said: "The court should be satisfied by the clearest evidence of the fraudulent representations and that they were made under such circumstances as to show the contract was founded upon

them." The defendant did not testify that he believed the statements of Hurt, or that he was induced by them to enter into the contract, and, even when he was asked why he could not sell the cabinets in Howell county, he said that the persons to whom he tried to sell said the price was too high.

What we have said regarding the issue will depend upon the allegations of the answer and reply thereto. The judgment will be reversed, and the cause remanded.

NIXON, P. J. Under the evidence in this case, I am of the opinion that the plaintiff's requested instruction, in the nature of a directed verdict, should have been given by the trial court.

WALD v. WALD.

(St. Louis Court of Appeals. Missouri. Dec. 3, 1912.)

1. DIVORCE (§§ 245, 308*)—CUSTODY OF CHILDREN OF PARTIES—JURISDICTION OF COURT.

Under Rev. St. 1909, § 2361, authorizing the court at any time to review any order awarding alimony and the custody of children of the parties, the court granting a divorce retains jurisdiction as to the modification of a judgment touching the custody of the children, and the same may be brought to the attention of the court by motion in the original cause as a proceeding constituting only a continuance of the original jurisdiction of the court.

[Ed. Note.—For other cases, see *Divorce*, Cent. Dig. §§ 691-695, 793-795; Dec. Dig. §§ 245, 303.*]

2. DIVORCE (§ 300*)—CUSTODY OF CHILDREN OF PARTIES—JURISDICTION OF COURT.

Where the custody of a child is awarded in divorce proceedings, the child becomes a ward of the court, and the court should not permit its removal into another jurisdiction, unless its best interests require it.

[Ed. Note.—For other cases, see *Divorce*, Cent. Dig. § 789; Dec. Dig. § 300.*]

3. DIVORCE (§ 303*)—CUSTODY OF CHILDREN OF PARTIES—JURISDICTION OF COURT.

Where a wife obtained a divorce from her husband, and the court awarded to her the custody of the child, and she was about to remove it from the jurisdiction of the court, the husband, on motion for a modification of the judgment, was entitled to a hearing to determine whether the best interests of the child required its retention within the jurisdiction of the court, or whether the removal would best subserve its interests.

[Ed. Note.—For other cases, see *Divorce*, Cent. Dig. §§ 793-795; Dec. Dig. § 303.*]

Appeal from St. Louis Circuit Court; *Chas. Clafin Allen*, Judge.

Action by *Cad S. Wald* against *Emile M. Wald*. From a judgment denying the application of defendant to modify the order awarding the custody of a child of the parties, he appeals. Reversed and remanded.

This is an appeal from the judgment of the court denying defendant the right to introduce testimony on his motion to modify a decree of divorce entered against him

in favor of plaintiff several years theretofore with respect to the custody of the minor child of the parties. We adopt from defendant's (appellant's) brief the following statement of facts which reveals the question in controversy and the ruling of the court thereon:

"On October 8, 1904, the plaintiff in this proceeding recovered a decree of divorce from defendant and was awarded alimony and the custody of their minor child, Lucile, then aged six years; and on October 31, 1904, the decree was modified, allowing defendant to visit the child on Tuesday and Thursday evenings of each week, and allowing him to take her out on Saturday and Sunday of each week. In February, 1911, the defendant filed his motion in said cause, under section 2381, R. S. 1909, to modify the said decree touching alimony and touching the custody of said minor, in which motion the defendant, after reciting the then state of the record, alleged that he has at all times since the decree paid to plaintiff the alimony as in the decree provided; that he has at all times recognized and respected her right to the custody of said child, as in the decree provided; also that he has at all times since the decree taken advantage of the privilege granted to him of visiting the child on Tuesday and Thursday evenings, and of visiting or taking her out on Saturday and Sunday, of each week; that said child is now 13 years of age, and the relations between her and her father, the defendant, have been most filial and affectionate, and that, besides paying the alimony to the mother, the defendant has also from time to time, when occasion made it proper to do so, provided the child with such necessities and luxuries as his means permitted; that since the decree plaintiff has been residing with her mother and sister at 5450 Clemens avenue, St. Louis, Mo., and the child has been residing with her; and that defendant has always been permitted to visit her at the said abode.

"It is also alleged that plaintiff contemplates becoming married in the near future to a man residing at Seattle, Wash.; that her future husband is well able to provide for her support, and after the marriage she will no longer need alimony from the defendant to provide for her support; that plaintiff intends to remove said child to Seattle as her future home, and to permanently take the child from St. Louis, and beyond the jurisdiction of this court, and thus deprive the defendant of his right to visit and take out the child, as in the decree provided. It is also alleged that the best interests and welfare of the child demand that she be not taken away from the city of St. Louis, and beyond the jurisdiction of this court, and thus be deprived of the advantage of the superintending control of this court, in case her mother, through her conduct or through

the conduct of her future husband, forfeits her right of custody of said child; that the welfare of said child also demands that she be not taken into the home of a stepfather; also that she be not taken away from the school where she is now being educated, and from the companionship of her playmates and relatives, all of whom reside in the city of St. Louis; also that she be not taken away, so that she will lose the companionship, advice, and assistance of her father, the defendant, as assured to her under the decree.

"It is also alleged that defendant is in the employ of the Ferguson-McKinney Dry Goods Company, in St. Louis, and is in charge of their claim department; that he is earning \$100 per month; that he resides at 5017 Delmar avenue, is of good moral character, and enjoys good associates and good repute and standing; that he is well able to provide a proper and comfortable home for his said child, under proper superintendence, and to properly provide for her education and support and for her welfare; that he is able to have her make her home at his sister's house, where she will also have the benefit of the supervision and care of his sister, who is a widow and well qualified to look after the wants and needs of the child; or, if the court deems it more advantageous for the welfare of the child, defendant is willing to make any arrangement which the court may deem proper for the child to remain at the home of her maternal grandmother, with whom the child has resided and now resides; but, if such an arrangement be insisted upon, it should be made under such safeguards as may be necessary to guarantee that the said child will not be taken away or permitted to go beyond the jurisdiction of this court.

"Defendant prayed the court to review, modify, and change the decree touching alimony, and touching the custody of said child, in the following respects: That the order touching alimony, under which defendant is now obligated to pay plaintiff the sum of \$30 per month, be so modified that it is to terminate upon and in the event of plaintiff's remarriage; that the order touching the custody of the child be so modified that in the future the defendant alone be awarded the care, custody, and maintenance of the child, giving, however, to the plaintiff, the right to visit the child at such times and under such conditions as the court may deem reasonable, the custody of the child to be awarded to the defendant under such conditions, if any, as the court may see fit to impose; and defendant also prayed for a restraining order, restraining plaintiff from taking the child out of the city of St. Louis, or beyond the jurisdiction of the court, until otherwise ordered by the court, and that she be notified of the making of such restraining order and of the time when the hearing will

be had by the court upon the motion, and that she be required to produce the child in court upon the said hearing and to await the further orders of the court. The court set the motion for hearing, and issued a temporary restraining order, as prayed.

"On February 24, 1911, the parties appeared, and the motion came on for hearing. On an objection by plaintiff to the introduction of any evidence to be offered by defendant in support of the motion, the court took the motion and objection under advisement, and on March 2, 1912, entered an order sustaining the objection to the introduction of evidence vacating the restraining order previously issued, and overruling the motion of February 17, 1911, to modify the decree, and in so far as said motion asks for a change of the care, custody, and control of the child, the motion was denied. The court reserved jurisdiction over the cause and the parties, for the purpose of making such further orders with reference to the judgment for alimony as may hereafter be deemed meet and proper.

"In due time defendant filed his motion for a new trial. Defendant also offered to dismiss the specification as to alimony, and upon the court's refusal to permit the dismissal to be entered, defendant filed a motion, praying for leave to amend by dismissing the said specification. The latter motion, as well as the motion for a new trial, was overruled by the court, and defendant in due time perfected his appeal to this court. Defendant had also duly saved his exception to the orders of the court above complained of, and to the sustaining of the objection to the introduction of evidence, and to the order overruling defendant's motion for new trial.

"In view of the subsequent action of the court in vacating the order for alimony, when proof was subsequently submitted of the remarriage of the plaintiff, the defendant does not wish to raise, on this appeal, any question as to the propriety of the action of the court in refusing to vacate the order for alimony upon his original motion, nor to complain of the action of the court in refusing to permit defendant to dismiss the specification respecting alimony. Appellant assigns as error: First, the error of the court in entering the order of March 2, 1911, aforesaid, in sustaining plaintiff's objection to the admission of testimony offered by defendant in support of the motion, in vacating the restraining order which had theretofore been made, in overruling defendant's motion to modify the decree in so far as it related to the custody of the child, and in denying to the defendant the custody of the child, all of which matters were set out in the motion for a new trial; second, the error of the court in overruling defendant's motion for a new trial."

Schnurmacher & Rassieur, of St. Louis, for appellant. Henderson, Marshall & Becker, of St. Louis, for respondent.

NORTONI, J. (after stating the facts as above). [1] The statute provides there may be a review of any order or judgment touching the alimony and maintenance of the wife, and the care, custody, and maintenance of the children, or any of them, as in other cases. Section 2381, R. S. 1909. There can be no doubt that under this statute the court granting the divorce retains jurisdiction as to the modification of the judgment or decree touching the maintenance of the wife and the custody of the children. These matters may be brought to the attention of the court by motion in the original cause, as here, at a subsequent term, for the proceeding is but a continuation of the original jurisdiction concerning the custody of the children. See *Cole v. Cole*, 89 Mo. App. 223; *Meyers v. Meyers*, 91 Mo. App. 151.

[2] But though defendant filed a proper motion in the case, setting forth the facts upon which the modification of the decree concerning the custody of the child was sought, the court refused him the right to introduce testimony in support thereof, and denied the application upon a mere *ore tenus* objection thereto, as if it appeared on the facts stated in the motion no *prima facie* right to the relief prayed appeared. It would seem the court treated the oral objection to the introduction of evidence in support of the motion as a demurrer thereto, and by the judgment given declared plaintiff had a right to remove the child out of the jurisdiction of the court into a foreign state and into a new home, amid other surroundings, notwithstanding the decree establishing defendant's right to frequently visit his offspring and take her out on Saturdays and Sundays in St. Louis. Obviously, this was error, for the decree of divorce established a right *prima facie* in defendant to visit the child and take her out in St. Louis; and this is true, though it appears the divorce was granted for his fault. It is true that the motion for a modification of the decree sets forth no facts suggesting unfitness of plaintiff, the mother, as a proper person to retain custody of the little girl; but it does reveal that she was about to remove it from the jurisdiction of the court here and into a foreign state. Where the custody of children is awarded in divorce proceedings, as was done in the instant case, the child becomes the ward of the court, and the court thereby assumes a position of guardianship with respect to its person and future well-being. In this view, it is said to be against the policy of the law to permit the child to be removed into another jurisdiction and from within the province of the court first awarding the custody, unless the

well-being and the future of the child would be better subserved thereby. See *Miner v. Miner*, 11 Ill. 43, 51; *Chase v. Chase*, 70 Ill. App. 572; *Campbell v. Campbell*, 37 Wis. 206, 221, 222, 223; *Jennings v. Jennings*, 85 Mo. App. 290; *Edwards v. Edwards*, 84 Mo. App. 552.

[3] It appearing by the motion that the plaintiff, the mother, was about to remove the child from within the jurisdiction of the court, defendant was entitled to a hearing thereon, and should have been permitted to show that the interests of the child would not be bettered by the removal. Although no one can doubt that the policy of the law forbids the removal of the child from within the jurisdiction of which it is a ward, the best interests and the future welfare of the ward should in every instance be weighed in the balance and determine the final order of the court touching its custody. While it is important to retain the child within the jurisdiction of the court, to the end of exercising its guardianship and power in making future orders for the custody, care, and maintenance, it appears that the controlling thought influencing prior decisions on the subject makes for the welfare of the child, and a considerable discretion is allowed on this score. In other words, unless it appears the interests of the child would be best subserved by the removal, she should be retained here within the power of the court. *Jennings v. Jennings*, 85 Mo. App. 290; *Campbell v. Campbell*, 37 Wis. 206, 221.

The judgment should be reversed, and the cause remanded. It is so ordered.

REYNOLDS, P. J., and CAULFIELD, J., concur.

HAWKINS v. WIEST.

(Kansas City Court of Appeals. Missouri. Dec. 9, 1912.)

1. BILLS AND NOTES (§ 440*) — ISSUE BY PAYEE AFTER JUDGMENT AGAINST MAKER.

Under Rev. St. 1909, § 9978, providing that a note indorsed after due becomes a note payable on demand, and section 10035, declaring that one negotiating a note warrants it to be what it purports to be, and that he has no knowledge of any fact impairing its validity, a note indorsed by its payee, and reissued after he has obtained judgment on it, is as to him a valid note.

[Ed. Note.—For other cases, see *Bills and Notes*, Cent. Dig. §§ 1223-1232; Dec. Dig. § 440.*]

2. BILLS AND NOTES (§ 396*)—DEMAND AND NOTICE.

Demand on the maker of a note, and notice to the payee thereof and of nonpayment, is not necessary for liability of the payee to one to whom he indorsed it, not only when due, but after judgment on it against the maker, so that as to him it was no longer an obligation.

[Ed. Note.—For other cases, see *Bills and Notes*, Cent. Dig. §§ 1022-1028; Dec. Dig. § 396.*]

Error to Circuit Court, Morgan County; John M. Williams, Judge.

Action by J. A. Hawkins against Charles A. Wiest. Judgment for defendant, and plaintiff brings error. Reversed and remanded.

R. M. Livesay, Forman & Hubbard, and J. W. McClelland, all of Versailles, for plaintiff in error. A. L. Ross, of Versailles, and Sangree & Bohling, of Sedalia, for defendant in error.

ELLISON, J. Plaintiff's action is founded on a promissory note. The judgment in the trial court was for defendant.

It appears that the note was executed to defendant by John and Martha Birchfield, that it was negotiable in form, was for \$350 with interest, and was dated the 5th of March, 1907, due one year after date. On the back is a credit of \$24.72, and the blank indorsement of defendant and also the blank indorsement of R. M. Johnson, "Without recourse." The evidence disclosed that defendant, as payee, brought suit against the Birchfields on the note in the Buchanan county circuit court, and on February 3, 1909, nearly a year after it became due, obtained judgment. The note was obtained from the files of the circuit court by defendant, and on January 5, 1910, he indorsed it for value by the blank indorsement appearing thereon to R. M. Johnson, and the latter thereafter indorsed it by the above indorsement on the back thereof to plaintiff without recourse.

The petition alleges that the judgment was unknown to plaintiff when he purchased the note, and "that by reason of the judgment the note as against the makers thereof merged into the judgment, and for that reason no presentment to the makers for payment was made by plaintiff, and no notice of presentment, demand, and nonpayment given to defendant."

[1] The foregoing shows that defendant, the payee of the note, after recovering judgment upon it against the makers, and after it was due, started it out afresh by negotiating it to Johnson, who indorsed to plaintiff. It is true that an indorsee of an overdue negotiable note takes it subject to all proper defenses as between the original parties to it, the maker and the payee. But it should not be overlooked that a note, negotiable in form, being overdue, does not destroy its negotiability. A bill indorsed after due becomes a new bill at sight (*Davis v. Francisco*, 11 Mo. 572, 49 Am. Dec. 98; *Kelly v. Staud*, 136 Mo. 430, 37 S. W. 1110, 58 Am. St. Rep. 648), or, as expressed in our present statute, becomes a note payable on demand (section 9978, R. S. 1909). And ordinarily there must be demand, notice, and protest. Therefore when defendant, after obtaining judgment upon the note against the makers, took possession of it and reissued it, though after

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

due, it became a new instrument payable on demand.

Defendant, however, insists that the note became extinct by merger into the judgment. So does it lose vitality, as to the maker, by payment, yet if it be reissued by the payee, as to him it becomes a legal obligation, a new bill at sight. *Kelly v. Staed*, supra. It seems to us it would be most unjust and unreasonable to permit defendant, who reissued the note after obtaining judgment upon it, to escape liability for his act to his indorsees on the plea that there was no note, that it had become void by being merged in the judgment. To do so would be in the face of the statute itself (section 10035, R. S. 1909), which declares that every person negotiating a note warrants "that it is in all respects what it purports to be," and "that he has no knowledge of any fact which would impair the validity of the instrument, or render it valueless."

[2] We think from the fact that defendant himself had put the note into a judgment against the makers it became functus officio as to them, and as to them became merged in the judgment, and there remained no right to pursue them on the note; their liability being transferred to the judgment. *Tourville v. Wabash Ry. Co.*, 148 Mo. 614, 623, 50 S. W. 300, 71 Am. St. Rep. 650; *Freeman on Judgments*, § 215. There was therefore no right to present the note to the makers for payment, and no right in any one to expect it would be paid, if presented. It was no longer an obligation against them. In such circumstances defendant has no right to require demand and notice as a prerequisite to his liability as indorser.

The judgment should have been for the plaintiff, and it is accordingly reversed and the cause remanded. All concur.

KORACH v. LOEFFEL

(St. Louis Court of Appeals. Missouri. Dec. 3, 1912. Rehearing Denied Dec. 14, 1912.)

1. PLEADING (§ 252*)—DEMURRER—PLEADING OVER—EFFECT.

Where, after a demurrer has been sustained, plaintiff files a new petition, the original petition is abandoned, and goes out of the record.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. §§ 736-743; Dec. Dig. § 252.*]

2. PLEADING (§ 8*)—PETITION—CONCLUSIONS.

In an action against a landlord for injuries to the tenant's minor child from the falling of a mantel in the demised premises, an averment in the petition that it was the duty of the landlord to have the premises in a safe condition for the use of plaintiff is a mere conclusion, and is not equivalent to an allegation of an express covenant to repair.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. §§ 12-28½; Dec. Dig. § 8.*]

3. LANDLORD AND TENANT (§ 164*)—PREMISES—INJURIES FROM DANGEROUS CONDITION—DUTY OF LANDLORD.

While a landlord, who demises parts of premises to a number of tenants, is bound to maintain in reasonable repair a common passageway, he is not bound to maintain or keep in repair premises demised as a dwelling, there being no implied warranty in the contract of letting that the premises are tenantable or suitable for the purposes for which they are leased; and hence, though the demised premises were a ramshackle house, the tenant's minor child, who was injured by the falling of a mantel, cannot recover.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 630-641; Dec. Dig. § 164.*]

4. LANDLORD AND TENANT (§ 150*)—PREMISES—REPAIRS—ENTRY.

Where a single dwelling was demised to one person, without any covenant as to repairs, no one, not even the landlord, could enter, without defendant's consent, to make repairs.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 536-557; Dec. Dig. § 150.*]

5. LANDLORD AND TENANT (§ 164*)—INJURIES FROM DANGEROUS CONDITION—COVENANT TO MAKE REPAIRS.

Though it was agreed that the landlord should repair the demised premises and make them reasonably safe, a breach of that covenant will not support an action for personal injuries due to failure to make such repairs, those injuries being deemed too remote to have been contemplated by the parties when the covenant was given.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 630-641; Dec. Dig. § 164.*]

Appeal from St. Louis Circuit Court; Chas. C. Allen, Judge.

Action by Irene Korach by L. F. Korach, her next friend, against Anna M. Loeffel. From a judgment for defendant, plaintiff appeals. Affirmed.

O. Porter Johnson and W. Blodgett Priest, both of St. Louis, for appellant. Julius T. Muench, of St. Louis, for respondent.

REYNOLDS, P. J. In this case plaintiff, after filing an original and two amended petitions, to each of which demurrers were successfully interposed on the ground that they stated no cause of action, filed her third amended petition. In this she avers that she is an infant under the age of two years, that her father has been duly appointed her next friend, has duly qualified as such, and that she brings this action by that father as her next friend. It is then averred that on a day named her father, by a verbal contract, leased certain premises in the city of St. Louis of the defendant, then the owner and in possession of them, for the purpose of residing therein with his family, including plaintiff; that afterwards Korach with his family, including plaintiff, took possession of and moved into and began the occupancy of the premises as a residence, "and plaintiff then and there became a tenant of this defendant." It is further averred that

it was the duty of defendant by the terms and conditions of the verbal lease, to have the premises in a safe and proper condition for the use and occupancy of plaintiff so that plaintiff could occupy them with safety, but it is alleged that the premises were not, at the time of the renting, and for a long time prior thereto had not been, in a safe condition; that there was located in one of the rooms a large fireplace or grate, over which was a large and heavy metal plate or metal sheet covering, so adjusted and placed that plaintiff could not see or know by the exercise of ordinary care that it was insecure and improperly fastened and could not see or know that it was dangerous and unsafe and liable to give way and fall. Plaintiff avers that defendant negligently and carelessly permitted this metal sheet covering over the grate to be so placed, adjusted and maintained that at the time of the leasing it was dangerous to the occupants of the premises including plaintiff, and that defendant knew or could have known by the exercise of ordinary care and prudence that it was dangerous and unsafe; that defendant could have repaired the same and prevented the happening of the injuries complained of but that defendant negligently and carelessly permitted this grate or plate to be and remain in the unsafe and dangerous condition thereby directly causing the injuries to plaintiff of which she complains. That on a day named and while plaintiff was occupying the premises and was on the floor of the parlor or sitting room in which this grate was located and while she was within about three feet of the fireplace, the metal sheet, plate, or covering over the grate, by reason of its unsafe, insecure and dangerous condition, as before mentioned, fell from its place onto and upon plaintiff, crushing and bruising her left hand, breaking and fracturing the second and third fingers of that hand and causing plaintiff severe pain and anguish. Charging that her injuries are serious and permanent and that she has suffered great pain of body and mind, she demands judgment for \$5,000.

A demurrer was filed to this petition on the ground that it does not state facts sufficient to constitute a cause of action. This demurrer was sustained and plaintiff electing to stand upon the petition and declining to plead further, judgment followed in favor of defendant, from which plaintiff has duly perfected her appeal to this court.

The error here assigned is to the action of the court in sustaining the demurrer, it being argued that this third amended petition does state facts sufficient to constitute a cause of action.

[1] Counsel for appellant make some reference to the abandoned petitions. It is a settled rule of practice in our state that by pleading over, as was done here, those abandoned petitions disappeared from the case

and are not, so far as concerns the present case, open to consideration. No pretense is made that the demurrers to the abandoned petitions were improperly sustained.

[2-4] The question here presented is on the liability of the landlord in damages to a member of the tenant's family, the tenant being in the occupancy of the whole of the premises, under a verbal lease. It will be noted that there is no charge of misrepresentation, misfeasance or concealment of fact by the landlord.

Accepted writers on the law of landlord and tenant lay it down as the rule established by the great weight of authority, that the lessee cannot assert a claim for damages against the lessor on the ground that owing to the condition of the premises at the time of the leasing, he or a member of his family suffered physical injury by reason or in consequence of the condition of the leased property at the time of the letting; that there is no implied warranty in the contract of letting that the premises are tenantable or suitable for the purposes for which they were leased, or, in the case of a dwelling house, that it is either safe or convenient, and that where the landlord has created no nuisance and is guilty of no willful wrong or fraud or culpable negligence, he is not liable for any injury suffered by any person occupying or coming upon the premises during the term of the lease. See 1 Tiffany on Landlord and Tenant, § 86, pp. 556-559; 1 McAdam on Landlord and Tenant (4th Ed.), p. 373; 2 Id. pp. 1313-1315. Our Supreme Court in Ward v. Fagin, 101 Mo. 669, 674, 14 S. W. 738, 739, has said: "Of course, if the landlord is not bound to repair unless upon a covenant so to do, it must logically follow that any injuries arising from a failure on his part to repair can give no cause of action to the tenant, whether resulting to the tenant's goods or to his person. If the landlord owes no duty to his tenant in this regard, then certainly negligence cannot be imputed to him; for negligence can only spring from unperformed duty. Cooley on Torts (2d Ed.) 791; Hallihan v. Railroad, 71 Mo. 113. * * *

And, if it be conceded, as it must (be) from the authorities, that the landlord is not bound to keep the leased premises in repair, the same principle will apply whether the tenant be lessee of the whole premises or of only a portion thereof; for what is true of the integer of non-liability must be equally true of each of its component fractions."

The averment is that "it was the duty of the defendant, by the terms and conditions of the verbal lease aforesaid, to have said premises in a safe and proper condition for the use and occupancy of plaintiff so that plaintiff could occupy said premises with safety." This can hardly be construed into an averment that there was a covenant to repair—at most it is a conclusion drawn by the pleader on the verbal contract of letting.

In *Glenn v. Hill*, 210 Mo. 291, loc. cit. 296, 109 S. W. 27, 28, 16 L. R. A. (N. S.) 699, our Supreme Court has stated the rule as follows: "There is no averment in the petition that under the contract of leasing the defendants agreed to repair, and in the absence of an agreement in the lease binding the landlord to put or keep the premises in repair, he is not liable in damages for failure to do so or for injuries sustained by the tenant by reason thereof."

The rule is very concisely stated in *Robins v. Jones*, 15 C. B. (N. S.) 221, loc. cit. 239, that "fraud apart, there is no law against letting a tumble-down house." The same rule is announced and fully discussed by the Kansas City Court of Appeals in *Graff v. Brewing Company*, 180 Mo. App. 618, 109 S. W. 1044.

In *Marcheck v. Klute*, 133 Mo. App. 280, loc. cit. 290, 113 S. W. 654, 658, it is said, referring to the fact that a child of plaintiff had been killed by falling through an open chute in a building in which he was playing: "Conceding plaintiff's children were licensed to play in the loft, defendants were under no duty to keep the floor safe for their use in that manner, and unless guilty of misfeasance, were not liable for an accident received by them."

This is not the case of a common passageway, the possession of which is in the landlord. In such a case "there is an implied obligation imposed by the law upon the landlord to exercise ordinary care to keep such common portion of the premises in a reasonably safe condition for such purposes as may reasonably be anticipated to be a proper use of the property for which it is let." *Karp v. Barton*, 164 Mo. App. 389, loc. cit. 396, 144 S. W. 1111, 1112; *Marcheck v. Klute*, supra, 133 Mo. App. l. c. 287, 113 S. W. 654. See, also, *McGinley v. Alliance Trust Co.*, 168 Mo. 257, 66 S. W.

153, 56 L. R. A. 334. These are all cases in which the injured party was a member of the family of the tenant, and in which the injury was sustained from defects in those parts of the premises which were in control of the landlord.

Here the father of plaintiff, the lessee, was in possession of the whole premises, a single dwelling, and without his permission, no one, not even the landlord, could enter to make repairs. *McGinley v. Alliance Trust Co.*, supra, 168 Mo. loc. cit. 263, 66 S. W. 153, 56 L. R. A. 334.

[5] But if it be said that the petition avers a contract to repair, and recovery can be had for damages suffered by reason of the failure to repair, it is to be observed that the contract is averred to be with the father, not with plaintiff. Conceding that the contract inures to plaintiff as a member of the family of the lessee, she certainly can have no higher right than the lessee under the contract. As to that right it is said in the *Marcheck Case*, supra, 133 Mo. App. l. c. 291, 113 S. W. 659: "The weight of authority is that a lessor's covenant to repair will not support an action for a personal injury due to failure to make repairs, because those injuries are deemed too remote to have been contemplated by the parties when the covenant was given," citing cases. That rule was not applied in the *Marcheck Case*—for reasons there given—but it does apply here. No promise is alleged to have been made by the lessor looking to special provision for guarding the children of the lessee, as was in evidence in the *Marcheck Case*, but a mere general promise to repair is averred.

Our conclusion upon the case is that the demurrer to the third amended petition was properly sustained. The judgment of the circuit court is affirmed.

NORTONI and CAULFIELD, JJ., concur.

TURNER v. GIBSON.

(Supreme Court of Texas. Dec. 18, 1912.)

1. GARNISHMENT (§ 60*)—MONEY SUBJECT—MONEY IN CUSTODY OF LAW.

In view of Rev. Civ. St. 1911, art. 8778, providing, if on the sale of property more money is received than is sufficient to pay the amount of the execution in the officer's hands, the surplus shall be paid over to defendant, the excess of the proceeds of a sale under execution, remaining in the sheriff's hands after satisfying the execution, is subject to garnishment by another creditor of the judgment debtor.

[Ed. Note.—For other cases, see Garnishment, Cent. Dig. §§ 115, 116; Dec. Dig. § 60.*]

2. GARNISHMENT (§ 58*)—PROPERTY SUBJECT—PROPERTY IN LEGAL CUSTODY.

The principle underlying the rule that property in custodia legis is not subject to garnishment, etc., is to protect the jurisdiction of the court from invasion by another tribunal or officer, and not to protect the debtor's property.

[Ed. Note.—For other cases, see Garnishment, Cent. Dig. § 113; Dec. Dig. § 58.*]

Certified Question from Court of Civil Appeals of First Supreme Judicial District.

Action by B. L. Turner against N. M. Gibson. From a judgment for defendant, plaintiff appealed to the Court of Civil Appeals, which court certified a certain question to the Supreme Court. Question answered as stated.

Jacob C. Baldwin and Charles H. Taylor, both of Houston, for appellant. Woods & Graham, of Houston, for appellee.

BROWN, C. J. Certified question from the Court of Civil Appeals of the First Supreme Judicial District, as follows:

"In the above-styled cause, pending in this court on appeal from the county court of Harris county, the appellant seeks to subject to a writ of garnishment money in the hands of appellee, Gibson, who is sheriff of Brazoria county. This money is the excess of the proceeds of a sale by Gibson under execution of property of appellant's debtor, remaining in his hands after satisfying the writ of execution under which the property was sold. The trial court held that the money, having come into the hands of the sheriff by virtue of his office, is in custodia legis and for that reason not subject to garnishment. Upon consideration of this question at a former day of this term, this court reached the conclusion that the rule announced in *Pace v. Smith*, 57 Tex. 555, and in *Loftus v. Williams*, 24 Tex. Civ. App. 393, 59 S. W. 291, does not require a holding that the surplus in the hands of appellee is not subject to garnishment, and reversed the judgment of the court below, and rendered judgment for appellant. Appellee has filed a motion for rehearing, and being in doubt as to the correctness of our holding, and the question being of general importance, and the case not being one in which a writ of

error will lie, we deem it advisable to certify for your decision the following question:

"Upon the facts stated, did the trial court err in holding that the money in the hands of the sheriff was not subject to garnishment?"

[1] We answer: The trial court erred in holding that the money in the hands of the sheriff was exempted from the writ of garnishment. The opinion of the Chief Justice of the Court of Civil Appeals in this case correctly disposes of the question of law involved, and is approved. Our Supreme Court has gone quite far on the question of protection to property from legal process in the hands of officers of the law, but no decided case by this court will sustain the action of the district court. Article 3778, Revised Civil Statutes of 1911, reads: "If, on the sale of property, more money is received than is sufficient to pay the amount of the execution or executions in the hands of the officer, the surplus shall be immediately paid over to the defendant, his agent or attorney." Clearly the surplus of the sale becomes the property of the judgment debtor, and he is entitled to receive it at once. If, however, the sheriff should have another execution in his hands against that party, he would be required by law to levy upon that surplus, and could be held responsible if he failed to do so. *Hamilton v. Ward*, 4 Tex. 356; *Walton v. Compton*, 28 Tex. 569; *Mann v. Kelsey*, 71 Tex. 609, 12 S. W. 43, 10 Am. St. Rep. 800. It would be peculiar logic which would hold that the sheriff must condemn the money in his possession to the payment of another execution against the same party, yet a court could not do the same by regular proceeding of garnishment.

[2] The principle which underlies the doctrine of "custodia legis" does not look to the protection of the debtor's property, but protects the jurisdiction which has attached from invasion by another tribunal or officer. There is apparent conflict in cases decided by this court; but we believe that they have distinguishing features, although they may not be reconcilable on principle. We are of opinion that the statute which requires the sheriff to immediately pay the surplus to the defendant has the effect to fix the right in him to possession of it, and, being so entitled to possession, it is subject to seizure for his debt by execution in the hands of the same officer, or by garnishment from a court. *Drake on Attachments*, § 251. After stating the rule which would deny the right to appropriate the surplus created by execution sale by other process, Mr. Drake, in his work on *Attachments*, says: "This rule, however, applies only where the sheriff is bound, virtue officii, to have the money in hand to pay to the execution sheriff, and not to cases in which he has in his possession, after satisfying the execution, a surplus of money raised by the sale of property. Such surplus

is the property of the execution defendant, and, being held by the sheriff in a private, and not in his official, capacity, it may be attached in his hands." This proposition is supported by these cases: *Burleson v. Milan*, 56 Miss. 399; *Jacquett v. Palmer*, 2 Har. (Del.) 144.

We find no case in any state, where the sheriff was authorized to levy upon money in his own hands, that denies the right to garnish such funds. The distinction made in many of the cases is exceedingly technical, and, believing that our rule is just and consistent, we will adhere to it.

OAR et ux. v. DAVIS et al.

(Supreme Court of Texas. Dec. 18, 1912.)

1. APPEAL AND ERROR (§ 719*)—ASSIGNMENT—"APPARENT ON THE FACE OF THE RECORD."

In Rev. Civ. St. 1911, arts. 1607, 1612, requiring that errors at law not "apparent on the face of the record" be presented by timely assignments of error, the phrase quoted refers to such manifest error as when removed destroys the foundation of the judgment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2968-2982; Dec. Dig. § 719.*]

2. APPEAL AND ERROR (§ 719*)—ASSIGNMENT OF ERROR—ERROR APPARENT ON THE FACE OF THE RECORD.

Where, in an action to cancel deeds conveying certain land, one defendant's one-third life estate in such land was not put in issue either by the pleadings or evidence, and such defendant joined with her husband in his claim for the entire interest of plaintiffs in the land under the deeds or the homestead laws, the refusal of the Court of Appeals to reverse or reform the judgment of the district court partitioning the land and divesting such defendant of her life estate did not present error apparent upon the face of the record, such as could be considered on writ of error in the absence of a timely assignment of error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2968-2982; Dec. Dig. § 719.*]

3. ACKNOWLEDGMENT (§ 58*)—PLEADING—DEED OF MARRIED WOMEN.

Where, in an action to set aside deeds executed by married women, on the ground that defendant, their stepfather, had fraudulently included therein a 100-acre tract not agreed upon, and through their confidence in him had induced them to sign the deeds without reading them or discovering the fraud, the proper execution of the deeds was not questioned, it was not necessary for the petition to allege that the notary, through fraud or imposition, failed to explain the deeds to them; the rule that the notary's certificate is conclusive of the facts therein stated, unless fraud or imposition is alleged, not applying where the proper execution of the deed is admitted.

[Ed. Note.—For other cases, see Acknowledgment, Cent. Dig. §§ 316, 317; Dec. Dig. § 58.*]

4. ESTOPPEL (§ 22*)—DEEDS BY MARRIED WOMEN.

Where a married woman is imposed upon by one in whom she has confidence, and induced to sign and acknowledge a deed covering land which she has not bargained to sell, she is not estopped, in an action to set the

deed aside, to allege her want of knowledge of what land was covered by the deed.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 27-51; Dec. Dig. § 22.*]

5. DEEDS (§ 203*)—VALIDITY—EVIDENCE—CERTIFICATE OF NOTARY.

In an action to set aside a deed executed by a married woman, the certificate of the notary to her acknowledgment is not competent as testimony to show that she knew what land was covered by the deed.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 602, 604-611; Dec. Dig. § 203.*]

Error to Court of Civil Appeals of Fifth Supreme Judicial District.

Action by J. C. Davis, Myrtle Davis, and others against R. V. Oar and wife. Judgment for plaintiffs was affirmed by the Court of Civil Appeals (135 S. W. 710), and defendants bring error. Affirmed.

J. P. Yates and T. D. Starnes, both of Greenville, for plaintiffs in error. Sherrill, Mulkey & Hamilton, of Greenville, for defendants in error.

DIBRELL, J. This was a suit begun in the district court of Hunt county by J. C. Davis and Myrtle and Ella Davis, joined by their husbands, Lee and J. F. Davis, against R. V. Oar and wife, M. A. Oar, to cancel so much of three deeds as conveyed a certain tract of 100 acres of land out of the Donelly survey, in Hunt county; said deeds having been executed by plaintiffs to the defendant R. V. Oar. These deeds conveyed other lands against which no relief is sought. Earl C. Davis intervened, claiming an interest in the property the subject of the litigation, and about his claim there was no controversy.

The plaintiffs J. C., Myrtle, and Ella Davis and the intervenor, Earl Davis, were the children of the defendant Mrs. M. A. Oar, and her former husband, J. A. Davis. At the time of the death of J. A. Davis, the father of plaintiffs and husband of the defendant Mrs. M. A. Oar, he held in his name four tracts of land, 100 acres in the Sallie Owen survey in Hunt county, 50 acres in the Elam survey in Hunt county, 110 acres in the John Mason survey in Hunt and Hopkins counties, and 100 acres in the Donelly survey in Hunt county. The three first tracts mentioned were the community property of J. A. Davis, deceased, and his surviving wife, Mrs. M. A. Oar. The last tract mentioned, which is the subject of this controversy, was the separate property of J. A. Davis, deceased, the father of plaintiffs and the intervenor. On November 26, 1904, J. C. Davis and Myrtle and Ella Davis, joined by their husbands, Lee and J. F. Davis, executed deeds to R. V. Oar conveying each their one-eighth interest in the three tracts of land, the community property of J. A. Davis, deceased, and his surviving wife, Mrs. M. A. Oar, and also their one-fourth interest each in the 100 acres out of the Donelly survey, that was

the separate property of their deceased father, J. A. Davis. The 100 acres of land in controversy, the separate property of J. A. Davis, deceased, was located contiguous to the 100 acres out of the Sallie Owen survey, and the two tracts thus contiguous were occupied by J. A. Davis and his wife during his lifetime, and after his death by the defendants R. V. and M. A. Oar as their homestead. The defendants in 1906 moved from said lands so occupied as their homestead to Cumby, where they purchased a home, and where they were residing at the time of this suit.

Plaintiffs seek to cancel said three deeds in so far as they convey their interest in the 100 acres of land out of the Donnelly survey, but not otherwise. The ground upon which plaintiffs seek to cancel said deeds in so far as they convey their interest in the 100 acres, the separate property of their father, is that some time prior to November, 1904, the defendant R. V. Oar proposed to buy the respective interests of plaintiffs in the three tracts of land that formed a part of the community estate of their father and mother, and after some trading and agreement was reached, whereby plaintiffs agreed to sell their respective interests in said three tracts of land for the stipulated price of \$550 to be paid each of them by the defendant R. V. Oar, their stepfather, aggregating the sum of \$1,650. They did not agree to sell the defendant Oar any part of their interest in the 100 acres of land in controversy, and it was understood by all parties that the 100 acres in controversy, which was known as the home place, was not to be conveyed. The defendant R. V. Oar agreed to have the deeds drawn in accordance with the agreement and understanding of the parties as above indicated, and plaintiffs, having been reared by said defendant from their early childhood, reposed great confidence in their said stepfather, and did not think he would impose upon them or attempt to cheat and defraud them out of any of their property. By reason of their close relationship to the defendant R. V. Oar, and confidence in him, they did not read or have read to them the deed before its execution and delivery, and that said Oar, for the purpose of cheating and defrauding plaintiffs out of the land in controversy, embraced said 100 acres in the deed and procured a notary to take the acknowledgment, and said notary failed to explain the same to plaintiffs, or to any one of them, and plaintiffs did not know that the land in controversy was embraced in the description of the lands in the deeds. But that the defendant Oar did know that said land was included in the description of the lands in said deeds and accepted same with such knowledge. No consideration was paid by said Oar for said land, but he paid only the amount agreed upon for the three tracts they agreed to sell him, which amount was

adequate compensation for plaintiffs' interest in those tracts, but grossly inadequate as a consideration for all the land embraced in the deeds. Plaintiffs did not discover that the land in controversy was included in said deed until in the year 1908, when they learned through their mother that defendant R. V. Oar was claiming the land in his own right. Soon after this discovery suit was brought to cancel the deeds in so far as they conveyed the 100 acres in question. Abandonment of the land in controversy as a homestead was alleged, and there was a prayer that the deeds "described be canceled and held for naught, in so far as they attempt to convey the interest of plaintiffs in the said 100 acres of the Donnelly survey, and that plaintiffs have judgment against R. V. Oar and M. A. Oar for their one-fourth interest each in said land, and that same be partitioned."

Defendants answered by general demurrer, special exceptions, a general denial, plea of homestead, and a community interest in said 100 acres of land to the extent of certain improvements placed thereon since their intermarriage. They pleaded specially that the deeds were executed by plaintiffs with full knowledge that they contained the 100 acres of land in controversy, and that the plaintiffs Ella and Myrtle Davis were married women, and that the notary taking their acknowledgments fully explained said deeds to them as required by law; that plaintiffs either read or had read to them said deeds; and that they are estopped from claiming the land sued for or any part thereof. The court overruled defendants' general demurrer to plaintiffs' petition, but sustained the second special exception to said petition, which exception was in substance that because the plaintiffs Myrtle and Ella Davis, being married women, conveying their separate property, had the deeds fully explained to them by the notary, as required by law, and because said petition failed to show that the certificate of the notary certifying these facts was obtained by fraud, the certificate of the notary was conclusive of the facts therein certified. This objection was met by a supplemental petition. The issues of fraud in the procurement of the deed and of homestead were submitted to the jury, which returned a verdict for plaintiffs on both issues, and judgment for plaintiffs and intervener for the land in suit, and its partition was duly entered.

[1] The first question raised in the application for writ of error is one of practice. The assignment presenting this question was not made in the court below, or in the Court of Civil Appeals, until upon motion for rehearing, and is as follows: "The Court of Civil Appeals erred in not reversing or reforming the judgment of the district court, ordering partition of the land in controversy between the plaintiffs and inter-

vener, because the judgment divested the defendant Mrs. M. A. Oar of her one-third life estate in said land." The Court of Civil Appeals refused to consider the assignment, and that court's action, as well as that of this court here exercised, depend in a measure upon the issue whether or not the assignment presents "an error of law, apparent upon the face of the record." Such is the contention of plaintiffs in error, and upon the face of the application we were of the opinion, when the writ was granted, that such an error appeared. However, upon a more careful examination of the entire record, we have concluded that we were mistaken in our first impression.

[2] The adjudications of this court have given to the expression, "an error of law, apparent upon the face of the record," the meaning of such error as is fundamental in character or one determining a question upon which the very right of the case depends, or such an error as being readily seen lies at the base and foundation of the proceeding, and necessarily affects the judgment. *Wilson v. Johnson*, 94 Tex. 276, 60 S. W. 242; *Houston Oil Co. of Texas v. Kimball*, 103 Tex. 103, 122 S. W. 533, 124 S. W. 85. Unless the error presented for the first time in a motion for a rehearing in the Court of Civil Appeals, or in the application for writ of error in the Supreme Court for the first time, is such an error as meets the provision above quoted as its meaning has been construed to be as above stated, it will be treated as waived and cannot be considered.

In announcing the rule and construing the meaning of articles 1607 and 1612 of the Revised Statutes of 1911, being articles 1014 and 1018 of the Revised Statutes of 1895, relating to assignments of error, in the case of *Wilson v. Johnson*, above cited, Judge Gaines said: "Since every error must in one sense appear upon the face of the transcript, it is difficult to tell what is meant by this language, but we incline to think it intended to signify a prominent error, either fundamental in character or one determining a question upon which the very right of the case depends." One of the latest utterances upon this subject will be found in the case of the *Houston Oil Co. of Texas v. Kimball*, 103 Tex. 103, 122 S. W. 533, 124 S. W. 85, in which Judge Brown gives a clear and more definite construction of the meaning of these articles of the statute above referred to in the following language: "Webster defines the word, 'apparent', thus: 'clear; manifest to the understanding; plain; evident; obvious; appearing to the eye or mind.' This does not mean that an error which can be ascertained by looking into the record and considering the evidence may be considered without an assignment, for that would include every error that can be considered at all. Nothing can be considered as an error which cannot be made apparent by an examination of the

record; therefore, the language of the statute must be given that construction which will make it consistent with its requirements in other respects. The language, 'apparent upon the face of the record,' indicates that it is to be seen upon looking at the face of the record—that is, the assignment itself—the fact pointed out by it must show a good and sufficient ground for the court to interfere to prevent injustice being done to one of the parties. Perhaps the best expression is that it must be a fundamental error, such error as being readily seen lies at the base and foundation of the proceeding and affects the judgment necessarily."

It is evident that the meaning of the two articles of the Revised Statutes of 1911, arts. 1607, 1612, and articles 1014 and 1018 of the Revised Statutes of 1895, when taken one in connection with the other, which must be done, is that all errors of law which are not "apparent upon the face of the record" must be presented by assignments of error distinctly specifying the grounds on which a reliance is had for a revision of such error, and a failure to make such assignment of error must be treated as a waiver thereof. It seems to us there is no more accurate and comprehensive summing up of the whole matter than is contained in the last sentence in the excerpt taken from the opinion of Judge Brown in the *Houston Oil Case* cited above, "that it must be a fundamental error, such error as being readily seen lies at the base and foundation of the proceeding and affects the judgment necessarily." At the risk at being thought to have added perfume to the violet or color to the rose, we suggest that the error contemplated by the provision of the law under discussion was intended such manifest error as when removed destroys the foundation of the judgment.

In the case of *Pendleton v. Colville*, 49 Tex. 528, a number of defendants were nonresidents, and were cited by publication, the suit being for land, and upon the day of trial an amendment was filed setting up a new cause of action and judgment was founded on the matters alleged in the amended pleading, without notice to the parties actual or constructive. In reversing that judgment the court said: "The assignment of errors fails to specify this as a ground of error, but it is one which is apparent on the record, and is so fundamental that the court will act upon it though not assigned." It is evident that the error of law there considered lay at the base and foundation of the proceeding and affected the judgment necessarily, and destroyed its foundation.

In the case of *Dean v. Lyons*, 47 Tex. 20, the suit was for a tract of land in the form of trespass to try title. The issue made by the pleading was whether or not one John F. Lyons had conveyed the land in question to his son John T. Lyons, through whom plaintiffs in that case claimed, "the court, how-

ever, after charging upon this issue, presenting to the jury other and different issues that were not embraced in the pleadings of the parties, and the jury found upon them, and upon their finding the court proceeded to render a further judgment that the land was bound for the support of John T. and Caroline Lyons to the extent of \$175 annually each, during their respective lives, to be paid in semiannual payments to each of them; that the rental value of the land was of the value of \$350; that, if the land failed to produce said amounts thus to be paid to them, the deficit should be supplied by a sale of so much of the land as might be necessary for that support." In reversing that case upon the ground of fundamental error Chief Justice Roberts said: "There was no pleading in the case designed to produce, or capable of producing, these results, nor was the evidence adduced upon the trial sufficient to establish such results, had it been offered for such purpose, which was certainly not justified by the pleading." So in that case it may be said the error of law considered by the court lay at the base and foundation of the proceeding and affected the judgment necessarily, and destroyed its foundation.

In the case of Fuqua et al. v. Pabst Brewing Co., 90 Tex. 301, 38 S. W. 29, 750, 35 L. R. A. 241, the question presented arose out of a general demurrer, which in effect challenged the validity of a contract set out in the petition, and upon which the cause of action was based. The Court of Civil Appeals considered the question in the absence of an assignment, and their right to do so was made the basis of an assignment in this court. In rendering the decision of the court in that case Judge Denman said: "We are of opinion that this objection is not well taken (1) because the general demurrer urged in the trial court necessarily raised the question of the validity of the contract sued on, it being the settled practice to disregard the reason given in an assignment and to treat the same as if such reasons had been omitted; and (2) because, if the contract be controlled by and is violative of said statute, the same is thereby declared to be void (T. & P. Coal Co. v. Lawson, 89 Tex. 394, 32 S. W. 871, 34 S. W. 919), and it was the duty of the Court of Civil Appeals, notwithstanding the absence of an assignment, to set aside the judgment rendered thereon, as its rendition was 'an error in law * * * apparent on the face of the record.'" This is another instance where the error lay at the base and foundation of the proceeding and affected the judgment necessarily and destroyed its foundation. We think no case will be found decided by this court where the assignment was presented for the first time in the appellate court and considered upon the ground of "an error of law, apparent on the face of the record," that is not

based upon the ground that such error goes to the foundation of the cause of action upon which the judgment is based, and thereby destroys the validity of such judgment.

Let us determine whether the error here complained of is one that meets the requirement of the law as it has been construed by this court as above indicated. It must be conceded that neither by pleadings of the parties nor by any testimony presented in the court below was the subject of Mrs. Oar's one-third life interest in the land in controversy made an issue. She joined her husband in his claim for the entire interest of plaintiffs in the land under the deeds from plaintiffs, and, in the event that the land could not be held under said deeds, then the right in the whole tract of land was claimed by virtue of the homestead laws. Plaintiffs and intervener in their prayer for relief asked judgment against the defendants for the entire tract of land and its partition. It was thus well said by Judge Talbot in his opinion overruling the motion for rehearing: "Not having pleaded this matter, or in any way invoked the aid or action of the court below to protect the interest of Mrs. Oar in a life estate of one-third of the land, appellants cannot be heard to complain for the first time in the manner attempted here. Had an issue been made in the trial court, as to whether or not Mrs. Oar was entitled to have set apart to her, for and during her life, one-third of the land in controversy, in the event plaintiffs should recover, it might have been shown, if such was the fact, that Mrs. Oar had, by deed or otherwise, parted with her life estate in said land." If the error complained of is one of law, it neither lies at the base and foundation of plaintiffs' cause of action, nor is it such an error of law as is apparent upon the face of the record. To determine whether it be an error of law at all depends upon the issue of title made by the pleadings and the evidence adduced to sustain or deny the respective rights of the parties. In the absence of any claim on the part of Mrs. Oar in her pleadings, or in the presentation of her claim to any part of the land in controversy, other than that claimed through the deed to her husband and the right of the homestead, which claims were litigated, the court might well presume that, if she was entitled to a one-third life interest in the land, she had waived such claim. Whether this view be sound or not, there is no phase of the law under which we can treat the supposed error of law as one of a fundamental character. As suggested by Judge Talbot, if a claim had been made by Mrs. Oar to the land by virtue of inheritance, plaintiffs might have shown by reason of some conveyance or other arrangement she had parted with such interest. We therefore think the Court of Civil Appeals was right under the circumstances in refusing to consider the assignment of error.

[3] In their second, third, and fourth assignments of error in this court plaintiffs in error seek to raise the question whether or not the certificate of an officer taking the acknowledgment of a married woman to a deed conveying land, her separate property, may be impeached by an allegation and proof that such instrument was not in fact explained to her in contradiction to such certificate that it was so explained. This question was first raised in the trial court when the defendants presented a special exception to plaintiffs' petition that it was defective in not alleging that the deeds sought to be canceled were not explained to those plaintiffs who were married women, and that such failure on the part of the notary to so explain such deeds to the grantors who were married women was the result of fraud or imposition on the part of the notary. This special exception was sustained, and plaintiffs, in order to meet the objection, filed a supplemental petition in which fraud was alleged, and the question presented by plaintiffs in error is as to the sufficiency of the allegation in the supplemental petition to constitute fraud on the part of the notary.

We think it unnecessary to discuss the question as to whether or not the allegations of the supplemental petition were sufficient to constitute fraud on the part of the notary in failing to explain the deeds of conveyance to the grantors who were married women, for the reason the question may be more appropriately settled by determining whether or not the trial court committed error in the first place by sustaining the special exception that produced the necessity of the allegations in the supplemental petition to meet the views of the trial judge. If it was error to sustain the special exception to plaintiffs' petition, then it becomes immaterial that the trial court refused to sustain special exceptions to the allegations of fraud on the part of the notary as contained in the supplemental petition. It is the well-settled rule of law in this state that the certificate of the officer taking the acknowledgment of a married woman is conclusive of the facts therein stated, unless fraud or imposition is alleged. *Hartley v. Frosh*, 6 Tex. 208, 55 Am. Dec. 772; *Brand v. Colorado Salt Co.*, 30 Tex. Civ. App. 458, 70 S. W. 578; *Waltee v. Weaver*, 57 Tex. 571; 1 Cyc. 619. But, while the rule above stated is well and definitely settled in this state, it has application only in those cases where the proper execution of the deed itself is questioned. In the case at bar the proper execution of the deeds is not questioned, or in any manner made an issue in the cause of action as stated in the pleadings first excepted to. The trial court erred in sustaining the special exception ad-

dressed to such pleading, because it failed to allege that the deeds were not explained to the grantors, who were married women, by the notary, and that such failure was the result of fraud on the part of the notary. The action was to cancel certain deeds in so far as they conveyed a certain tract of 100 acres of land that defendant Oar fraudulently had inserted in the deeds executed by plaintiffs. In no manner did this action call into question the proper execution of the deeds. That was admitted, but it was alleged that plaintiffs did not sell or agree to sell the 100 acres of land in controversy, and that plaintiffs on account of their close relationship to the defendant R. V. Oar, who was their stepfather and who, having reared them from early childhood, stood in relation to them as parent, and in whom they reposed great confidence, did not read the deeds or have them read or explained, and that said defendant took advantage of their confidence, and knowingly had the description of the land in controversy embraced in said deeds for the purpose of defrauding plaintiffs.

[4] It cannot be said that, when a married woman has thus been imposed upon, she is estopped to allege her want of knowledge of the fact that the deed embraced property she never sold or contracted to sell the grantee.

[5] In such a proceeding, the certificate of the notary is not competent as testimony to show that the grantor knew the land claimed not to have been sold was in fact embraced in the deed. That fact might be shown by the testimony of the notary himself, but his statement to one state of fact would not preclude the grantor from denying the correctness of such statement. This suit, not in any manner involving the validity of the execution of the deeds sought to be canceled, did not and could not permit the application of the doctrine that the certificate of the officer taking the acknowledgment speaks verity and is nonassailable as to the facts it certified. In the absence of allegations of fraud or imposition on the part of the notary. It follows, therefore, that the trial court erred in sustaining the special exception urged by defendants to plaintiffs' second amended original petition, and that it did not err in refusing to sustain the special exceptions urged by defendants to the first supplemental petition.

We think all other questions presented in the petition for writ of error have been properly disposed of by the Court of Civil Appeals, and there is no error in the judgment of that court.

The judgment of the Court of Civil Appeals is accordingly affirmed.

MOLLENKOPF v. STATE.

(Court of Criminal Appeals of Texas. Dec. 4, 1912.)

1. INTOXICATING LIQUORS (§ 239*)—WRONGFUL SALE—PURSUING BUSINESS IN PROHIBITION TERRITORY—INTENT.

Pen. Code 1911, arts. 45, 47, provide that no act done by accident is an offense except where there has been a degree of carelessness or negligence which the law regards as criminal, but that the mistake of fact which will excuse must be such that the person so acting under a mistake would have been excusable had his conjecture as to the fact been correct, and that it must also be such a mistake as does not arise from a want of proper care on the part of the person committing the offense. *Held*, that mere evidence in a prosecution for engaging in the business of selling intoxicating liquors that accused did not know that the substance she sold was intoxicating was insufficient to raise the issue that she acted by accident, in the absence of further proof that she had used care to ascertain whether it was intoxicating or not before offering to sell it.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. §§ 331-347; Dec. Dig. § 239.*]

2. INTOXICATING LIQUORS (§ 239*)—WRONGFUL SALE—ENGAGING IN BUSINESS—DEFENSES—INSTRUCTIONS.

Where, in a prosecution for engaging in the business of selling intoxicating liquor in prohibition territory, the state's witnesses testified that they bought intoxicating wine from accused, while she claimed that the beverage was grape juice made by boiling the juice of the grape, and was not intoxicating, she was entitled to an affirmative instruction that if the jury believed from the evidence that the beverage was grape juice, and would not intoxicate, or if they had a reasonable doubt of that fact, they must acquit.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. §§ 331-347; Dec. Dig. § 239.*]

3. INTOXICATING LIQUORS (§ 239*)—WRONGFUL SALE—ENGAGING IN BUSINESS—BUSINESS AND OCCUPATION.

In a prosecution for engaging in the business of selling intoxicating liquors in prohibition territory, the court charged that, to constitute the engaging in the occupation or business of selling intoxicating liquors, it was necessary to prove that accused made at least two sales of intoxicating liquor during December, 1910, and that by the term "business and occupation" was meant a calling, trade, or vocation which one engages in to make a living or obtain wealth. *Held*, that such instruction was misleading, in that it authorized an inference that proof of two sales in and of itself would constitute a business or occupation, and that the latter part of the charge was a definition more burdensome on the state and more favorable to accused than required by the statute creating the offense, it being only essential, to establish engaging in the business or pursuing the occupation of selling whisky, that the state prove that accused kept in her possession whisky for sale, and that she actually made two sales within the time specified in the statute.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. §§ 331-347; Dec. Dig. § 239.*]

Appeal from District Court, Eastland County; Thomas L. Blanton, Judge.

Mary Mollenkopf was convicted of pursu-

ing the occupation of selling intoxicating liquor in prohibition territory, and she appeals. Reversed and remanded.

J. R. Stubblefield, of Eastland, for appellant. C. E. Lane, Asst. Atty. Gen., for the State.

HARPER, J. Appellant was prosecuted and convicted of pursuing the occupation or business of selling intoxicating liquor in prohibition territory, and her punishment assessed at two years' confinement in the state penitentiary.

Ed Houston testified: "On or about the 18th day of December, 1910, I bought some wine from Mary Mollenkopf. I pronounced that wine intoxicating. I bought about two or three gallons, paying her \$2 a gallon. I drank the wine, and it intoxicated me."

C. P. Houston testified: "On or about the 20th day of December, 1910, I bought some wine from Mary Mollenkopf. I bought a gallon, and paid her \$2 for it. I also bought some wine from her about December 26th, getting a gallon and paying her \$2 for it. I think the wine I bought from her was intoxicating. I drank some of it. It seemed to intoxicate me to some extent. About the best I could express it, it made me dizzy."

This was all the testimony offered in behalf of the state, and, if the defendant had also rested her case, we would feel inclined to sustain her contention that the evidence would not sustain the conviction—that it did not show she was engaged in the business or occupation of selling intoxicating liquors. However, defendant herself took the stand, and on cross-examination admitted she had sold considerable quantities of the wine or grape juice as she called it, and taking her testimony, in connection with that offered by the state, the testimony would support a verdict that she was engaged in the business of selling this liquor for profit. Among other things, she testified: "Mary Mollenkopf is my name. I live seven miles south of Cisco. I was born in Germany. I am 45 years old. I have been in this country 21 years. I am now, at this time, engaged in farming. I have been farming here in Eastland county about five years. Along about December of 1910, at that time, I was engaged in picking cotton. I was farming, gathering my crop. At that time I made a living farming. I raised corn and cotton, and had a little vineyard, and I sold some grapes. At that time I had to do the farm work myself. I didn't have anybody else to do it. I picked cotton and hoed the cotton and everything. I can't do the plowing. I am too old. Along about that time, I did some of the plowing. I helped to haul off and market my cotton and things of that kind. The farming out there was my dependence for making a living. I had no other means of getting a living. I did not sell any intoxicating liquors. Ed Hous-

ton came to me along in July, and asked me if I could make him some grape juice. I told him I could make it, and that he could get it if he would come after it. I let him have it. He paid me \$2 a gallon for it. Grape juice is made by heating. It is not intoxicating. When I let him have this, it was not intoxicating. I remember the Cap Houston transaction. It was the same like Mr. Ed. Cap Houston came to me and told me to make him some grape juice, so many gallons, and he came after it, and he didn't pay me for it. I didn't let him have the next one. I let him have it two times. He paid me \$2 for one gallon, and the next time he came I didn't let him have it. He didn't pay me that next one. When I let him have that grape juice, it was not intoxicating, because heated juice cannot be intoxicating; that is, the heated stuff. I did not intend to violate the law in any respect. I did not intend to violate the laws of my country." Thus the issue was squarely presented whether it was wine she sold or grape juice; whether or not it was intoxicating. The state's witnesses said it was wine and would intoxicate. She said it was grape juice, and would not intoxicate.

The record being in this condition, appellant asked the court to give a number of special charges, but we do not deem it necessary to take up and discuss each of them, but rather treat the issues they seek to have presented.

[1] In the first instance appellant asked the court to instruct the jury that, even though they believe the beverage she sold was intoxicating, yet if they believed, or had a reasonable doubt of the fact, she did not know it was intoxicating, to acquit her, and cites us to articles 45 and 47 of the Penal Code, in which it is provided that "no act done by accident is an offense except where there has been a degree of carelessness or negligence which the law regards as criminal. * * * The mistake as to fact which will excuse must be such that the person so acting under a mistake would have been excusable had his conjecture as to the fact been correct; and it also must be such a mistake as does not arise from a want of proper care on the part of the person committing the offense." We do not think the evidence brings this case within the purview of the meaning of those articles of the Code. Appellant made a sale of the article she intended to sell, and the fact she states that she did not believe it would intoxicate is not in and of itself enough to suggest this issue. She knew it was an offense to sell intoxicating liquor in Eastland county, and the evidence, to raise this question, should have gone further, and shown that she had used "proper care" to ascertain whether or not it was intoxicating before offering to sell it. It should show she made proper investigation, and not merely relied on her belief in the matter. Cole-

man v. State, 54 Tex. Cr. R. 402, 112 S. W. 1049, 130 Am. St. Rep. 896.

[2] The other issue raised by the special charges is one of more doubt. Appellant testified that the beverage was grape juice, was made by boiling the juice of the grape, and that it would not intoxicate. It is a matter of common knowledge that in all parts of our state there is an article of commerce sold as a beverage known as grape juice that has no intoxicating qualities. As to its ingredients, or the mode and manner of its manufacture, we have no information. The state's witnesses swore this was wine and would intoxicate. Appellant testified positively it was not wine, but grape juice, and manufactured by boiling the juice of grapes, and would not intoxicate. We are inclined to the opinion that she had a right to have this defense affirmatively presented to the jury for their determination. The court did not do so, and refused the special instructions presenting this issue. The jury should have been told that if they believed from the evidence that the beverage sold was grape juice and that it would not produce intoxication, or they had a reasonable doubt of that fact, to acquit her. The issue in the case was whether or not the beverage was intoxicating. She admitted making the sales as alleged, but contested this issue, and it should have been pertinently presented to the jury for their determination, and a failure to do so will necessitate a reversal of the case. And, as the case will be reversed on this issue, we would call attention of the court to another part of his charge whereby the jury may have been misled.

[3] In defining "business" or "occupation," the court instructed the jury: "In order to constitute the engaging in or pursuing the occupation or business of selling intoxicating liquors, within the meaning of the law, it is necessary to prove that the defendant made at least two sales of intoxicating liquor in Eastland county, Tex., during the month of December, 1910. By the term 'business' and 'occupation' is meant a calling, trade, or vocation which one engages in for the purpose of making a living or obtaining wealth." It is insisted that this charge is confusing and misleading, and the jury would infer that proof of two sales would in and of itself constitute a business or occupation. The latter part of this charge is a definition more burdensome upon the state and more favorable to defendant than required under this act of the Legislature. *Fitch v. State*, 127 S. W. 1046. In the *Fitch Case* the question is discussed at length ably, and the charge, if it thus defined "business" or "occupation," and then followed it up by an instruction that if the jury believed one engaged in the business *and made two sales*, etc., would not be subject to criticism. On another trial a proper definition of "occupation" or "business" should be given without reference to

the number of sales it would take to constitute one engaging in the occupation, and the jury told if a person engaged in this business or occupation, and made two sales, they would be guilty. In other words, the burden is upon the state to prove, first, that the person charged with the offense is engaged in the business and occupation of selling intoxicating liquors, and this may be proven by facts or circumstances the same as proving that a person was engaged in any other character of business, and then prove, in addition to this, that two sales of intoxicating liquor had been made to persons named in the indictment. There are two facts to be proven under the law defining this offense, and that is a person is engaged in the business, and the other is that such person made two sales while engaged in such business. They may be isolated sales, if one is proven to be engaged in that business or occupation by other facts and circumstances. The law so provides. In some cases two sales, with other facts and circumstances in the case, may authorize a jury to find that a person was engaged in that business, while in another case two sales, with no other facts or circumstances in the case, may not justify such a finding. Each case must stand upon the evidence in that case. The evidence in this case would support a finding that, if the beverage sold was intoxicating, the appellant made many sales and was engaged in the business of selling it, and this instruction, although subject to criticism, would not alone present reversible error, but, inasmuch as the case will be reversed on other grounds, we call attention to it that it may be eliminated on another trial.

We do not deem it necessary to discuss the other questions raised, as the opinion herein rendered will indicate the proper disposition of them.

The judgment is reversed, and the cause is remanded.

BROCK v. STATE

(Court of Criminal Appeals of Texas. Nov. 20, 1912. Rehearing Denied Dec. 18, 1912.)

1. HOMICIDE (§ 158*)—ADMISSIBILITY OF EVIDENCE—THREATS BY ACCUSED.

In a prosecution for homicide, threats by accused to kill deceased were admissible.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 293-296; Dec. Dig. § 158.*]

2. CRIMINAL LAW (§§ 763, 764*)—TRIAL—INSTRUCTION—PROVINCE OF COURT AND JURY—WEIGHT OF EVIDENCE.

Where the state, in a prosecution for homicide, introduced threats by defendant to kill deceased, his requested instruction that if such threats were made with no intention of taking the life of deceased, or were made in a jocular manner, they should not be considered in reaching the verdict, was properly refused, as invading the province of the jury as the

judge of the credibility of witnesses and the weight of the evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1731-1748, 1752, 1763, 1770; Dec. Dig. §§ 763, 764.*]

3. CRIMINAL LAW (§ 673*)—CREDIBILITY OF WITNESSES—DEFENDANT'S TESTIMONY BEARING ON MOTIVE.

Where defendant's testimony, introduced without objection, tended strongly to show his motive in killing deceased, a refusal to limit such testimony to the question of his credit as a witness was proper.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1597, 1872-1876; Dec. Dig. § 673.*]

4. CRIMINAL LAW (§ 1086*)—APPEAL—NECESSITY OF OBJECTION.

Alleged error in the admission of certain evidence cannot be considered, where the record does not show that it was objected to at the time of its introduction, or that there was any motion made to exclude it.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2736-2769, 2772, 2794; Dec. Dig. § 1086.*]

5. HOMICIDE (§ 250*)—EVIDENCE—SUFFICIENCY.

Evidence in a prosecution for homicide held sufficient to sustain a conviction.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 515-517; Dec. Dig. § 250.*]

Appeal from District Court, Travis County; George Calhoun, Judge.

Henry Brock was convicted of murder, and he appeals. Affirmed.

C. C. Parker and Henry Faulk, both of Austin, for appellant. C. E. Lane, Asst. Atty. Gen., for the State.

HARPER, J. Appellant was prosecuted and convicted of murder, and his punishment assessed at death.

The facts would disclose: That appellant and deceased had been criminally intimate for a number of years. That deceased was of a jealous nature, and if appellant paid attention to other women she would become very angry. Just a short time before the killing, appellant, being away from home, wrote deceased to send him money to return on, and she did so, when they renewed their association. They spent the night before the homicide together, and were seen walking down a street or alley early in the morning. A shot was heard, and those going to the body found the woman shot in the back of the head or neck; the pistol having been held close enough to powder-burn the skin. Appellant was cut in the face, and he says deceased became angry with him and cut him; that he did not intend to kill her, but in attempting to push or drive her off the pistol was accidentally discharged. The killing took place on April 24th, and Policeman Allen says just one week before he had a talk with appellant, and appellant told him he was having a lot of trouble with deceased. Said she had telephoned his (appellant's) wife, and told her about sending him the money to come home on, and he was

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

staying away from home on that account. That he was afraid deceased was going to his home, and said he was going to kill her. Some other threats are also testified to by witnesses. Naomi Luck says the morning before the killing appellant told her that he and deceased "were having hell all the time, and he could not get rid of the damn bitch, unless he killed her." Edgar East testified that the night before the killing he heard appellant say, "I'll kill the God damn bitch before the sun rises." Appellant denies making the threat East testified to, and says if he made the threats testified to by Mr. Allen and Naomi Luck he was drunk, and had no intention of carrying them out; that he and the woman often quarreled, would make up, and it was nothing unusual for people in that strata of society to speak harshly and abusively of one another, and no one took it seriously.

[1, 2] Appellant requested the court to instruct the jury: "Gentlemen of the jury, you are instructed that if you find from the evidence that defendant made threats against the deceased, but that same were made with no intention of taking the life of deceased, or were made in a jocular manner with no purpose of execution, you are instructed not to consider same against defendant in arriving at your verdict." This testimony was admissible in evidence; and, while it was permissible for appellant's counsel to argue to the jury that they should give the remarks but little weight, and doubtless counsel did do so, yet it would have been improper for the court to so have instructed the jury. Under our law the jury is the judge of the credibility of the witnesses and the weight to be given testimony. Under the state's contention the threats were seriously made; and it would have been just as permissible for the court to have told the jury, if they believed they were seriously made, to give weight to them, as for him to tell them, if not seriously made, to not consider the threats. *Kirk v. State*, 35 Tex. Cr. R. 224, 32 S. W. 1045, and cases cited in section 809, White's Ann. Procedure.

[3] All testimony of intimacy between appellant and deceased was introduced without objection, and it tended strongly to prove the motive of appellant in killing deceased, if he did so intentionally; and the court did not err in failing to limit such testimony to affecting the credit of defendant as a witness.

[4] The grounds in the motion complaining of the admissibility of certain testimony cannot be considered, as the record before us does not disclose that it was objected to at the time of its introduction; nor was there any motion made to exclude it.

[5] After a careful review of the entire record, we are of the opinion that the evidence supports the verdict of the jury, and

they were authorized under it to conclude that it was a willful, intentional killing. The point of entrance of the bullet and its range do not give support to the accidental theory.

The judgment is affirmed.

MACEY et al. v. STATE.

(Court of Criminal Appeals of Texas. Nov. 20, 1912. On Motion for Rehearing, Dec. 18, 1912.)

1. JURY (§ 29*)—RIGHT OF TRIAL BY JURY—WAIVER—CRIMINAL CASES.

The statute which provides that defendant in a misdemeanor case may waive a jury altogether carries with it the further right to agree to a trial by a jury composed of less than six men.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 197-203; Dec. Dig. § 29.*]

2. JURY (§ 29*)—NUMBER—OBJECTION—WAIVER.

Where defendants, on trial for a misdemeanor, agreed to try the case before a jury of five, which was done without objection pending the trial, an objection by themselves, after conviction, that they were tried by a jury of five men only, was too late.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 197-203; Dec. Dig. § 29.*]

3. CRIMINAL LAW (§ 871*)—TRIAL—VERDICT.

The verdict of the jury does not have to be signed by the foreman or any others of the jury, even in a felony case.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2079-2081; Dec. Dig. § 871.*]

4. CRIMINAL LAW (§ 1090*)—APPEAL—NECESSITY OF EXCEPTIONS.

Unless defendants, in a misdemeanor case, take a bill of exceptions to the admission of evidence, and so preserve the point, the question of its admissibility cannot be held reversible error on appeal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2789, 2803-2827, 2927, 2928, 2948, 3204; Dec. Dig. § 1090.*]

5. ADULTERY (§ 11*)—TRIAL—EVIDENCE—IDENTITY OF PARTIES.

In a prosecution for adultery, where the state necessarily depended somewhat upon circumstantial evidence, evidence tending to show that persons seen by witness under circumstances indicating the offense were the defendants was admissible as a circumstance bearing upon the identity of the parties.

[Ed. Note.—For other cases, see Adultery, Cent. Dig. §§ 20-23; Dec. Dig. § 11.*]

Appeal from Taylor County Court; Thomas A. Bledsoe, Judge.

J. P. Mackey and Minnie Grice were convicted of adultery, and they appeal. Affirmed.

M. W. Shelley, Jr., of Abilene, for appellants. C. E. Lane, Asst. Atty. Gen., for the State.

PRENDERGAST, J. The appellants were jointly indicted for adultery. They were tried together jointly, and in the trial represented by the same attorney. Each was convicted, Mackey fined \$325 and Grice \$100.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

They both appealed, each entering into a recognizance separately.

[1, 2] The record shows that in the organization of the jury, when both sides got through with their challenges, only five jurors were left. Thereupon both sides agreed in open court, both appellants being present, to try the case before a jury of five, which was done. No objection was made by the appellants, or either of them, by their attorney, or any other way, pending the trial. After the verdict of conviction, on motion for new trial, for the first time appellants claim that the case was tried before a jury of five men only, instead of six, and that they personally did not agree to this at the time. The verdict, as rendered, was signed by one man as foreman, and not by the other four. We think the record clearly shows that each of the appellants did agree to try the case before a jury of five men; but, whether they did or not, they knew all the time during the trial and until after its conclusion that they were being tried by a jury of five men, and made no objection thereto. The charge against them was a misdemeanor. Our statute provides that an appellant in a misdemeanor case can waive a jury altogether. This would carry with it the further right to agree to a trial by a jury composed of less than six men. *Stell v. State*, 14 Tex. App. 59. And it was too late for appellants to make said objection to wait till after the verdict of the jury before making any complaint. *West v. State*, 54 Tex. Cr. R. 597, 114 S. W. 142; *Munson v. State*, 34 Tex. Cr. R. 498, 31 S. W. 357; C. C. P. art. 938.

[3] The verdict of the jury does not have to be signed by the foreman or any other or others of the jury, even in a felony case. *Petty v. State*, 59 Tex. Cr. R. 586, 129 S. W. 615.

[4] By several bills appellants complain that the court admitted certain admissions and statements by each of the parties when the other was not present, and complain that the court did not charge that such testimony should be considered only against the one so making such statements or admissions, and omitted to charge that it should not be considered against the other. As the evidence on the trial of both persons was clearly admissible in the case, it was the duty of the respective appellants, if they desired it, to request written charges limiting the consideration of such evidence to the party making such statement or admission. And, if such charge were refused, it was his duty to take a bill of exceptions thereto, and thus preserve his point. It is only when such course is pursued that this court can consider any such question on appeal in a misdemeanor case. This clearly not having been done does not present reversible error. This has always been the established law of this state, and decided so many times that it is unnecessary to collate or cite the

authorities; but see *Giles v. State*, 148 S. W. 320; *Perkins v. State*, 144 S. W. 244; *Golden v. State*, 146 S. W. 946; *Luttrall v. State*, 142 S. W. 589; *Melear v. State*, 145 S. W. 354. This applies also to appellants' complaint of the refusal of the court to give their special charge.

[5] The state, being under the necessity of securing a conviction somewhat upon circumstantial evidence, and the court having given a correct charge on that subject, did not commit any error in admitting the testimony of Tom Newman as complained by appellant, as his testimony was admissible as a circumstance, among others, tending to show that the parties he saw were the appellants, and under such circumstances as clearly showed they had sexual intercourse on that occasion. Neither did the court err in permitting the witness Horace Holt, a boy 13 years of age, to testify, as the bill does not show that he was incompetent so to do. Neither does the bill to the objection of the testimony of the deputy sheriff show any error. Nor that of the sheriff to the fact that appellant Minnie Grice told him that she was 15 years old.

We have considered all of appellants' assignments and none of them show any reversible error.

The only other question raised is appellants' contention that the evidence is insufficient to justify the verdict. We have carefully read the statement of facts, and in our opinion the evidence was sufficient to authorize the jury to convict the appellants. It shows such a state of fact extending over such a period of time sufficient to convince the jury, as it did, beyond a reasonable doubt, that the sexual intercourse between the appellants was habitual. She was an unmarried girl 15 years old. Appellant Mackey was a married man. It is unnecessary to detail the evidence.

The judgment is affirmed.

On Motion for Rehearing.

Appellant in his motion for rehearing complains that we did not consider nor pass upon his bill of exception, wherein he objected to the county attorney testifying to what Minnie Grice, one of the appellants, testified before the grand jury, claiming that what was testified before the grand jury was secret and could not be disclosed, and refers us only to the case of *Gutgesell v. State*, 43 S. W. 1016.

He is mistaken in claiming that we did not consider nor pass on this question. We stated in the opinion: "We have considered all of appellant's assignments, and none of them show any reversible error." The *Gutgesell* Case, referred to and relied upon by appellant, has been so many times expressly overruled, and conceded to be by so many decisions, we thought it altogether unnecessary to say anything specially about his bill. The question has been so thoroughly considered

and the authorities collated in several cases, and decided against appellant, we deem it unnecessary to again discuss the question. *Wisdom v. State*, 42 Tex. Cr. R. 584, 61 S. W. 926; *Grimsinger v. State*, 44 Tex. Cr. R. 18, 23, 29, 69 S. W. 553; *Wooley v. State*, 64 S. W. 1055; *Pierce v. State*, 54 Tex. Cr. R. 425, 113 S. W. 148; *Giles v. State*, 43 Tex. Cr. R. 563, 67 S. W. 411; *Smith v. State*, 48 Tex. Cr. R. 510, 90 S. W. 37.

The motion for rehearing is overruled.

WILSON v. STATE.

(Court of Criminal Appeals of Texas. Nov. 20, 1912. Rehearing Denied Dec. 18, 1912.)

WEAPONS (§ 11*)—CARRYING WEAPONS—JUSTIFICATION.

Accused who had won at gaming, and who was then robbed and made to give the money back to the loser, and who knew that a police office was within calling distance or within as easy reach as his own arms, was not justified in going 700 yards to his residence returning with a pistol and himself attempting to arrest the robber, and was guilty of unlawfully carrying a pistol.

[Ed. Note.—For other cases, see *Weapons*, Cent. Dig. §§ 10-14; Dec. Dig. § 11.*]

Appeal from San Augustine County Court; W. C. Ramsey, Judge.

Jeff Wilson was convicted of unlawfully carrying a pistol, and he appeals. Affirmed.

Foster & Davis, of San Augustine, for appellant. C. E. Lane, Asst. Atty. Gen., for the State.

HARPER, J. In this case the undisputed testimony shows that appellant and one Will Woods engaged in gambling in a barn about 700 yards from appellant's residence; that appellant won the money of Woods, when Woods took a scantling, and compelled appellant to give him back his money; that appellant then left the barn, went to his home, armed himself with a pistol, and returned to the barn. Woods having left the barn, appellant pursued him, and shot at him with a pistol. He was convicted of unlawfully carrying a pistol, and his punishment assessed at a fine of \$100.

Appellant offered to testify that he went to his home to get a pistol to arrest Woods, and turn him over to the officers for robbing him, as he claimed, and whether or not this testimony was admissible presents the sole question in the case; for, if the testimony was admissible, then the special charge should have been given. If the court did not err in excluding the testimony, then no error is assigned which would present reversible error. The testimony shows that the transaction took place in the town of San Augustine; that, when appellant fired at Woods, an officer immediately appeared on the scene. Then the question presented is:

Even if Woods robbed appellant, and he, knowing that an officer of the law was in immediate reach, was he authorized to go 700 yards to his residence, secure a pistol, return the same distance, and himself attempt to make the arrest? Each case of this kind must be decided from the facts in that case, and the evidence convincing us that appellant knew that an officer of the law could be reached at once, he was not authorized to go to his home, secure a weapon, and himself undertake to make the arrest. Of course, the state's testimony would raise the issue that appellant had not such purpose and object, but we are not passing on that question, but solely upon the question that when an officer of the law is in calling distance, or is in as easy reach as the arms of appellant, is he authorized to go after his arms and make the arrest, or should he go to an officer? Under such circumstances, we think it the duty of one to appeal to the officers of the law, and not himself take the law into his own hands, and, having reached this conclusion, the judgment is affirmed. The law aids no one in a gambling transaction.

The judgment is affirmed.

CRAIG v. STATE.

(Court of Criminal Appeals of Texas. Oct. 16, 1912. Rehearing Denied Dec. 18, 1912.)

CRIMINAL LAW (§ 1166½*)—APPEAL—PREJUDICE—RULINGS ON JURORS.

At the commencement of the trial of accused for perjury, his counsel asked the jurors whether they heard comments of the court, before the case was called for trial, with reference to perjury while sentencing another person convicted of a different crime. A number of the jurors, having answered in the affirmative, also stated, in answer to a question of the district attorney, that the court's remarks would have no effect on them in giving defendant a fair trial. The court overruled defendant's objection to the jurors, and he was required, after exhausting his peremptory challenges, to accept three of them as members of the jury. Held that, no prejudice having been shown, such facts were insufficient to constitute reversible error.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 3114-3125; Dec. Dig. § 1166½.*]

Appeal from District Court, Hunt County; R. L. Porter, Judge.

Dabney Craig was convicted of perjury, and he appeals. Affirmed.

S. D. Stinson and Evans & Carpenter, all of Greenville, for appellant. C. E. Lane, Asst. Atty. Gen., for the State.

PRENDERGAST, J. Appellant was convicted of perjury and given the lowest penalty—two years in the penitentiary.

This is a companion case to that of *Moore v. State*, 144 S. W. 598. That case and this

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

all grew out of the same transaction, at the same time, between the same parties. Practically the only difference between the two is that one is a charge against Moore and the other against appellant. Every question that is raised, or attempted to be raised, in this case, was substantially raised, or attempted to be raised, in said Moore Case, supra, except one which will hereafter be noticed. Therefore, instead of taking up the several questions and again discussing or deciding them, we refer to the said Moore Case, supra.

The only question that is raised in this case which was not raised in the Moore Case is this: By appellant's bill No. 1 it is shown that, after both parties announced ready and they were engaged in questioning the jurors of the panel for the week, the appellant asked them this question: "Were you present in court on the day that the court was sentencing a young man, who had been convicted of breaking a house to steal whisky, this week, and heard the court make the following remarks: 'Young men very often engage in violations of law, and then go before the grand jury and swear falsely about it. When a man has no regard for his honor and oath, he is mighty near a lost proposition, and that worries me to see young man after young man go before the grand jury and perjure himself.'" To which question the jurors, 18 in number, whose names are given, answered that they were present and remembered hearing said remarks of the court. The district attorney then asked them: "Would said remarks of the court affect you in passing on this case, or can you give the defendant a fair and impartial trial, as if you had never heard said remarks?" To which question each of the jurors answered that such remarks would not affect him, and that they would give the defendant a fair trial. The defendant objected to the qualification of each of these jurors on account of the above and moved the court to excuse them from the panel and not require him to exhaust his peremptory challenges. The court overruled this, and the defendant then challenged peremptorily only three of these jurors, leaving him but seven peremptory challenges remaining, which he was compelled to and did exhaust on talesmen summoned and tendered him on said panel, and that there was thus left on said panel three of the said eighteen, naming them, who were impaneled and served as jurors in the trial of the case. The court qualified this bill by stating this: "The remarks complained of in the bill are fragments of a talk I gave a young man 2 or 3 days before this case was called, in passing sentence upon him for breaking a house to steal whisky. The talk I made the young man had no reference whatever to this case or any other case on the docket, and was

made for the purpose of admonishing him, when he served out his time, to shun bad habits and company, such as gambling and whisky drinking, and to try to make a useful and honorable citizen. Each of the jurors on the panel stated very positively that said remarks would have no effect or bearing whatever upon them in passing upon the guilt or innocence of this defendant, and that they could and would try the case as though they had not heard the remarks. I felt satisfied at the time that said jurors would not be influenced by said remarks, and I still believe that they were not. Understanding the matter as I do, I cannot see how counsel could seriously insist upon this bill."

This bill does not show, or attempt to show, that appellant was in any way injured by having to take as jurors the said three who heard said remarks of the court. Clearly they are not shown to in any way be disqualified to serve, but, on the contrary, so far as this bill shows, they were each qualified to serve. The court did not err in refusing to sustain appellant's objections to said jurors.

The evidence in every way clearly and unquestionably showed the guilt of appellant, and the charge of the court correctly and aptly submits every question necessary or proper to be submitted under the law and evidence.

The judgment will be affirmed.

HOGUE v. STATE.

(Court of Criminal Appeals of Texas. Nov. 6, 1912. Rehearing Denied Dec. 18, 1912.)

1. CRIMINAL LAW (§ 1144*)—CONTINUANCE—ABSENCE OF WITNESSES—PRESUMPTIONS.

The court, on reviewing the denial of an application for a continuance on the ground of the absence of witnesses, must, in the absence of a contrary showing, presume that accused was arrested on the day the indictment was returned, and cause transferred to the county court, or within a day or two thereafter, so that, to show diligence, accused must show that he procured process for his witnesses at once, or at least within a very few days, requiring them to attend court at the next term.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2736-2781, 2801, 3016-3037; Dec. Dig. § 1144.*]

2. CRIMINAL LAW (§ 598*)—CONTINUANCE—ABSENCE OF WITNESSES—PRESUMPTIONS.

Where accused was indicted in the criminal district court of a county on March 30th, and the cause was transferred on the same day to the county court, the next term of which began on May 6th, accused was not entitled to a continuance on the ground of the absence of witnesses, where no process was procured, and none placed in the proper officer's hands until May 10th, returnable on May 17th, the day the cause was set for trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1335-1341; Dec. Dig. § 598.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

3. CRIMINAL LAW (§ 1159*)—VERDIOT—CONCLUSIVENESS.

The jury are the exclusive judges of the credibility of the witnesses and the weight of their testimony, and the court on appeal will consider only whether the evidence is sufficient as a matter of law if believed to sustain a conviction.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3074-3083; Dec. Dig. § 1159.*]

4. DISORDERLY HOUSE (§ 17*)—EVIDENCE—SUFFICIENCY.

Evidence held to support a conviction for keeping a disorderly house.

[Ed. Note.—For other cases, see Disorderly House, Cent. Dig. §§ 26-29; Dec. Dig. § 17.*]

Appeal from Dallas County Court, at Law; W. F. Whitehurst, Judge.

Nannie Dee Hogue was convicted of crime, and she appeals. Affirmed.

Currie McCutcheon, of Dallas, for appellant. C. E. Lane, Asst. Atty. Gen., for the State.

PRENDERGAST, J. Appellant was indicted for unlawfully keeping, and being concerned in keeping, a certain house in Dallas county as a house where prostitutes were permitted to resort and reside for the purpose of plying their vocation, and as a house kept for the purpose of prostitution. She was found guilty, and her punishment assessed at a fine of \$200 and 20 days in jail.

Appellant, by his brief, presents but two questions: First, that the court erred in overruling his motion for continuance; and, second, the evidence is insufficient to sustain the verdict. There are some other bills of exceptions in the record which are not presented by appellant, but which we have considered and find that they present no error. We will therefore discuss only the said two questions presented.

The record shows that the appellant was duly indicted by the grand jury of Dallas county on March 30, 1912, and the case properly transferred from the criminal district court of Dallas county to the county court at law and filed in said county court on the same day.

[1] It further shows that the term at which appellant was tried began on May 6, 1912, and ended June 29, 1912. The application for continuance not showing otherwise, under the law, we must presume that the appellant was arrested at once, either on March 30, 1912, or within a day or two thereafter. In order to show diligence, the appellant must have procured process for her witnesses at once, or, at least, within a very few days, requiring them to attend court at its next sitting on May 6, 1912, but this was not done.

[2] Doubtless, if it had been done, as the claimed absent witnesses were both alleged and shown to be residents of the city of Dallas where the court was held, they could have been found within the five weeks from

the arrest of the appellant before the court convened. Instead of doing this, no process whatever for them was procured and none placed in the proper officer's hands until May 10, 1912, returnable on the 17th day of May, the day the case was set for trial. So that we hold, under the authorities, that no diligence is shown. *Giles v. State*, 148 S. W. 317, and cases therein cited; *Walker v. State*, 13 Tex. App. 618, 44 Am. Rep. 716, note; *Massie v. State*, 30 Tex. App. 67, 16 S. W. 770; *Long v. State*, 17 Tex. App. 129; *Skipworth v. State*, 8 Tex. App. 139.

[3] There was amply sufficient evidence, if believed by the jury, to have authorized them to acquit the appellant. The law makes them the exclusive judges of the credibility of the witnesses, and the weight to be given to their testimony. This court cannot take that question from them. Therefore, when this court is called upon to determine whether or not the evidence is sufficient to authorize the conviction, this court should properly consider only the question of whether the evidence was sufficient as a matter of law, if believed by the jury, to sustain the conviction, not upon the whole testimony of whether or not this court would have found a different verdict from that of the jury.

[4] It is unnecessary to state all of the evidence, and, of course, unnecessary to state any of that of the appellant which the jury had the right to disbelieve and give no credence to if in their judgment and opinion they ought not. The evidence conclusively shows that the appellant was in charge as tenant of the hotel which it is claimed was used by her for the purpose charged in the indictment and at the time charged therein. Two witnesses on the police force of the city of Dallas testified that the hotel run by appellant at the time charged in the indictment had the reputation of being a place where prostitutes were permitted to resort and reside for the purpose of plying their vocation. Each of them also testified that they had visited the place repeatedly along about the time charged in the indictment and shortly prior thereto, and that appellant was present each time in charge of the house; that on one occasion about March 2, 1912, they saw that two women had registered there; that they at once went up to the room assigned to these women, were invited in by them, and the women proposed to have sexual intercourse with them for the price of \$10; that they declined this proposition, and at once informed the appellant, and she thereupon required these women to leave her house. Both of these women were shown to have been common prostitutes and went direct from the appellant's house to a house of prostitution, and remained therein as such up to the time of this trial some two months and a half later. Both of these women testified on this trial substantially as the said policemen had tes-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

tified. They claim, and so did appellant, that they reached Dallas and went to this hotel from the train with their grips, modestly attired. One of them testified she did not know whether they could have gotten a room in said hotel for the purpose of having intercourse with these men or not. On another occasion one of these officers went into this hotel about 3 o'clock in the morning, went to one of the rooms, and found a man in bed with Mattie Nichols, whom he testified was a common prostitute, and another woman named Lula Washington, whom he testified was a common prostitute, in another bed with another man. The exact time when this occurred is not shown, but we take it from the whole of the circumstances detailed by the witnesses that it was along about the same time charged in the indictment. The two men who were caught in bed with these two women as testified by the police officer also testified and confirmed the testimony of the police officer. They claim, however, that appellant knew nothing of this, and they thought she would not have permitted it if she had known it.

It was further clearly shown that the woman, Mattie Nichols, was an employé in appellant's house, and had been continuously for some time, and that Lula Washington had a room therein for some time; her husband being a night employé at another and different hotel.

Another officer, a deputy sheriff of Dallas county, testified that on one occasion he visited this hotel, and while there saw Mattie Nichols therein, that he had known her for 35 years, and she had a bad reputation for chastity. Another very significant fact and one doubtless of considerable weight with the jury was testified to by appellant herself, and that is that said Mattie Nichols' name appeared on the register of her hotel each day, the register showing "pd" after her name which was her custom in keeping the register, and once her name so appeared twice the same date.

We think the evidence was ample sufficient to sustain the verdict.

The judgment is therefore affirmed.

ALEXANDER v. STATE.

(Court of Criminal Appeals of Texas. Dec. 4, 1912.)

1. WITNESSES (§ 380*) — CREDIBILITY — IMPEACHING OWN WITNESS.

Under Code Cr. Proc. 1911, art. 815, which modifies the rule forbidding a party to attack his own witness' testimony, by permitting such attack when facts and testimony are injurious to his cause, but not by impeaching his character, the prosecuting attorney, after a witness for defendant, on trial for murder, had testified that deceased had an open knife in his hand, and had said that he was going to kill some one thereabouts that night, and after asking the witness on cross-examination

what defendant was doing and saying, without eliciting desired responses, was entitled to ask a witness if he did not testify to a certain state of facts before the grand jury, and upon his denial to prove by a witness that he had so stated before the grand jury, since the witness, even if considered as a state's witness, had testified injuriously.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1210-1219; Dec. Dig. § 380.*]

2. CRIMINAL LAW (§ 1090*) — APPEAL — NECESSITY OF BILL OF EXCEPTIONS.

Where no bills of exceptions are reserved, matters complaining of the admission of certain testimony cannot be considered.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2789, 2803-2827, 2927, 2928, 2948, 3204; Dec. Dig. § 1090.*]

3. HOMICIDE (§ 340*) — APPEAL — HARMLESS ERROR—ISSUES AND EVIDENCE.

Where the court submitted the issue of manslaughter, and the jury convicted defendant of that offense only, error, if any, in failing to submit that issue, in conformity with the evidence, was harmless.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 715-720; Dec. Dig. § 340.*]

4. CRIMINAL LAW (§ 1129*) — APPEAL — SUFFICIENCY OF ASSIGNMENT OF ERROR.

An assignment of error, on the ground that "the court erred in his charge to the jury in defining manslaughter," is too general to require attention.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2954-2964; Dec. Dig. § 1129.*]

Appeal from District Court, Collin County; J. M. Pearson, Judge.

Clarence Alexander was convicted of manslaughter, and he appeals. Affirmed.

C. E. Lane, Asst. Atty. Gen., for the State.

HARPER, J. Appellant was indicted, charged with murder, and, when tried was convicted of manslaughter. There was no error in overruling the application for a continuance, as it was wholly lacking in diligence.

[1] The defendant placed upon the witness stand one Joe Nichols, and proved by him that deceased had an open knife in his hand and said "he was going to kill some son of a bitch on Eleven Row to-night." On cross-examination the state asked him what defendant was doing and saying at that time, and, not eliciting desired responses, asked him if he did not testify to a certain state of facts before the grand jury, and, when he denied doing so, proved by a witness that he had so stated when testifying before the grand jury. The defendant objected, on the ground that, when the state inquired of the witness about matters not drawn out by him, the state made the witness its witness, and should not be allowed to impeach him. Article 815 of the Code of Criminal Procedure provides that "the rule that a party introducing a witness shall not attack his testimony is so far modified as that any party, when facts stated by the witness are injurious to his cause, may attack his testimony in any other manner, except by prov-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

ing the bad character of the witness." See, also, *Erwin v. State*, 32 Tex. Cr. R. 519, 24 S. W. 904, and cases there cited. The answers of the witness to the questions propounded were of an injurious nature, and, if it should be held he became the state's witness on this phase of the case, this would present no error. We hardly think the witness became a state's witness, however. He had testified for the defendant in regard to the origin of the difficulty, and the state was only cross-examining on this phase of the case.

[2] Those grounds in the motion complaining of the action of the court in admitting certain testimony, to which no bills of exception were reserved, cannot be considered by us.

[3, 4] The court submitted the issue of manslaughter, and the jury convicted appellant of that offense only; consequently it could not be said, if the court failed to submit that issue in conformity with the evidence, any injury resulted to appellant, and in the motion it is not assigned in a way we could consider it—the ground reading: "The court erred in his charge to the jury in defining manslaughter." This is too general to call our attention to any error in the charge, if error there be. However, we will add that the court's charge was a fair submission of that issue.

The judgment is affirmed.

STANTON v. STATE.

(Court of Criminal Appeals of Texas. Dec. 4, 1912.)

1. CRIMINAL LAW (§ 595*)—CONTINUANCE—GROUNDS—ABSENCE OF WITNESS.

Accused went to the house where his wife was working to induce her to return to him. This she declined to do, whereupon he secured a hatchet and struck her several blows on the head with it, from which she did not recover for considerable time. There was nothing said at the time that would indicate that he intended to attack her, or concerning her alleged unfaithfulness to him. *Held*, that the denial of accused's application for a continuance because of an absent witness, who would testify to the wife's unfaithfulness, but whose testimony was unknown to accused until the morning the application was filed, was not error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1323-1327; Dec. Dig. § 595.*]

2. HOMICIDE (§ 257*)—"DANGEROUS WEAPON"—HATCHET.

Where accused struck his wife several times on the head with a hatchet, causing wounds from which she did not recover for considerable time, and a physician testified that the wounds were all serious, and that the hatchet in the hands of a strong man like accused was a weapon with which a person could be killed, it was sufficiently shown to be a "dangerous weapon."

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 543-552; Dec. Dig. § 257.*]

For other definitions, see Words and Phrases, vol. 2, pp. 1828-1829.]

3. HOMICIDE (§ 257*)—ASSAULT TO KILL—EVIDENCE.

Evidence held to sustain a conviction of assault with intent to murder.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 543-552; Dec. Dig. § 257.*]

Appeal from District Court, Kaufman County; F. L. Hawkins, Judge.

Floyd Stanton was convicted of assault with intent to murder, and he appeals. Affirmed.

Woods & Morrow, of Kaufman, for appellant. C. E. Lane, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted of an assault with intent to murder his wife.

[1] When the case was called for trial, he applied for a continuance on account of the absence of Marcia Stanton. The facts alleged to have been known by the absent witness were unknown to appellant until the morning the application was filed. At this time he had been in jail about a month and had no opportunity to communicate with his friends on the outside to ascertain the materiality of the witness named above; that if the absent witness was present he would swear that his (appellant's) wife had been untrue to him, and that in his absence from home when at work she was seen to receive other male persons at his (appellant's) home; that the difficulty between his wife and himself grew out of the fact that she had been untrue to him as a wife, receiving other male persons, etc. This application was overruled, and a bill of exceptions taken. On the trial of the case it developed that appellant had become jealous of his wife on account of another negro at Terrell, where the difficulty occurred. Prior to the time of the attack he made on his wife, he and his wife and her sister were in a store where another negro was clerking, and his wife did not introduce him to the negro to whom she spoke and with whom she had some conversation. When they were leaving the store, he (appellant) reminded her of that fact, and she then proposed to take him back and introduce him to the other negro. This, however, was finally declined, and they went away. Subsequently, appellant went to the house of a Mr. Franks, where his wife was employed as cook, and, after spending the morning with her, knocked her down by striking her on the back of the head with a hatchet, and after she was down he repeated these licks several times, inflicting serious wounds. On the trial of the case the evidence disclosed, substantially, that appellant went to the house of Mr. Franks, where his wife was employed as servant and cook, spent the morning with her, trying to induce her to return and live with him. This she declined to do. Under the state's case, appellant, without any

warning so far as his wife was concerned, secured a hatchet weighing about a pound and a quarter to a pound and a half, from a little gallery on the outside of the kitchen, came in the kitchen where his wife was, and while the white family were at dinner, his wife being en route from the kitchen into the dining room, he struck her on the back of the head with the hatchet. She fell from the force of the blow, in the dining room near where Mrs. Franks was sitting. Appellant continued to strike her on the back or side of the head several blows. He then ran away and was finally captured. There seems to have been nothing said at the time that would indicate that he intended to attack her, nor was anything said about her intimacy with anybody other than her husband, unless it was in reference to the negro mentioned above found at the store in Terrell. We are of opinion, in the light of these facts, that the court did not err in refusing a continuance. The testimony, as stated in the application, was unknown to defendant, and did not, therefore, enter into the case.

[2] One other question worthy of notice is appellant's contention that the evidence is not sufficient to support the conviction, and under the circumstances the conviction should not have been for a higher offense than aggravated assault. Appellant made a statement, which was introduced in evidence against him, which may be termed a "confession," in which he admits striking his wife, but said at the time he had no intent to kill her. The evidence shows, as above stated, that he struck her several times. The witnesses vary, some of them stating that he struck her as many as six times with the hatchet, and the blows were all confined except one to the head. The doctor stated there was a bruise or wound on one of her wrists. The doctor testified the wounds were all serious, and that either from the force of the blow or falling on the floor she bled freely from the ears, which perhaps saved her life. This blood was from the inside of the head and came out through the ears. The evidence does not show definitely the weapon was a deadly one, but the doctor and Mr. Franks testified that it was one with which a person could be killed, especially in the hands of a strong vigorous man like the defendant.

[3] There is enough, we think, in the record from which the jury could infer and conclude that appellant made an assault with intent to kill. The witnesses testified the instrument was an ordinary hatchet, and Mr. Franks stated it would weigh from a pound and a quarter to a pound and a half and was made of iron or steel. Appellant's wife was confined to her bed for quite a length of time. The sharp issue and appellant's contention from this view-

point is whether it was done with intent to murder or only to make a serious assault. The court submitted the issue closely and sharply as between the two grades of the offense, and the appellant requested special instructions on the same point, and these were given. We are of opinion that there is enough evidence to authorize the jury to reach the conclusion that the assault was made with intent to kill, and that there is evidence enough for the jury to infer that the weapon as used, and under the circumstances of the case, was used as a deadly weapon, and that it was used under the circumstances as a deadly weapon. Witnesses testified that a party could be killed with the instrument in the hands of a man like the defendant, and that he made a vicious assault upon her is unquestioned, knocking her down and striking her several times with it after she was down, and each time on the back or side of the head. Sometimes these questions are close; but the facts are sufficient in this case, we think, to justify the conclusion of the jury that the assault was made for the purpose and with the intent to kill. They could have solved the question the other way and given appellant only the punishment of aggravated assault; but, under the facts developed, we are of opinion this court would not be justified or authorized to interfere and hold that the evidence was not sufficient.

Therefore we think the judgment ought to be affirmed, and it is, accordingly, so ordered.

HOBBS v. STATE.

(Court of Criminal Appeals of Texas. Dec. 4, 1912.

1. HOMICIDE (§ 96*)—DEFENSE OF ATTACK—SHOOTING THIRD PERSON—SELF-DEFENSE.

Where accused accidentally shot his wife as he was defending himself against another, who was in his wife's company, he was entitled to defend on the ground of self-defense.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 124-127; Dec. Dig. § 96.*]

2. HOMICIDE (§ 89*)—SHOOTING THIRD PERSON—SUDDEN PASSION—AGGRAVATED ASSAULT.

Where accused was seized with sudden passion on seeing his wife caressed by another, and shot at him, but struck his wife, he would be guilty of no higher offense than aggravated assault; the insult to the wife being adequate cause.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 115-118; Dec. Dig. § 89.*]

3. HOMICIDE (§ 310*)—ADEQUATE CAUSE—INSULT TO WIFE—INSTRUCTIONS.

Where accused's theory was that he shot his wife, intending to shoot another, whom he discovered caressing her, such insult to her being a statutory adequate cause, accused was entitled to an affirmative charge that if the shooting occurred on account of this conduct of the person at whom he shot toward his wife, and the passion was thus engendered, he would be guilty of no greater offense than man-

slaughter, had death occurred, and, death not having resulted, his offense could not be greater than aggravated assault.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 657-661; Dec. Dig. § 310.*]

Appeal from District Court, Galveston County; Clay S. Briggs, Judge.

Frank Hobbs was convicted of assault with intent to murder, and he appeals. Reversed and remanded.

T. C. Turnley, of Galveston, for appellant.
C. E. Lane, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted of assault with intent to murder; his punishment being assessed at two years' confinement in the penitentiary.

The evidence, briefly stated, will disclose that appellant was jealous of a man named Prince Helm; that his wife and a sister of Helm left appellant's residence to go to a certain point in the city of Galveston; that later he followed them, and, overtaking them further down the street, he found his wife and the woman Helm and Prince Helm walking along the street together, Prince Helm holding the hand of his wife while so walking. Enraged by this, he made an assault upon Prince Helm and shot at him, and in shooting at Helm struck his wife.

The court charged the jury on this theory of the case that, if they were satisfied the defendant did assault his wife with intent then and there to kill and murder her by the means charged in the indictment, and if further satisfied by the evidence, beyond a reasonable doubt, that the assault was not made under the immediate influence of sudden passion, etc., that they would find him guilty of an assault with intent to murder, stating the punishment; or if they were satisfied beyond a reasonable doubt that the defendant did assault Prince Helm with intent then and there to kill and murder him, by means charged in the indictment, and they were further satisfied by the evidence beyond a reasonable doubt that the assault was not made under the immediate influence of sudden passion, etc., and if they were further satisfied that, in the act of preparing for or executing the same, the defendant through accident shot his wife, and that the assault, if any, upon his wife, if voluntarily done, that it would then be an assault to murder his wife, and they would find him guilty of an assault to murder.

The court then charged the jury, if they should not so believe that the assault, if any, upon his wife, if voluntarily done, would constitute assault with intent to murder, or have a reasonable doubt thereof, but believed beyond a reasonable doubt that such assault upon his wife would constitute aggravated assault as hereinafter defined, they would

find him guilty of aggravated assault. The court then charged the jury, if they had a doubt as to the degree, whether he was guilty of aggravated assault or assault with intent to murder, to give him the benefit of that doubt. Then a charge was given submitting the issue of aggravated assault in a general way.

The jury was then charged that "any condition or circumstance capable of creating and which does create sudden passion, such as anger, rage, sudden resentment, or terror, rendering the mind for the time incapable of cool reflection, whether accompanied by bodily pain or not, may be adequate cause; and whether such adequate cause existed for such sudden passion, if any there was, it is for you to determine, and in determining this question, as well as all other matters before you, you will consider all the facts and circumstances in evidence in this case."

The court then charged the jury upon the issue of self-defense, upon the theory, if from the acts of the said Prince Helm, or from his words coupled with his acts, there was created in the mind of the defendant a reasonable apprehension that he was in danger of losing his life or of suffering serious bodily injury at the hands of said Prince Helm, then the defendant had the right to defend himself from such danger or apparent danger; and it is not necessary to the right of self-defense that the danger should in fact exist, but if it reasonably appeared to the defendant at the time, viewed from his standpoint at the time of the shooting, that such danger existed, he would have the same right to defend against it that he would have were the danger real.

The court then submitted this issue to the jury: "If you believe that the defendant committed an assault upon Prince Helm as a means of defense, believing at the time he did so (if he did do so) that he was in danger of losing his life or of serious bodily injury at the hands of said Prince Helm, and that in so acting the defendant accidentally shot the said Ida Hobbs, or if you have a reasonable doubt thereof, then you will acquit the defendant."

They found him guilty, and sent him to the penitentiary for assault to murder.

[1] It will be observed that the court submitted the right of self-defense against Prince Helm, and if he accidentally shot his wife they would find him not guilty. We understand the law to be that if he was defending himself against an attack of Prince Helm, and the testimony suggests the theory, and in shooting at Helm he shot his wife, that it would be a case of self-defense.

[2] We also further understand the law to be that if, in shooting at Helm under the immediate influence of sudden passion, he shot his wife, he could be guilty of no higher of-

fense than aggravated assault. If Helm had insulted his wife, or was in such position with her as the law considers it adequate cause, and he shot at Helm under sudden passion produced by the cause, then, if he shot Helm, he could not be guilty of any higher offense than aggravated assault, death not resulting. He therefore could not be guilty of any higher offense in shooting his wife than he would be guilty of in shooting Helm. It is objected to the charge that this theory was not presented to the jury by the charge. It should have been given. Appellant could be guilty of no higher offense in shooting his wife under the circumstances than he would in shooting at Helm, if the jury should find that the shot received by his wife was intended for Prince Helm.

[3] Another exception is urged to the charge in this: That the court charged the jury, as stated above, in a general way, that any circumstance or set of circumstances that would produce adequate cause would be sufficient to reduce the homicide, had a killing occurred, to manslaughter; the sudden passion being present. The contention here is, as it was below, that this was a statutory adequate cause, to wit, the insulting conduct to the wife, and the criticism below and here is that the charge is not sufficient, in that it fails to inform the jury directly and affirmatively that if the shooting occurred on account of this conduct on the part of Helm towards appellant's wife, and the passion was thereby engendered, he would not be guilty of a greater offense than manslaughter, had the killing occurred, and, the killing not having occurred, that his offense would not be higher than aggravated assault.

We are of opinion that this contention is correct. Wherever the statute names, as it does in this instance, that insulting conduct about or towards a female relative constitutes adequate cause, it must be expressly mentioned in the charge to the jury as a predicate for the submission of the law in that respect. This the court did not do. The court should have informed the jury that insulting conduct towards the wife would be adequate cause, but that the jury should therefore find, if adequate cause existed and the mind of the defendant became thereby inflamed to such a degree as to render it incapable of cool reflection, appellant could be guilty of no higher grade of offense than aggravated assault, and this being the law, in shooting his wife he would be guilty of no higher offense than if he had shot Helm; that is, he could be guilty of no higher offense than aggravated assault. This contention of appellant and criticism of the court's charge is correct, and aptly presents the question.

For the reasons indicated, the judgment is reversed, and the cause is remanded.

RAINES v. STATE.

(Court of Criminal Appeals of Texas. Dec. 4, 1912.)

CRIMINAL LAW (§ 1081*)—APPEAL—NOTICE—RECORD ENTRY.

A recitation, at the close of a sentence, that as defendant had given notice of appeal the judgment would be suspended, was insufficient as an entry of notice of appeal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2722-2724, 2962; Dec. Dig. § 1081.*]

Appeal from Criminal District Court, Dallas County; Robt. B. Seay, Judge.

Son Raines was convicted of burglary, and he appeals. Dismissed.

C. E. Lane, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted of burglary; his punishment being assessed at 10 years' confinement in the penitentiary.

This record is before us without a statement of facts, bills of exception, or motion for new trial. The record does not show that notice of appeal was given and entered in the court below. There is a recitation, at the close of the sentence, that inasmuch as defendant has given notice of appeal the judgment will be suspended; but under the decisions this is held not to be sufficient entry of notice of appeal.

In any event, in the condition the record is presented, there is nothing the court can review, and the judgment would be affirmed, if jurisdiction had attached; but, because of want of notice of appeal, as required by the statute, the appeal is dismissed.

STONE v. STATE.

(Court of Criminal Appeals of Texas. Dec. 4, 1912.)

CRIMINAL LAW (§ 1090*)—APPEAL—REVIEW—RECORD.

Grounds of a motion for new trial relating to the admission and exclusion of evidence cannot be reviewed, in the absence of bills of exception.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2653, 2789, 2803-2822, 2825-2827, 2928, 2948, 3204; Dec. Dig. § 1090.*]

Appeal from District Court, Collin County; J. M. Pearson, Judge.

Pearl Stone was convicted of pursuing the occupation of selling intoxicating liquors in prohibition territory, and she appeals. Affirmed.

C. E. Lane, Asst. Atty. Gen., for the State.

HARPER, J. Appellant was indicted, prosecuted, and convicted of unlawfully pursuing the occupation of selling intoxicating liquors in prohibition territory, and her pun-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

ishment assessed at two years' confinement in the penitentiary.

The two grounds in the motion, complaining that the court erred in admitting testimony, and in excluding testimony, cannot be considered by us, as there are no bills of exception in the record.

There was no error in the court refusing the special charges requested. There was no evidence calling for the first special charge; the record not even suggesting that she, in making the sales and pursuing the occupation, was acting under the direction of her husband.

The statutes provide that the purchaser of intoxicating liquor in prohibition territory is not an accomplice; consequently the court did not err in refusing the instruction presenting this issue.

The only ground in the motion complaining of the charge of the court is too general to be considered.

The judgment is affirmed.

LODGE v. STATE.

(Court of Criminal Appeals of Texas. Dec. 4, 1912.)

CRIMINAL LAW (§ 1090*)—RECORD—STATEMENT OF FACTS—BILL OF EXCEPTIONS.

Where there is neither a statement of facts nor bill of exceptions in the record, assignments in the motion for new trial are not reviewable.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2789, 2803-2827, 2927, 2928, 2943, 3204; Dec. Dig. § 1090.*]

Appeal from Criminal District Court, Dallas County; Robt. B. Seay, Judge.

Arthur Lodge was convicted of robbery, and he appeals. Affirmed.

C. E. Lane, Asst. Atty. Gen., for the State.

HARPER, J. Appellant was indicted, prosecuted, and convicted of the offense of robbery.

There is neither a statement of facts nor bills of exception accompanying the record, and under these circumstances there is no assignment in the motion for a new trial we can review.

The judgment is affirmed.

MCCRARY v. STATE.

(Court of Criminal Appeals of Texas. Dec. 4, 1912.)

1. CRIMINAL LAW (§ 1091*)—APPEAL AND ERROR—BURDEN OF SHOWING ERROR.

On appeal from a conviction for unlawfully carrying a pistol, a bill of exceptions stated that a witness for the state testified that he saw a pistol in accused's pocket and told him he had better behave himself or he would get into trouble. Appellant denied this, and objected to the testimony, on the ground that it was immaterial, irrelevant, and calculated to prejudice the jury against him, since

he was not being prosecuted for misbehaving himself or disturbing the peace, but had pleaded guilty to that offense. The court qualified the bill by stating that accused had denied such statement, and that it was admitted as a part of the *res gestæ*. *Held*, that the bill was so meager in stating the status of the case as not to show any reversible error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2803, 2815, 2816, 2818, 2819, 2823, 2824, 2828-2833, 2843, 2831-2833, 2943; Dec. Dig. § 1091.*]

2. CRIMINAL LAW (§ 1172*)—APPEAL AND ERROR—HARMLESS ERROR.

In a prosecution for carrying a pistol, where the court properly stated the law as to unlawfully carrying a pistol, an instruction that, if accused did unlawfully "have" on or about his person a pistol as charged, he should be found guilty, did not prejudice accused, because of the use of the word "have," instead of "carry."

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3128, 3154-3157, 3159-3163, 3169; Dec. Dig. § 1172.*]

Appeal from Smith County Court; Jesse F. Odom, Judge.

Oscar McCrary was convicted of unlawfully carrying a pistol, and he appeals. Affirmed.

C. E. Lane, Asst. Atty. Gen., for the State.

PRENDERGAST, J. The appellant was convicted for carrying a pistol and fined \$100, the lowest penalty. The evidence by the state is clearly sufficient to sustain the conviction. That by the defendant, if believed, would have justified an acquittal. The jury must have believed the state's evidence, and disbelieved appellant's. We cannot disturb the verdict.

[1] By one bill of exceptions it is stated that one of the state's witnesses, Jim Rushing, testified that when appellant was in his store in the afternoon of July 11, 1911, at which time he saw in the inside coat pocket of appellant what he took to be the handle of a pistol, he said to him, "You had better behave yourself, or you will get into trouble." Appellant testified, and denied making any such statement. Appellant's objection to this was that it was immaterial, irrelevant, and calculated to prejudice the jury against him. The objection further is that he was not then being prosecuted for misbehaving himself, or disturbing the peace, but had pleaded guilty to that offense, it seems, on the same occasion, and had paid his fine therefor. The court qualified this bill by stating that appellant had testified, denying making such statement, and that this statement by Rushing was made to him at the time he saw what he took to be a pistol in appellant's pocket, and was admitted as a part of the *res gestæ*; that appellant had pleaded guilty to disturbing the peace there on that same day; that this testimony could not have in any way injured appellant's rights, especially as the jury gave him the minimum penalty. The bill is so meager in

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

stating the status of the case as not to specifically show that there was any error in the admission of this testimony. His objections thereto were very general. It seems the evidence was admitted to impeach appellant's testimony. This bill shows no reversible error.

[2] By another bill appellant objects to that part of the court's charge wherein he uses this language: "Now, if you believe from the evidence, beyond a reasonable doubt, that the defendant did, in Smith county, Texas, on or about the 11th day of July, 1911, unlawfully *have* on or about his person a pistol, as charged, you will find him guilty," etc. The objection to this charge is the use of the word "have," underscored above. This objection is hypercritical. The complaint and information charged that on said date appellant did then and there unlawfully *carry* on or about his person a pistol, and the proof by the state is that he did so carry a pistol. The court, in his charge, properly stated the law that, if any person shall unlawfully *carry* on or about his person a pistol, etc. Taking the charge as a whole, no possible injury could have occurred to the appellant by the use of the word "have," instead of "carry," under the circumstances. The judgment is affirmed.

MONTGOMERY v. STATE

(Court of Criminal Appeals of Texas. Oct. 30, 1912. Rehearing Denied Dec. 18, 1912.)

1. HOMICIDE (§ 332*)—INSANITY—EVIDENCE—REVIEW.

Evidence held to sustain a jury's finding, sustained by the trial court, that accused was not so insane when he killed deceased as to take away criminal responsibility.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 699-704; Dec. Dig. § 332.*]

2. CRIMINAL LAW (§ 421*)—EVIDENCE—HEARSAY.

On the issue of insanity, a witness was not entitled to testify over objection to what third persons had told him respecting defendant's acts or conduct.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 976-983; Dec. Dig. § 421.*]

3. CRIMINAL LAW (§ 439*)—INSANITY—EVIDENCE—MEDICAL BOOKS.

On an issue of defendant's insanity, he was not entitled to introduce in evidence a chapter in a standard medical work on mental and nervous diseases.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1025; Dec. Dig. § 439.*]

4. CRIMINAL LAW (§ 683*)—RECEPTION OF EVIDENCE—REBUTTAL.

Code Cr. Proc. 1895, art. 698, providing that the court shall allow testimony to be introduced at any time before the argument is concluded, if it appears necessary in the due administration of justice, abolished the common-law rule as to matters in rebuttal, and hence it was not error for the court to permit the state in rebuttal to introduce eyewitnesses

of the crime and to permit them to testify as to the homicide generally.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1615-1617; Dec. Dig. § 683.*]

5. HOMICIDE (§ 300*)—ISSUES—INSTRUCTIONS—THREATS—SELF-DEFENSE.

Where defendant, notwithstanding his sole plea of insanity, introduced evidence of prior communicated threats by deceased, and also that but a short time prior to the difficulty deceased had given defendant a severe whipping and had threatened to take his life, the court did not err in charging on threats and self-defense.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 614-632; Dec. Dig. § 300.*]

6. HOMICIDE (§ 294*)—INSTRUCTIONS—INSANITY—MIND AND MEMORY.

Where, in a prosecution for murder, defendant pleaded insanity, an instruction that every person with a sound memory and discretion, who unlawfully kills, etc., with malice aforethought, shall be guilty of murder, etc., was not defective for failure to use the word "mind" instead of "memory."

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 605; Dec. Dig. § 294.*]

7. HOMICIDE (§ 294*)—INSANITY—INSTRUCTIONS—PROOF—REASONABLE DOUBT.

Defendant, in a prosecution for homicide, having pleaded insanity, the court charged that, if defendant's guilt had been established beyond a reasonable doubt, it devolved on him to establish his insanity at the time of the killing in order to excuse himself from legal responsibility; that, if the state had proved the offense, the jury's next inquiry would be whether defendant established his plea of insanity with reference to the act charged and the time of the commission of the offense; that the law did not hold a man for an act committed when insane; and that it was not necessary that the insanity should be permanent or the person charged should be a raving maniac, but was sufficient if he was insane at the time the act was committed though he was sane at other times. Held, that such instruction was not objectionable as requiring defendant to prove insanity beyond reasonable doubt, nor for failure to inform the jury that the diseased condition must be such that defendant did not know the nature and quality of his acts, or, if he did, that he did not know he was doing wrong.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 605; Dec. Dig. § 294.*]

8. CRIMINAL LAW (§ 800*)—INSTRUCTIONS—DEFINITION OF TERMS.

An instruction on insanity, in a prosecution for homicide, was not objectionable for failure to define the words "lucid interval"; they being words of generally well-understood meaning.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1808-1810, 1812; Dec. Dig. § 800.*]

9. HOMICIDE (§ 294*)—INSANITY—FORM OF INSTRUCTION.

Where the court charged that defendant was entitled to an acquittal if he was a paranoiac, or was suffering from delusion of persecution, or from a homicidal mania, or from some other form of insanity, the instruction was not objectionable as limiting the jury to the form of insanity known as paranoia.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 605; Dec. Dig. § 294.*]

10. HOMICIDE (§ 294*)—INSANITY—"NATURE OF ACT"—"QUALITY OF ACT."

An instruction on insanity, in a prosecution for homicide, that, if accused was suffi-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

ciently sane to know the nature and quality of his act, he was then legally responsible therefor, was not objectionable for failure to also require that he was sufficiently sane to know that his act in killing deceased was wrong; the term "nature of act" being defined to mean the attributes which constitute the thing and distinguish it from all others, while "quality of act" is the power to clearly and distinctly apprehend its nature, so that, if a person has sufficient mental power to fully appreciate and know what he is doing, he must necessarily know that the killing of a human being is wrong.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 605; Dec. Dig. § 294.*]

11. CRIMINAL LAW (§ 806*)—INSTRUCTIONS—REPETITION.

Where, in a prosecution for homicide, accused pleaded insanity, the law of which was fully presented in the charge, it was not necessary for the court to qualify the paragraphs of the charge dealing with murder in the first and second degree by referring to the charge on insanity.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1973, 1991; Dec. Dig. § 806.*]

12. CRIMINAL LAW (§ 824*)—EVIDENCE—LIMITATION—INSTRUCTIONS—NECESSITY OF REQUEST.

Where, in a prosecution for homicide, defendant introduced evidence of other assaults made by appellant on other persons, and the attending circumstances as bearing on the plea of insanity, it was not error for the court, in the absence of a request, to omit to limit the purpose and effect of such evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1996–2004; Dec. Dig. § 824; * Homicide, Cent. Dig. §§ 615, 651.]

Appeal from District Court, Jones County, Jno. B. Thomas, Judge.

J. J. Montgomery was convicted of murder in the first degree, and he appeals. Affirmed.

W. S. Payne, of Snyder, L. H. McCrea, of Roby, and Chapman & Coombes, of Anson, for appellant. C. E. Lane, Asst. Atty. Gen., for the State.

HARPER, J. Appellant was indicted for and convicted of murder in the first degree, and his punishment assessed at imprisonment in the penitentiary for life.

[1] It is not insisted by appellant that the evidence does not support the verdict, if the evidence would justify the jury in finding that he was sane at the time of the commission of the offense; but it is earnestly insisted that the evidence would not justify such a finding. The evidence conclusively shows that appellant was a man who transacted his own business, had been a merchant, owned rent houses, and was fully competent and capable of transacting all business in connection therewith; but it was insisted by appellant that he had delusions on the question of being persecuted, that there were certain people and orders who desired to run him out of town, and desired to take his life. It is further shown that twice prior to this trial appellant had

been tried, it being sought to adjudge him an insane person, but in both instances the juries had adjudged him of sound mind. However, based on these illusions or delusions testified to by witnesses, appellant contends that he was suffering from "paranoia," a form of delusional insanity—and such contention has support in the testimony,—and he was therefore incapable of knowing and appreciating the fact that the act was a wrongful act, and that under the peculiar form of insanity from which he was suffering, under the "delusions" to which he was subject, he might conceive a condition in his mind (not existent) which would justify his act, and, while laboring under this condition of mind, he would not appreciate and know that it was wrong to kill a man. While there is much evidence in the record to sustain the contention that if appellant conceived the idea, rightfully or wrongfully, that a given person held animosity towards him and intended to do him harm, in regard to such person, owing to such delusion, appellant would be in such state of mind that he should not be held criminally responsible for his acts under such conditions. Yet, as said in the Tubbs Case, 55 Tex. Cr. R. 606, 117 S. W. 858, the appellant may be a singular and strange man, and that he may, in the light of the record, possibly be an insane man, yet this issue was submitted to the triers of fact under our law, and the jury have affirmed their solemn conviction that at the time he shot and killed the deceased he was laboring under no such infirmity of mind as would excuse him for his crime. And whatever our view individually may be, we have no right to disturb their verdict where there is evidence to sustain it, and in this case, taking the state's view, there is ample testimony to support their finding. The trial judge, in overruling the motion for new trial, has affirmed his belief in the sanity of appellant, and we would not feel authorized to grant a rehearing on this ground. And under these circumstances we will take up and review each assignment of error.

[2] In the first and second bills of exception it is shown that Madison Morgan had testified that in his opinion he did not think appellant capable of knowing the nature and quality of the offense alleged against him, and had recited an instance wherein appellant had made a seemingly unprovoked assault on Mr. Tackett, and recited other matters upon which he based his opinion, and he was asked if he had heard of others, among them an attack on John A. Wood, and what he heard. This witness was permitted to detail everything happening within his view, and all incidents within his knowledge, but on objection was not permitted to detail what third persons had told him as to acts or conduct of appellant. In this we do not

think the court erred, especially as it is shown that in one instance he was requested to state what he had heard in regard to a difficulty between appellant and Mr. Wood. The record discloses that Mr. Wood was in attendance on court, and was excused by appellant without being placed on the witness stand.

[3] In the third bill it is shown that appellant offered in evidence chapter No. 14, extending from page 843 to 867, of Church & Peterson's work on Mental and Nervous Diseases. There was no error in sustaining the objection to the introduction of this chapter of a medical work. It may be that the authors were gifted and learned men, and had ably expressed their views on mental diseases and disorders, yet this court has always held such evidence inadmissible. *Burt v. State*, 38 Tex. Cr. R. 436, 40 S. W. 1000, 43 S. W. 344, 39 L. R. A. 305, 330; and for an extensive list of authorities, see Wharton's Crim. Law, § 538.

[4] After the state had made its case in chief, and the defendant, had introduced his testimony and rested, the state then introduced Dr. G. J. Hubbert and W. A. McKenzie, both of whom were eyewitnesses to the tragedy. The defendant objected to them being permitted to testify, claiming their testimony was not in rebuttal of any testimony offered in behalf of defendant, as he relied on the plea of insanity, and did not attempt to justify his act. While article 697 of the Code of Criminal Procedure prescribes the order of a trial, yet article 698 provides that the court shall allow testimony to be introduced at any time before the argument of a case is concluded, if it appears necessary to the due administration of justice, and in *Morris v. State*, 30 Tex. App. 95, 16 S. W. 757, this court said the rule of the common law which confines cross-examination of a witness to matters inquired about on his examination in chief, or to matters in rebuttal, does not obtain in this state; that the common-law rule is practically abrogated by the provision of our Code of Criminal Procedure which authorizes the court to admit testimony at any time before argument is concluded, if it appear that it is necessary to a due administration of justice, and, if necessary for that purpose, it is admissible whether in rebuttal or not. See, also, *Upton v. State*, 33 Tex. Cr. R. 231, 26 S. W. 197, and *Wentworth v. Crawford*, 11 Tex. 127. In this case it was permissible for these witnesses to describe appellant's acts on that occasion; his demeanor and appearance as bearing on the issue of whether he was sane or insane at the time of the fatal shots, as well as the remark made by appellant shortly after he fired the shots, when he inquired as to how many times he struck deceased, and when told only once, his remark, "that he was getting old and his eyesight bad." All these incidents would

aid the jury in passing on his plea of delusive insanity, and whether he was in that state of mind at the time of the killing as to comprehend the nature of his act.

[5] The appellant earnestly insists that the court erred in this case in charging on threats and self-defense, contending that his sole defense was a plea of insanity, and he did not rely on the threats nor self-defense in mitigation nor justification of his act. The state introduced no evidence on these issues, but the defendant on cross-examination of the state's witnesses proved that immediately after appellant had fired the fatal shots and advanced and struck deceased over the head, when caught and disarmed, appellant exclaimed, "I had to do this," and just before making this remark, and after firing the shots, had asked, "Are you satisfied?" In addition to this, defendant developed that but a short time prior to the fatal encounter deceased had given appellant a severe whipping, and had threatened to take the life of appellant, and these threats had been communicated to appellant before he shot and killed deceased, and when these threats were communicated to him, and he was told that deceased had called him a "G—d d—n one-eyed s—n of a b—h, and that he would put the other eye out if he got a chance," appellant had only remarked, "A man is a darned fool to make any such threats." Appellant also developed that deceased was a man who went armed, brought witnesses to prove that they had seen deceased with a shotgun on different occasions about this time, and had placed it in the witnesses' place of business. And proved that witnesses had seen deceased with a pistol on frequent occasions just before the killing. Appellant introduced other facts and circumstances bearing on this issue, and what his object and purpose was in so doing we fail to see, if it was not to raise the issues that he now complains of the action of the court in submitting to the jury. None of these facts or circumstances would tend to show whether appellant was sane or insane, and, having developed them and introduced witnesses to prove these facts, appellant cannot be heard now to complain of the action of the court in submitting these issues to the jury, and that they were properly submitted, if called for, appellant does not question. In addition to this, appellant requested a charge on one phase of self-defense, which was given by the court.

[6] Appellant complains of the following paragraph of the court's charge: "Every person with a sound memory and discretion, who shall unlawfully kill any reasonable creature in being within this state, with malice aforethought, either express or implied, shall be deemed guilty of murder. Murder is distinguishable from every other species of homicide by the absence of circumstances which reduce the offense to neg-

ligent homicide or manslaughter, or which excuse or justify the homicide." Appellant's criticism is that the court should have used the word "mind" where "memory" is used. The court submitted the issue of insanity in its proper place. The other criticisms of the definitions of murder and in submitting that issue are likewise hypercritical, and the language of the court in submitting the offense of murder has been so frequently approved by this court we do not deem it necessary to discuss it. For authorities, see section 418 et seq., Branch's Crim. Law.

[7] On the issue of insanity the court charged the jury: "Among the defenses relied upon by the defendant in this case is that of insanity. No act done in a state of insanity can be punished as an offense. Every person charged with crime is presumed to be sane—that is, of sound memory and discretion—until the contrary is shown by proof. If, under the law as herein given you in charge, and the testimony of the witnesses, the guilt of the defendant has been established beyond a reasonable doubt, it devolves on the defendant to establish his insanity at the time of committing the act, in order to excuse himself from legal responsibility; that is to say, the burden of proof to establish his plea of insanity devolves upon the defendant. If the state has, as before explained, proved the facts which constitute the offense charged in the bill of indictment, your next inquiry will be: Has the defendant established by proof his plea of insanity, or has it been established by proof from any source? If it has, the law excuses him from criminal liability, and you should acquit him. The question of the insanity of the defendant has exclusive reference to the act with which he is charged, and the time of the commission of the same. If he was sane at the time of the commission of the crime, he is amenable to the law. As to his mental condition at the time, with reference to the crime alleged, it is peculiarly a question of fact to be decided by you from all the evidence in the case, before the act, at the time, and after. The law does not hold a man for an act committed by him when insane, and it is not necessary that the insanity should be permanent, or that the person charged should have been a raving maniac at the time of the commission of the act, in order to absolve the person from punishment prescribed by law. It is sufficient to absolve such person if it is shown that he was insane at the time of the commission of the act, though it be shown that such person at other times was sane. On the other hand, the fact that such person may have been at other times insane, or may have been of impaired mind, is not sufficient to absolve such person from punishment prescribed by law from the commission of the act, if it was committed by him during a lucid interval. A person can dis-

charge himself from responsibility only by proving that his intellect was so disordered at the time he committed the act that he did not know the nature and quality of the act he was doing. If you believe from the evidence that the defendant killed Riley Newton, but at the time he did so that he was what is called a 'paranoliac,' or was suffering from delusion of persecution, or from a homicidal mania, though you might believe he was sane on any and all other of the affairs or transactions of life, or that he was suffering from some other form of insanity, and that at the time of the killing by reason of such insanity, delusion, or mania, the defendant's mind was in an impaired and unsound state so that for the time being it overruled his reason or judgment, or conscience, or that his delusion or mania was such that it deprived him of a knowledge of the right and wrong of the killing so that he did not know the nature and quality of the act, then you will acquit him on the ground of insanity and so say by your verdict; and if you acquit the defendant on this ground your verdict will read, 'We the jury, acquit the defendant on the ground of insanity.'"

The first criticism of this charge is that it required appellant to prove his insanity "beyond a reasonable doubt." A reading of the charge will disclose that this criticism is not well founded. The next criticism is that the charge "did not inform the jury the diseased condition must be such that the defendant did not know the nature and quality of his acts, or, if he did, he did not know that he was doing wrong." In the first paragraph above copied, which is thus criticised by appellant, all these words do not occur; but they will be found in the second paragraph where the court applied the law. One must read the entire charge, and its connection, and, if it as a whole presents the issue fairly, no error would be apparent.

[8] The third complaint is that the court did not explain the meaning of the words "lucid interval." These words have a well-understood meaning; but, if appellant desired a definition of them to be given, he should have requested an instruction. It is never incumbent upon the court to explain the meaning of words whose meaning is as well understood by all mankind as is the meaning of these words, unless requested so to do.

[9] The second paragraph of the above charge is criticised because it limits the consideration of the jury to the form of insanity termed "paranoliac insanity." As all the evidence tended to show this form of insanity, if any existed, this would not present error if the criticism was authorized; but, if one reads the charge herein copied, it will be seen that this criticism is also unfounded, for the court instructs the jury, "if he was what is called a paranoliac, or was

suffering from delusion of persecution, or from a homicidal mania, or that he was suffering from some other form of insanity," etc. Thus it is seen that if he was suffering from any form of insanity was submitted to the jury.

[10] Another criticism is that the court should have instructed the jury that, even if appellant was sufficiently sane as to "know the nature and quality of the act," yet if the jury in their judgment find appellant did not know it was wrong he should be acquitted. It is almost inconceivable that a man could be sane enough to fully appreciate and know the nature and quality of an act, and yet not know whether it was right or wrong to commit such an act. The "nature of an act," as defined in the Century Dictionary, is "the attributes which constitute the thing, and distinguish it from all others," while "the quality of an act" is defined to be the power to clearly and distinctly apprehend its nature, and, if a person has sufficient mental power to fully appreciate and know what he is doing, we cannot concur in an opinion that he would not be criminally liable for such an act. Many of us do not commend all the provisions of our criminal law. Some think some of its provisions wrong, and are sincere in that belief, yet they would not be justified in violating such provisions. Of course, a man must be sane enough and have sufficient comprehension to appreciate and know that such an act is a violation of law, yet there is no sane person but who knows it is wrong to take human life, and, where one is sane enough to comprehend the nature and quality of the act committed, it is not incumbent on the court to charge that, even though one comprehended the nature and quality of the offense, yet they must further find beyond a reasonable doubt that he knew such act was wrong. The court instructed the jury, if appellant's mental condition was such as to "deprive him of a knowledge of the right and wrong of the killing, so that he did not know the nature and quality of the act," he should be acquitted, and this, we think, a sufficient presentation of that question. At least, the jury could not have been misled, for by the language used they would know that, if appellant was in such mental condition as not to appreciate the gravity of the offense and know it was wrong, they should acquit. In addition to the above-copied charge, at the request of appellant the court gave the following special charge: "If you find from a preponderance of the evidence in this case that, at the time of the homicide, the defendant, J. J. Montgomery, under the influence of his delusion supposed Riley Newton to be in the act of attempting to take away his life, and he, the said defendant, killed the said Riley Newton as he supposed in self-defense, and that such delusion was the result of a de-

fective reasoning from such a disease of the mind as that he did not know the nature and quality of the act, that is, that he was not in fact acting in his own self-defense viewed from his standpoint, and therefore did not know that he was doing wrong, then you will acquit the defendant on the ground of insanity." Thus it is seen that, taking the charge as a whole, together with the special charge given, it is not subject to the criticisms contained in appellant's motion for new trial.

[11] It was not necessary for the court in his charge on murder in the first and second degree to qualify these paragraphs by referring to the charge on insanity. In its proper place this issue was fully presented.

[12] The defendant introduced evidence of assaults made by appellant on other persons and the attendant circumstances, as he says, for the purpose of showing a peculiar form of insanity. The court in his charge did not refer to nor limit the purpose or effect of this testimony, and appellant complains of the action of the court in not limiting it. If appellant desired such instructions, he should have made a request that such be done when he himself introduced the testimony. Inasmuch as he brought this testimony into the record, and under no conceivable theory could the jury have been misled into convicting him of one of those offenses, the failure of the court to limit this testimony does not present reversible error.

This is a case in which we frankly admit that the evidence offered on behalf of defendant would have authorized the jury to find that he was suffering from a form of delusive insanity, and, taking the life and history of appellant, some of the attending physicians pronounce it paranoia in its secondary stage, and, if suffering from this disease, their opinion is he would be mentally unbalanced to the extent that he should not be held responsible for taking the life of any human being. Yet, as hereinbefore stated, this issue has been three times submitted to juries, who heard the testimony, and in many instances knew the witnesses, and each time they find appellant sane. The state's testimony would make him a man capable of transacting all the business affairs of life and protecting his interests; a nervous, irritable man, quick to become angry, and when angry commit acts of violence. A witness for defendant, Judge Montgomery, introduced to detail some circumstances, and who testified he had known appellant for many years, and had dealings with him, when asked as to his sanity, testified that appellant was of such a depraved nature that he did not care what he did, but that he was a sane man and knew right from wrong. Mr. McBride, another witness for defendant, said that "he was sane except when mad, but when he gets mad he wants revenge." A number of other witnesses for defendant,

when cross-examined, expressed the opinion that, while appellant was at times "queer in his actions and remarks," yet they believed he knew right from wrong and was a sane man. All the witnesses both for the state and defendant agree that appellant was a capable business man, served as county commissioner of his county, and his erratic way of imagining that people had it in for him was the only thing on which he was not a normal man; this being virtually the sole basis of his plea of insanity. The evidence shows appellant approached deceased once before, when they quarreled, and deceased had given him a severe whipping. Shortly after he recovered from the injuries received, in passing deceased, he pulled a pistol, shot and killed him, remarking, after he shot him down, "Are you satisfied?"

The witnesses who witnessed the difficulty virtually all give to appellant a look, and state his acts were those, of a rational, sane man, and, under such circumstances, the judgment must be affirmed.

WASHINGTON v. STATE.

(Court of Criminal Appeals of Texas. Dec. 4, 1912.)

1. HOMICIDE (§ 295*)—INSTRUCTIONS—APPLICATION TO CASE.

On a trial for homicide, where accused's evidence showed that he was told by his wife that deceased had asked her to have sexual intercourse with him, and that, when he spoke to him about it, deceased said, "Yes; God damn you, what are you going to do about it? I will cut your God damned guts out," and commenced cutting accused with a knife, the court in its charge on manslaughter should have submitted as adequate cause the repetition and renewal of the insult, as well as communicated insults.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 606-609; Dec. Dig. § 295.*]

2. HOMICIDE (§ 340*)—APPEAL—REVERSIBLE ERROR—INSTRUCTIONS.

Where the jury convicted for murder in the second degree and assessed the punishment at 20 years' imprisonment the failure of the court in charging on manslaughter to submit as adequate cause insults shown by the evidence was reversible error.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 715-717, 720; Dec. Dig. § 340.*]

3. CRIMINAL LAW (§§ 1165, 1172*)—APPEAL—REVERSIBLE ERROR.

An erroneous charge or ruling which actually or probably led to a higher punishment than the minimum is reversible error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3085, 3086, 3088, 3089, 3123, 3154-3157, 3159-3163, 3169; Dec. Dig. §§ 1165, 1172.*]

4. CRIMINAL LAW (§ 1090*)—APPEAL—BILL OF EXCEPTIONS—NECESSITY.

The denial of an application for a continuance will not be reviewed in the absence of a bill of exceptions, especially where other errors necessitate a new trial at which the at-

tendance of the absent witnesses may be obtained.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2653, 2789, 2803-2822, 2825-2827, 2927, 2928, 2948, 3204; Dec. Dig. § 1090.*]

5. CRIMINAL LAW (§ 829*)—INSTRUCTIONS—CURE BY OTHER INSTRUCTIONS.

The refusal of instructions was not erroneous where the court charged in practically the same language, or sufficiently presented the issue in the general charge.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. § 829.*]

Appeal from District Court, Kaufman County; F. L. Hawkins, Judge.

Sam Washington was convicted of murder in the second degree, and he appeals. Reversed and remanded.

Joel R. Bond, of Terrell, for appellant.
O. E. Lane, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted of murder in the second degree; his punishment being assessed at 20 years' confinement in the penitentiary.

[1] The serious question in the case is raised on the charge of manslaughter. The court charged upon communicated insults and all the environments of the case in a general way as shedding light on the condition of the mind of appellant at the time he shot and killed the deceased. Without going into a detailed statement of the evidence, we deem it sufficient to state that appellant and deceased were brothers-in-law, and had been on amicable terms. Appellant came home on the day before the homicide, and informed his wife that he felt happy, that he had finished gathering his crop, and that he was going the next day to a nearby town, and wanted herself and children to go over and assist the brother-in-law, deceased, in gathering his cotton. This was late in the evening, and about 24 hours after the alleged insulting conduct on the part of deceased towards appellant's wife. She declined to go, and finally told her husband the reason, and it was this: Deceased had been to the home of appellant and his wife the day before, late in the evening, and, after talking with her a little while, invited her in an adjoining room, with the request substantially that she have sexual intercourse with him. This she declined, and told deceased that she purposed informing her husband. After receiving this information, appellant went to his trunk, got his Masonic apron, and at the same time took from the trunk a pistol, and put it in his pocket. A doctor had been phoned to come to appellant's residence to see a sick child. As appellant left the house and about the time he reached his front gate, the doctor drove up. He returned to the house with the doctor, and went into the room where the sick child was, and, while in there with his wife and the doctor, deceased and his wife

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

made their appearance and entered the room. The doctor, after diagnosing the case, gave appellant a couple of prescriptions to have filled. He walked out of the house into the yard, where he found his stepson, and gave the prescriptions to him, with the request that he go to the drug store and have them filled. About this time deceased came from the house, and was walking towards the gate, and appellant informed him he wanted to talk with him. They walked for some 75 yards up the road, and appellant reminded him of what he had said, and told him he wanted to have a friendly talk with him about the matter and sever their friendly relations; that he desired to know why he had treated his wife the way he had the day before, and that he had already in other matters, to use his expression, been giving him "dirt." The deceased replied in regard to insulting appellant's wife the day before, "Yes; God damn you, what are you going to do about it? I will cut your God damned guts out;" and immediately rushed at him, and began cutting at him with a knife, and succeeded in cutting two or three holes in his coat, inflicting no injury upon his person, whereupon appellant shot and killed him. This is as favorable as the testimony could be to the defendant. The state's case is to the effect that the parties walked out of the gate and up the road about 75 yards, and while standing talking appellant remarked to deceased, "Look, look Link, your horses are about to run away," and as he turned his head to look in the direction where his wagon was appellant shot and killed him. So far as the state's evidence is concerned, it is made to appear that the deceased had no knife; not only so, but that one of the boys in the wagon had borrowed deceased's knife for the purpose of peeling an apple, and that he had the knife at the time of the homicide in his pocket.

Appellant contends under these circumstances that the court's charge on manslaughter was too restricted, in that he only submitted the issue of manslaughter from the standpoint of communicated insults, contending further that inasmuch as the deceased had repeated to appellant when he talked with him about the matter, "Yes; God damn you, what are you going to do about it? I will cut your guts out," that that was an admission to him at the time of the insult, and therefore a renewal of the insult. This being true, the contention is that the court should have submitted that insult as an adequate cause, as it was a reaffirmance of it, and that the court's charge was too restrictive in limiting to communicated insults, when, in fact, deceased at the time of the homicide had repeated the insults, and deceased challenged the defendant to accept the situation, or to do what

he pleased about it. We are of opinion that appellant's contention is correct, and that the charge on manslaughter is too restrictive. The charge on manslaughter should have been submitted in the light of the statement at the time of the homicide, viewed in the light of the communicated insults by the wife to appellant.

[2] Had the jury given appellant manslaughter with the minimum punishment, it would not have been reversible error, but the jury did not do this. They gave him 20 years for murder in the second degree.

[3] The unbroken line of decisions, as we understand them in Texas, is that where the charge or the ruling of the court is erroneous, and may or probably led, or did lead, to a higher punishment than the minimum, it would be error. If the jury had been properly charged on the facts of the case, and afforded an opportunity to have decided the case on the issues of manslaughter as the facts presented them, this verdict may have been much more favorable than as found by the jury. If the ruling of the court, being erroneous, leads or probably leads to either a conviction when it would not otherwise have occurred, or, conceding the guilt of the appellant, led to a higher punishment than it would had the law been properly given, then in either case the error is fatal, and the judgment should be reversed. This we understand to be the settled law in Texas, and we are not prepared to say that had the court charged the law of manslaughter, in the light of the statements made by deceased at the time of the homicide, the jury might have given appellant a much more favorable verdict than they did give him. They could have given him five years. They could have given him five years for murder in the second degree. They could have given him manslaughter with the minimum punishment of two years, but this they did not do. We are of opinion that this is not only error, but of such a nature as requires this court to reverse the judgment.

[4] In regard to the application for a continuance, we dispose of it by saying, in the first place, a bill of exceptions was not reserved to the ruling of the court, and, in the second place, upon another trial they may obtain the absent witnesses.

[5] Error is assigned on the refusal of the court to give special instructions requested by appellant on the issue of self-defense. We do not believe there was any error in this action of the court, for the reason that the court gave the same charge in practically the same language, or sufficiently and fully presented that issue to the jury in the general charge.

Because of the error in the court's charge on manslaughter, the judgment is reversed, and the cause is remanded.

COONS v. STATE.

(Court of Criminal Appeals of Texas. Dec. 4, 1912.)

ASSAULT AND BATTERY (§ 96*) — SELF-DEFENSE—INSTRUCTIONS.

Where accused testified that, to protect his son from unlawful violence sought to be inflicted by prosecutor and his sister, he struck prosecutor with a scantling, the failure to submit the right of accused to defend his son was reversible error, though the requested charge on the subject was not accurate.

[Ed. Note.—For other cases, see *Assault and Battery*, Cent. Dig. §§ 142-150; Dec. Dig. § 96.*]

Appeal from Jones County Court; Joe C. Randal, Judge.

J. C. Coons was convicted of aggravated assault, and he appeals. Reversed and remanded.

Brooks & Brooks, of Anson, for appellant. C. E. Lane, Asst. Atty. Gen., for the State.

PRENDERGAST, J. The appellant was prosecuted and convicted of an aggravated assault, and fined \$25.

The evidence by the state was amply sufficient to sustain the verdict.

There is but one question in the case necessary to be decided, and that is a complaint of the charge of the court and the refusal of appellant's special charge on the same subject—that of self-defense. A day or two before July 9, 1911, Bert Coons, the son of appellant, and Bert's wife, had some trouble. Her complaint to her husband was that her husband permitted his father and mother and their children to remain at his house, and that his father's children were disrespectful and quite offensive to her in their treatment of her and manner towards her, and that, as her parents lived in the same town, she would take their young child with her and stay with her parents until his father's family left her home. She thereupon took their child, left their home, and went to that of her father. On July 9th said Bert Coons passed her father's house, and, seeing his child in the yard, proceeded to take it in his buggy, and rapidly drive with it to his home. His wife saw him, and immediately followed. Arriving at their home, some wrangle and struggle occurred between them, she endeavoring to get possession of her child and return to her father's with it, and her husband resisting and refusing this. Hot words and some scuffling occurred between them. Appellant appeared on the scene while this was going on between his son and his wife, he having in his hand at the time a butcher knife, and told his son, so some of the witnesses say, that he would slap hell out of her, and then went out of the room where the wrangling and scuffling occurred. Bert's wife claimed that she was only temporarily leaving her husband, and she wanted to keep her

child with her during that time, while her husband claimed that she intended to take their child and permanently abandon him. Just at this point Mrs. Coon's young brother, upon whom the assault and battery is alleged to have been committed, appeared, when his sister, Mrs. Coons, called him to come to where she and her husband were, and verify her purpose and intent in going to her father's with the child. Her brother started into the house. Appellant's son Bert thereupon cursed him and called him opprobrious epithets, ordered him not to come into the house, immediately got his target rifle, and presented it towards his brother-in-law, but his brother-in-law stated that, as his sister had called for him, he was going in and did proceed to go in; that her brother, upon reaching them, to keep from being shot, seized the gun, and Bert's wife also seized it, the three struggling for the possession of the gun. Appellant claims that he saw, heard, and knew nothing of this, but that his little girl, 13 years of age, thereupon informed him that they were about to kill Bert, and to run and help him; that he at once ran around the house, and in going picked up what the witnesses show to have been a scantling two by four inches, some three or four feet long, and ran up and struck Mrs. Coon's brother, Milner, whom he is charged to have committed this aggravated assault upon. He testified that he struck said Milner with this scantling only one lick, and did so to protect his son from what he thought was an assault upon him to either kill him or to seriously injure him, and to make Milner, the assaulted party, turn loose the gun.

The evidence further shows that, immediately after Milner was struck this lick, it caused him to sink down, and that he immediately left, went out of the yard. Appellant went around the house, and then they had some wordy altercation and perhaps cursing. Proper objection was made to the court's charge in submitting appellant's claimed act in defense of his son, and his special charge, which he asked and which was refused on that subject. In the court's charge, excepted to, he stated that every person was permitted by law to defend himself against any act of unlawful violence offered to his person, but did not in that portion of the charge state, instead of having a right to defend himself, that he also had the right to defend another, in this instance his son, from such unlawful violence. The evidence did not raise the question of the defense of appellant himself, but it did raise the question of an assault and battery being committed in defense of his son. The charge requested on this point, while it is not a model for such charge, did state that the law justified another to act in defense of another, and required, before conviction, the jury to believe beyond a reasonable doubt that when appel-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

lant struck Milner, if they believed he struck him, while his son, his daughter-in-law, and Milner were struggling over the possession of the gun for the purpose of making Milner release said gun, and at the time he struck him appellant believed that his son was about to be unlawfully assaulted by Milner, or that his son was in danger of serious bodily injury from Milner, then to acquit appellant. This feature of the court's charge was not submitted in the charge complained of, but was substantially so in that requested by appellant and refused.

It may be that, under the testimony in the case, the jury would not have believed appellant under all the circumstances, yet the testimony made it necessary for the court to properly submit that question to the jury for them to find, and the court could not take it away from the jury. For this error of the court in its main charge and the refusal to submit the question substantially as appellant requested, it will be necessary to reverse the judgment and remand the cause.

BISHOP v. STATE.

(Court of Criminal Appeals of Texas. Dec. 4, 1912.)

1. CRIMINAL LAW (§ 442*)—EVIDENCE—ADMISSIONS—LETTERS.

In a prosecution for seduction, evidence by the prosecutrix that certain letters were written by defendant to her rendered them admissible.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1027; Dec. Dig. § 442.*]

2. SEDUCTION (§ 46*)—CORROBORATION—LETTERS.

In a prosecution for seduction, where prosecutrix alone testified that certain letters offered in evidence at the trial had been written to her by defendant, such letters could not furnish corroborative evidence, since she could not corroborate herself.

[Ed. Note.—For other cases, see Seduction, Cent. Dig. §§ 83-86; Dec. Dig. § 46.*]

3. CRIMINAL LAW (§ 722½*)—CROSS-EXAMINATION—QUESTIONS.

In a criminal prosecution, questions by the state's attorney, on cross-examination of a witness, whether he came to testify in the case until he found out that defendant had been convicted and sentenced to the penitentiary on a former trial, and whether he knew that defendant was convicted and sentenced at a former trial, were improper.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1676; Dec. Dig. § 722½.*]

Appeal from District Court, Comanche County; J. H. Arnold, Judge.

Willie Bishop was convicted of seduction, and he appeals. Reversed and remanded.

Callaway & Callaway, of Comanche, and J. R. Stubblefield, of Eastland, for appellant. C. E. Lane, Asst. Atty. Gen., for the State.

HARPER, J. Appellant was prosecuted and convicted of the offense of seduction, and his punishment assessed at three years' con-

finement in the state penitentiary. This is the second appeal in this case; the opinion of the court on the former appeal being reported in 144 S. W. 278.

The testimony of the prosecuting witness, Miss Ethel Harrison, would support a verdict that appellant was guilty of seduction, if her testimony was corroborated as required by law; but one of the serious questions in the case, Does the testimony corroborate her sufficiently, tending to connect the defendant with the commission of the offense? Miss Harrison testifies that the first act of intercourse took place at her father's residence just before Christmas; that she was in the room with her father, mother, and sister, and Frank Brooks; that appellant came by and touched her shoulder and asked her to go out on the front gallery, when by his promises and assurances she was induced to yield her person to him. The father, mother, sister, nor Frank Brooks were not called to corroborate this circumstance. Had they been, or either of them, and they corroborated her in her testimony that appellant was present on that occasion, and they went out on the gallery together, with the testimony of Miss Flora Roscoe, the testimony would be ample to support the conviction. Why the prosecuting attorney did not call the father, mother, sister, nor Frank Brooks is not apparent of record, although the record discloses a portion of them were in attendance on court.

[1, 2] The prosecuting officers evidently relied on the letters said to have been written by appellant and introduced in evidence. Miss Harrison testified that the letters were written by appellant, and this rendered them admissible in evidence; but could they be used to corroborate her, when she alone testified they were written by appellant? Eliminate her testimony, and the letters go with it. If it was desired to use the letters as corroborative testimony, some evidence, other than that of Miss Harrison, should have been introduced tending to show that appellant wrote the letters. An accomplice cannot corroborate herself, and no testimony she gives can be so used. If the state had introduced any testimony, other than that of Miss Harrison, that the letters were written by appellant, or were in his handwriting, they might be corroborative of her testimony; but no such evidence was introduced, and appellant asked a special charge which should have been given. The charge reads as follows: "Should you find from the evidence that the prosecuting witness, Ethel Harrison, testified that she received from the defendant certain letters, which have been introduced in evidence before you, and you should further find that no other witness testified that the defendant wrote and mailed said letters, and that the state must rely alone upon the testimony of said Ethel Harrison for the purpose of showing the defendant

wrote said letters, then and in that event you are instructed that said letters would not be sufficient within themselves and alone to corroborate the testimony of said Ethel Harrison and to warrant a conviction of the defendant. In other words, the law requires that the prosecuting witness, Ethel Harrison, shall be corroborated by other testimony than her own and by such testimony as tends to connect the defendant with the commission of the crime with which he is charged, and, if no other witness in the case testified that the defendant either wrote or mailed said letters than the said Ethel Harrison, then and in such event the said letters within themselves and alone would not furnish the corroboration which the law requires in order to warrant a conviction of the defendant."

This charge should have been given when the state offered no evidence other than that of Miss Harrison that appellant wrote the letters. She could not corroborate herself. *Smith v. State*, 58 Tex. Cr. R. 106, 124 S. W. 919.

[3] It is shown by bill of exceptions No. 1 that, on cross-examination of the witness Mrs. Vinie Stanfield, the district attorney asked her: "You never came here to testify in this cause until you found out that the defendant had been convicted and sentenced to the penitentiary on a former trial?" And on cross-examination of the witness John Chatman the district attorney asked him: "You know that the defendant was convicted at a former trial in this court, and given a term of three years in the penitentiary?" Such questions were highly improper and should not have been asked. *Wyatt v. State*, 58 Tex. Cr. R. 116, 124 S. W. 929, 137 Am. St. Rep. 926, and cases there cited. The court excluded the testimony when his attention was called to it, but we call attention to this error that prosecuting attorneys may avoid it in the future.

We do not deem it necessary to discuss the other questions raised in the motion for new trial, but on account of the above errors the case must be reversed. Eliminate the letters, and the corroboration is not sufficient to sustain the verdict, and these letters were only proven up by the testimony of the alleged seduced person, who in law was an accomplice.

Reversed and remanded.

WALKER v. STATE.

(Court of Criminal Appeals of Texas. Nov. 27, 1912.)

1. BURGLARY (§ 41*)—EVIDENCE.

Evidence held sufficient to sustain a conviction of burglary.

[Ed. Note.—For other cases, see *Burglary*, Cent. Dig. §§ 94-103, 109; Dec. Dig. § 41.*]

2. CRIMINAL LAW (§ 1166¼*)—APPEAL—PREJUDICE—OBJECTIONS TO JURORS.

Where accused did not exhaust his peremptory challenges, he was not prejudiced by the overruling of challenges of certain jurors for cause, whom accused thereupon challenged peremptorily.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 3114-3123; Dec. Dig. § 1166¼.*]

3. BURGLARY (§ 34*)—EVIDENCE—WEIGHT.

In a prosecution for burglary of a clothing store, evidence of the manager of the store concerning the suit case and clothing claimed to have been stolen was not objectionable, on the ground that the goods produced and exhibited were not sufficiently identified as those stolen; the objection going to the weight, and not to the admissibility, of the evidence.

[Ed. Note.—For other cases, see *Burglary*, Cent. Dig. § 85; Dec. Dig. § 34.*]

4. CRIMINAL LAW (§§ 419, 420, 650*)—EVIDENCE—HEARSAY.

Where a clerk of the store alleged to have been burglarized, on discovering the burglary, showed the owner as soon as he arrived how the door had been unfastened and an entry effected, the owner was entitled to illustrate with a stick the condition of the bar with which the door had been fastened, and the door, but was not entitled to state what was told him by his clerk.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 973-983, 1457; Dec. Dig. §§ 419, 420, 650.*]

5. CRIMINAL LAW (§ 369*)—EVIDENCE—OTHER OFFENSES.

Where, in a prosecution for burglary, defendant denied that he had committed it, but claimed he had purchased the stolen property from G., while the state claimed defendant and G. acted together in committing the burglary, evidence that G. had previously committed other burglaries in the same town, with which defendant had nothing to do, was inadmissible.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 822-824; Dec. Dig. § 369.*]

6. CRIMINAL LAW (§ 844*)—INSTRUCTIONS—OBJECTIONS.

An objection to a part of the charge on circumstantial evidence, that it did not correctly define circumstantial evidence, nor apply it to the facts of the case, without pointing out specifically wherein it was defective, was insufficient.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 2025; Dec. Dig. § 844.*]

7. CRIMINAL LAW (§ 792*)—INSTRUCTIONS—PRINCIPALS AND ACCESSORIES.

Where the state claimed that, if accused himself did not commit the burglary in question, he nevertheless participated therein as a principal with another, and defendant's own evidence indicated such participation, the court did not err in charging on principals.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1818-1820; Dec. Dig. § 792.*]

Appeal from District Court, Comanche County; J. H. Arnold, Judge.

Rowe Walker was convicted of burglary. and he appeals. Affirmed.

Callaway & Callaway, of Comanche, for appellant. C. E. Lane, Asst. Atty. Gen., for the State.

PRENDERGAST, J. The appellant was indicted and convicted of burglary, and his

penalty fixed at two years, which is the lowest penalty prescribed by law.

[1] It is unnecessary to give a detailed statement of the evidence. It was clearly sufficient to authorize the jury to find that on or about June 19, 1911, the store of the Farmers' Union at De Leon in Comanche county, in charge of and under the control of one Morton, was burglarized, and a suit case, a suit of clothes, and other clothing were stolen therefrom. This suit case and the clothing were soon afterwards recovered and sufficiently identified to show that it was the property stolen from said store at said time. Appellant was shown to have lived in said town of De Leon since early boyhood. He was about 17 years old at the time of this burglary. He was shown to be reasonably familiar with the store, and in it the evening of the burglary, and was also in it the next morning after the burglary. He left De Leon the evening after the burglary on a freight train about 3 o'clock in the evening. By his own testimony he claimed that he bought this suit case and clothing from one Ed Gray about 2 o'clock the night of the burglary, paying him \$4.15 therefor; that he and Gray were at the depot at that time of night, and that Gray left on the train a few minutes after his (appellant's) claimed purchase of the suit case and clothing; that he hid the suit case and its contents under a house that night, and himself slept in an open park—not at his grandfather's, where he is shown to have lived, if he could be said to have a place of habitation. On the freight train in the evening after he left De Leon going north, he is shown to have had this suit case filled with these clothes. In effect, on this occasion, he told the brakeman, to whom he tried to sell some of the clothes, and did sell a pair of pants, that he bought the goods on a credit and was leaving the country, not stating to that witness from whom he had bought the clothes and suit case, although, in effect, asked about it. He, on the next day, is shown to have had the said suit case filled with said clothes in Cisco, some 30 miles north from De Leon, and that on that day he sold some two suits of the clothes. The first person to whom he sold some of these clothes on that day inquired where he got so many clothes, and he stated that he had been working on the railroad, and wanted to quit his job, and could not get his money, and that he traded his time check for the clothes, and got them from said Farmers' Union store in De Leon. Later, on the same day, when he sold another suit of the clothes to another witness and was asked where he got them, he claimed that he bought them at De Leon from a clerk in said Union store. This witness could not tell for certain whether he said Ed Gray, or Ed Morton, or Ed somebody else. To another witness, the same day or the day later, to whom he sold some more of the clothes, he claimed that he was broke, and trying

to get some money to go off and get a job, and did not tell this witness from whom or where he got the clothes. It was clearly shown that he did not buy the clothes, or any of them, or suit case, from either of the clerks in said store, there being only two clerks or employes in said store.

After he had made the disposition of the different suits and pieces of clothes above mentioned, it seems, the officers, upon investigation, began to hunt him to arrest him for said burglary. He heard of this, and began to undertake to evade arrest, and skipped about from first one place to another to various towns on the Texas Central and Texas & Pacific Railroads, but was ultimately arrested when fleeing and attempting to get out of the country. Later, after arrest for this burglary, when the county attorney and justice of the peace were investigating the question, he made a written statement. At first he stated, and had it written down, that he bought the clothes from Ed Gray at Cisco, and that they were delivered to him at Cisco, some 30 to 35 miles from De Leon. After having so stated, and having that so written down, the county attorney and justice of the peace told him that they knew that was not true, because they had found from others that they saw him hide the suit case under some coal in a coal tinder in De Leon. Then he had that statement erased, and stated that he bought and received the suit case and clothes from Ed Gray, and that Ed Gray delivered to him in De Leon, he paying Ed Gray \$4.15 therefor. The property was shown to have been worth many times more than \$4.15. He sold part of the property at what he stated at the time was much less than the goods were worth, and got something like \$10 to \$15. It was shown on the trial that the state had made repeated efforts to get Gray as a witness for the state and that appellant made none. The state failed to get him; that Gray had been arrested at first for this offense, but upon investigation discharged; that afterwards he was arrested and placed in jail for other offenses, broke jail, and had not been apprehended since. Upon the whole, the evidence was amply sufficient to sustain the conviction. It was largely upon circumstantial evidence. The court gave a correct and proper charge on circumstantial evidence.

Appellant has several bills of exception, not one of which is sufficient under the rules to require this court to consider the point attempted to be raised. Section 857, p. 557, and section 1123, p. 732, of White's Ann. Code Cr. Proc. However, we have gone over every one of his bills, and, as explained and qualified by the court, no reversible error whatever is shown.

[2] By his first bill he claims that the court erred in refusing to sustain his challenge for cause to several of the jurors, not one of whom served on the jury. The court,

in allowing this bill, shows that the voir dire examination of the jurors did not disqualify them from serving. Notwithstanding this, appellant peremptorily challenged them, and did not exhaust his challenges, and no objectionable juror sat upon the jury, and no injury whatever is shown, even if it were conceded that the court should have sustained his challenges.

[3] There are several bills complaining of the action of the court in permitting Morton, the manager of the store, to produce, identify, and testify about the suit case and clothing claimed to have been stolen from said store at the time of the burglary. Appellant's objection to this character of testimony was that the goods produced and exhibited were not sufficiently identified as those which were so stolen. This would go to the weight, and not to the admissibility, of the evidence. The testimony by the state's witnesses sufficiently, and we think clearly, identified the suit case and some of the clothes stolen from said store. The court, in qualifying these bills, showed that this testimony objected to was only a part of the state's testimony as to the identification of the stolen goods at the time of the burglary.

[4] It was shown that Mr. Stover, one of the two clerks in said store, reached the store next morning after the burglary before Mr. Morton, the other clerk and manager thereof, did. Upon discovering that the house had been burglarized, as soon as Morton arrived, he showed him the situation of things, and how the door had been unfastened and an entry effected, and then an attempted reclosing of the door after the burglary. Both of these witnesses testified, and Stover, on the trial, illustrated and showed to the jury how the door had been opened, the entrance effected, and an attempted reclosing and refastening of the door had been made. Appellant's objection to Morton's testimony was that what Stover had told him about how the door had been opened, etc., was inadmissible as hearsay. The court, in qualifying the bills, states that he allowed the witness to illustrate before the jury with a stick the condition of the bar and door in question, but did not permit him to state a word the witness Stover had said to him. No error is shown in this.

[5] By another bill appellant claims that the court would not permit him to prove by several witnesses named that said Ed Gray had stolen a lot of goods from various stores and persons in De Leon prior to said burglary, and had secreted them under the Baptist Church in De Leon, and had sold various of these stolen articles some time before this burglary, and that appellant had nothing to do with those thefts. The court, in effect, refused to approve this bill, stating that he did not agree that it correctly stated the facts; but he further explained and

qualified it by stating that appellant did offer to prove prior to this burglary on distinct and different occasions that some other boys, including Ed Gray, had stolen goods, and perhaps burglarized a store or stores, in De Leon, that he would not permit the time of the court in this trial to be taken up by inquiring into extraneous crimes, and sought to confine the testimony to the case on trial, that while it was the theory of the state that Gray and appellant acted together in the burglary in question, he did not think it proper to go into the proof of these specific extraneous crimes by Gray, if any. The testimony was inadmissible in this case, and especially so as explained by the court.

[6] There are some complaints of various paragraphs of the court's charge. We have carefully gone over the whole charge, and find that, taken as a whole, it is an admirable one, and presents all of the various questions arising in the case properly to the jury for a finding therein. None of his criticisms show any reversible error at all. Some of his complaints of the charge are too general, and do not point out any specific error. For instance, he quotes only a part of the charge of the court on circumstantial evidence, and then says that particular paragraph was error, in that it did not correctly define circumstantial evidence, and does not correctly apply it to the facts of the case, not pointing out wherein it did not correctly define circumstantial evidence, and not pointing out wherein it did not correctly apply to the facts of the case. We have considered it in connection with the case and the whole charge, and can find no error therein.

[7] He also complains that the court charged on principals, claiming that such charge was not called for, and there was no allegation in the indictment that appellant acted with any other in committing the offense, if any was committed. The theory of the state, as stated by the court, was that, if appellant himself did not commit the burglary, he participated therein as a principal with said Ed Gray; and appellant's own evidence on this point raised such question, and made it proper for the court to so charge, and the charge on the subject, taken as a whole, correctly applies the law to the facts.

The court gave a full, fair, and correct charge on the subject of appellant being found in possession of the recently stolen property from said burglarized house at the time of the burglary. This charge is strictly in conformity to charges on the subject uniformly approved as correct by this court. Section 1518, White's Ann. P. C. p. 624.

We have considered all of appellant's assigned errors in this case, and find that none of them are sufficient to authorize this court to reverse the judgment in this case.

The judgment is affirmed.

ZINN v. STATE.

(Court of Criminal Appeals of Texas. Nov. 13, 1912. On Motion for Rehearing, Dec. 4, 1912.)

INDICTMENT AND INFORMATION (§ 70*)—SUFFICIENCY OF ACCUSATION—CHARGING OFFENSE.

An information by a county attorney, upon affidavit attached, presenting that defendant unlawfully bet at a game of cards at a place not then and there a private residence occupied by a family, and that affiant had reason to believe and did believe that defendant then played at cards at a place not then and there a private residence, is defective, in that it does not present to the court that accused had violated a law, but only that some affiant charged him with committing the offense.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 192; Dec. Dig. § 70.*]

Appeal from Hamilton County Court; R. Q. Murphree, Judge.

Ollie Zinn was convicted of a violation of the gaming laws, and he appeals. Reversed, and prosecution dismissed.

S. R. Allen, of Hamilton, for appellant. C. E. Lane, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. This is a conviction for a violation of the gaming laws.

The statement of facts and bills of exception were filed after the adjournment of court. The case being appealed from the county court, there must be an order, entered of record, authorizing the filing of these papers after term time, in order to authorize this court to consider and review them. In the absence of these matters, there is nothing which the court can intelligently revise.

The judgment is ordered to be affirmed.

On Motion for Rehearing.

On a former day of the term the appeal herein was affirmed, without reference to the statement of facts. It is shown now the statement of facts was filed within the 20 days allowed by the court, and will be considered.

The motion for rehearing calls our attention to the fact that we overlooked the motion to quash and in arrest of judgment, contending that the information is not sufficient. The information charges as follows: "In the name and by the authority of the state of Texas, now comes P. M. Rice, county attorney of Hamilton county, Texas, upon affidavit of J. E. Beck, hereto attached and made a part hereof and in behalf of said state presents in the county court of Hamilton county, Texas, at the April term, 1912, of said court, that heretofore to wit, on or about the 13th day of November, 1911, in said county of Hamilton and state of Texas, one Ollie Zinn did then and there unlawfully bet at a game of cards at a place not then and there a private residence occupied by a family. * * * And the affiant afore-

said upon his oath aforesaid further deposes and says that he has reason to believe and does believe that heretofore, to wit, on or about the 13th day of November, 1911, in said county of Hamilton, state of Texas, one Ollie Zinn did then and there play at a game of cards at a place not then and there a private residence occupied by a family, contrary," etc. The contention is made that the information does not present in the court, under the last count mentioned and quoted, that appellant had violated the law; that it only presents to the court that the affiant further deposes and says:

This is not sufficient. The information may allege that the affidavit was filed, but it must allege that the county attorney presented in the court that appellant did the prohibited thing. It is not sufficient to present that there was an affidavit filed to the effect that appellant committed the offense, but the county attorney must directly present the fact that he charges and presents in the court that appellant did the act of which complaint is made. The first count in the information was properly presented; but it does not present that appellant, on either of the subsequent counts in the information, committed the offense. It only states the fact that the affiant, whoever he may have been, charged appellant with committing the offense. It nowhere, in connection with the third count, presents that appellant violated the law as charged in that count.

For this reason, the judgment is reversed, and the prosecution is ordered dismissed.

TATE v. STATE.†

(Court of Criminal Appeals of Texas. Nov. 20, 1912.)

CRIMINAL LAW (§ 736*)—ACCOMPLICES—WHO ARE.

Where the evidence in no way connected a witness with the crime charged, he was not an accomplice, so as to authorize or require the submission to the jury of the question whether he was an accomplice.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1219, 1220, 1701, 1702, 1705, 1716; Dec. Dig. § 736.*]

Appeal from District Court, Cottle County; Jo. A. P. Dickson, Judge.

Burrell Tate was convicted of theft, and he appeals. Affirmed.

M. J. Hathaway, of Childress, for appellant. C. E. Lane, Asst. Atty. Gen., for the State.

PRENDERGAST, J. Appellant was convicted of cow theft, and given the lowest penalty.

As stated by appellant in his brief, the sole question in this case was whether or not the evidence showed or tended to show that the state's witness Hobbs was an accomplice in the theft, so as to require the court to sub-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes
† Rehearing denied December 18, 1912.

mit that question to the jury. The court charged that Stanfield was an accomplice, and gave a correct charge as to the necessity of the corroboration of his testimony. No complaint is made of this.

We have carefully studied the evidence in this case, and in our opinion the evidence does not show or tend to show that Hobbs was an accomplice, so as to authorize or require the court to submit that question to the jury, and the court did not err in not submitting it to the jury. It is unnecessary to recite the evidence. It in no way connects Hobbs with the theft, so as to show or tend to show that he had anything to do therewith, or was in any way an accomplice in the theft.

The judgment is affirmed.

WHITE v. STATE.

(Court of Criminal Appeals of Texas. Nov. 13, 1912. On Motion for Rehearing, Dec. 4, 1912.)

1. BAIL (§ 57*)—RECOGNIZANCE—RECITALS.

Where a recognizance does not state the punishment assessed against accused in compliance with Code Cr. Proc. 1911, arts. 900-903, his appeal must be dismissed.

[Ed. Note.—For other cases, see Bail, Cent. Dig. §§ 232-236; Dec. Dig. § 57.*]

On Rehearing.

2. CRIMINAL LAW (§ 1131*)—APPEAL—REINSTATEMENT OF APPEAL.

Where accused files a proper recognizance, his appeal will on motion be reinstated, although the first recognizance was not in accordance with the statute.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2971-2979, 2985; Dec. Dig. § 1131.*]

3. WORDS AND PHRASES—"MAN" AND "BOY."

The word "boy" is applied to a male person under 21 years of age. "Man" is a noun used to designate one over 21 years of age.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 1, p. 855; vol. 5, pp. 4315-4316.]

4. CRIMINAL LAW (§ 1144*)—AGGRAVATED ASSAULT.

In a prosecution for aggravated assault on a female, where there was no evidence to show the age of accused, it cannot be presumed that he was an adult over the age of 21 years.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2736-2781, 2901, 3016-3037; Dec. Dig. § 1144.*]

Appeal from District Court, Hill County; C. M. Smithdeal, Judge.

Ed White was convicted of aggravated assault, and he appeals. Reversed and remanded.

J. E. Clarke, of Hillsboro, for appellant.
C. E. Lane, Asst. Atty. Gen., for the State.

HARPER, J. [1] Appellant was prosecuted, charged with assault with intent to rape, and, when tried, was convicted of an aggravated assault.

The recognizance entered into is not in

compliance with articles 900 and 903, and the case must be dismissed because of said defects. It does not state the punishment assessed against him, etc.

The appeal is dismissed.

On Motion for Rehearing.

[2] At a former day of this term this case was dismissed on account of a defective recognizance. Appellant files a motion to reinstate, and accompanies his motion with a recognizance in conformity with law and the rules of this court as announced in *Burton v. State*, 48 Tex. Cr. R. 544, 90 S. W. 498, and the motion is granted. Appellant was prosecuted, charged with assault with intent to rape, and, when tried, was convicted of an aggravated assault, and his punishment assessed at 18 months confinement in the county jail.

[3,4] The court instructed the jury that "an assault becomes aggravated when committed by an adult male upon the person of a female." And the charge on aggravated assault is predicated on this subdivision of the provision of the Code defining aggravated assault alone. Appellant earnestly insists that there is no testimony in the record that appellant is 21 years of age, or was of that age when the offense was alleged to have been committed. The evidence would support the verdict that he is guilty of an assault, but whether aggravated or simple assault would depend upon his age. If he is less than 21 years of age, he would be guilty of simple assault only. We have searched the record in vain for some evidence upon which to base a conclusion that he is 21 years old, and we find none. The unvarying rule in this court appears to have been announced in *Hartsell v. State*, 55 Tex. Cr. R. 389, 116 S. W. 1159, Judge Brooks rendering the opinion. He says: "Appellant's only contention is that the evidence fails to show that he is an adult male; the assault alleged being made upon a female. The prosecutrix, in her testimony, in speaking of appellant, uses this language: 'I know John Hartsell, the defendant, like any other boy, in passing.' Then, in another portion of her testimony, in speaking of the appellant, she uses this language: 'I saw the defendant the next day. I identified him as the man who assaulted me that night.' In the case of *Davis v. State*, 76 S. W. 467, in passing upon a similar question, will be found the following language: 'We are not authorized to indulge any presumption against appellant. If he is convicted of any offense, it must be upon evidence; and here we find no evidence to sustain the fact that he was an adult male, either of a positive or circumstantial character.' In this case we have the prosecuting witness speaking of appellant as a boy in one place and a man in another place. The word 'boy' is always applied to a male person under 21 years of age. 'Man'

is a noun used to designate one over 21 years of age. For a discussion of similar questions, see *Davis v. State*, 6 Tex. App. 133; *Gaston v. State*, 11 Tex. App. 143; *Tucker v. State*, 43 S. W. 106. From the record before us we cannot tell whether appellant is a boy or man. By the record alone we are governed. If appellant is a boy, then it could not be aggravated assault. If he is a man, it could. The record on this question ought to have been made more explicit. We are not authorized to indulge presumptions against appellant, but must pass upon the case on the record as made."

We do not deem it necessary to discuss the other questions, but, on account of the above error, this case is reversed and the cause is remanded.

KEARSE v. STATE.

(Court of Criminal Appeals of Texas. Nov. 13, 1912. Rehearing Denied Dec. 18, 1912.)

1. CRIMINAL LAW (§ 1159*)—VERDICT—CONCLUSIVENESS.

The jury are the exclusive judges of the facts proved, and of the weight of the testimony, and the court on appeal from a verdict attacked on the ground of the insufficiency of the testimony to sustain it may only determine whether there is sufficient evidence, if believed, to sustain it.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3074-3083; Dec. Dig. § 1159.*]

2. CRIMINAL LAW (§ 783*)—INSTRUCTION—IMPEACHMENT OF WITNESS.

Where the state on the cross-examination of a witness for accused produced the testimony of the witness before the grand jury to contradict the testimony on the trial, a charge that the testimony given before the grand jury was not admitted to prove the guilt of accused, but solely as impeaching the credibility of the witness, was proper.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1734, 1735, 1872-1876; Dec. Dig. § 783.*]

3. CRIMINAL LAW (§ 1172*)—APPEAL—HARMLESS ERROR—ERRONEOUS INSTRUCTIONS.

An instruction erroneously permitting the jury to consider the testimony of a witness before the grand jury to impeach a witness for the state, arising from the fact that the state's witness could not be impeached by such character of testimony, was in accused's favor, and he could not complain thereof.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3154-3163, 3169; Dec. Dig. § 1172.*]

4. CRIMINAL LAW (§ 406*)—EVIDENCE—ADMISSIONS.

Accused on trial for rape of a girl under 15 years of age may admit that prosecutrix was not 15 years of age at the time of the alleged offense, and be bound by such admission.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 785, 894-927; Dec. Dig. § 406.*]

5. RAPE (§ 38*)—STATUTORY RAPE—EVIDENCE—ADMISSIBILITY.

Where accused on a trial for rape on a girl under 15 years of age contended that the different members of the family of prosecu-

trix were about the premises at the time of the alleged offense, so that they would have known what was being done, the court properly permitted the state to prove the membership of the family of prosecutrix, and to show their whereabouts at the time of the alleged offense, and that the members of the family were not in sight or hearing at such time, and to show that the mother of prosecutrix was dead.

[Ed. Note.—For other cases, see Rape, Cent. Dig. §§ 48-50; Dec. Dig. § 38.*]

6. CRIMINAL LAW (§ 1169*)—APPEAL—HARMLESS ERROR—ADMISSION OF TESTIMONY.

The admission of improper testimony is not reversible error unless some injury is shown or reasonably made to appear, and the mere fact that the state on the trial for statutory rape was permitted to prove that the mother of prosecutrix was dead at the time of the alleged offense was not reversible error, in the absence of any improper use of the testimony in argument before the jury or otherwise.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3137-3143; Dec. Dig. § 1169.*]

7. RAPE (§ 40*)—STATUTORY RAPE—EVIDENCE.

Under Pen. Code 1911, art. 1063, defining "rape" with a girl under 15 years of age with her consent, evidence that prosecutrix under 15 years of age was a lewd woman at the time of the alleged offense was inadmissible to affect her credibility.

[Ed. Note.—For other cases, see Rape, Cent. Dig. §§ 55-59, 64; Dec. Dig. § 40.*]

8. CRIMINAL LAW (§ 1170*)—APPEAL—HARMLESS ERROR—ADMISSION OF EVIDENCE.

Error in excluding on a trial for statutory rape evidence of the bad reputation of prosecutrix for virtue and chastity is harmless, where it is conceded that she was a lewd woman at the time of the alleged offense.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3145-3153; Dec. Dig. § 1170.*]

9. CRIMINAL LAW (§ 1114*)—APPEAL—QUESTIONS REVIEWABLE—BILL OF EXCEPTIONS.

The court on appeal may only look to the authenticated record in considering the case on appeal, or any question raised or presented therein, and it may not look to the oral assertions of accused or his attorney in oral argument.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2913, 2921; Dec. Dig. § 1114.*]

10. CRIMINAL LAW (§ 1064*)—APPEAL—QUESTIONS REVIEWABLE—MOTION FOR NEW TRIAL.

Where a motion for new trial on a trial for statutory rape alleged that the court sustained an objection to evidence, and stated that it did not want to hear the theory of accused's counsel on which the evidence would be admissible, accused on appeal could not urge that the court erred in refusing to permit his attorney to state at the time what he expected to prove.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2676-2684; Dec. Dig. § 1064.*]

11. RAPE (§ 38*)—STATUTORY RAPE—EVIDENCE—ADMISSIBILITY.

On a trial of statutory rape, evidence that a third person charged with having raped prosecutrix had been acquitted was inadmissible.

[Ed. Note.—For other cases, see Rape, Cent. Dig. §§ 48-50; Dec. Dig. § 38.*]

12. CRIMINAL LAW (§ 1092*)—APPEAL—BILL OF EXCEPTIONS.

Under Code Cr. Proc. 1911, art. 744, authorizing a bill of exceptions, and Rev. Civ. St. 1911, arts. 2058 et seq., providing for the preparation, allowance, and signature of bills of exceptions, and providing that, on the judge finding a proposed bill incorrect, he may prepare a bill of exceptions presenting the ruling of the court, and providing for bills by bystanders, the court may prepare a bill of exceptions where the bill presented is erroneous, and, where the bill as prepared by the judge is not questioned, the court on appeal is bound thereby.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2829, 2834-2861, 2919; Dec. Dig. § 1092.*]

13. CRIMINAL LAW (§ 1166½*) — APPEAL — BILL OF EXCEPTIONS—HARMLESS ERROR.

Though the statute makes it proper for the court when an objection is made and a bill of exceptions is taken to stop the trial a sufficient length of time to then and there prepare, sign, and approve the bill, the refusal to suspend the trial for that purpose is not reversible error, where the party complaining is subsequently given his bill in full.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3114-3125; Dec. Dig. § 1166½.*]

Appeal from District Court, Fisher County; John B. Thomas, Judge.

Knox Kearse was convicted of crime, and he appeals. Affirmed.

M. E. Rosser and Wilmeth & Boyd, all of Snyder, L. H. McCrea, of Roby, and Higgins, Hamilton & Taylor, of Snyder, for appellant. O. E. Lane, Asst. Atty. Gen., for the State.

PRENDERGAST, J. Appellant was convicted of rape of a girl under 15 years of age, and his penalty fixed at 10 years in the penitentiary.

[1] Appellant contends that the evidence is insufficient to sustain the verdict. The contention is based largely on the fact that the girl alleged to have been raped by appellant contradicted herself in her testimony and was contradicted by the testimony of other witnesses and by some circumstances. There is hardly any contested case that comes to this court but what there are contradictions in the testimony, and frequently a principal witness may contradict himself in material matters. In such cases, when it is contended that the evidence is insufficient to sustain the verdict, this court cannot legally take the place of the jury, and determine whether or not it will believe any witness or witnesses, and from all of the testimony, as put down on paper and sent to this court, it would have found a different verdict from that of the jury, and, if so, reverse the case on that account. The only question this court can determine is whether there is sufficient evidence, if believed by the jury, to sustain the conviction. This court passes upon that question as a question of law which is all it can legally do under such circumstances. Our law expressly provides that the jury in all

cases are the exclusive judges of the facts proved and of the weight to be given to the testimony. This court therefore cannot take that question from the jury without usurping authority that was never given or intended to be given to it. The jury in a felony case is made up of 12 fair, disinterested, impartial, unprejudiced, unbiased, and competent jurors selected from different portions of the county, each one of whom hears all the witnesses, looks them in the face when testifying, observes their manner and the method of their examination by the respective attorneys, then hears the argument of the attorneys for each side, one side undertaking to break down the testimony of the witness and calling attention to every contradiction in the testimony of such witness and the contradiction by others of him, the other explaining such matters, and seeking to sustain such witness, then hear and take with them in their retirement the charge of the court. Then the twelve men discuss and consider in private between themselves all such matters, and, after weighing it all and all the arguments against it and in support of it, come to the conclusion that the testimony of a certain witness, or witnesses, although contradicted and although there are contradictions in the testimony of such witness, that it is true and they believe it. The jury is made up of men of different ages, from young to comparatively old men, and they pursue different occupations and businesses. With all these surroundings they are much more competent to arrive at the truth than are the judges of this court who must look solely to the testimony as written down on paper. It cannot portray the manner, the looks, and the deportment of the witness, nor the manner of his examination and cross-examination by the attorneys. Besides this, the presiding judge hears and sees and observes all that the jury does in the trial of the case and he then sustains the verdict of the jury. Therefore, when the evidence taken in its favorable light sustains the verdict, this court cannot legally set it aside. We have carefully read and studied all the evidence in this case. It is amply sufficient, if believed by the jury as it was, to sustain the verdict. We are not authorized to set it aside. It is unnecessary to recite the evidence.

[2, 3] Among others, the appellant introduced the witness Clarence Thrash, whose testimony, in some particulars, tended to break down the state's case, as made by its evidence, and in some particulars in favor of the defendant. On cross-examination of this witness the state by him showed or tended to show some inconsistencies, if not contradictions, of his own testimony, damaging to the state, given in his direct examination. Then the district attorney produced the written and signed testimony of this witness before the grand jury when they were investi-

gating the case and found the indictment herein. He admitted that that was his signed statement of his testimony before the grand jury, and that he had so testified before the grand jury; that, before he testified before the grand jury, he was duly and properly sworn. The district attorney, who was present in the grand jury room and who wrote down this statement before it was signed by this witness, as well as one of the grand jurors, testified positively that this statement of the witness of his testimony before the grand jury was written down at the time he gave it, read over to him, and signed by him. There is no doubt, and cannot be, from the testimony that this statement was signed by the witness and his testimony before the grand jury as therein written down and signed by him. This testimony in some particulars was in direct contradiction of some of his testimony in favor of the appellant given on this trial.

The state thereupon, without any objection whatever by appellant, introduced the following portion of said statement: "My name is Clarence Thrash. I know Essie Moore and Etta Moore. Am a rural route mail carrier. Etta Moore told me she was 17 years old, and asked me to hold her mail. Have been to Moore's house two times. The first time was there was to get E. L. Moore to sign a petition to the government for a daily mail route. This was in 1911. I cannot tell what month or the day of the month. Nobody but the Moore family was there that day. I was back there some time before any arrest was made. Nobody was there that day except the two girls. It was on Friday or Friday a week before anybody was arrested. Can't say for certain. I went with Knox Kearse. Knox Kearse and I went there about the middle of the afternoon. Just the two girls were there. Two McCullough boys passed around there while we were there. We stayed there about 20 minutes. I talked to both of the girls. I have had sexual intercourse with Essie Moore. I never did have intercourse with Etta Moore. [Some omitted.] At the time Knox Kearse and I were at Moore's house as above stated, Knox Kearse went into the Moore house. I did not use my watch to tell the length of time that he was in the house. Knox Kearse was with the younger girl. We went to the house a second time to get a drink of water, and Kearse went into the house with the younger girl, Etta Moore, the second time that we were that day. This day was not a regular mail day with me. Kearse and the girl remained in the house three or four minutes. I was with Essie Moore during this time. Me and Essie had gotten to my motor cycle about 100 yards from the house, when Kearse and Etta Moore came out of the house. Kearse and Etta Moore come on to the motor cycle where me and Essie were. I did not see any children at the house that day. E. L. Moore, the father of the girls, was out in the field about

a half mile. I have guded Knox Kearse, and offered to bet him a dollar that he has had intercourse with Etta Moore, but he never would say whether he had or not. He would not say anything. That day Knox Kearse told me that he had been out to Moore's before then. One night in town, when Kearse was with Lon Smith, Smith was drunk, and Kearse took him home in an auto. Kearse afterwards told me that he had been out to Moore's that night, in the car he took Smith home in, that night. Clarence Thrash."

In the introduction of it by the state, where the words in about the middle of the body of the statement above copied says in parenthesis "some omitted," the state omitted and did not introduce that part of the statement. Thereupon the appellant announced that he would introduce that part of the statement which was omitted by the state, which part is as follows: "Charles Jones told me that he had been to Moore's house. He told me this about one week before he was arrested. He said the Moore girls were warm members. Jones and I were standing in a crowd when he made this statement. He said he had been out there, and asked me if I had seen him out at Moore's house. It was about a week before Jones was arrested that he made this statement. Hugh Scarborough told me that he had been out to Moore's. I think it was about a week after the boys were arrested that he had been out there. Have seen Curtis Teeter and another boy out there at Moore's," announcing at the time that they desired to introduce it for the purpose of impeaching the prosecutrix and for whatever the jury might think it worth.

The court on this subject gave to the jury this charge: "Fourth. The written statement of the witness Clarence Thrash made before the grand jury of Scurry county, Tex., from the beginning of said statement up to and including that part of said statement ending with the words, 'I never did have sexual intercourse with Etta Moore,' and also that part of said statement beginning with the words, 'At the time Knox Kearse and I were at Moore's house as above stated Knox Kearse went into the Moore house,' and ending with the end of said statement, was not admitted before you for the purpose of proving the guilt of the defendant in this case, but was admitted before you solely for the purpose for you to consider, if you do consider it, for whatever right (weight) you may give it, if any, or for whatever you may consider it worth, if anything, as impeaching the credibility of the witness Clarence Thrash, and you will consider it for no other purpose. The balance of said statement beginning with the words, 'Charles Jones told me that he had been to Moore's house,' and ending with the words, 'have seen Curtis Teeter and another boy out there at Moore's,' offered in evidence before you by the defendant, was admitted before you sole-

ly for the purpose for you to consider, if you do consider it, for whatever you may think it entitled to, if anything, as impeaching the credibility of the witness Etta Moore, and for no other purpose." Appellant objected to this charge on various grounds. In our opinion the first part of this charge about the jury considering it to impeach the credibility of Thrash was proper, and in no way objectionable. The latter part of the charge, telling the jury they might consider the portion of it introduced by the appellant to impeach the witness Etta Moore, should not have been given, and that part of the statement should not have been admitted in evidence for that purpose. The witness Etta Moore could not be impeached by this character of statement made at the time and under the circumstances when this was by the witness Thrash, but this portion of this charge is clearly in appellant's favor, and not against him, and he has no cause of complaint on that account. *Clanton v. State*, 13 Tex. App. 153; *Wooley v. State*, 64 S. W. 1055; *Turner v. State*, 51 S. W. 367; *Gutgesell v. State*, 43 S. W. 1016; *Scott v. State*, 23 Tex. App. 535, 5 S. W. 142; *Ripsey v. State*, 29 Tex. App. 43, 14 S. W. 448; *Gibson v. State*, 45 Tex. Cr. R. 313, 77 S. W. 812; *Wyatt v. State*, 38 Tex. Cr. R. 256, 42 S. W. 598; *Gallegos v. State*, 48 Tex. Cr. R. 61, 85 S. W. 1150. We think the authorities cited by appellant on this subject are inapplicable.

[4, 5] By one bill of exceptions it is shown that when the state's witnesses E. L. Moore and Mrs. May Cross, father and sister, respectively, of the prosecuting witness Etta Moore, were on the stand as witnesses for the state, the state was permitted to prove by them that the mother of Etta Moore was dead; that before this evidence was introduced the appellant, in open court, in the presence of the jury, admitted that Etta Moore was 15 years of age on January 6, 1912, and that she was not 15 years of age at the time of the alleged offense (the offense was alleged to have been committed on April 20, 1911, and the proof showed, if committed, it was on or about the same date). By another bill that when said state's witness E. L. Moore, father of Etta, was upon the stand as a state's witness, the state asked him who composed his family in the spring of 1911, and during April of that year. He answered: "I had three little girls and two little boys at that time. The names of the three little girls were Essie, Etta, and Linnie." Then the state's counsel asked him whether or not his wife was dead at that time. He answered: "At that time my wife was dead." State's counsel then asked him when his wife died, to which he replied: "My wife died four years ago last fall, the fall of 1911." The appellant objected to the said questions by the state, asking whether or not his wife was dead at that time and

his answers thereto, and the state's further question of him when she died and his answer thereto, "for the reason that same was immaterial, irrelevant, and calculated to inflame the minds of the jury, and to prejudice the rights of the defendant before the jury." The court overruled these objections, and permitted the questions and answers above objected to. The court in approving the bills qualified them by stating the court did not believe the defendant could waive or the state dispense with the proof of prosecutrix's age, and he admitted the proof to account for the absence of the mother as a witness to the age of the prosecutrix. We think the appellant could admit and be bound thereby; that the prosecutrix was not 15 years of age at the time of the alleged offense upon her; and that the court in assigning this as his reason for admitting said testimony may have been incorrect, but even his assigning an incorrect reason would not make the evidence inadmissible, if it otherwise was admissible. If the evidence was admissible for any legitimate purpose, neither the bill nor the record anywhere shows, or tends to show, that any improper use was made thereof, nor how its introduction was calculated to inflame the minds of the jury, or prejudice appellant's rights, are shown or attempted to be shown.

Evidently the contention of the appellant before the jury, among other things, was that the different members of the Moore family were about the premises or in or about the house at the time of the alleged offense so that they could and would have known what was being done, or that the testimony of the prosecutrix was not to be believed, because different members of the family were about in such way as that the offense would not have been committed at the time and place the prosecutrix testified it was. The record, as the bill, shows that it was proven without objection who constituted the other members of the family, the father and the six children, and the whereabouts of each at this particular time was fully shown so as to account for their not being present or in proximity at the time where the offense was alleged and shown to have been committed. Upon a thorough investigation and consideration of this character of question in the case of *Sweeney v. State*, 146 S. W. 888, this court held: "The rule, without question, is that either side can introduce any pertinent testimony tending to prove any pertinent issue in the case, or which may do away with, or lessen, the adverse effect of any proper deduction that may be made from evidence that is introduced against him. In the recent work of *Standard Ency. of Law & Proc.* (vol. 2, p. 773), the correct doctrine is thus laid down: 'On the trial of a criminal case the failure to produce available witnesses, the absence of any evidence willfully omitted, forms a predicate for

any legitimate deduction for or against the defendant, where the materiality and competency of such evidence appears * * *—citing many authorities sustaining this rule. Among them are cases from the United States (Supreme Court), Alabama, Georgia, Iowa, Kansas, Kentucky, Massachusetts, Michigan, Minnesota, Missouri, North Carolina, Oregon, Texas, and Wisconsin. This same doctrine is also laid down in the recent work of 5 Am. & Eng. Ency. of Law & Practice, p. 333, in this language: "The rule prevailing in civil cases, under which counsel may comment on the failure of the adverse party to produce evidence apparently accessible to him or witnesses having knowledge of the facts in issue, is likewise applicable in criminal cases. Counsel may comment on the failure of the state or defendant to produce such witnesses or evidence"—citing substantially the authorities as the other work quoted above cites. In the case of *Graves v. United States*, 150 U. S. 118, 14 Sup. Ct. 40, 37 L. Ed. 1021, the Supreme Court of the United States, through Mr. Justice Brown, said: "The rule, even in criminal cases, is that, if a party has it peculiarly within his power to produce witnesses whose testimony would elucidate the transaction, the fact that he does not do it creates the presumption that the testimony, if produced, would be unfavorable."

The record in this case, we think, demonstrates the application of the above rules thereto. As stated above, the state's theory was to account for the whereabouts of each member of prosecutrix's family at the time the alleged offense was committed for the purpose of showing that they were not in sight or hearing so as to have known, or seen, what was being done, and thereby tend to prevent a successful attack of the testimony of the prosecutrix on that theory. It was therefore very important, we think, for the state to show where the mother was; for, of all members of the family, the most natural and reasonable thing was, if she was living, for her to have been in or about the house and the premises, so that, if the offense was even attempted to have been committed, she would have known or heard of it at the time, and by her mere presence, if not otherwise, have prevented it. As a further illustration of this, the appellant had the state to admit that Essie Moore, one of the prosecutrix's sisters, had been duly subpoenaed to attend the trial of this case and that she was not present and in attendance thereon; that the state then showed it did not know why she was not in attendance; that she had been present at the former trials in Scurry and Haskell counties of other parties charged with rape upon this same girl. Evidently this was for the purpose of having the jury to consider, and it was doubtless commented upon by appellant's attorney in argument to the jury that the state had

another witness who was not present at the trial who would and doubtless could have shed some light upon the case for the state, and, by not having her present, the jury should and would consider is as a circumstance against the state. So, doubtless, if the state had not accounted for the mother of the prosecutrix at the time by showing that she was dead, the same use of her absence would have been made by appellant's attorneys, and could have been made by the jury. Of all members of the family, under the circumstances, it was more necessary to account for the absence of the mother than any other member. In our opinion the evidence was admissible, and the court did not commit error in permitting the proof to be made. *Sweeney v. State*, 146 S. W. 883; subdivision 8, *White's C. C. P.* p. 659, and cases there cited.

[6] Doubtless, if any improper use of the testimony had been attempted by the state in argument before the jury, or otherwise, the court with, or perhaps without, any objection would have stopped and prevented this. Neither the bill nor record shows that any improper use was attempted of it, nor is it shown that it in any way inflamed the minds of the jury or prejudiced the rights of appellant. Even "the admission of illegal testimony will not constitute reversible error, unless some injury is shown or reasonably made to appear." *Hooper v. State*, 29 Tex. App. 616, 16 S. W. 655; *Coyle v. State*, 31 Tex. Cr. R. 607, 21 S. W. 765; *Tweedle v. State*, 29 Tex. App. 590, 16 S. W. 544.

[7, 8] By another bill it is shown that the court limited the defendant to three witnesses for the purpose of proving that the reputation of prosecutrix in the community in which she lived was bad for virtue and chastity, he offering to place ten additional witnesses on the stand to make that proof; that the state's counsel contended before the court in the presence of the jury that such evidence was no defense, because the prosecutrix had already stated that she had other acts of sexual intercourse, which position of the state's counsel was sustained by the court. The court in allowing this bill qualified it by stating that he permitted four witnesses to the general reputation of the prosecutrix to be placed on the stand, one failing to qualify; that the court thought this sufficient, in view of the fact that prosecutrix admitted that she had carnal intercourse with four different men before this act with appellant. This shows no reversible error by the court. The only purpose for which such testimony is admissible in a rape case is where the alleged raped person is a woman more than 15 years of age at the time, and solely for the purpose of consideration by the jury to determine whether or not she consented to the act. Our statute on the subject makes it rape for a man to have

sexual intercourse with a girl under 15 years of age with her express consent, and the decisions hold that even where she has solicited and brought about the act. P. O. art. 1063; *Robertson v. State*, 51 Tex. Cr. R. 494, 102 S. W. 1130, and many other cases might be cited, but we deem it unnecessary. So that the evidence in this case that the reputation of the prosecutrix was that of a lewd person, when it is conclusively shown that she was under 15 years of age at the time the act occurred, was not admissible for the purpose of affecting her credibility; but, even if it was, it was a conceded fact and not contested by the state, in fact, apparently asserted by the state, that she was this character of woman, and the additional evidence of other witnesses could not have made the fact clearer or more certain. Hence, in any event, the court did not err in this particular.

The only other question necessary to discuss and decide is what is raised by the third bill of exceptions. We quote that in full, omitting solely the style of the case and court at the head, and the signature of the judge at the end. It is: "Be it remembered that on this the 30th day of March, A. D. 1912, the defendant in the above entitled and numbered cause presented to this court his bill of exceptions No. 8, which in the opinion of the court not being a correct bill and not fairly presenting the matters therein set forth, the court herewith prepares and files this bill of exceptions, setting forth the matters and things as they occurred, in lieu of said bill of exceptions No. 8 presented to him by the defendant as aforesaid, the court bill of exceptions being as follows: Be it remembered that on the trial of the above styled and numbered cause in said court on the 7th and 8th days of March, A. D. 1912, the following proceedings were had, to wit: On said 8th day of March, A. D. 1912, while the defendant's witness H. P. Welborn was on the stand, counsel for the defendant M. E. Rosser, Esq., propounded to said witness in substance the following question: 'Were you present at Haskell, Texas, in December, 1911, at the trial of Charley Jones for the offense of rape on the prosecutrix, Etta Moore, in which he was acquitted?' To which counsel for the state objected, and made the remark 'that, if counsel for the defendant is ignorant of the law, he did not wish him to be fined,' and ask that he be required to stay within the law, and the court sustained the objection of the counsel for the state to said question, for the reason that in the trial of the state of Texas v. Charley Jones tried at Haskell, Tex., in which the said Charley Jones was tried for rape upon the prosecutrix in this case, the said Charley Jones was acquitted. There were four several indictments presented in the district court of Scurry county, Texas, charging different parties with rape upon

said prosecutrix, Etta Moore, all charged to have been by different persons and on different occasions, one of the defendants under said indictments being the said Charley Jones, and one being Knox Kearse, the defendant in this case, and the said cases having no relation to each other, and the court being of the opinion that counsel for the defense in this case was merely trying to get before the jury the fact that in the trial of the case of the State of Texas versus Charley Jones at Haskell for rape upon the said prosecutrix in this case, that the said Charley Jones was acquitted, and that the same was not admissible for any purpose, and shed no light upon the facts in this case and had no bearing upon the facts in this case, sustained said objection of the state. That, after the court had sustained said objection of the state, a colloquy ensued between counsel for the defense and counsel for the state, and counsel for the defense, there being four of them, insisted on asking the question again, whereupon the court remarked that if counsel asked the question again that he would fine him in the sum of \$50. The counsel for the defense then asked the court to withdraw the jury that he might make his objections and take his exceptions to the ruling of the court as aforesaid, which the court declined to do as such matters would necessarily delay the trial, the court at that time stating to counsel for the defense that they could put any objections they wanted to in their bill of exceptions; and afterward, during an intermission or recess in the trial of the case, the court told L. H. McCrea, one of the counsel for the defense, that he could put any objection in his bill that he wished, which the said L. H. McCrea stated was all right and all that they wanted, but that he believed the testimony was admissible. And afterward, to wit, at Snyder, Tex., when the said bill of exceptions of the defendant was presented to the court by Hardy Boyd, one of the counsel for the defense, the court then told the said Hardy Boyd that he could not approve the said bill of exceptions in the shape it was in, or the form in which he had it, and refused to approve same, but that, if he would prepare same and put in any objections to the ruling of the court that he wished to in said case, he could do so, and that he could set out any objections that he wished to the ruling of the court, which said counsel declined to do. Thereupon, the court refused to approve said bill of exceptions, and herewith filed this his bill of exceptions as the true and correct bill of exceptions in this case, and the same is ordered filed by the district clerk of Fisher county, Tex., as part of the record in this cause." On oral argument before this court in the submission of this case, it was stated by appellant's counsel, as we understood him, that the court refused to permit appel-

lant to state what he wanted to *prove* by this witness Welborn which was the testimony of the prosecutrix in the trial of the Charley Jones case, which had occurred prior to this trial. It is due to the attorney who made this statement in oral argument to state he did not represent appellant in the court below and doubtless was not present and did not hear what then occurred.

[9] It is, and must necessarily be, the law that this court can look only to the authenticated record before it in considering any case on appeal, or any question raised or presented therein. We cannot under any circumstances look to the oral assertions of appellants or their attorneys in oral argument before this court. If this was not true, this court would in many cases be flooded by oral statements of attorneys and the parties for both sides of what occurred and what didn't occur, and what was said and what was not said in the trial court. If such were the case, this court would be converted into a trial court and have to have witnesses summoned, hear testimony, and pass upon the weight to be given thereto, and the credibility of the witnesses. And it would not be a Court of Appeals, as it exclusively is, and so fixed by the law.

We do not mean to be understood to imply a lack of faith in such statements by counsel in this case or any other. We are merely discussing what this court is confined to in considering the cases on appeal before it, and questions raised and presented by the record therein.

[10] The only reference to this matter, in any ground of the motion for new trial is the following: "(7) The court erred upon the trial of this cause wherein the defendant had placed the witness H. P. Welborn on the stand as a witness in his behalf when letting counsel M. E. Rosser propound to witness the following question: 'Were you present at Haskell, Tex., on December, 1911, and heard the trial of Charley Jones for the offense of rape with the prosecutrix, Etta Moore, *in which he was acquitted*,' in which private prosecutor, C. P. Woodruff, objected, in substance, 'that, if counsel for the defendant is ignorant of the law, we do not wish him fined, otherwise we ask the court to fine him and which the court remarked and reprimanded counsel that, if such a question was propounded again, he would fine counsel \$50,' and whereupon co-counsel for defendant, L. H. McCrea, endeavored to present to the court the *theory upon which said evidence would be admissible* and in which the court refused to hear, and ordered counsel to be seated, which remarks and action of the court were calculated to mislead the jury in believing that the court might be biased or leaning to the state and to give undue prominence to the remarks of private prosecutor, and to belittle the attorneys for the defendant in the eyes of the

jury, as shown by bill of exceptions No. 3, filed in the records of this cause." As we understood appellant's counsel in oral argument, he contended that the court below refused to permit appellant's attorney to tell the court at the time what *they expected to prove* by the witness Welborn as to what the prosecuting witness, Etta Moore, had testified on the trial of the Charley Jones case. This bill does not so state and nowhere so intimates, and neither does the motion for new trial. Neither is it anywhere so made to appear either directly or indirectly by the record elsewhere or anywhere. The bill expressly states that when the *question* was asked, and the court sustained the objection thereto, the appellant's attorneys attempted to *ask* it again, and the court refused to even permit them to do that. The bill then shows that the appellant's attorneys asked the court to withdraw the jury, not that he might state what the testimony he *expected to prove would be*, but "that he might make his *objections and take his exceptions* to the ruling of the court." The court declined to do this, then stating to the counsel that they could put *any objections* which they wanted to in their bill of exceptions, and that afterwards, during an intermission or recess of the trial, the court told one of appellant's counsel that he could put *any objection* in his bill that he wished, and that the counsel stated in reply that it "was all right," and all they wanted; that again, when another one of appellant's counsel presented his bill covering this matter to him, he was informed by the court that he could not approve it in the shape it was and refused to approve it, "but that, if he would prepare same and put in *any objections* to the ruling of the court that he wished to in said case, he could do so, and that he could set up *any objections* that he wished to the ruling of the court, which said counsel declined to do. Thereupon, the court prepared this bill and filed it in lieu of the one which had been presented to him, instead of the incorrect one which had been presented to him and which he refused. Again, we find in the record, statement of facts, that the official court stenographer who took down on the trial all of the testimony in the said Charley Jones case was present on this trial, and, introduced by appellant, testified that he was such official stenographer; that he did as such take down all the testimony in the Jones case, and had his notes with him, produced and identified them and then, without any objection whatever, by the state, reproduced such part of the testimony of Etta Moore in the Jones case, and read it in this, at the instance of the appellant herein, as he called for, reading it in full by question and answer.

So that we conclude from all this and the record as a whole that appellant's attorneys

must have been in error in contending orally before this court that the lower court refused to permit appellant to tell what he expected to prove by the witness Welborn as to what said state's witness Etta Moore testified on the trial of the Charley Jones case.

[11] But, instead, that what appellant's attorneys sought to get before the jury in putting Welborn on the stand was to inject into the evidence, as shown by his questions and the attempted repetition thereof, that Jones was acquitted by the jury in his case. That such could be done no one could contend, and the court was correct in suppressing the injection of such testimony in this case, even if some temper and threat of a fine for so doing was shown and made.

[12] Art. 744, C. C. P., prescribes that on the trial of any criminal action the defendant, by himself or counsel, may tender his bill of exceptions to any decision, opinion, order, or charge of the court or other proceedings in the case; and the judge shall sign such bill of exceptions, under the rules prescribed in civil suits, in order that such decision, opinion, order, or charge may be revised upon appeal. There is no other statutory provision in our Criminal Codes, on this subject, so that we go to the Civil Code to determine what shall be done in cases arising as did this case. R. S. art. 2058 (1360), prescribes: "Whenever, in the progress of a cause, either party is dissatisfied with any ruling, opinion, or other action of the court, he may except thereto at the time the same is made, or announced, and at his request, time shall be given to embody such exception in a written bill." R. S. art. 2063 (1365), makes it the duty of the party taking any such bill to reduce it to writing and present it to the judge for his allowance and signature. The next article requires the judge to submit such bill to the adverse party or his counsel, if in attendance on the court, and, if found to be correct, to sign it without delay, and file it with the clerk. Then the succeeding articles of the statute are as follows:

"Art. 2065 (1367). If found incorrect. Should the judge find such bill of exceptions to be incorrect, he shall suggest to the party, or his counsel who drew it, such corrections as he may deem necessary therein; and if they are agreed to, he shall make such corrections and sign the same and file it with the clerk.

"Art. 2066. (1368) On disagreement, judge to make out bill, etc.—Should the party not agree to such corrections, the judge shall return the bill of exceptions to him with his refusal indorsed thereon, and shall make out and sign and file with the clerk such a bill of exceptions as will, in his opinion, present the ruling of the court in that behalf as it actually occurred.

"Art. 2067. (1369) Bystanders bill, how obtained. Should the party be dissatisfied with the bill of exceptions filed by the judge, as provided in the preceding article, he may,

upon procuring the signatures of three respectable bystanders, citizens of this state, attesting the correctness of the bill of exceptions as presented by him, have the same filed as part of the record of the cause; and the truth of the matter in reference thereto may be controverted and maintained by affidavits, not exceeding five in number on each side, to be filed with the papers of the cause, within ten days after the filing of such bill of exceptions, and to be considered as a part of the record relating thereto. When the court refuses to sign a correct bill of exceptions, such proceedings may be had in the court of civil appeals, as is prescribed in article 1607."

In our opinion the said bill No. 3, above quoted, shows that the judge substantially, if not literally, complied with this law and his duty. The appellant in no way shown by the record contested by affidavit or otherwise the correctness of the judge's bill, or of any of the facts and circumstances stated by him as having occurred. But, on the contrary, as we take it, his counsel were satisfied with the bill as prepared by the judge. Under the circumstances, it will not meet the question to say that the bystanders would not have known, and could not have known, what they expected to prove by the witness. They, the attorneys, could, at least, have made their affidavits of what this was, if it was other or different from what the judge states in the bill. Again (R. S. art. 1607 [1014]) the statute referred to in article 2067, above quoted, expressly states: "And the court (appellate court) shall admit as part of the record to be examined by them in the trial of a cause, every bill of exceptions not signed by the judge trying the cause below, upon its appearing to the satisfaction of the court (appellate court) that the facts are fairly stated therein; that said bill was prepared in accordance with the law governing the preparation of such bills and that the judge trying the cause refused to sign the same; and the truth of any such bill of exceptions shall be determined by the court (appellate court) on the copies of the affidavits required by law to be made in such case, such copies to be copied in, and to form a part of the record transmitted to the Court of Civil Appeals (or Criminal Appeals)." The record nowhere and in no way shows that any such affidavit was filed in the lower court, and none such is contained in the record before us.

[13] It has always been held by this and the civil courts that, as the statute requires, it would be proper for the court, when an objection is made and a bill of exceptions is taken, to stop the trial a sufficient length of time to then and there prepare, sign, and approve such bill. The general practice, however, in the trial courts is not to do this. But it has also always been held that even when this is not done and the party is afterwards given his bill in full, the mere fact that

the court did not suspend the trial and give it to him when first taken would not be reversible error, and no case has been reversed, so far as we know, because the court did not stop the trial, and then and there give the party a bill of exceptions.

We therefore hold as this matter is presented to us that the appellant has no cause of complaint that would justify this court to reverse this cause.

The judgment is therefore affirmed.

LITTLE v. JAMES McCORD CO.

(Court of Civil Appeals of Texas. Texarkana. Nov. 28, 1912. On Motion for Rehearing, Dec. 12, 1912.)

1. NEGLIGENCE (§ 23*)—DANGEROUS PREMISES—ATTRACTIVE TO CHILDREN.

One who leaves unguarded dangerous machinery usually attractive to children is liable for injuries to a child attracted to the machinery, though he is there without express permission.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 33, 84; Dec. Dig. § 23.*]

2. EXPLOSIVES (§ 8*)—NEGLIGENCE—QUESTIONS FOR JURY.

Where an owner of explosives, consisting of Roman candles, skyrockets, and other explosives made to amuse children on holiday occasions, placed them on the premises of a third person to which children, either as licensees or trespassers, had for a long time resorted, he owed to such children the legal duty of guarding the explosives, and where he failed to do so, and a child was injured by an explosion while playing with one of the explosives, the question of his guilt of actionable negligence was for the jury.

[Ed. Note.—For other cases, see Explosives, Cent. Dig. §§ 4, 5; Dec. Dig. § 8.*]

3. EXPLOSIVES (§ 8*)—INJURIES TO CHILDREN—PROXIMATE CAUSE—QUESTION FOR JURY.

Whether the negligence of an owner of explosives, who placed them on the premises of a third person to which children resorted, was the proximate cause of an injury to a child, caused by an explosive exploding while the child handled it, *held* under the evidence for the jury.

[Ed. Note.—For other cases, see Explosives, Cent. Dig. §§ 4, 5; Dec. Dig. § 8.*]

4. NEGLIGENCE (§ 136*)—DANGEROUS PREMISES—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

Whether a child, injured by an explosion of an explosive left by the owner on the premises of a third person, was guilty of contributory negligence in handling the explosive at the time of the explosion, *held* under the evidence for the jury.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 277-358; Dec. Dig. § 136.*]

On Motion for Rehearing.

5. EXPLOSIVES (§ 8*)—DANGEROUS PREMISES—LIABILITY.

Where an owner of explosives placed them on the premises of a third person, and children visited the premises in search of pecans without permission from any one, and while on the premises for that purpose discovered the explosives and then left and subsequently returned for the sole purpose of examining and playing with the explosives, and a child was injured in consequence of an explosion, the owner of

the explosives could not escape liability on the ground that the pecans furnished the chief attraction which induced the children to visit the premises.

[Ed. Note.—For other cases, see Explosives, Cent. Dig. §§ 4, 5; Dec. Dig. § 8.*]

Appeal from District Court, Tarrant County; Jas. W. Swayne, Judge.

Action by Fred Little, by next friend, against the James McCord Company. From a judgment for defendant, plaintiff appeals. Reversed and remanded.

McLean & Carlock, of Ft. Worth, for appellant. Slay, Simon & Wynn, of Ft. Worth, for appellee.

HODGES, J. Fred Little, a minor, by his next friend sued the James McCord Company for personal injuries. The petition alleges that the James McCord Company is a private corporation and owns a building called a "magazine" situated on a lot in the city of Ft. Worth, in which are stored skyrockets, firecrackers, Roman candles, dynamite caps, and other explosives; that in November, 1910, defendant carried from its magazine and deposited in an open lot a large quantity of those explosives; that the lot where this material was deposited was a pecan grove near a public highway and possessed peculiar attractions to children of tender years and was a place where such children were accustomed to resort. It was further alleged that the plaintiff was a boy 12 years of age, and was attracted to the place where those explosives had been left scattered upon the ground, and was prompted by his childish impulses to appropriate some of them; that in attempting to break one of the pieces on a rock it exploded with great violence and blew off his right hand. It is claimed that appellee was negligent in depositing dangerous and attractive explosives at a place where young children were accustomed to resort. In addition to a general denial, the defendant pleaded that the premises where the explosives were deposited were private property, and that the plaintiff was trespassing at the time he entered thereon and carried away the material which caused his injury. It is further alleged that he failed to exercise ordinary care in handling the explosive. Both the plaintiff and the defendant introduced testimony, and at the conclusion the jury were peremptorily instructed to return a verdict for the defendant. From the judgment rendered in accordance with that verdict this appeal is prosecuted.

The only assignment of error is one which assails the action of the court in directing the verdict for the defendant. There appears to be no dispute in the testimony about the fact that appellant was injured in the manner and by the agency alleged; neither is there any controversy as to the fact that the appellee owned the magazine and the explosives, and that its agents had previously car-

ried them out of the building and deposited the box in which they were contained in an open lot where they were accessible to any one who might wish to appropriate them. The evidence showed that the lot upon which the magazine was situated belonged to the Collins estate and was under the management and control of Judge C. K. Bell, the administrator of that estate. It also appears that the lot was a strip of land about 180 feet wide and much longer, lying adjacent to one of the highways of the city and in a vicinity containing some private residences. The appellee did not have any interest in the lot, and its magazine was kept there by permission of the administrator. A negro named William Cowen occupied a residence upon the lot, with his family, and was charged with the duty of looking after the property and keeping off trespassers. There were quite a number of pecan trees situated on this lot, and it required some effort to prevent trespassers from depredating thereon during the season when pecans were falling. The premises were inclosed with a wire fence, and were entered through a gate situated near the house occupied by Cowen. Notices showing that the premises were posted were to be seen at different points over the fence and near the gate. Under one of the large pecan trees was a swing such as are used by children at play, which had been placed there some time during the year preceding appellant's injury. In November, 1910, and prior to the day when the appellant was injured, the appellee had its magazine cleared of old material which was considered worthless for the market. One of the employes testified that in cleaning out the magazine a large wooden box filled with this rubbish was carried out about a hundred feet and dumped upon the ground near one of those pecan trees. Another of appellee's employes testified that on previous occasions when the magazine was cleaned out it was the practice to burn the old material but that was not done on this occasion because of the high wind prevailing at the time and the danger of communicating fire to other objects. The appellant, Fred Little, testified in substance that the accident occurred on Monday, November 28, 1910, and that he was 12 years old in the preceding September. On the Sunday before the accident he, in company with some other boys near his age, went to this lot for the purpose of getting pecans. They were standing on the outside of the fence when Jess Cowen, the son of William Cowen, invited them to come inside. They entered through the gate, which at the time was partly open, and after gathering pecans started home. The Cowen boy then called their attention to this material, which had been placed near one of the pecan trees by the agents of the appellee. He testified that this rubbish was about 50 feet from the gate and within about 25 feet of the swing previously mentioned. The box was open, and the material was scattered around upon

the ground. There was quite a lot of it. They took a few articles which they called "sparklers," something attached to a piece of wire which when ignited would emit sparks but made no noise. Some of these he carried home with him. He returned about 2 o'clock the same afternoon. His father, mother, uncle, and aunt were with him. On the following Monday he attended school, and while there he and several other boys agreed to again visit this pile of explosives and get some of them. They were dismissed from school about 3 o'clock, and immediately repaired to the grove for that purpose. They picked up some of the material and started home. Appellant says that he carried some in his cap—had about 10 or 12 boxes of what he called "dynamite caps." He had never seen anything like that before. They had melted and run together. He had seen the little ones, but not those which had coagulated. They all started home; and after reaching a point about a quarter of a mile distant he undertook to break one of those which had melted and run together, for the purpose of giving a piece of it to one of the other boys, when it exploded with great force and blew off his right hand. He undertook to break it upon a rock, and stated that he had no idea that there was any danger in doing so. He admitted that he knew the grounds were posted, and that he had seen the sign. A chemist who testified upon the trial stated that he had examined the explosives which were shown to be similar to the one that caused the injury, and found that they contained a mixture of potassium chlorate and sulphur mixed with sand; that when the sand is struck there is a certain amount of friction, or heat, generated, causing the sulphur to unite with the oxygen, producing combustion; that it was the friction and striking that caused the explosion. It appears from other portions of the testimony that these explosives had previously been a part of the appellee's stock of goods, and for some reason had become melted, or partially dissolved by water, and had run together, so that numbers of them were sometimes coagulated into a single mass. There was other testimony sufficient to show that boys in large numbers frequented this lot in search of pecans; that sometimes they were ordered out by Cowen or members of his family, and at other times they were not molested. Cowen's testimony justified the inference that he was willing for some of the boys who resided in the neighborhood to come on the premises and gather pecans after he had supplied Judge Bell and himself. In one portion of his testimony Cowen stated that it was impossible to keep the boys away; that they "came there in droves."

[1, 2] In order to establish a legal liability in a case like this, it is necessary that the evidence be sufficient to support a finding by the jury that the defendant owed the plaintiff a legal duty and had negligently failed to perform it. In the case of Dob-

bins v. Railway Co., 91 Tex. 60, 41 S. W. 62, 38 L. R. A. 573, 66 Am. St. Rep. 856, an effort was made to hold the defendant liable for the death of a small child that was drowned in a pond of water caused by the construction of the railroad. The facts were held insufficient; the court concluding as a matter of law that an ordinary pond of water was not so unusually attractive to children as to impose upon the owner of the premises any duty to guard against its use by them. In disposing of the case, Judge Denman used the following language: "The common law imposes no duty upon the owner to use care to keep his property in such condition that persons going thereon without his invitation may not be injured. In considering the question as to whether a duty exists, there is no distinction between a case where an infant is injured and one where the injury is to an adult, though where the duty is imposed the law may exact more vigilance in its discharge as to the former." But in the well-known "turntable cases" it is held that the owner cannot escape liability for a resulting injury if he places on his premises and leaves unguarded dangerous machinery *unusually* attractive to children, even though the injured child was there without express permission. *Railway Co. v. Morgan*, 92 Tex. 102, 46 S. W. 28. There is no sound reason for restricting that rule to injuries resulting from unguarded turntables. It is not because the object which furnished the attraction and caused the injury is a turntable, and the owner of the premises a railroad corporation, that the duty of exercising due care to save children from their own indiscretion is imposed in such cases; but the rule is regarded as a salutary requirement which should be enforced for the protection of the lives and limbs of those too young to be held responsible, under all conditions, for their own lack of judgment. Human life and personal safety are the most important objects of governmental protection, and the policy of imposing civil liability upon those whose carelessness or indifference may cause the loss of either is one of the most effective means of inspiring a proper degree of diligence to avoid injurious or fatal accidents resulting from exposure to dangerous agencies and hazardous situations. There was evidence offered upon the trial of this case sufficient to warrant the jury in finding the following facts: That a box containing dangerous explosives was taken by agents of the appellee from its magazine and dumped upon the ground in a lot which was at the time under the management and control of a third party; that this lot, though inclosed and posted, was frequently visited by children, some of whom went there by invitation from the occupants, and a large number of others either as licensees or trespassers; that the chief attraction which caused children to resort to that place was the large number of pecan trees growing

thereon, and a desire to gather nuts during the pecan season; that this attraction was so strong that those in charge of the premises were unable to keep children away. If an ordinary turntable may be looked upon as such an unusually attractive object as to impose upon owners the duty of guarding against its use by children, we see no good reason why Roman candles, skyrockets and other explosives made for the purpose of amusing children at Christmas times and on holiday occasions should not also be so regarded. Hence the jury would have been justified in this case in concluding that the defendant had placed upon this lot, to which large numbers of children resorted, dangerous explosives *unusually* attractive to them. It would seem that these facts are sufficient to show the existence of the legal duty before referred to, and a failure in its performance. Whether or not this failure was the result of negligence on the part of the defendant is an issue of fact which might, under the evidence, have been determined against the appellee.

We have so far inquired into the sufficiency of the evidence to support a finding in favor of the plaintiff upon the hypothesis that the defendant was either the owner of the premises or had the legal right to use them as a dumping ground for its waste material. The facts do not entirely justify that inference. The evidence shows that the James McCord Company had merely the permissive right to maintain a magazine for the storage of such explosives upon those premises, and the incidental right of ingress and egress. While there was no objection made to leaving this rubbish upon the premises, the evidence shows that no opportunity was given for any; that the owner and manager had no notice that it was done until after the accident occurred. By discarding this rubbish in the manner shown by the evidence, the appellee extended to all children who might go upon those premises an implied invitation to appropriate as much of it as they saw fit. Whether the children were rightfully there, or were there as trespassers, they violated no rights of the defendant in availing themselves of that privilege.

[3, 4] It is also contended that, even if the defendant be held negligent in leaving the explosive material where it was, its negligence was not the proximate cause of the injury. That issue and the defense of contributory negligence were questions which should, under proper instructions, have been submitted for determination by the jury.

Our conclusion is that the trial court erred in instructing a peremptory verdict for the defendant. The judgment will therefore be reversed, and the cause remanded.

On Motion for Rehearing.

[5] Counsel for appellee insist in their motion for a rehearing that, inasmuch as the evidence conclusively shows that the pecans

furnished the chief attraction which induced children to visit that inclosure, there should be no liability attached to the conduct of the appellee in placing other objects thereon which did not furnish any attraction for children to resort to that place. The argument is based upon a misconception of what we think is the underlying principle upon which the liability of the appellee in this case must rest. It is true that the evidence does show that up to the time of the appellant's first visit to that place the pecans were the only attraction, and that on that occasion he went inside only in response to an invitation from Cowen's boy. But it is also true that large numbers of children did visit that grove in search of pecans, and did so without any permission from any one. This created a condition which even the owner of the premises could not wholly ignore in casting away or depositing thereon dangerous objects possessing special or unusual attractions to such children. Certainly the right to so encumber the premises with such dangerous and attractive objects would be still less available to one who had no legal right to so use such premises. The proof in this case does show that, on the occasion when those explosives were obtained and carried away by the appellant and his companions, they were attracted to that place by these objects alone. If the conduct of the appellee in depositing them in that particular place should not here be held as tantamount to an implied invitation to enter the inclosure, it must be due to the fact that appellee had no authority to extend such an invitation. It did, however, extend an invitation, in so far as one may be implied from casting away such toys and playthings, to all children who might be upon those premises from any motive or purpose. There can be no hard and fast rule laid down by the courts for determining common-law liability resulting from personal negligence. Each case must be determined by its own facts. The question presented is: Would a person of ordinary prudence have deposited such objects at such a place under the circumstances detailed by the evidence in this case? We adhere to the holding that the evidence presented a question which the court should have submitted to the jury, and the motion is overruled.

SULLIVAN et al. v. HOUSTON &
T. C. R. CO.

(Court of Civil Appeals of Texas. El Paso.
Nov. 21, 1912.)

1. APPEAL AND ERROR (§ 732*)—ASSIGNMENTS OF ERROR—SPECIFICATIONS—SUFFICIENCY.

An assignment of error that the court erred in denying a new trial for the reasons in the bill of exceptions, based on errors in the charge, and in granting special charges, cannot be considered, because it fails to specify the

grounds of error relied on, as required by Rev. St. 1895, art. 1018, and court rules 24-26 (142 S. W. xii).

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3022-3024; Dec. Dig. § 732.*]

2. APPEAL AND ERROR (§ 742*)—ASSIGNMENTS OF ERROR—PROPOSITIONS—REQUISITES.

A proposition following an assignment of error, which only refers to propositions under other assignments of error, violates court rules 30, 33 (142 S. W. xiii), providing that each point under each assignment shall be stated as a proposition, which shall refer to the particular grounds relied on.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3000; Dec. Dig. § 742.*]

3. APPEAL AND ERROR (§ 742*)—ASSIGNMENTS OF ERROR—PROPOSITIONS.

Where the proposition subjoined to an assignment of error complaining of a paragraph of the charge copied in the assignment complains of the charge for failure to instruct on matters raised by the evidence, but fails to disclose the evidence, and the only statement following the proposition is a quotation from the petition, the assignment cannot be considered, in view of court rule 31 (142 S. W. xiii), providing that to each proposition there shall be subjoined a statement of the proceedings in the record necessary to support the proposition.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3000; Dec. Dig. § 742.*]

4. APPEAL AND ERROR (§ 742*)—ASSIGNMENTS OF ERROR—PROPOSITIONS.

Where the propositions following an assignment of error complaining of the giving of a special requested charge do not point out wherein the charge is erroneous, and the subjoined statements to the propositions do not disclose error, the assignment will not be considered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3000; Dec. Dig. § 742.*]

Appeal from District Court, Grimes County; S. W. Dean, Judge.

Action by Mrs. Anna Sullivan and others against the Houston & Texas Central Railroad Company. From a judgment for defendant, plaintiffs appeal. Affirmed.

T. C. Buffington and T. P. Buffington, both of Navasota, for appellants. Baker, Botts, Parker & Garwood and Jno. T. Garrison, all of Houston, and Geo. D. Neal, of Navasota, for appellee.

MCKENZIE, J. Mrs. Anna Sullivan, for herself and minor children, sued the Houston & Texas Central Railroad Company, in the district court of Grimes county, to recover damages for the death of her husband, W. A. Sullivan, alleging that the accident occurred at a bridge, which bridge was constructed over a bar pit at or near the railroad crossing upon the defendant's right of way. The deceased was in his buggy, driving across said bridge, and while crossing the horse which he was driving backed, with the buggy, off of the bridge; the horse falling upon the deceased and inflicting injuries which caused his death. The negligence alleged was that the said bridge, which was constructed by the railroad company on its right of way

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

leading to the crossing, was constructed so that the floor formed a steep incline, and that the bridge was without banisters; that both the incline of the bridge and the lack of banisters rendered said bridge unsafe for travelers in going over same to reach the crossing.

Appellee urges objection to the consideration of each of the appellants' assignments of error. We will treat of these objections in their order, as we consider the respective assignments of error.

[1, 2] Appellants' first assignment of error is as follows: "The court erred in refusing to grant plaintiffs' motion for a new trial, filed by plaintiffs herein on the 15th day of June, A. D. 1911, and in refusing to set aside the verdict and judgment entered in this case. Said motion for a new trial should have been granted, because of the reasons set forth in plaintiffs' bills of exceptions from 1 to 6, being errors in the general charge of the court, and in granting certain special charges asked by the defendant; and because of the errors so committed plaintiffs did not have a fair and impartial trial of this case—the errors so committed being prejudicial to plaintiffs' rights before the jury." To this assignment is the following proposition: "Same proposition, statement, and authorities as under third, fifth, sixth, seventh, and eighth assignments of error." This proposition is not followed by any statement. The assignment of error cannot be considered by the court, because it does not distinctly specify the grounds relied upon, as required by article 1018, Revised Statute of 1895. It appears that the assignment, as well as the proposition, also violates the rules which govern this court. See Rules, 102 Tex. xii, 67 S. W. xi. Rule 24 (102 Tex. xxviii, 67 S. W. xv) requires that the assignment shall distinctly specify the ground relied upon; and it is provided by rule 25 (102 Tex. xxviii, 67 S. W. xv) that, "to be a distinct specification of error, it must point out that part of the proceedings contained in the record in which the error is complained of, in a particular manner, so as to identify it. * * *". And rule 26 (102 Tex. xxviii, 67 S. W. xv) provides that "assignments of error which are expressed only in such general terms as that the court erred in its rulings upon the pleadings, when there are more than one, or in its charge, when there are a number of charges, or the verdict is contrary to law, or to the charge of the court, and the like, without referring to and identifying the proceeding, will not be regarded by the court as a compliance with the statute requiring the grounds to be distinctly specified, and will be considered as a waiver of errors, the same as if no assignment of errors had been attempted to be filed." As to the kind of proposition required, it is provided in rule 30 (102 Tex. xxix, 67 S. W. xvi) that "each point under each assignment

shall be stated as a proposition, unless the assignment itself may sufficiently disclose the point, in which event it may be sufficient to copy the assignment." Rule 33 (102 Tex. xxviii, 67 S. W. xvi) provides that "in a proposition relating to error of the court in overruling a motion for a new trial or to arrest the judgment, in which there are several grounds, the particular ground or grounds should be referred to with the appropriate explanation. * * *". As to the required statement which must be subjoined to the proposition, rule 31 (102 Tex. xxviii, 67 S. W. xvi) requires that "to each of said propositions there shall be subjoined a brief statement, in substance, of such proceedings, or part thereof, contained in the record, as will be necessary and sufficient to explain and support the proposition, with a reference to the pages of the record. * * *".

It will be observed from the foregoing that appellants have flagrantly disregarded the statute and the rules of the court in preparing their cause for submission: First. The assignment is not sufficient, in that it fails to distinctly specify the grounds, as required by article 1018, supra, and rules 24, 25, and 26, supra. Second. The proposition following the assignment violates rules 30 and 33, supra, and is insufficient, also, because it only refers the court to propositions to be found under other assignments of error, which is not permissible. *San Antonio Foundry Co. v. Drish*, 38 Tex. Civ. App. 214, 85 S. W. 440. By reference, however, to the propositions under said assignments, we find as many separate propositions as there are assignments of error, dealing with different subjects. This is not permissible. *McAllen v. Raphael*, 98 S. W. 760.

We overrule appellants' third assignment of error. The charge of the court as complained of, when taken in connection with the other part of the charge, is quite sufficient, and certainly the jury was not misled thereby.

[3] The fifth assignment of error complains of the eighth paragraph of the general charge of the court, which paragraph is copied in the assignment. The proposition following the assignment does not complain that the charge of the court is incorrect, but rather as omitting to charge upon matters which appellants contend were raised by the evidence. The proposition subjoined to the assignment fails to disclose what this evidence is; and the only statement following the proposition and assignment appears to be a quotation from plaintiffs' petition. Certainly the allegations in the petition cannot be considered by this court as evidence. The statement fails to explain and support the proposition as made, and is therefore in violation of the requirements of rule 31, supra. Nothing is stated under the assignment and proposition in appellants' brief which discloses any error, or that appellants were in-

jured in the manner by the charge; nor does it show that the charge as given did not cover fully all the issues as raised by the evidence. We are not warranted, therefore, in considering further this assignment. *Wirtz v. G., H. & S. A. Ry. Co.*, 132 S. W. 513.

[4] Under the sixth assignment complaint is made to a special charge requested by the defendant and given by the court to the jury. We have examined the two propositions in appellants' brief following the assignment, and neither of said propositions points out wherein the charge is erroneous; nor do the subjoined statements to the propositions disclose error, so far as we are able to determine. The evidence set out in the statement under the second proposition fails to disclose harmful error in the charge; and certainly we would not be required to go to the record and there search for some proof which would render the charge complained of inapplicable. We are of opinion, for the reasons as given, that this assignment should not be further considered.

The eighth assignment of error, complaining of a special charge given by the court to the jury, is not considered, because the appellants merely refer us to "same proposition as under the sixth assignment of error." This is not permissible. *San Antonio Foundry Co. v. Drish*, supra. The statement subjoined fails to disclose wherein the charge, as submitted by the court to the jury, was not wholly justified.

Having considered the assignments of error as presented in appellants' brief, and finding no error which would require a reversal of this cause, we are of opinion that the case should be, in all things, affirmed.

Affirmed.

CONTINENTAL LUMBER & TIE CO. v. WILROY.

(Court of Civil Appeals of Texas. Galveston. Oct. 22, 1912. On Motion for Rehearing, Nov. 21, 1912.)

1. CONTINUANCE (§ 26*) — DISCRETION OF COURT.

Defendant caused depositions to be taken, which were duly returned to the district clerk on November 18, 1910, during the November term of court. About May 8, 1911, defendant's counsel discovered that the depositions could not be found in the district clerk's office, and wired to the notary taking them, who informed counsel that the depositions had been mailed to the clerk as instructed, whereupon defendant applied for a continuance for want of such depositions, stating the facts. A previous continuance had been granted for another cause. The depositions were merely cumulative of evidence given somewhat fully at trial. *Held*, in view of counsel's delay in not inquiring whether the depositions had been returned, that there was no abuse of discretion in overruling the application for a continuance.

[Ed. Note.—For other cases, see *Continuance*, Cent. Dig. §§ 74-93; Dec. Dig. § 26.*]

2. CONTINUANCE (§ 51*) — SECOND APPLICATION.

It is within the sound discretion of the court to grant or refuse a second application for a continuance, which is not strictly a statutory application.

[Ed. Note.—For other cases, see *Continuance*, Cent. Dig. §§ 69, 79, 85, 87, 88, 118, 123, 130, 132, 135, 141, 147; Dec. Dig. § 51.*]

On Motion for Rehearing.

3. COURTS (§ 116*)—RECORDS—JURISDICTION—IN VACATION.

An order of the judge, made in vacation, after trial and adjournment of court, incorporating certain depositions in the record, was without authority and ineffectual for that purpose.

[Ed. Note.—For other cases, see *Courts*, Cent. Dig. §§ 369-373; Dec. Dig. § 116.*]

4. CONTINUANCE (§ 26*)—DILIGENCE.

If defendant's counsel were advised by letter in November, 1910, from the notary public, who took depositions for use at trial, that the depositions had been taken and mailed to the clerk of court, counsel could assume that the depositions were on file, and were not guilty of a lack of diligence in not inquiring until the time of trial, in May, 1911, as to whether the depositions were on file, so as to preclude them from moving for a continuance because of their loss, first discovered at the trial.

[Ed. Note.—For other cases, see *Continuance*, Cent. Dig. §§ 74-93; Dec. Dig. § 26.*]

5. APPEAL AND ERROR (§ 671*) — PRESENTATION BELOW.

An appellate court is only required to pass upon the action of the trial court as shown by the record, so that, in determining whether an application for a continuance was properly overruled, it can only consider the facts stated in the application, as shown by the trial court's record.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 2867-2872; Dec. Dig. § 671.*]

Appeal from District Court, Angelina County.

Action by Joe Wilroy against the Continental Lumber & Tie Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Mantooth & Collins, of Lufkin, and Lane, Wolters & Storey, of Houston, for appellant. W. J. Townsend, Jr., of Lufkin, for appellee.

REESE, J. This suit was instituted in the district court by Joe Wilroy against the Continental Lumber & Tie Company to recover a debt alleged to be owing to plaintiff by defendant, being the contract price for a lot of ties sold by plaintiff to defendant. The defense was that a large portion of the ties were not first-class ties, as were contracted for. A trial with a jury resulted in a judgment for plaintiff for \$1,121.97, from which this appeal is prosecuted.

[1] There are three assignments of error in the brief of appellant, all presenting the same question, to wit, the error in overruling appellant's application for continuance. No question is raised on the facts by the assignments. As appears from the bill of exceptions, the application for continuance was

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

the second application made by appellant. The facts pertinent to the question, as shown by the bill of exceptions and the record, are as follows: The suit was instituted by filing the original petition on the 19th day of February, 1910. It does not appear when service was had on defendant; but it filed its original answer, presenting a valid and meritorious defense, on May 5, 1910. The terms of court in the county began on the first Mondays in May and November, respectively. It does not appear why the case was continued at either the first or second terms; but at one or the other of them the case was continued on the application of the defendant, as shown by the fact that the application for continuance under consideration, made at the May term, 1911, was its second application. In June, 1910, appellant had an inspection made of the ties by William Blair and A. T. Thompson at Clifton, Ariz., to which point they had been shipped, and in June, 1910, at the same time, it had certain photographs taken of some of the ties. About the 12th of November, 1910, appellant filed interrogatories to Blair, Thompson, and Dunlap, and had their depositions taken in answer thereto. The depositions were duly returned to the district clerk on November 16, 1910, which must have been during the November term of the court. About May 8, 1911, counsel for appellant discovered that these depositions could not be found in the district clerk's office, and on that day they wired to the officer to whom the commission had been sent, inquiring whether the depositions had been returned. The telegram states that the case was then on call. In reply to this message the officer wired that the depositions had been mailed as instructed. The case being called for trial, appellant made application in the usual form for continuance for want of these depositions, stating the facts about their taking and return, and attaching to the application, as part thereof, a copy of the answers, which we presume had been procured from the officer, who stated in his message that he had such copy. The testimony was material to the defense set up in the answer. The photographs were attached to Dunlap's deposition. The application was made and overruled on May 12, 1911. After the adjournment of the May term of court the depositions were found in a box in the district clerk's office, unopened. After stating the facts with regard to the taking, return, and loss of the depositions, the application states in the usual form that it was not made for delay, and that the testimony could not be procured from any other source. It is shown by the depositions of these witnesses that George A. Wagstaff and George M. Coale were present when the inspection referred to in Arizona was made, and participated therein; Coale being an officer of appellant, and Wagstaff a tie inspector for the railway company

to whom the ties had been contracted to be sold. On the trial Wagstaff testified by depositions; his testimony being substantially the same as that of Blair and Thompson. Dunlap seems to have testified only as to the photographs taken by him. Coale appeared in person and testified for appellant on the trial, at considerable length and very fully, and in substance to the same effect as Blair and Thompson.

[2] The above are the material facts to be gathered from the record. The application being the second one, and not strictly a statutory application, it was within the sound discretion of the court to grant or refuse it. We think the record shows such want of diligence on the part of appellant as justifies the action of the court. At least, we cannot say that his action was such an abuse of his discretion as would authorize this court to reverse the judgment, in the circumstances stated. It will be seen that appellant made no inquiry as to the return of the deposition from November 16th, when they were returned and filed, until the case was called for trial on May 8, 1911. They had not even been opened. It seems to us that the most ordinary diligence, in the circumstances, the case having been once continued on its application, required appellant to learn whether these depositions had been taken and returned, at least after the lapse of a reasonable time for doing so. If such inquiry had been seasonably made, it would have disclosed the loss of the depositions in ample time for appellant to have again filed interrogatories and taken the depositions. If it be urged that the missing photographs could not have been again procured, that is no answer, because the continuance, if granted, could not enable appellant to do so. While we cannot agree with appellee that the mere fact that the testimony is merely cumulative of that of Wagstaff and Coale, and several other witnesses who testified for appellant as to the character of the ties, would of itself justify the overruling of the application, in case proper diligence had been shown, still this fact must also be taken into consideration in determining whether there has been an abuse, or a proper exercise, of discretion on the part of the trial court.

We are of the opinion that the assignments of error present no grounds for reversal, and the judgment is therefore affirmed.

On Motion for Rehearing.

[3] On motion for rehearing appellant insists strenuously that the opinion in this case imposes upon attorneys duties entirely too onerous, and that it would require of them, in the exercise of proper diligence, to keep track, by daily inquiry of the clerk, of important papers filed in the case. If this be the effect of the opinion, it is clearly wrong; and if we thought that it was susceptible of

such construction, it would be promptly withdrawn, and this motion granted. It is not necessary here to restate the facts as they were made to appear to the trial court in the motion for a continuance. We may say here that, as the depositions were not found until after the notice for continuance had been overruled, the case tried, and the court adjourned, there is no way that we know of by which this fact could be incorporated in the record or considered by us on this appeal. The order of the judge, made in vacation, directing the depositions, together with the fact with regard to their having been found, to be incorporated in the record, was made without authority. It is not an order of the court.

[4] But, aside from this, counsel for appellant, in this motion for a rehearing, show that in fact the notary who took these depositions advised them by a letter of date November 12, 1910, which was the day the depositions were taken, and which letter was promptly received by them, that the depositions had been taken, and had been that day mailed to the clerk. The letter, which is appended to the motion, also states that copies of the answers are inclosed. This puts an entirely different aspect upon the question of the diligence of counsel. Having been advised that the depositions had been taken and returned, and having copies of the answers, counsel for appellant could safely assume that they were on file with the papers of the case, and their failure to inquire for them, in these circumstances, until they were needed on the trial, was the exercise of proper diligence. Certainly an attorney, who has once informed himself that depositions have been taken and filed, has a right to assume that they will be safely kept by the clerk, and is not required by subsequent inquiry to keep himself informed whether the papers have been lost or mislaid, unless there be some special circumstance, not present in this case, to call for such inquiry. Now this is the case made by the motion for rehearing. Appellants had a copy of the answers, and therefore did not need to cause the depositions to be opened until needed at the trial, unless there was some informality in their taking and return, which could only be discovered by inspection. But no such thing appears to be present here.

[5] But can these facts, now shown for the first time, avail appellants? We are called upon to pass upon the action of the trial court. The appellee is required to respond to such errors as are assigned, upon the record as presented. If the trial court erred in overruling the application for continuance, a new trial should be granted. But how can we say that the trial court erred, unless such error is shown by the record in that court. The case presented by the application for continuance is shown by the opinion. No reference is made to the fact that appel-

lant's counsel had been advised by the notary on November 12th that the depositions had been taken and returned, and that a copy of the answers had been then sent to them; but, on the contrary, the application has attached to it the telegram received from the notary on May 8th, when the case was on call, in reply to a telegram from counsel to the notary, making inquiry as to whether the depositions had ever been taken and returned. It is stated in the motion filed May 12, 1911, that "defendant has reason to believe and does believe that the depositions of said witnesses were taken on the 12th day of November, 1910, at Clifton, Ariz., and duly returned into this court." There is attached to the motion the following telegrams:

"May 8, 1911.

"To T. B. Inglis, Clifton, Ariz.: Did you return depositions to Lufkin, Texas, in case Joe Wilroy v. Continental Lumber & Tie Company. Attorneys there report they have not been received. Case on call. Please answer immediately."

"Your wire received depositions in case of Wilroy versus Continental Company mailed to Lufkin, Texas, as you instructed have duplicate on file if you want it.

"T. B. Inglis."

There is no reference in the application to the most important fact, as showing diligence on the part of appellant's counsel, that they were relying upon the information conveyed to them by the letter of November 12, 1910, that depositions had been taken and returned, and a copy of the answers then received by them. There was sufficient time from the date of the telegrams of May 8, 1911, to the date of the application, May 12, 1911, for the notary to have sent to appellant's counsel the copy of the answers which he then advised them he had.

It was a reasonable conclusion—in fact, the only reasonable conclusion—to be drawn from the facts stated in the application for continuance that after mailing the interrogatories and commission to the notary, about November 12, 1910, appellant made no further inquiry even to learn whether the interrogatories had been received by the notary, or whether they had been taken and returned, until six months later, when the case was actually on call for trial. This is the case presented to the trial court, and to this court, by the record on submission, and by the briefs. The actual facts, as presented by the motion for rehearing, may—in fact they do, in our opinion—exonerate appellant's counsel from any charge of negligence, or want of diligence, in their failure to sooner learn of the loss of the depositions in the clerk's office. But these facts are presented for the first time on this motion for rehearing. How can we say that, in the light of these facts, the trial court erred in overruling the application for continuance, or that

this court erred in its former holding? It is not fair to the trial court, nor to appellee. If these facts had been properly urged in the motion for continuance, we must assume that the continuance would have been granted, which would have resulted in a delay of six months in the trial. Is it fair to appellee that he should be made to bear the additional burden of a further delay of 18 months, occasioned by the failure of appellant to set up these facts, now urged, in the application for continuance? We think not. We have gone into this matter at what may appear to be unnecessary length, in view of the entirely erroneous construction placed upon our opinion by counsel for appellant. The motion for rehearing is overruled.

CHANCE v. PACE et al.

(Court of Civil Appeals of Texas. Galveston. Nov. 9, 1912.)

1. JUSTICES OF THE PEACE (§ 135*)—JURISDICTION—AMOUNT IN CONTROVERSY—PLEADING.

A petition in a suit to restrain an execution sale under a justice's judgment, which alleged that the amount in controversy was beyond the jurisdiction of the justice, in that the suit was based on 20 notes of \$10 each and 10 per cent. on the principal and interest as attorney's fees, and which averred that a credit of \$45 had been allowed, but which did not state the date of the credit, or when the debtor was entitled to it, did not show that the justice was without jurisdiction, where, if the credit accrued near the time of the filing of the suit, the principal and attorney's fees exceeded the jurisdiction of the justice; while if the right to the credit accrued and was allowed at the date of the notes, or within a year thereafter, the amount due, excluding interest, was within the jurisdiction of the justice.

[Ed. Note.—For other cases, see *Justices of the Peace*, Cent. Dig. §§ 426-447; Dec. Dig. § 135.*]

2. JUSTICES OF THE PEACE (§ 135*)—ERRONEOUS JUDGMENT—REMEDY.

Where a defendant in justice's court made no defense, though he knew for more than a year before the judgment that the action was pending, and he did not show any excuse for failing to appeal or obtain relief by certiorari, injunction did not lie to restrain an execution sale under the judgment.

[Ed. Note.—For other cases, see *Justices of the Peace*, Cent. Dig. §§ 426-447; Dec. Dig. § 135.*]

3. JUSTICES OF THE PEACE (§ 84*)—WAIVER OF WANT OF SERVICE OF SUMMONS—APPEARANCE.

An appearance by defendant in justice's court for the purpose of obtaining a continuance, and actually obtaining a continuance, is a waiver of the issuance and service of citation on him.

[Ed. Note.—For other cases, see *Justices of the Peace*, Cent. Dig. §§ 266-278; Dec. Dig. § 84.*]

4. JUSTICES OF THE PEACE (§§ 73, 74*)—JURISDICTION—ABSENCE OF REGULAR JUSTICE.

Where the regular justice of the peace was sick, a justice of the peace in the same precinct could, as authorized by *Sayles' Ann. Civ.*

St. 1897, art. 1566, perform the duties of the office, provided he was the nearest justice.

[Ed. Note.—For other cases, see *Justices of the Peace*, Cent. Dig. §§ 236-242; Dec. Dig. §§ 73, 74.*]

5. JUSTICES OF THE PEACE (§ 135*)—EXECUTION—ISSUANCE—DIRECTIONS FOR RETURN.

Under *Sayles' Ann. Civ. St.* 1897, art. 1657-1659, providing that writs of execution issued on justice's judgment shall be returnable in 60 days from date of issuance, a writ of execution, after the lapse of time in which it is made returnable by law, is of no force; and the right of an officer, by virtue of the writ, to take and sell property ceases from the date the writ is returnable.

[Ed. Note.—For other cases, see *Justices of the Peace*, Cent. Dig. §§ 426-447; Dec. Dig. § 135.*]

6. PLEADING (§ 214*)—DEMURRERS—ADMISSIONS.

A petition tested by a general demurrer must be taken as true.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. §§ 525-534; Dec. Dig. § 214.*]

Appeal from District Court, Jefferson County; W. H. Pope, Judge.

Action by S. D. Chance against W. L. Pace and another. From a judgment of dismissal, plaintiff appeals. Reversed and remanded.

O'Fiel & O'Fiel, of Beaumont, for appellant. J. D. Campbell, of Beaumont, for appellees.

McMEANS, J. Appellant presented to Hon. W. H. Pope, judge of the district court of Jefferson county, his petition for a writ of injunction to restrain the appellees from making sale of a piano belonging to him under an order of sale issued out of the justice court of said county. The court granted a temporary restraining order, and set the case down for hearing at a future date. On the hearing the judge sustained appellees' general demurrer to plaintiff's petition and dismissed his suit, and from the judgment of dismissal plaintiff has appealed.

Plaintiff alleged the following grounds for the issuance of the writ: (1) That the court of H. E. Showers, justice of the peace, in which the judgment, under which the order of sale was issued, was rendered, was without jurisdiction, because the amount of the notes sued on was beyond the jurisdiction of the justice court, and the value of the piano foreclosed upon was greater than \$200 at the date of the judgment, and that therefore the judgment was void; (2) that plaintiff had not been served with citation and had no notice of the pendency of the suit against him, but that if he had been served or had such notice the justice of the peace had promised him to continue the case from term to term, in order that plaintiff might prepare his defenses, and that judgment was finally rendered against him by default, without his being notified that such a judgment would be asked; (3) that the judgment of

the justice court was not rendered by H. E. Showers, the regular justice of the peace of the court in which the suit was filed, but by another justice of the peace who was holding court for said Showers at the time of the latter's sickness and inability to preside over his court; and (4) that the order of sale by virtue of which the piano was seized by the constable was at the time of the seizure *functus officio*.

It appears from the allegations of the petition that appellee, W. L. Pace, on April 7, 1909, filed suit in the court of H. E. Showers, justice of the peace of precinct No. 1 of Jefferson county, against appellant on 20 promissory notes for \$10 each, bearing interest at the rate of 10 per cent. per annum from date, viz., August 17, 1905, and 10 per cent. additional on the principal and interest as attorney's fees, less a credit of \$45. Just when this credit was entered does not appear. The case was continued from term to term until the 17th day of May, 1910, when judgment by default was rendered in plaintiff's favor for the amount of his debt, and for foreclosure of his mortgage lien on a piano, by G. M. Oliver, who was also a justice of the peace of precinct No. 1, and who was sitting in Justice Showers' court during the time the latter was sick and unable to discharge the duties of his office. On April 28, 1911, nearly a year after rendition of the judgment, the plaintiff in the justice court suit sued out an order of sale, which was placed in the hands of James Evins, a constable of Hardin county, where the piano then was, and this writ was not levied nor the piano seized under it until about the 29th day of September, 1911, about five months after the issuance of the order of sale.

[1] We think the allegations of the petition are not sufficient to show that the justice court did not have jurisdiction to render judgment for the amount of the notes and attorney's fees. True it is alleged in general terms that the amount was beyond its jurisdiction, but in alleging the specific facts upon which appellant relies to show this the facts stated do not bear out the general allegation that the justice court was without jurisdiction. Had the pleader stopped after alleging that plaintiff's suit was upon 20 notes of \$10 each, and 10 per cent. on the principal and interest as attorney's fees, his petition would have shown, *prima facie*, that the amount sued for was beyond the jurisdiction of the justice court. But he alleged, further, that a credit of \$45 had been allowed, without stating the date when appellant became entitled to the credit, or when it was in fact given. It will be noted that the notes were dated August 17, 1905, and at the time of the judgment nearly five years' interest had accrued. A simple calculation will prove that, if the right to the credit

accrued at or near the time the suit was filed, then the principal and attorney's fees together amounted to a sum beyond the jurisdiction of the court; but if the right to the credit accrued and was allowed at the date of the notes, or within a year thereafter, the amount then due, excluding the interest, would be within the jurisdiction of the justice court. In the absence, then, of an allegation showing when the payment was made which entitled the appellant to the credit, we think the petition is insufficient to show that the amount sued for was beyond the jurisdiction of the court.

[2] But, regardless of the matter above discussed, we think the court did not err in refusing to grant the writ of injunction, on the ground that the justice court was without jurisdiction, either because the amount of plaintiff's demand, or the value of the piano foreclosed upon, was beyond its jurisdiction. There was no allegation in the petition for injunction to show that from the record in the justice court it affirmatively appeared that the subject-matter of the litigation was not within the jurisdiction of that court, but it does so appear that the appellant failed to make any defense to appellee's demand, although he knew for more than 12 months before the judgment was rendered that the suit was pending, and at his instance had been continued from term to term, and the petition is silent in the matter of showing any excuse whatever for failing to avail himself of the legal remedy of appeal or certiorari to vacate it. True he alleges that at the time of applying for the injunction he had no remedy at law, either by way of appeal or certiorari, but this allegation falls far short of a legal excuse for not having availed himself of his legal remedy within the time provided by law. We understand the law to be that, even if the judgment was void because of matters arising dehors the record, an injunction will not lie if the party complaining has not availed himself of his legal remedy to vacate the judgment by appeal or certiorari. *Railway v. Ware*, 74 Tex. 49, 11 S. W. 918; *Tucker v. Williams*, 56 S. W. 586.

[3] The allegation that appellant had not been served with citation and did not know of the pendency of the suit against him is contradicted by the further allegation that he did know of the pendency of the suit, and that the suit had been continued from term to term by the justice of the peace at his special instance and request. Even if he had not been served with citation, we think his frequent appearance for the purpose of obtaining the continuance was a waiver of the issuance and service of citation upon him.

[4] There is no merit in the allegation that the judgment was void because rendered by a justice of the peace other than the regular justice of the court in which the suit was filed. The petition shows that the regular

justice of the peace was sick and unable to discharge the duties of his office, and that G. M. Oliver, a justice of the peace in the same precinct, held court for him and rendered the judgment in question. Article 1566, Sayles' Civil Statutes, provides: " * * * Whenever the justice of the peace of any precinct shall be absent, or unable or unwilling to perform the duties of his office, the nearest justice of the peace in the county may perform the duties of the office until such * * * absence, inability or unwillingness shall cease." There was no allegation that G. M. Oliver was not the nearest justice of the peace.

[5] But we think that the court erred in sustaining the general demurrer, because the petition sufficiently alleged that the writ under and by virtue of which the piano was seized was at the time of the seizure functus officio. It was alleged that the writ was issued on April 28, 1911, and the levy thereof and the seizure of the piano was on the 29th day of September, 1911, five months after the date of its issuance. The statute requires all such writs to be returnable in 60 days from date of issuance. Sayles' Civil Statutes, articles 1657, 1658, 1659. It is well settled that such writs, after the lapse of the time in which they are made returnable by law, are of no force and effect (Reagan v. Evans, 2 Tex. Civ. App. 35, 21 S. W. 429), and that the right of the constable, by virtue of such a writ, to take and sell property ceases from the date the writ was returnable. Harris v. Ellis, 30 Tex. 6, 94 Am. Dec. 296; Hester v. Duprey, 46 Tex. 627; Young v. Smith, 23 Tex. 600, 76 Am. Dec. 81.

[6] It follows that from the allegations of the petition, which, being tested by a general demurrer, must be taken as true, that at the date of the levy upon and seizure of the piano by the constable the writ upon which he assumed to act was of no force and effect, and his acts in the premises were unauthorized, and that a sale of the piano thereunder would be void. We think, therefore, that the sale of the piano under such void writ should have been enjoined, and that the court erred in sustaining the general demurrer to this ground for relief. For the error indicated, the judgment of the court is reversed and the cause remanded.

Reversed and remanded.

HICKS v. MURPHY et al.

(Court of Civil Appeals of Texas. San Antonio. Nov. 20, 1912. Rehearing Denied Dec. 18, 1912.)

1. PLEADING (§ 409*)—ANSWER—FORM—MOTION TO DISSOLVE INJUNCTION.

A verified pleading containing allegations intended as denials and a prayer for dissolution of the injunction and general relief, in the absence of objection below, as to form, will be

held sufficient as an answer, although styled a "motion to dissolve injunction."

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1375-1383, 1386; Dec. Dig. § 409.*]

2. INJUNCTION (§ 118*)—INJUNCTION AGAINST SALE—PETITION.

A petition to enjoin a substituted trustee from selling land which states that such trustee did not have authority under the trust deed, which was a conclusion, and pleads no facts from which it could be determined whether the deed of trust gave him authority, was insufficient; a power to sell being strictly construed.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 223-242; Dec. Dig. § 118.*]

3. APPEAL AND ERROR (§ 1039*)—PLEADING—INSUFFICIENCY.

A plaintiff is not entitled to a reversal for insufficiency of the answer where the petition did not state a cause of action, and the answer did not supply its defects.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4075-4088; Dec. Dig. § 1039.*]

4. INJUNCTION (§ 148*) — "COLLECTION OF MONEY"—REFUNDING BONDS.

An injunction restraining a substituted trustee under a deed of trust from selling the land, but saying nothing about the collection of the notes for which the deed of trust was security, was not one restraining the "collection of money" within Sayles' Ann. Civ. St. 1897, art. 3008, requiring a refunding bond in such cases.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 323-334; Dec. Dig. § 148.*]

Appeal from District Court, Bexar County; J. L. Camp, Judge.

Action by E. G. Hicks against J. E. Murphy and another. From an order dissolving a temporary injunction, the plaintiff appeals. Affirmed.

See, also, 150 S. W. 955.

MOURSUND, J. This is an appeal from an interlocutory order dissolving a temporary injunction, which restrained C. W. Kuykendall from selling certain lands as substitute trustee under a deed of trust. There is no statement of facts in the record, and we are confined to the consideration of questions arising upon the pleading.

Appellant's first contention is that the court had no authority to dissolve the temporary injunction because no answer was filed, but merely a motion to dissolve. The instrument is styled, "Motion to Dissolve Injunction," and is so referred to by the court. It begins as follows: "Now come J. E. Murphy and C. W. Kuykendall, the defendants herein, and, moving the court to dissolve and vacate the injunction issued upon the defendants herein, would show to the court." Then follow the allegations intended as denials of the material allegations of the petition, and the prayer for dissolution of the injunction and for general relief. It is verified by the oath of one of the defendants. No exceptions were filed to the form of this instrument, nor any question raised in the lower court in regard to its sufficiency as an answer, but issue was joined and

evidence introduced as shown by the judgment of the court.

[1] In the case of *Smith v. Palo Pinto County*, 128 S. W. 1193, the court held it was unnecessary to file a separate motion to dissolve the injunction; that the prayer in the answer for such relief was sufficient. In that case the pleading was styled an answer. In this case it was styled a motion to dissolve, but there was no difference in substance, and, in the absence of objection in the lower court, we hold the instrument filed in this case sufficient as an answer. Nor do we agree with appellant's contention that the case of *Dawson v. Baldrige*, 55 Tex. Civ. App. 124, 118 S. W. 593, is authority for a contrary holding. In that case the court considered a verified motion to dissolve as an answer, but held that it was not an answer such as equity requires, in that it did not contain a full and unequivocal denial of all the material allegations of plaintiffs' petition.

[2] Appellant's second contention is that, if the motion to dissolve be considered as an answer, then that same does not deny all the material allegations of the petition, and leaves sufficient uncontroverted to entitle appellant to the injunction. He says the petition alleges that Mrs. Herriott, who held the two notes payable to defendant Murphy, as collateral to secure the payment of his note to her for \$1,500, did not join said Murphy in the selection and designation of Kuykendall as substitute trustee, and that the deed of trust under which the sale was sought to be made by Kuykendall contained the usual power of sale, and the usual stipulation providing for the substitution of trustees in case the original trustee should die, become disqualified, or be unable to act, etc. We find the petition alleges that the two notes payable to defendant Murphy, one for \$4,500 and the other for \$4,477, secured by a deed of trust on the land in McMullen county, Tex., sought to be sold by Kuykendall, are held by Mrs. Herriott as collateral to secure the payment of Murphy's note to her for \$1,500; that neither she nor any authorized agent of hers ever made any request for the sale of the land under the deed of trust; and that Murphy acted wholly without right or authority under the terms of the deed of trust when he attempted to appoint Kuykendall as a substitute trustee under the terms of said instrument, and when he requested Kuykendall to advertise and sell the land to satisfy said two notes, and for said reasons the attempt of said Kuykendall to sell said land was in violation of law and of plaintiff's rights as the owner of the land. We find no allegation setting out or describing the provision, if any, contained in said deed of trust with respect to the appointment of a substitute trustee. We do not know from the perusal of the petition whether any request by Mrs. Herriott was required

before the original trustee could sell, nor do we know what provision was made for the appointment of a substitute trustee. True, the petition sets out the conclusion of the pleader that Murphy acted wholly without authority or right under the terms of said deed of trust when he attempted to appoint Kuykendall as substitute trustee, and requested him to sell the land. "The petition for an injunction should state all and negative all, which is necessary to establish a right." *Moss v. Whitson*, 130 S. W. 1035; *Gillis v. Rosenheimer*, 64 Tex. 243; *City of Paris v. Sturgeon*, 50 Tex. Civ. App. 522, 110 S. W. 459; *Cotulla v. Burswell*, 22 Tex. Civ. App. 329, 54 S. W. 614. It is necessary to allege such facts as show a want of authority. The conclusion of the pleader is not sufficient. *Moss v. Whitson*, supra. There are no facts pleaded by plaintiff from which we can determine whether or not the deed of trust authorized Murphy, even though he had parted with the title to the notes, to appoint a substitute trustee, and request him to proceed with the discharge of his duties as such trustee. Our law prescribes no form for deeds of trust, nor does it stipulate that a sale of notes secured by such an instrument carries with it the power to appoint a substitute trustee. The power to sell is strictly construed, and the deed of trust might give the power to appoint a substitute trustee solely to the payee of the notes. We conclude that the allegations of the petition are insufficient to authorize an injunction on the ground of the failure of Mrs. Herriott to appoint or join in the appointment of the substitute trustee and to request him to sell. It is therefore only necessary to determine whether the allegations of the answer aid those of the petition so as to make a case for plaintiff.

[3] The answer denies that the defendant Murphy had no right to foreclose the notes and deed of trust, or that Mrs. Herriott did not know of his foreclosure of said notes, and says he had an arrangement with her through her authorized agent, C. P. Stafford, allowing and permitting him to foreclose upon said land for the notes described in plaintiffs' petition, and that he had an agreement in writing, placed of record in McMullen county, Tex., on April 20, 1912, showing his right to proceed and foreclose said notes, and that for all the purposes of this foreclosure he is the owner and holder of said notes, the same having been turned over to his attorney, C. A. Davies, by C. P. Stafford, agent of Mrs. Herriott, and the said C. P. Stafford having authorized C. A. Davies to act for and in his behalf in protecting him in the said foreclosure. We find no admission in this answer that the deed of trust required Mrs. Herriott to appoint a substitute trustee, nor that it required her to make request for sale before such sale could be made. It denies that Murphy had

no right to foreclose the notes and deed of trust, then sets up an agreement, concerning the terms of which we are left in the dark, and states the conclusion of the pleader that said agreement is sufficient to vest the title to the notes in Murphy for the purpose of foreclosure. This answer in our opinion would not be sufficient if the petition showed the provisions of the deed of trust to be such that the legal holder of the notes had to appoint the substitute trustee and that such appointment had to be made in writing, because such power is strictly construed, and appellant would be entitled to have the sale made in strict compliance with the terms of the deed of trust. The answer, however, is not such an admission as supplies the allegations wanting in the petition, and we hold that appellant is not entitled to a reversal upon his second contention.

[4] Appellant's third contention is that the temporary injunction dissolved below was one restraining the collection of money within the meaning of article 3008, Sayles' Civ. Stat., and a refunding bond should have been required of appellees. The prayer was for an injunction restraining each of the defendants from selling or further attempting to sell under the terms of said deed of trust any part of the lands described. The writ of injunction copied in the record was strictly in accordance with the prayer, except that it was directed only to defendant Kuykendall. Appellant failed to ask that the defendants be restrained from negotiating or collecting the notes, and the injunction granted does not prohibit Murphy from suing Womack, the maker of the notes, to collect same, nor, if Mrs. Herriott is the legal owner and holder as contended by appellant, would it prevent her from appointing a substitute trustee, and having the land sold under the deed of trust to satisfy the notes. The refunding bond required by statute is required to be in double the sum enjoined, and the same cannot be required unless the collection of some sum is enjoined, and the same is stated with such certainty that the amount of the bond can be fixed.

We conclude the court did not err in failing to exact a refunding bond as a condition precedent to dissolving the injunction.

We find no error in the record, and the judgment is affirmed.

KIRBY LUMBER CO. v. GRESHAM.

(Court of Civil Appeals of Texas. Galveston.
Nov. 1, 1912. Rehearing Denied
Dec. 5, 1912.)

1. NEGLIGENCE (§ 32*)—CARE REQUIRED AS TO LICENSEE.

A person riding on another's log train without any express or implied invitation or contract, and without his consent or acquiescence, was a mere licensee to whom the owner

owed the duty only of using ordinary care in the management and running of the train, and to whom it was not liable for negligence caused by the defective condition of its track, since a licensee must accept the premises or property of another upon which he enters for his own purposes as they are.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 42-44; Dec. Dig. § 32.*]

2. MASTER AND SERVANT (§ 224*)—CARE REQUIRED AS TO LICENSEE.

Where there was no evidence that an employer derived any benefit or advantage from his employes riding on one of its log trains, or that it was under any obligation to carry them thereon, but, on the contrary, it appeared that an employe rode thereon in order to reach home earlier, and solely for his own benefit, he was a mere licensee and had no implied invitation to so ride.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 654; Dec. Dig. § 224.*]

Appeal from District Court, Jefferson County; L. B. Hightower, Jr., Judge.

Action by Phil Gresham against the Kirby Lumber Company. Judgment for plaintiff, and defendant appeals. Reversed and rendered.

Oliver J. Todd, of Beaumont, and Andrews, Ball & Streetman, of Houston, for appellant. Blain & Howth and M. G. Adams, all of Beaumont, for appellee.

PLEASANTS, C. J. This suit was brought by appellee against appellant to recover damages for personal injuries alleged to have been caused by the negligence of appellant. Plaintiff's petition alleges, in substance, that on or about the 25th of March, 1910, plaintiff was in the employment of defendant as a woodcutter or sawyer; that he was employed to cut or saw logs in the woods several miles from the town of Buna where the defendant operates a lumber mill; that it was at the date mentioned, and had long been, the custom of defendant's employes who worked in the woods to ride to and from their work on defendant's trains and cars; that such custom was known to and acquiesced in by the defendant and was for the mutual benefit and profit of defendant and its said employes; that in pursuance of said custom, and with the consent and under the direction of defendant and its authorized agents, plaintiff, on the date before mentioned, after having finished his day's work in the woods, got upon a flat car or trailer of a train composed of an engine, flatcar or trailer, and log cars loaded with logs, for the purpose of returning to his home at Buna, and while riding upon said train it was negligently derailed and wrecked and plaintiff was thereby injured.

The acts of negligence charged in the petition are as follows: (a) A failure to provide a reasonably safe track, in that (1) the rails thereof were not spiked and attached and fastened in any manner to the ties, or were not spiked and fastened with reasonable se-

curity for a distance of several feet or about five ties, and (2) the track and roadbed were curved and rested on a wet, boggy, and muddy foundation, which caused and permitted the track to sink and to be low and depressed, especially on one side; (b) the running and use of said engine, which was too heavy and dangerous under all the circumstances for said defective and curved part of the track; (c) the running of said engine without air or other brakes with which to control the speed thereof down a steep hill immediately before passing said defective part of the track, by reason of which incline and hill, the said engine and cars attained a speed high and dangerous, under all the circumstances and conditions.

The defendant's answer consisted of: (a) A general demurrer; (b) a general denial; (c) pleas of contributory negligence and assumed risk; (d) a special plea, in substance, that the log train was not provided or fitted up for plaintiff or other employes to ride upon, but that the defendant had provided regular trains for the purpose, and that plaintiff was not expected, required, or invited to ride upon it, nor was it necessary for him so to do, and that it was against the rules, order, and wishes of the defendant for him so to do, and that he was riding upon it solely for his own convenience and pleasure, and that the defendant owed him no duty with respect to the matters complained of by him; (e) a special plea, in substance, that the defendant had made and promulgated rules prohibiting riding on its log trains, and that the plaintiff was riding on the log train in violation of said rules; and (f) a special plea, in substance, that the plaintiff voluntarily and without necessity selected the log train as a means of returning from his work, which train, while being run over the temporary switch track upon which the accident occurred, was a notoriously dangerous means of transportation, for the sole purpose of convenience to himself in getting to his destination earlier, in preference to waiting until later in the afternoon and riding in on the regular train provided by the defendant to carry employes from their work, which regular train was run only over the permanent main line track and was a safe means of transportation, and by such voluntary choice on his part was precluded from recovering.

The trial in the court below with a jury resulted in a verdict and judgment in favor of plaintiff for the sum of \$9,500.

The evidence shows that plaintiff was injured at the time and place alleged in his petition as a result of the derailment of a log train owned and operated by appellant and upon which he was riding in from his work in the woods to his home in the town of Buna. At the time of his injury he was employed by appellant to saw logs in the forest. He furnished his own tools and

was paid according to the number of feet of logs sawed by him. He was not required to work any specific time. He and the other employes who composed the sawing crew were only expected to saw enough logs to keep the loading crew engaged, and they quit work at any hour in the day that they found they had sawed the logs that were necessary to keep the loaders busy.

The appellant company is organized and chartered for the purpose of manufacturing lumber and is not a common carrier or railroad company. It operates a lumber mill at Buna and owns and maintains a tram railroad which it operates in connection with said mill for the purpose of hauling logs from the woods or forest to the mill. The main line of this road extends from Buna to a point in the woods called the corral, a distance of about four miles. Near the corral a switch track branches off to the right of the main track and extends into the woods for a distance of a mile and one half. This switch track is known as the "loading switch." Another switch track, known as the "skidder switch," branches off to the left of the main track from a point near the corral. These switch tracks are intended for temporary use only and are removed from time to time as the timber is cut from along their line. The loading switch, upon which the injury to plaintiff occurred, had been in use a month or two. This track was poorly constructed, in that the rails were not securely fastened to the ties, and the foundation or bed of the track upon which the ties rested was soft and boggy. These defects in the track caused the derailment of the train and the consequent injury to plaintiff. The appellant company furnished and ran a train every working day consisting of an engine and caboose, or an engine and a flat car, from Buna to the corral and back. The employes of the company who worked in the woods were carried back and forth on this train which left Buna at a certain hour every morning and returned from the corral every evening about 6 o'clock. The hands quit work in the woods usually about 5:30 p. m. The engine which was used on the loading switch for the purpose of hauling in the cars of logs whenever a sufficient number of cars were loaded also had a flat car or trailer attached thereto. A trailer was used in all log trains and was necessary to connect the engine with the loaded log cars because of the projection of the logs over the ends of log cars. The trailers generally used for this purpose were skeleton flat cars without flooring. The starting of the log trains from where the logs were loaded was at no regular time. Whenever a sufficient number of cars were loaded, the engine and trailer which did the switching on this track would couple onto them and take them out to the main line or on to the mill at Buna. Because of the danger in

riding upon these trains of loaded log cars, appellant promulgated a rule forbidding its employes, other than those engaged in the operation of such trains, from riding thereon. There is much testimony tending to show that the appellant made reasonable efforts to enforce this rule; but there is sufficient testimony to sustain the finding of the jury that appellant did not use ordinary care in this respect, that the rule was habitually violated with the knowledge and acquiescence of appellant, and its enforcement, in effect, abandoned. All the evidence shows that these log trains were not provided or intended for the transportation of the employes from the woods, and appellant was under no contract or agreement, either express or implied, to transport its employes thereon. It was in no way to the benefit or advantage of appellant for its employes to ride upon said trains, but employes rode thereon solely for their own convenience and to save walking the distance from the place they were at work along the switch track back to the corral at the end of the main track, from which place appellant, as before stated, had provided a train to carry them to Buna which train left the corral regularly every evening about 6 o'clock. When the log train did not stop at the corral, the employes by riding on said train reached Buna some time earlier in the evening than the regular train from the corral reached that place, and for this reason they frequently rode on the log train.

The evidence sustains the finding of the jury that the plaintiff was not guilty of contributory negligence and did not assume the risk of injury, if such injury was caused by the negligence of defendant in the performance of any duty it owed the plaintiff. The only grounds of negligence submitted to the jury were the alleged defects in the construction and maintenance of appellant's track. The undisputed evidence shows that the track was in the condition alleged in the petition, and this was the proximate cause of the derailment of the train and the consequent injury to plaintiff. The evidence also sustains the verdict of the jury as to the amount of damages sustained by the plaintiff.

Under an appropriate assignment of error, the appellant complains of the refusal of the trial court to instruct the jury to find a verdict in its favor as requested by it. It is contended by appellant that this instruction should have been given because the undisputed evidence shows that the log train upon which appellee was riding at the time he received his injuries was not provided by the appellant for its employes to ride on either to or from their work, and plaintiff in riding thereon upon the occasion in question was so riding solely for his own convenience and benefit, and not for the convenience or benefit of appellant; that it was wholly un-

necessary for him to ride on said train, and he was not required or invited either expressly or impliedly so to do; that plaintiff was at most only a licensee upon said train, and as such the defendant owed him no duty to keep its track or roadbed or other premises in a reasonably safe condition, and the only negligence alleged or proven against appellant was its failure to use ordinary care to properly construct and maintain its track and roadbed in a reasonably safe condition, no active negligence on appellant's part being either alleged or proven.

[1] If appellee was riding upon appellant's log train without any invitation or any contract on the part of appellant, either expressed or implied, but with the consent or acquiescence of appellant, he was a mere licensee, and the only duty which appellant owed him was to use ordinary care in the management and running of the train, and it was not liable for any injury caused him by the defective condition of its track. In the case of *Railway Co. v. Spivey*, 97 Tex. 143, 76 S. W. 748, our Supreme Court, in stating the duty of a railway company to a licensee riding upon its cars, says: "If he used the cars as a licensee, it was at his own risk, for he must accept them and the track over which they pass in the condition in which he found them. The company was under no obligation to arrange its yards, tracks, and schedules to suit his convenience, or to secure his safety while riding on its freight trains."

The general rule that a licensee must accept the premises or property of another upon which he enters for purposes of his own and without being invited thereon by the owner is sustained by all the authorities. *Oil Co. v. Morton*, 70 Tex. 400, 7 S. W. 756, 8 Am. St. Rep. 611.

It is sometimes difficult to determine from the facts of the particular case whether the person injured upon the premises of another is there by the implied invitation of the owner or is a mere licensee. Mr. White, in his book, *Personal Injuries on Railroads*, says: "In ascertaining the relation which an injured person bears to the owner of premises where the injury was received, it is generally held to be a reliable test, in determining the duty owing by the owner, to inquire whether or not the injured person at the time of the injury had business relations with the owner of the premises which would render his presence of mutual aid to the two, or whether his presence was for his own convenience or on business with others than the owner of the premises. In the absence of some relation which inures to the mutual benefit of the owner of the premises and the injured person, or to the former alone, there is generally held to be no implied invitation on the part of the owner. *Benson v. Traction Co.* [77 Md. 535] 28 Atl. 973 [20 L. R. A. 714, 39 Am. St. Rep.

436]; *Plummer v. Dill* [156 Mass. 426] 31 N. E. 128 [32 Am. St. Rep. 463]."

In the case of *Bennett v. Railway Co.*, 102 U. S. 577, 26 L. Ed. 235, the Supreme Court of the United States, speaking through Mr. Justice Harlan, says: "It is sometimes difficult to determine whether the circumstances make a case of 'invitation' in the technical sense of that word, as used in a large number of adjudged cases, or only a case of mere license. 'The principle,' says Mr. Campbell, in his treatise on Negligence, 'appears to be that invitation is inferred where there is a common interest or mutual aid, while a license is inferred where the object is the mere pleasure or benefit of the person using it.'"

[2] Under this test the undisputed evidence in this case shows that appellee was only a licensee on appellant's train at the time he was injured. There was no possible benefit or advantage to appellant in his riding in on the log train, and appellee in his testimony says, in effect, that he took the log train because by so doing he could reach home earlier. On the evening of his injury he and a number of other sawyers got on this train at the suggestion of their foreman, and appellee says that he did not know that the employes had been forbidden to ride thereon; but he must have known from the character of the train and the fact that it did not run on any regular time that it was not provided by appellant for the purpose of taking the hands in from the woods. He testifies that he could not tell how many times he walked from his place of work to the corral and took the regular train there, or how many times he rode in on the log train. There is no testimony tending to show that appellant derived any benefit or advantage from its employes riding on the log train, or that it was under any obligation, express or implied, to carry them on said train.

We think it clear from the undisputed evidence that appellee was only a licensee on the train, and, under the authorities before cited, appellant owed him no duty in respect to the condition of its track and roadbed. This was the only ground of negligence submitted to the jury, and there is no evidence showing any negligence in operation of the train. It follows that appellant is not liable for the injury to appellee, and the trial court should have so instructed the jury.

Such being our conclusion, it is unnecessary for us to pass upon the remaining assignments of error presented in appellant's brief.

For the reason indicated, we are of opinion that the judgment of the court below should be reversed, and judgment here rendered in favor of appellant, and it has been so ordered.

Reversed and rendered.

FT. WORTH & D. C. RY. CO. v. SOUTHERN KANSAS RY. CO. OF TEXAS
et al.

(Court of Civil Appeals of Texas. Amarillo. Nov. 2, 1912. Rehearing Denied Nov. 23, 1912.)

1. APPEAL AND ERROR (§ 742*) — BRIEFS — PROPOSITIONS — JOINT PROPOSITIONS.

Appellee's brief, in submitting four "counterpropositions to all of appellant's assignments" of error, violated the Court of Civil Appeals rules.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3000; Dec. Dig. § 742.*]

2. PUBLIC LANDS (§ 172*) — RAILWAY GRANTS — DESCRIPTION OF LAND — CERTAINTY.

The grant of land to the Ft. Worth & Denver City Railway Company, by its special charter in 1873 (Sp. Laws 1873, c. 208), providing "the right of way, to be held to the extent of 200 feet in width, is hereby granted to said railway company through the public lands of Texas," sufficiently designated the right of way granted, and was not void for uncertainty; Rev. Civ. St. 1911, art. 6482 (Sayles' Ann. Civ. St. 1897, art. 4423), giving every railroad corporation a right of way for its line of road over any state lands, and Rev. Civ. St. 1911, art. 6484 (Sayles' Ann. Civ. St. 1897, art. 4425), giving to such corporation the right to lay out its road, not exceeding 200 feet in width.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 523-543; Dec. Dig. § 172.*]

3. PUBLIC LANDS (§ 172*) — RAILROAD LAND GRANT — TIME EFFECTIVE.

The grant of a right of way through the public lands, by special charter in 1873 (Sp. Laws 1873, c. 208), to the Ft. Worth & Denver City Railway Company became effective in present, and not after the first 25 miles were built, if completed within three years, and the completion of 30 miles every two years thereafter until completed, as provided by section 12 of the act.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 523-543; Dec. Dig. § 172.*]

4. RAILROADS (§ 82*) — RIGHT OF WAY — ABANDONMENT — EVIDENCE.

In trespass to try title to a strip granted to plaintiff as a railroad right of way, evidence as to the necessity of using the land for switches was admissible for plaintiff on the issue of abandonment.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 213-219; Dec. Dig. § 82.*]

5. EVIDENCE (§ 318*) — DECLARATIONS — LETTERS.

In trespass to try title between two railroad companies, letters passing between defendant's officials, relating to the land in controversy, were not admissible, not binding plaintiff.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1193-1200; Dec. Dig. § 318.*]

6. EVIDENCE (§ 244*) — ADMISSIONS — BY AGENTS.

Agreements or concessions by plaintiff's superintendents with reference to another part of its right of way than that in controversy, though a part of the same section, would not bind plaintiff, so as to be admissible in evidence in trespass to try title between it and another railroad company.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 916-936; Dec. Dig. § 244.*]

7. EVIDENCE (§ 317*)—ADMISSIBILITY.

It was error to permit a witness to testify to the contents of a letter which was not itself admissible in evidence, as not binding the other party.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1174-1192; Dec. Dig. § 317.*]

8. TRESPASS TO TRY TITLE (§ 39*)—EVIDENCE—OTHER TRANSACTIONS.

Evidence relating to an interlocking agreement between plaintiff and defendant railroad companies as to a crossing not touching the land in controversy was not admissible in trespass to try title.

[Ed. Note.—For other cases, see Trespass to Try Title, Cent. Dig. § 54; Dec. Dig. § 39.*]

9. ESTOPPEL (§ 93*)—KNOWLEDGE.

Evidence that plaintiff railroad company did not object when defendant's track was laid across the land in controversy was not admissible to create an estoppel by silence against plaintiff in trespass to try title, if plaintiff's officials did not know at the time that it owned the land.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 264-275; Dec. Dig. § 93.*]

10. EVIDENCE (§ 65*)—PRESUMPTIONS—KNOWLEDGE OF SPECIAL STATUTES.

A special statute granting a right of way to a railroad company through the public lands of the state is a public law, so as to be constructive notice to another railroad company of the extent of the rights of the grantee; every one being presumed to know the law.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 85; Dec. Dig. § 65.*]

11. EVIDENCE (§ 65*)—PRESUMPTIONS—KNOWLEDGE OF LAW.

There is a pseudo-presumption that every one is presumed to know the law.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 85; Dec. Dig. § 65.*]

12. ESTOPPEL (§ 97*)—ESTOPPEL BY DEED—PERSONS BOUND—PARTIES.

Any act by plaintiff, pursuant to an agreement between itself and another railroad company, could not be taken advantage of as an estoppel by defendant railroad company, which was not a party thereto.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. § 289; Dec. Dig. § 97.*]

13. TRESPASS TO TRY TITLE (§ 40*)—ADMISSION OF EVIDENCE.

In trespass to try title to a tract claimed by plaintiff railroad company as a part of its right of way, a deed from plaintiff to defendant company, transferring another part of its right of way, was not admissible.

[Ed. Note.—For other cases, see Trespass to Try Title, Cent. Dig. §§ 55-61; Dec. Dig. § 40.*]

14. PUBLIC LANDS (§ 172*)—RAILROAD LAND GRANTS—FORFEITURE.

The failure of the Ft. Worth & Denver City Railway Company, which was granted a right of way over the public lands by its special charter in 1873 (Sp. Laws 1873, c. 208), to file maps of its right of way with the Commissioner of the General Land Office within six months after organization, as required by section 15 of the charter, was not a forfeiture of its rights; the charter containing no conditions of forfeiture, and the state not having sought to compel a forfeiture.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 523-543; Dec. Dig. § 172.*]

Appeal from District Court, Potter County; J. N. Browning, Judge.

Action by the Ft. Worth & Denver City Railway Company against the Southern Kansas Railway Company of Texas and another. From a judgment for defendants, plaintiff appeals. Reversed and remanded.

Spoonts, Thompson & Barwise, of Ft. Worth, and Turner & Wharton, of Amarillo, for appellant. Madden, Trulove & Kimbrough, of Amarillo, and Terry, Cavin & Mills, of Galveston, for appellees.

HALL, J. This suit was instituted by the Ft. Worth & Denver City Railway Company, in the district court of Potter county, against the Southern Kansas Railway Company of Texas and the Pecos & Northern Texas Railway Company to recover a strip of land lying immediately south of plaintiff's main track across section 156, block, 2, A. B. & M. surveys, in Potter county, Tex. The strip of land in question is 50 feet wide and 750 feet long; the northern line thereof being 50 feet south of and parallel with the center of plaintiff's main track, and its southern line being 100 feet south of the center of said track. Plaintiff's petition is in the form of trespass to try title, and this is followed by a second count, pleading specially its title, in which it set forth a history of the granting of its special charter in 1873 (Sp. Laws 1873, c. 208), its compliance with the requirements of its charter, and further alleging that since the completion of its road the town of Amarillo had grown to be a city of over 10,000 inhabitants, and that the land in controversy, which is a part of the town of Amarillo, is now needed for the construction of switch and storage tracks, and for the proper conduct of plaintiff's business as a common carrier.

The defendants answered by general demurrer, general denial, plea of not guilty, and pleaded the statutes of limitation of three, four, five, and ten years, set up valuable improvements, and by special answer attacked plaintiff's right to the land in controversy, because of plaintiff's failure to comply with the requirements of its charter. Plaintiff filed a supplemental petition, attacking the special answer of the defendants, and a special exception, which was overruled. There was a trial before a jury, and after the evidence was all in the court peremptorily instructed the jury to find in favor of defendants, and this appeal is prosecuted from the judgment rendered upon such findings.

Plaintiff's assignments of error do not comply with rules 24 and 25 for the Courts of Civil Appeals (142 S. W. xi); but, by reason of the fact that at the time the appeal herein was perfected said rules had not been printed and generally distributed, we are not inclined to heed the objections of appellees to the sufficiency of the assignments as heretofore announced by us in the case of Davidson v. Patton, 149 S. W. 757.

[1] Our attention is also directed to the form of appellees' brief, wherein they first submit four "counterpropositions to all of appellant's assignments." This is manifestly a violation of the rules, but we waive the informality and give both briefs full consideration. The principal questions presented for our consideration are these: (1) Does the grant contained in appellant's charter in the following words, "That the right of way, to be held to the extent of 200 feet in width, is hereby granted to said railway company, through the public lands of Texas," etc., sufficiently designate the property therein sought to be granted, or is it void for uncertainty? (2) If sufficiently certain, was the grant effective in present, or was it intended to take effect in the future, after the first section of 25 miles of the road was built, if completed within three years from the passage of the act, and an additional 30 miles every two years thereafter until completed through the state, as provided in section 12 of the act, and did the effectiveness of the grant further depend upon compliance with section 15 of the act, which is: "That within six months after the organization of the company incorporated by this act, it shall be the duty of said company to file with the Commissioner of the General Land Office of the state plans and maps, showing the line upon which it is intended to construct said road."

[2, 3] We are cited to numerous authorities in the briefs bearing upon these issues, and after a careful review of them all we have concluded that the grant of the right of way was sufficiently certain in its terms, and that it took effect in present, and in support of our conclusion quote as follows: "It is claimed that the deed to the right of way was void because of the indefiniteness of the description. The road, at the date of the deed, had been located across the Pearson survey, and was a thing in existence. The conveyance of the right of way evidently had reference to the road as it existed, and conveyed the right to occupy a strip of land 200 feet wide along its line. *But, had the situation been otherwise, the deed was sufficient, and would have authorized the railway company to cross the land with its road, selecting its own route.* The easement conveyed is the right of way 200 feet wide across the James Pearson survey, and it is contended that this entitled the company to occupy and use for its purposes, not necessarily all of the strip 200 feet wide, but only so much thereof as was essential to the purposes for which the right was obtained, i. e., a convenient passage across the land in a proper performance of its duties by the company. But the conveyance is of a right of way 200 feet wide over a larger tract, and not simply a right of way over a strip of land 200 feet wide. The grant defines the extent of the right of way, and the court cannot restrict it to narrower limits, though it should be of the opinion

that so much was not needed for the purposes intended. The right of the railway company, such as it is, is, as between it and its grantor, the same over every part of the land designated in the grant." *Olive v. Sabin & E. T. Railway Co.*, 11 Tex. Civ. App. 208, 33 S. W. 139. The deed conveying the right of way in the above-quoted case conveyed the "right of way 200 feet wide over and upon" the said Pearson survey.

As further bearing upon the question of the necessity of identifying the land upon the ground at the date of the charter and the particularity of its designation, we call attention to article 6482, Rev. Stat. 1911 (*Sayles' Civ. Stat. art. 4423*): "Every such corporation shall have the right of way for its line of road through and over any lands belonging to this state." And it is further provided in article 6484, Rev. Stat. 1911 (*Sayles' Civ. Stat. 4425*): "Such corporation shall have the right to lay out its road not exceeding 200 feet in width and to construct the same." This is a general grant to any and all railway corporations desiring to construct a railway through any public domain of the state. Prior to its enactment, as said by Gill, J., in *Ayres v. G., C. & S. F. Ry. Co.*, 39 Tex. Civ. App. 561, 88 S. W. 436: "A grant of a charter to construct a railroad carries with it, either directly or inferentially, a grant of right of way through and over such tracts on its route as were yet a part of the public domain." Further quoting from *T. C. Ry. Co. v. Bowman*, 97 Tex. 420, 79 S. W. 296, Gill, J., said: "The general laws which had been enacted regulating railways theretofore seem to have assumed, rather than to have expressly declared, the existence of the right over the lands of the state; for the provisions for the acquisition of such right by purchase or condemnation apply only to private property. The general law passed in 1876 [*Laws 1876, c. 97*] for the chartering of railway corporations omitted any express provision as to right of way upon lands belonging to the state, but, as before, regulated the acquisition of such rights over private property by agreement or condemnation." Justice Williams, after this comment upon the state of the law, proceeds to show that the absence of any provision for the acquisition of right of way over public properties pervaded all general legislation on the subject until the Revision of 1879. Rev. St. 1879, c. 8. While it is not expressly held, nor was it necessary to be decided in the case cited, it is inferentially held that prior to the passage of the act a charter, authorizing the construction of a railway through a country held in part by private ownership and in part by the state, the general laws providing for acquisition of right of way was from private owners, but leaving the company powerless against the lands of the state, impliedly granted the right to construct through and over the public domain. The grant is so

necessary to the exercise of the general powers conferred, it is inevitably carried by the general terms of the grant. This is in accord with the elementary rule of construction that a power necessary to the exercise of a power already granted will be implied. We are of the opinion, therefore, that by its charter the Great Northern Company acquired the right to enter upon and appropriate so much of the public domain over which its route was projected as was necessary for its right of way, not to exceed the prescribed width, and that having done so the width actually appropriated was not affected by the subsequent grant and by the state of the Lang survey. By the description in the grant the grantees had actual notice of the railway company's existence and its powers and the fact that the Wilson Lang grant had been located along its line. They took subject to the rights acquired by the company. A land certificate issued by the Commissioner of the General Land Office for 640 or any number of acres of land, as a general rule, authorizes the holder thereof to locate the same wherever the holder thereof can find unappropriated public domain of the class designated in the certificate, and, although the cases are numerous where land certificates and the two articles quoted above from the general railway law of the state have been considered by the courts, in none of the cases are we able to find where the articles of the statutes relating to railroads or special acts of the Legislature granting lands have been questioned by reason of uncertainty; nor are we cited to any case declaring any railroad right of way, under such statutes, void by reason of such uncertainty.

In *Bybee v. O. & C. R. Co.*, 139 U. S. 663, 11 Sup. Ct. 641, 35 L. Ed. 305, the question was considered which is raised by the appellees in this case, and it was there held that lands granted by Congress to aid in the construction of railroads do not revert, after condition broken, until a forfeiture has been asserted by the United States, and that a person subsequently acquiring any part of the public lands over which a railway company had been granted a right of way by Congress took such land subject to the prior right of the railway company, and used this language: "The distinction between a right of way over the public lands and lands granted in aid of construction of the road is important in this connection. As to the latter, the rights of settlers or others, who acquire lands by purchase or occupation between the passage of the act and the actual location and identification of the lands, are preserved unimpaired, while the grant of the right of way is subject to no such condition; and in the construction given by this court to a similar grant, in *St. Joseph & D. C. Ry. Co. v. Baldwin*, 103 U. S. 426, at page 430 [26 L. Ed. 578], a person subsequently acquiring any part of such right of way takes it subject to the prior right of the railroad com-

pany. As remarked by the court in that case: 'If the company could be compelled to purchase its way over any section that might be occupied in advance of its location, very serious obstacles would be often imposed to the progress of the road. For any such loss of lands by settlement or reservation, other lands are given; but for the loss of the right of way by this means, no compensation is provided, nor could any be given by the substitution of another route.'" In that case, by section 8 of the act of Congress (Act July 23, 1866, c. 212, 14 Stat. 210), there was granted to the O. & C. Railroad Company the right of way through the public lands to the extent of 100 feet in width on each side of said railroad where it might pass over public lands, including all necessary grounds for stations, etc.; and by section 6 of the act the companies were required to file their assent to the act within one year, and to complete the first 20 miles within two years, etc. *Jones v. Erie & W. V. Ry. Co.*, 144 Pa. 629, 23 Atl. 251, is authority for our holding in this case that, in the absence of any designation of the boundaries of the plaintiff's right of way, the presumption is that it extends 100 feet on each side of the center of the main line of appellant's track as it has been constructed since the date of its grant in 1873, and that it is presumed to take the full width granted. To the same effect is *Campbell v. Ind. & V. Ry. Co.*, 110 Ind. 490, 11 N. E. 482; *Gaston v. Gainesville & D. Elec. Ry. Co.*, 120 Ga. 516, 48 S. E. 188; *Kindred v. U. P. R. R. Co.*, 168 Fed. 648, 94 C. C. A. 112; *P. & R. Ry. Co. v. Obert*, 109 Pa. 193, 1 Atl. 398; *Prather v. W. U. Telegraph Co.*, 89 Ind. 501; *N. P. Ry. Co. v. Smith*, 171 U. S. 261, 18 Sup. Ct. 794, 43 L. Ed. 157. While the evidence is not perfectly clear upon the point, we think the record shows that plaintiff's line of road had been surveyed and staked across section 156 prior to the time the section was awarded to Lester, under whom appellees claim. This, however, becomes a matter of secondary importance under the view we take of the case.

[4] The proposition under appellant's first assignment of error is that the land in controversy belonged to the plaintiff, and by reason of the growth of Amarillo it has become necessary to use this land for switches and storage tracks, and consequently the court erred in refusing to permit plaintiff to prove the necessity existing for the use of said land. This assignment is sustained, as the evidence was admissible upon the issue of abandonment.

The second, third, fourth, fifth, sixth, and seventh assignments of error are based upon the action of the court in admitting in evidence a statement of facts agreed to, together with certain letters attached thereto, and will be considered together. Counsel for appellant and appellees entered into an agreed statement of facts in order to save time and

expense of establishing the facts, which statement it was understood should not be introduced, unless objections made thereto by appellant should be overruled by the trial judge. This agreement related to a different tract of land lying west of the tract in controversy, but which was also 50 feet in width, and the northerly line of which was 50 feet south of the center of plaintiff's main track. It appears that plaintiff and its attorneys and officials had no knowledge of the extent of plaintiff's right of way, but were laboring under the impression that said right of way across section 156 was only 100 feet in width, and that during this time, on the 16th day of April, 1898, appellees secured a deed from the then owners of that particular portion of section 156 abutting upon plaintiff's right of way, which conveyed the particular strip of land referred to in the agreement in question. This is expressed in the agreement; and it is further shown that plaintiff, in 1897, constructed a siding, the south rail of which is along the north line of, and a few inches over on, the particular strip referred to in the agreement, and in rearranging its telegraph poles around its new depot, in 1897, a few posts were placed about eight feet over on said strip, where they remained until after appellee the Pecos & Northern Texas Railway Company secured its deed thereto on the 16th day of April, 1898. After securing the deed the said Pecos & Northern Texas Railway Company constructed its track along said strip, when, for the first time, the question as to the ownership thereof and the location of the true dividing line between plaintiff and said strip was raised. That the matter was brought to the attention of J. V. Goode, the then superintendent of appellant, who had a conference with one Faulkner, the general manager of the Pecos & Northern Texas Railway Company, when it was by them discussed. After which the work of the Pecos & Northern Texas in the construction of its track and sidings along said strip proceeded. The Pecos & Northern Texas Railway Company also constructed on said strip toolhouse, coalhouse, and express office, as well as a platform and passageway across the strip to appellant's depot, and held peaceable and undisputed possession thereof, without any knowledge upon its part, except such as may be imputed by law, until about the 15th day of August, 1902, when its agent observed that the Waters Pierce Oil Company had begun to place storage tanks on the north edge of said strip, and upon inquiry was informed by the agent of the oil company that the then superintendent of appellant, Mr. Scott, had given his permission for such construction, which resulted in another conference between the officials of appellant and appellee the Pecos & Northern Texas Railway Company as to their respective rights. Said agreement further

states that in April, 1898, A. B. Spencer, the station agent of appellant at Amarillo, suggested the purchase of said strip, which was done on the 15th day of June, 1901. The letters referred to are dated May 26, 1906, written by Faulkner, the general manager of appellee, to J. W. Terry, its general attorney, and from said Faulkner to a Mr. Mudge, another official of appellee railway company. Appellant insists that the letters and the agreement should not have been admitted in evidence, because they related to a wholly distinct and separate tract of land from that involved in the suit, and therefore no action on the part of the plaintiff with reference to said former controversy could be binding in this suit.

Appellant further insists that the agreed statement is inadmissible as an estoppel, because none of the representations or admissions claimed to have been made by plaintiff's officials could have been relied upon by appellees, or could have induced any action on the part of defendants with reference to the land involved in this suit, causing them to change their position for the worse; that the law of estoppel does not apply because appellant's superintendents were ignorant of the true location of the boundary lines of plaintiff's right of way, and any representations or admissions made by them were through mistake, even though they had been authorized to make such admissions. It further insists that no authority was shown on the part of its superintendents to make any admissions or statements, and, as such action was not within the apparent scope of their authority, appellant should not be bound thereby. It further insists, under these assignments, that appellant is not estopped from asserting title to the tract in question in this suit, as neither of the superintendents were apprised of the true state of the title. Appellant further insists that appellee's general manager, Faulkner, had equal means with appellant's superintendent, Goode, of ascertaining the true state of the title which plaintiff had to the land under consideration at that time, because plaintiff's charter containing the grant was a public law, of which every one must take notice; consequently, even though it be held that Superintendent Goode was charged with notice by reason of this being a public law, the same rule charged Faulkner with notice, and the law of estoppel does not apply.

[5, 6] The letters, being correspondence between appellee's officials, were clearly not admissible and could not bind the appellant, who had no notice of them, even though they related to the tract of land in issue in this suit; and we think it is equally clear that any representations, agreements, or concessions made by appellant's superintendents, Goode and Scott, with reference to another and different part of its right of way, could not be extended so as to bind appellant rail-

way company with reference to any other portion of its right of way obtained under its charter, even though it should be a part of the same section of land. The agreement in question should not have been admitted in evidence.

[7, 8] The eighth assignment of error complains of the action of the court in permitting the witness Avery Turner, an official of defendants, to detail the contents of a letter written by one Cotter, still another superintendent of appellant railway. The letter itself was not admissible, and to permit the witness to state: "His letter of June 27th was his permission for the crossing. We established the point of crossing by the location of the line after I received Mr. Cotter's letter and his permission"—was stating, in effect, the contents of the letter itself, and this assignment is sustained. The testimony and letter were further inadmissible, for the reason that it related to an interlocking agreement made between the superintendents of the two roads, and that the crossing in no way touched the land in controversy.

[9] Under the ninth assignment of error, appellant insists that the court erred in admitting, over the objection of plaintiff, the testimony of the witness Avery Turner to the effect that plaintiff made no objection when the appellee Pecos & Northern Texas Railway Company's track was laid across the land in controversy. The evident purpose of this testimony was to create an estoppel against plaintiff by silence on its part when it was its duty to speak. It is plain from the record that at the time of the construction of the track by the Pecos & Northern Texas Railway Company across the land in question appellant's officials had no actual knowledge of the fact that appellant owned the land, and under such conditions estoppel by silence does not apply. *Burns v. True*, 5 Tex. Civ. App. 74, 24 S. W. 338; *Stanley v. Schwalby*, 85 Tex. 348, 19 S. W. 264; *Pierce v. Texas Rice Development Co.*, 52 Tex. Civ. App. 205, 114 S. W. 857.

[10, 11] It is true that the right of way was granted by special act of the Legislature, but the act is also a public law, and was notice to the Pecos & Northern Texas Railway Company of the extent of appellant's rights. As a matter of fact, the officials of all the roads were ignorant of the provisions of the charter granting a right of way 200 feet in width across the section; but, since there is a pseudo-presumption that "every one is presumed to know the law," when the Pecos & Northern Texas Railway Company built its siding across the land, it must be held to have done so with full knowledge of the special act, and must be governed by the rules applicable to such condition. So appellant is not estopped by its failure to object to appellees doing something which both constructively and presumptively knew could

not legally be done. In *Preston et al. v. S. & M. T. Ry. Co.*, 70 Tex. 375, 7 S. W. 825, it is held that where a railroad company enters on land and constructs its road over it, without acquiring a legal right so to do, the materials used in its construction do not become the property of the landowner, but the company may remove them, and will not be liable as for a conversion.

[12] The Pecos & Northern Texas Railway Company was not a party to the interlocking switch agreement, but it seems from the record that this agreement was made by appellant and the Southern Kansas Railway Company of Texas; and therefore any act on the part of appellant with reference to that agreement could not be taken advantage of as an estoppel by the Pecos & Northern Texas Railway Company. It follows that the testimony of the witness Avery Turner on this point should have been excluded, and this assignment is sustained.

For the reasons stated in passing upon the ninth assignment, the tenth assignment is also sustained, and the testimony should have been excluded.

[13] The court admitted in evidence, over the objection of plaintiff, the deed from plaintiff to the Pecos & Northern Texas Railway Company, dated the 7th day of August, 1908, transferring a part of its right of way beginning on the western boundary of section No. 156 and which was no part of the land involved in this suit. This was error, and the eleventh assignment is sustained.

[14] It is insisted by the twelfth assignment that the court erred in refusing to give the peremptory instruction requested by plaintiff, requiring the jury to return a verdict in favor of plaintiff. This assignment is overruled. In our opinion, as heretofore stated, the right of the appellant railway company to its right of way across section 156 was not lost by its failure to locate and build its road across said section until 1887, and to file its map with the Commissioner of the General Land Office, in compliance with section 15 of the charter. The special charter granted by the Legislature contains no condition of forfeiture, and no suit had been filed by the state to enforce a forfeiture by reason of appellant's failure to comply with its above-named conditions. *Houston & T. C. Ry. Co. v. State of Texas*, 170 U. S. 243, 18 Sup. Ct. 610, 42 L. Ed. 1023; *Bybee v. O. & C. Ry. Co.*, 139 U. S. 663, 11 Sup. Ct. 641, 35 L. Ed. 305; *McAdam v. Lumber Co.*, 57 Wash. 407, 107 Pac. 187.

The thirteenth and fourteenth assignments are overruled, as, in our opinion, the issues of fact should have been submitted to the jury.

The fifteenth assignment is sustained, since the evidence shows that the Southern Kansas Railway Company of Texas was not entitled to judgment for any part of the land

in controversy; that its line of road terminated at the northern boundary of the land in controversy; and that it could not be held to be in possession of any part thereof.

The sixteenth and seventeenth assignments are overruled.

For the errors pointed out, the judgment is reversed and the cause remanded.

HUFF, C. J., not sitting.

**CASEY et al. v. TEXARKANA & FT.
S. RY. CO.**

(Court of Civil Appeals of Texas. Texarkana.
Nov. 14, 1912. Rehearing Denied Nov.
28, 1912.)

1. APPEAL AND ERROR (§ 374*)—APPEAL BOND—NECESSITY.

If one brings action in her individual capacity and as administratrix, while she cannot appeal in her individual capacity without giving a bond, she by express provision of Sayles' Ann. Civ. St. 1897, art. 1408, does not have to give bond on appeal in her capacity as administratrix.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2005-2010; Dec. Dig. § 374.*]

2. APPEAL AND ERROR (§ 242*)—REVIEW—CAPACITY TO SUE—WAIVER.

The question of plaintiff, suing as administratrix, not having executed a bond as such, and so not having capacity to sue as such, required by Sayles' Ann. Civ. St. 1897, art. 1265, to be raised by plea verified by affidavit, is waived by defendant, so that it cannot have it considered on appeal; it having failed to have it determined by the trial court, and to assign error thereon.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1417-1425; Dec. Dig. § 242.*]

3. MASTER AND SERVANT (§ 286*)—INJURY TO SERVANT—NEGLIGENCE—EVIDENCE.

Whether a switching crew which pushed cars against others to make a coupling, and not succeeding, repeated this, killing a car inspector, who in the meantime had gone between those first on the track to inspect them, was guilty of negligence, in not giving him warning of the second attempt, held under the evidence a question for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1001, 1006, 1010-1050; Dec. Dig. § 286.*]

4. MASTER AND SERVANT (§ 288*)—INJURY TO SERVANT—ASSUMPTION OF RISK—EVIDENCE.

Whether a car inspector, who, after cars had been pushed against others to make a coupling, went between those first there to inspect them, assumed the risk of the switching crew repeating this without notice to him, the first attempt having been unsuccessful, held under the evidence a question for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1005, 1068-1088; Dec. Dig. § 288.*]

Appeal from District Court, Bowie County; P. A. Turner, Judge.

Action by Mrs. Lillie B. Casey, individually and as administratrix, against the Texarkana & Ft. Smith Railway Company. Judgment for defendant. Plaintiff appeals. Reversed and remanded for new trial.

Between 5 and 6 o'clock on the morning of December 23, 1909, Ben F. Casey, while engaged in the discharge of duties he owed to appellee as one of its car inspectors, suffered injuries resulting in his death a few hours thereafterwards. He left surviving him his wife and several children. On the theory that the injuries were caused by the negligence of other employés of appellee, this suit was brought to recover damages occasioned by his death. At the time Casey was injured, appellee was engaged in interstate commerce, and Casey was employed by it in such commerce; and it is conceded that whether appellee is liable or not for the damages sought to be recovered must be determined with reference to the provisions of the act of Congress of April 22, 1906, usually referred to as the "Federal Employer's Liability Act" (Act April 22, 1906, c. 149, 35 Stat. 65 [U. S. Comp. St. Supp. 1911, p. 1322]). By the terms of that act, in a case like this one is, the right of action for damages recoverable is exclusively in the personal representative of the deceased, for the benefit of his surviving widow and children. It appears from the allegations in the petition that this suit was prosecuted by Mrs. Lillie B. Casey, deceased's widow, in her own right and as temporary administratrix of his estate. She alleged that "on the 17th day of May, 1911, she was duly appointed by the county court of Bowie county, Tex., administratrix of the estate of Ben F. Casey, deceased, without bond, and was granted by said court the power to prosecute any and all suits for the recovery of damages for the death of the said Ben F. Casey," and further alleged as follows: "That up until the 17th day of May, 1911, there had never been any administration upon the estate of the said Ben F. Casey, deceased, and that there had never been any necessity for any administration upon the estate of the said Ben F. Casey, unless such administration is necessary to the prosecution of the suit for damages which are entitled to be recovered for the benefit of his surviving widow and children. Plaintiff alleges that ever since the death of the said Ben F. Casey she has been acting as his personal representative in the capacity of surviving wife until May 17, 1911; that on May 17, 1911, plaintiff, Lillie B. Casey, was duly appointed and duly qualified as temporary administratrix of the estate of said Ben F. Casey by the county judge of Bowie county, Tex., and such temporary administration has been duly continued ever since, and plaintiff now and ever since has been such administratrix; that the said Casey left no will, and the debts, if any, owing by him at the time of his death, did not make an administration upon his estate necessary." In its answer to the suit appellee, among other things, alleged that Mrs. Casey "has no legal capacity to

maintain this suit as the administratrix or personal representative of the estate of Ben F. Casey, deceased; that the alleged appointment of the said Mrs. Lillie B. Casey as such administratrix by the county court of Bowie county was and is void; but that, if mistaken as to this, said appointment has long since expired; and that she is not now, either the administratrix of said estate or the personal representative of the said Ben F. Casey, deceased." This plea was verified by the affidavit of one of appellee's counsel, to the effect "that the facts set forth in the above and foregoing plea are true to the best of my knowledge and belief." It does not appear from the record that any effort was made by appellee to have the issue it attempted to make by this plea determined, nor that it was determined, by the court. After the testimony had been heard, the court peremptorily instructed the jury to find for appellee. In accordance with such a finding, a judgment was rendered "that the plaintiff, Mrs. Lillie B. Casey, prosecuting this action in her own right and as personal representative of Ben F. Casey, deceased, that is, as administratrix of the estate of Ben F. Casey, deceased, for the benefit of herself and also for the benefit of * * * the children of said Ben F. Casey, deceased, take nothing by reason of said cause of action alleged, and that the defendant, the Texarkana & Ft. Smith Railway Company, be and is hereby discharged, to go hence without day, and that said defendant do have and recover of and from the plaintiffs in the capacity in which their action is and has been prosecuted by them, as aforesaid, all costs herein incurred." It appears that "the plaintiff, Mrs. Lillie B. Casey et al.," excepted to the judgment and gave notice of an appeal to this court.

Smelser & Vaughan, of Texarkana, for appellant. Glass, Estes, King & Burford, of Texarkana, for appellee.

WILLSON, C. J. (after stating the facts as above). [1, 2] Before determining the appeal on its merits, we will dispose of the motion made by appellee to dismiss it, on the ground, supported by the record, that it is being prosecuted without an appeal bond. So far as it should be construed to be an appeal by Mrs. Casey in her capacity as an individual, the motion should be sustained, for in that capacity she is not entitled, without first making and filing a bond, to prosecute an appeal; but, so far as it is an appeal by her as administratrix, the motion should be overruled, for in that capacity she is entitled, without making a bond, to prosecute an appeal. *Sayles' Stat. art. 1408*. From the allegations in the petition and recitals in the judgment, set out in the statement, we think it appears that she prosecuted the suit as administratrix and as such is prose-

cuting the appeal. It may be that she had not executed a bond as temporary administratrix, and therefore had not so qualified as to be authorized to act as such in the prosecution of the suit. Whether she had executed a bond or not was a question of fact to be determined in the first instance by the court below. It was not determined there. In the attitude the matter is presented to us, if the question should be said ever to have been made, as it must have been, if at all, by a plea verified by affidavit (*Sayles' Stat. art. 1265; Graham v. McCarty, 69 Tex. 323, 7 S. W. 342*), we think it should be treated here as having been waived by the failure of appellee to have it determined by the court below and to assign error on it (*Grand Lodge v. Stumpf, 24 Tex. Civ. App. 309, 58 S. W. 840; Blum v. Strong, 71 Tex. 329, 6 S. W. 167; Railway Co. v. Harlan, 62 S. W. 972*).

The motion will be overruled so far as it applies to the appeal of Mrs. Casey as administratrix, and will be sustained so far as it applies to an appeal by her in her individual capacity.

[3, 4] Referring now to the merits of the appeal, we are of the opinion that the court below erred in peremptorily instructing the jury to find for appellee. The main track in appellee's yards in Texarkana, Tex., extended north and south. A short distance east of and parallel with that track was another, known as "track No. 1," and a short distance west of and parallel with said main track was another, known as "long house track." Both No. 1 and long house tracks were connected by switches to the main track. Between 5 and 6 o'clock, and when it was still dark, on the morning of December 23, 1908, freight train No. 74, from points in Louisiana, destined to points in Arkansas, reached appellee's said yards and was placed on track No. 1. Immediately thereafterwards Casey and an assistant began to inspect the cars constituting that train. On completing the inspection thereof Casey, having in the meantime been informed by Hiams, foreman of the switching crew, that 12 empty coal cars then on long house track were to be carried on as a part of train No. 74, soon to proceed north, in the discharge of his duty went to and commenced inspecting said coal cars. While he was engaged in this work, the switching crew cut the train on track No. 1, carrying 16 cars forming a part of same north on the main track, "kicked" two of the number south on said main track, and then pushed the other fourteen onto long house track, propelling them against the coal cars for the purpose of coupling thereto. The cars failed to couple when the attempt was first made. As a result of the collision, the coal cars rolled south about 15 feet on long house track, where they stopped. The fourteen cars out of train No. 74 were then again shoved south, against the coal cars, colliding with and pushing the latter sev-

eral car lengths further south. Between the time when the collision occurred between the coal cars and the cars out of train No. 74, in the effort first made to effect the coupling, and the time when the second collision occurred, Casey, in the discharge of his duty, had gone between two of the coal cars. As a result of the second collision he was hit by the cars, and knocked down, and suffered the injuries which caused his death. Negligence on the part of Casey contributing to the injury he suffered not being a bar to a right in his administratrix to recover damages for his death, the questions controlling on the issue as to liability on the part of appellee were: (1) Did the testimony make a question for the jury as to whether the switching crew were guilty of negligence or not in shoving the cars out of train No. 74 against the coal cars in the second attempt to make a coupling, without first warning Casey of their intention to do so? (2) Did the testimony make a question for the jury as to whether Casey had assumed the risk of such conduct on the part of the switching crew or not? We think both questions should be answered in the affirmative. There was testimony showing that appellee had promulgated a rule requiring car inspectors, if they did not wish cars they were inspecting to be moved while they were inspecting same, to place blue lights at the ends thereof, and prohibiting other employees from removing lights so placed and from coupling to or moving cars so protected. There also was evidence from which a jury might have found that the rule was not construed by appellee's employees as applying to cars designated, as the coal cars were, as "pick ups," meaning thereby, it seems, cars temporarily placed on a side track to be carried out by incoming trains, and that it was never observed as to such cars. There was testimony authorizing a jury to find that the switching crew knew, or should have known, that Casey was engaged in inspecting the coal cars at the time they pushed the other cars against them, and authorizing a finding that they knew, or should have known, that in inspecting the coal cars Casey might go between them. There was testimony which would have authorized a finding by the jury that it was not customary for the switching crew to propel other cars against cars which they knew to be undergoing inspection. Sturdevant, a member of the switching crew, testified: "As to our custom to couple onto cars in that yard while an inspector was doing the work of inspection, we do not do it if we know the inspector is around it. * * * I never coupled into any cars that had to be inspected to become part of a train, while inspectors were performing the work of inspection. It wasn't customary to my knowledge. * * * It is customary to wait until the inspector had finished the work of inspection

when we were notified by the inspector, or when we knew he was doing the work of inspection. I never knew of a blue light on a car unless an inspector was doing some work on it." While the testimony of Iiams, foreman of the switching crew, and of Bently, a member of that crew, indicated that Casey was advised by Iiams, before he (Casey) began the inspection of the coal cars, that cars out of train No. 74 would be pushed onto long house track against the coal cars, and that the latter would be shoved south thereon fourteen car lengths, Sturdevant testified, with reference to what Iiams said to Casey: "I heard Iiams tell him (Casey) that we were going to throw two bad orders—going to pull those sixteen out and throw two bad orders on the main line and shove the balance of the cut in on top of the coal cars on long house. I can't say whether he said anything about doubling over." From this testimony we think a jury might have found that the switching crew, having shoved "the balance of the cut in on top of the coal cars," should have anticipated that Casey might believe, as his declaration made after he received the injuries, testified to by Bently, that he "thought the boys were through," indicated he did, that the coal cars would not be further moved while he was inspecting them. If a jury might have found that reasonably prudent persons engaged in the work the switching crew were engaged in should have anticipated that Casey might so conclude and go between the coal cars as he did, we see no reason why they might not have further found that, in making the second attempt to couple the cars, the switching crew were guilty of negligence. And on the same testimony we see no reason why a jury might not have found that the risk resulting from their negligence was not assumed by Casey. We think the testimony presented issues for determination by the jury, and that the court erred in refusing to submit the case to them. Therefore the judgment is reversed, and the cause is remanded for a new trial.

CORBETT et al. v. SWEENEY et al.

(Court of Civil Appeals of Texas. Galveston.
Nov. 9, 1912. Rehearing Denied
Nov. 27, 1912.)

1. MORTGAGES (§ 330*)—FORECLOSURE BY EXERCISE OF POWER OF SALE—NOTICE TO MORTGAGOR—STATUTES.

Acts 1889, c. 118 (Rev. St. 1895, art. 2369), provided that notice of a sale of real estate under a trust deed should be given "as now required in judicial sales." The statute as to judicial sales in force at the time when the act of 1889 was enacted did not require personal service of notice on the defendant in execution. The act adopting the Revised Statutes in 1895 (Final Title, § 19), and also the act adopting the Revised Statutes in 1911 (Final Title, § 16), provided that the provisions of the Revised Statutes, so far as they

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

are substantially the same as the statutes in force at the time when the Revised Statutes shall go into effect, shall be construed as continuations thereof, and not as new enactments. The Revised Statutes of 1911 continued as article 3759 article 2369 of the Revised Statutes of 1895 in its exact language. *Held*, that a sale by a trustee in a deed of trust made in 1911 is to be governed by the act of 1889, rather than by a subsequent statute requiring service of notice on the defendant in execution, and hence no service on the mortgagor is necessary, especially in view of Acts 1903, c. 77 (article 3757, Rev. Civ. St. 1911), relating to sales under execution, and providing that nothing therein contained shall affect the method of advertising land under powers conferred by any deed of trust or other contract lien.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 1014; Dec. Dig. § 330.*]

2. BILLS AND NOTES (§ 139*)—CONTRACTS—CONSIDERATION—EXTENSIONS.

A payment of part of the interest due on a note is no consideration for an extension of time.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 340-354; Dec. Dig. § 139.*]

3. ESTOPPEL (§ 78*)—INVALID CONTRACT—DEFAULT IN PAYMENT OF INTEREST—OPTION TO DECLARE ENTIRE NOTE DUE.

Though a payment of a portion of the interest due on a note was no consideration for an agreement to extend time of payment if such agreement induced the maker to relax his efforts to procure money, which he could otherwise have procured, and thus avoided the exercise of an option by the holder to declare the note due for nonpayment of interest, the holder would be estopped to exercise such option at that time.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 204-210; Dec. Dig. § 78.*]

4. INJUNCTION (§ 172*)—DISSOLUTION—DISCRETION OF COURT.

Where the answer is a complete denial, the dissolution of a temporary injunction against the sale of land under a trust deed rests largely in the discretion of the trial court.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 374-384; Dec. Dig. § 172.*]

5. MORTGAGES (§ 338*)—RESTRAINING SALE—EXTORTIONATE FEES.

A maker of notes secured by a trust deed cannot enjoin a sale thereunder for the entire debt on the ground that attorney's fees and commissions are extortionate.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 1026-1035; Dec. Dig. § 338.*]

Appeal from District Court, Harris County; Charles E. Ashe, Judge.

Suit by W. C. Corbett and another to enjoin J. J. Sweeney and others from selling lands. From an order dissolving a temporary injunction, the plaintiffs appeal. Affirmed.

Woods, Graham & Harris, of Houston, for appellants. Fisher, Sears & Campbell, of Houston, for appellees.

REESE, J. This is an appeal from an order of Hon. Chas. E. Ashe, district judge, dissolving a temporary writ of injunction theretofore issued at the suit of W. C. Corbett and wife, Ella Corbett, enjoining the defendants J. J. Sweeney, William Giles, and George J. Mellinger from selling certain

lands under a deed of trust executed by said Corbett to secure the payment of a promissory note executed by him to Sweeney for \$22,500. Temporary injunction was issued upon the order of the district judge September 5, 1912. Defendants filed motion to dissolve, and afterwards a further amended motion setting out in full their grounds therefor, which is, in fact, an answer to plaintiffs' petition, and is sworn to. Upon hearing of the motion to dissolve evidence was introduced by both parties, and upon the conclusion the motion to dissolve was granted. From the order dissolving the injunction this appeal is prosecuted. It appears that the Union Land Company, claiming to be owner of the land, filed a plea in intervention and also prayed for injunction. In so far as the order dissolving the temporary injunction affects such intervener, there is no appeal by it, and it will not be necessary to refer farther to this branch of the case.

The undisputed facts as they are shown by the pleadings and evidence are as follows:

On May 30, 1911, W. C. Corbett executed to J. J. Sweeney his certain promissory note for \$22,500 for money borrowed by him from Sweeney, being a consolidation of several smaller loans previously made. The note was payable to Sweeney or order three years after date, with interest at the rate of 9 per cent. per annum payable semiannually, and contained a provision that upon failure to pay any installment of interest when due, or to pay the taxes on the land embraced in the deed of trust given to secure the same, the holder of the note at his option might declare the same due, principal and interest, and proceed to enforce collection by sale under the deed of trust. The note also provided for attorney's fees of \$3,000 in case it was not paid at maturity, and was placed in the hands of an attorney for collection. At the same time Corbett executed a deed of trust upon the lands described in the petition to secure the note referred to, naming William Giles as trustee, and containing a provision that, upon failure, refusal, or inability to act as such, the legal owner and holder of the note was authorized to appoint a substitute with the same powers conferred upon the original trustee. The deed of trust authorized a sale of the land, if the note was not paid when due, either upon its face or by reason of the failure to pay any installment of interest or the taxes on the land as they accrued. This note was for value and before due regularly transferred by Sweeney to William Giles. Giles declined and refused to act as trustee in the deed of trust, and, as legal owner and holder of the note, regularly appointed George J. Mellinger substitute trustee, in accordance with the provisions of the trust deed, and on or about the — day of July, 1912, there being then two semi-annual installments of interest due and un-

paid, amounting to \$2,025, except the sum of \$500 paid thereon, and the taxes for 1911, the said Giles declared the note due, in accordance with its terms, and called upon the substitute trustee to sell the property embraced in the deed of trust for the satisfaction thereof, whereupon the said Mellinger duly proceeded to advertise the property for sale on the first Monday in August, 1912, at the courthouse door of Harris county; the land being located in said county. Notice was given of such sale by publication in a newspaper published in Harris county, as provided in the deed of trust, for the length of time provided, but such sale was stopped by this injunction. No personal notice was given to Corbett as provided for sales of real estate under execution.

The grounds for injunction set up in the petition, and relied upon by appellant on this appeal, are substantially as follows: (1) That written notice of such sale had not been given to appellant as required in case of sales under execution. (2) That the land covered by the deed of trust is the separate estate of Mrs. Ella Corbett, wife of W. C. Corbett, and one of the plaintiffs, and that this fact was known to Sweeney before he took the deed of trust, and to Giles before the transfer of the notes and trust deed to him. (3) That 200 acres of the land is and was at the time of the execution of the trust deed the homestead of plaintiffs, which fact was also known to Sweeney and Giles. (4) That on June 5th Corbett had paid to Giles \$500 in consideration of which Giles had agreed and promised to extend the time of payment of the interest due on the note for ninety days. (5) That defendants are claiming \$3,000 as attorney's fees and \$3,000 as trustee's commissions for making such sale, and that said attorney's fees are an outrageous and extortionate charge.

It was alleged that the property was of the value of \$90,000, and that it would be sacrificed at such sale if it was allowed to be sold, and that said W. C. Corbett had tendered the interest due on the note, which defendants refused to receive. Defendants by their sworn answer denied specifically and in detail each of the material allegations of fact of the petition. They denied that the \$500 was paid by Corbett to Giles upon any agreement for extension, but alleged that it was simply paid upon the interest on May 30th, when the second installment was due, with a promise by Corbett to pay the balance in a few days. The answer denies that the property is the separate property of Mrs. Corbett, or that any part thereof is the homestead of plaintiffs, alleging that the land stood upon the public records in the name of W. C. Corbett and was acquired by him during the marriage, and denying that it was paid for with the separate means of Mrs. Corbett, alleged that if it was, neither Swee-

ney, when he took the deed of trust, nor Giles, when he acquired the note, had any notice or knowledge of any claim or interest of Mrs. Corbett therein as her separate estate. The facts going to show that no part of the land was the homestead of plaintiffs, but that their homestead was upon certain lots in the city of Houston, were fully set out, in connection with the specific denial of the homestead claim. It was alleged that the note provided for the payment of \$3,000 attorney's fees, that the same had been placed in the hands of an attorney for collection, and that defendants had agreed to pay them said amount and that the amount was reasonable. The case was heard upon the pleadings and evidence, which is very full, filling 128 pages of a statement of facts. There is no specific assignment of error, nor briefs, but since the oral argument upon submission, on the suggestion of the court, each party has filed a brief written statement. That of appellants is confined to the first ground for the injunction, as above set out, to wit, that written notice of such sale was not given by the trustee as required in case of sales under execution. We think this question is settled by the decision of the Supreme Court in *Fischer v. Simon*, 95 Tex. 234, 66 S. W. 447.

[1] It is insisted by appellant that since the adoption of the Revised Statutes of 1911 a different construction of the particular provision in question in article 3759 of that revision is required, and that *Fischer v. Simon* is not applicable. Article 3759 in the revision of 1911 is in the exact language of article 2369 of the revision of 1895, and of the original act of March 21, 1889. The Revised Statutes of 1911 contain the same provision as that contained in section 19, General Provisions of Revised Statutes of 1895 (section 16, General Provision, R. S. 1911), to wit: "The provisions of the Revised Statutes, so far as they are substantially the same as the statutes of this state in force at the time when the Revised Statutes shall go into effect, or of the common law in force at said time, shall be construed as continuations thereof, and not as new enactments of the same." What is said by the Supreme Court in the case cited is exactly applicable to a case arising since the adoption of the Revised Statutes of 1911. It was not necessary that the trustee give to appellant Corbett written notice of the sale, as is required in case of sale under execution. This is, we think, further emphasized by the provisions of the act of 1903, c. 77, relating to sales under execution, which is as follows: "But nothing herein shall affect the method of advertising land under powers conferred by any deed of trust or other contract lien." Article 3757, R. S. 1911.

[2, 3] In addition to the specific denial by appellee Giles of the allegations of the pe-

tion, as to the agreement, upon payment of the \$500, to extend the time of payment then due for 90 days, it is urged by appellee that such agreement, if made, was without consideration as appears from plaintiff's petition, and was nudum pactum—citing *Helms v. Crane*, 4 Tex. Civ. App. 89, 23 S. W. 392; *Yeary v. Smith*, 45 Tex. 71. Inasmuch as two installments of interest were due, the payment of a part thereof furnished no consideration for the promise. Still, if, relying upon such promise, appellant Corbett relaxed his efforts to procure the money, which otherwise he could and would have procured in time to have avoided the exercise of the option by appellee Giles to declare the notes due, we are inclined to think that such action would have worked an equitable estoppel upon Giles to declare the notes due at that time. This, however, is not material in view of the specific denial.

[4] As to the other grounds for the injunction, the specific denial by the answer, especially as it was supported by abundance of evidence on the hearing, left it largely in the discretion of the trial court whether the temporary injunction should be dissolved or continued to the hearing. 1 *Joyce on Injunctions*, §§ 307, 308. It is not necessary to refer to the voluminous testimony on the hearing further than to say that while there are sharp conflicts upon the material facts, the judge hearing the motion had the witnesses before him, and was in a better position than this court to judge of their credibility, and the weight of their testimony. It was amply sufficient to authorize the conclusion that there is no merit in the application for the temporary injunction. As we have seen, he is vested in such cases with a large discretion, and we cannot say that he erred in granting the motion to dissolve. If in fact the property is the separate estate of Mrs. Corbett, or if 200 acres thereof was at the date of the execution of the deed of trust the homestead of appellants, the sale under the trust deed will not affect their rights growing out of these facts.

[5] In the matter of attorney's fees and commissions of the trustee, if they are not a proper charge, the law affords appellants ample protection without enjoining the entire sale. Appellants would have occupied a better position in a court of equity if they had paid or offered to pay the debt and interest and sought only relief against a sale for these alleged extortionate fees and commissions. They have no right to stop the sale for the entire debt on the ground that part of it is not due. *Railway Co. v. Presidio County*, 53 Tex. 522; *Rosenberg v. Weeks*, 67 Tex. 584, 4 S. W. 899.

We conclude that the judge did not err in granting the motion to dissolve, and the judgment is affirmed.

Affirmed.

ARMOUR & CO. v. MORGAN.

(Court of Civil Appeals of Texas. Texarkana. Nov. 14, 1912. Rehearing Denied Nov. 28, 1912.)

1. MASTER AND SERVANT (§ 286*)—ACTION FOR INJURIES—QUESTION FOR JURY—FAILURE TO GUARD DANGEROUS MACHINERY.

In an action by a minor servant for personal injuries, held, that the question of defendant's negligence in failing to guard dangerous machinery was for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1001, 1008, 1008, 1010-1015, 1017-1033, 1036-1042, 1044, 1046-1060; Dec. Dig. § 286.*]

2. MASTER AND SERVANT (§ 201*)—FELLOW SERVANTS—CONCURRENT NEGLIGENCE OF MASTER AND FELLOW SERVANT.

Where the master's negligence in failing to guard dangerous machinery is the proximate cause of injury, he is not relieved from liability by the fact that plaintiff's fellow servant was negligent in operating the machine.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 515-534; Dec. Dig. § 201.*]

3. TRIAL (§ 260*)—REQUESTS FOR INSTRUCTIONS—INSTRUCTION OWNER GAVE.

Where the main charge in a servant's action for injuries affirmatively required the jury to find both that the failure to provide safeguards was negligence and that such failure was the proximate cause of the plaintiff's injury, the court was not required to further present the issue of proximate cause by a special charge.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651-659; Dec. Dig. § 260.*]

4. TRIAL (§ 252*)—INSTRUCTIONS—CONFORMITY TO PROOF.

There must be some proof that rules were promulgated to promote the safety of an inexperienced minor employé, or a specific order given as to the manner in which his work should be carried on, before it is error to refuse to submit an instruction based on contributory negligence for violating such known rules or specific order.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 506, 596-612; Dec. Dig. § 252.*]

5. MASTER AND SERVANT (§ 270*)—UNGUARDED MACHINERY—EVIDENCE.

In an action for injuries from dangerous unguarded machinery, where a question as to whether it could have been guarded without interfering with its operation was in issue, evidence that a guard was placed over part of it to show that it was practicable to have it so guarded, and that such guard did not interfere with its operation, was competent.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 913-927, 932; Dec. Dig. § 270.*]

6. MASTER AND SERVANT (§ 203*)—CONTRIBUTORY NEGLIGENCE—ASSUMED RISK.

The defenses of assumption of risk and contributory negligence are fundamentally inconsistent with each other, and the existence of one necessarily excludes the other.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 538-543; Dec. Dig. § 203.*]

7. APPEAL AND ERROR (§ 1066*)—HARMLESS ERROR—INSTRUCTIONS—ISSUES AND PROOF.

Where the evidence in a servant's action for injuries raised the issue of contributory negligence, but did not warrant an issue of his assumption of risk, error in submitting that issue conjunctively with the inconsistent issue

of contributory negligence was harmless to defendant.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4220; Dec. Dig. § 1066.*]

Appeal from District Court, Tarrant County.

Action by Eddie Morgan, by next friend, against Armour & Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Eddie Morgan, a boy about 15 years of age, had the entire forefinger of his left hand severed, and the thumb on that hand mashed and broken, causing it to be crooked and stiff, by being caught in the "lifter" of a machine being operated by appellant in a department of its packing plant at North Ft. Worth. The machine is used to place and brad round pieces of tin, called "ears," on tin buckets, and is described as being constructed of a metal frame and in shape like a table. The top is flat and is 24 inches wide, 5 feet long, and 31 inches from the floor. Immediately underneath the top of the frame is a board of iron 6 inches wide; otherwise it is open underneath. The legs are bolted to the floor of the room, and also from each corner of the frame rods are run to the joists of the flooring and securely bolted. There is located a slot, or feeder, in which the pieces of tin, or "ears," are placed, 17 inches higher than the top of the frame and 12 inches outside of it, and on the top and about the center are located two sets of dies. The machinery which operates the driving part of the machine is located underneath the frame. A portion of this machinery underneath is called a "lifter." It is operated by a pedal. The operator presses the pedal with his right foot, and the lifter falls down about $4\frac{1}{2}$ inches and comes up and permits the two dies to come together and brad the ears to the bucket. Four boys are employed to operate the machine; one to press the pedal, one to feed the slot, or ear chute, one to bring buckets to the machine to be eared, and one to carry away and stack same after they are eared. In the course of feeding the ears in the slot, or chute, it is usual for a number of the ears to fall on the floor near and by the machine, and it is required of and made a part of the duties of the feeder of the slot, or ear chute, to pick the ears from the floor. Eddie Morgan was employed by appellant as feeder of the slot, or ear chute. According to the proof made by appellee, the operator of the pedal shut off the motive power from the machine and brought it to a standstill and went to get a drink of water in the other end of the building, telling Eddie that was what he was going to do. While the operator was away and the machinery was not in motion, Eddie got off his stool and knelt on the floor, using his right hand to pick up the ears that had fallen on the floor; his left hand partly rest-

ing on the top of the machine. The operator got a drink of water, came back, and suddenly and without warning pressed his foot against the pedal, and the machinery started up. The vibration of the machine in operation immediately jarred Eddie's left hand off the table downward, and it was caught in the stroke of the lifter and injured. There was evidence offered by appellant that Eddie Morgan was sitting on a stool, stooping over picking up ears from the floor while the machine was in motion, and the stool slipped out from under him, and in his effort to catch he involuntarily threw his left hand under the machine, and the lifter caught it. The jury settled this conflict against appellant's contention. The machinery underneath the frame had no fender around it and was not guarded. It was shown that it was practicable and feasible to operate the lifter and machine with a guard or fender.

Appellee pleaded three grounds of negligence, but the court did not submit to the jury but one of the grounds for recovery, which was the second ground in the petition, and that was the failure to safeguard the cogwheels and other machinery under the table. The appellant answered by general denial, and specially pleaded that Eddie Morgan assumed the risks incident to his employment, and that he was injured by reason of his own contributory negligence and by reason of the negligence of a fellow servant.

The evidence warrants the conclusion that the appellant was guilty of negligence in failing to provide guards or fenders to dangerous machinery as pleaded, proximately causing the injury to the minor, and that the minor did not assume the risk and was not guilty of contributory negligence. The evidence warrants the amount of the verdict.

Capps, Cantey, Hanger & Short, and Wm. L. Evans, all of Ft. Worth, for appellant. A. J. Clendenen and Ben M. Terrell, both of Ft. Worth, for appellee.

LEVY, J. (after stating the facts as above). [1] The first assignment predicates error upon the refusal of the court to give a peremptory instruction in favor of the appellant. The evidence was sufficient to make an issue, and require the court to submit it to the jury, of negligence *vel non* in the company in failing to safeguard the dangerous piece of machinery under the frame. The "lifter" was a device made of iron, and in operation rose up and came down in a $4\frac{1}{2}$ -inch stroke, and was without guard or fender. Only boys were employed to work at the machine. For the want of a fender, or guard, the hand of the boy Eddie Morgan was caught and mangled in the "lifter" while he was in the discharge of his

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Index

duties in its immediate vicinity. The personal negligence of the company was the only ground of negligence that was submitted to the jury. The assignment is overruled.

[2] The third and fourth assignments predicate error upon the refusal of the court to give the special charge authorizing a verdict for appellant upon the finding that the negligence of Tom Driscoll, a fellow servant of Eddie Morgan, occasioned the injury. It was not error to refuse the charge, for the fellow-servant doctrine relieving a master from liability for injuries inflicted was not applicable to the ground that the liability of the company was made to depend by the charge of the court to the jury and under the evidence. The charge of the court only authorized a recovery of damages from appellant upon the finding by the jury of personal negligence of the company in failing to safeguard dangerous machinery, and such negligence being the proximate cause of the injury. The pleaded ground of liability predicated upon the negligent performance of duties by the coworker Driscoll was not submitted to the jury, and therefore was not an issue of liability before the jury. So if the injury to Eddie Morgan was traceable to the personal negligence of the company in failing to safeguard the machinery, as the evidence amply went to show, then the further fact that Driscoll, a coworker in the same common employment, was also negligent in operating the pedal, would not relieve the company of liability. It is the rule that, if the negligence of the master mingles with that of a fellow servant of the injured worker, the master is liable. *Railway Co. v. Jones*, 133 S. W. 744, and authorities there cited.

[3] The special charge was not required to further present the issue of "proximate cause," for the main charge affirmatively required the jury to find both that the failure to provide safeguards or fenders was negligence on the part of the company, and "that such failure was the proximate cause of the plaintiff's injury." Before the jury could return a verdict for appellee under this charge, they were required to find under all the evidence that the proximate cause of the injury was the personal negligence of the company.

The refusal by the court to give the special charge as written, complained of in the fifth assignment, does not furnish a reason for the reversal of the judgment. The charge precluded a recovery by the appellee upon the finding that it was a negligent disobedience of the rules of the shop and the instructions given him for Morgan to lean his body over from the stool he was sitting on in order to pick up the "ears" from the floor while the machine was running, if by reason of so doing he was injured. The charge, as seen, grouped together the two

facts of violating the rules of the shop and the instructions given Morgan. The testimony in the record bearing at all upon "rules" or upon "instructions given" was that by Eddie Morgan and appellant's foreman. The evidence of Eddie Morgan was that the foreman had previously directed him to pick up from the floor the "ears" that had fallen, but that he was to perform this duty when the machine was not in motion, because if he stopped his work of feeding the ear chute the machine thereby stopped earing buckets. The evidence of the foreman is substantially to the same effect. The foreman testified: "I gave the boy instructions when he went to work there. I told him to feed those ears in the chute, that was his work, that is all he has to do, to keep those ears in the chute so as to supply the machine as they were used up. I had him on a stool while he was doing that. * * * They do drop ears on the floor, they drop lots of them, and they are left there until we get through. After we get through running the machine, we clean up and pick up those ears, but not while we are in operation. The reason we do not do it when it is in operation is because it would stop the machine and all the rest of the machines. It takes three or four persons to keep the machine going. That boy is supposed to stay there and feed the ears while the machine is going; I instructed him to that effect." Eddie Morgan further testified that he did not know of the danger of operation of the machinery, and had received no warning of any danger incident to his work. The only reasonable conclusion from the testimony is that an economical rule of work was devised that an employé was directed to follow. The evidence would not warrant the finding that a specific order was given the boy as to the manner in which the work should be carried on. There is no proof of any "rule of shop" of instructions as to danger of the work devised and promulgated for the safety of the minor employées operating the machine.

[4] It is believed that there must be some proof that rules were devised and promulgated by the master to promote the safety of an inexperienced minor employé, or a specific order given as to the manner in which the work shall be carried on, before there would be error in refusing to submit to the jury an instruction based on contributory negligence for violating such known rules or specific order. The court submitted a question of contributory negligence in the main charge.

[5] Assignments Nos. 6 to 15, inclusive, predicate error upon the admission of certain evidence. After the injury to Eddie Morgan, a guard, or fender, was placed by appellant over the part of the machinery which caused the injury. The appellee proved the fact that a fender, or guard, was placed over that part of the machinery for the purpose of showing that it was practicable and prop-

er to have a guard around such part of the machine to make it safe from the dangers of its operation, and that the guard, or fender, did not interfere with the operation of the machine or any portion of it. Appellant contends that it was error to allow such proof to be made, and cites the McGowan (73 Tex. 355, 11 S. W. 836), and like cases in support of the point. The rule making incompetent evidence of subsequent changes or repairs in the machinery, as laid down in the McGowan Case, was differentiated in the later case of *Railway Co. v. Johnston*, 78 Tex. 536, 15 S. W. 104. See, also, *Railway Co. v. Gay*, 88 Tex. 111, 30 S. W. 543. In the *Johnston Case*, supra, the testimony there was held competent for the purpose for which it was offered and admitted. In the instant case appellees alleged that a guard, or fender, could have been placed over the "lifter" so as to render injury therefrom impossible to the operatives of the machine, without in any way interfering with the operation of the machine or any part of it. Appellant pleaded that the machine in question was of the most approved design, and that it was not practicable, safe, nor proper to have other guards or appliances around it than were on it at the time of the accident. Appellant proved by its foreman that the machine was a new machine of the latest design, modern in every particular, and exactly like those in the most up-to-date tinshops in the country. As there was no allegation, or recovery sought thereupon, that the machinery was defective or out of repair, in view of the record it is believed that the rule laid down in the *Johnston Case*, supra, proves the question here and makes the testimony competent for the purpose for which it was offered and admitted. The court excluded from its consideration by the jury that part of the evidence in the fifteenth assignment relating to a prior injury of an employé. The assignments are overruled.

The second, sixteenth, eighteenth, nineteenth, twentieth, twentieth-first, and twenty-second assignments are overruled as being without injury authorizing a reversal of the judgment.

[8, 7] By the seventeenth assignment error is predicated in the ninth paragraph of the court's charge, which was to the effect that the jury would return a verdict for appellant if Eddie Morgan knew, or in the performance of his duties about the earing machine would have discovered, the dangers to which he was exposed, and that he failed to exercise ordinary care for his own safety and was injured by reason thereof. The precise point made is that both the issue of assumed risk and of contributory negligence was raised by the evidence and should have been submitted as separate defenses, and that it was error to connect the two defenses by "and" as the court did. The case of

Railway Co. v. Conroy, 83 Tex. 214, 18 S. W. 609, is cited by appellant as ruling the point. In the instant case, though, it could not be said that that case rules this one, for both defenses claimed were not raised by the evidence, and as a consequence the objection to the court's charge would afford no ground for reversal, for no injury resulted to appellant. According to the testimony relied on by appellant, the injury was occasioned by Eddie Morgan stooping partly over from the stool to the floor to pick up the "ears," and the stool overturning under him overbalanced him, and in the effort to prevent his falling Morgan involuntarily thrust his hand into the opening of the "lifter" while the same was in motion, causing his hand to be caught and injured. Therefore, if true that Morgan in the course of his employment negligently assumed such a position on the stool as to cause it to turn over, and such negligence led directly or contributed to the injury, then the issue made by the testimony for the jury was one of contributory negligence rather than assumed risk. But if the stool turning under him while performing the duty of picking up "ears" led to his injury and was a risk involved in the performance of his duties, and assuming that he had been instructed and cautioned as to the danger, and the risk was understood, then rather should Eddie Morgan be charged with having assumed the risk. We think, though, the evidence presented the issue of contributory negligence rather than assumed risk. In another paragraph the court submitted the issue of contributory negligence. However, from a consideration of all evidence of both appellee and appellant, we do not think both defenses exist. The defenses of assumption of risk and contributory negligence are fundamentally inconsistent with each other, and the existence of one of them necessarily excludes the other. As the entire testimony in the record does not, we think, warrant an issue of the minor in this case assuming the risk, the error in the charge is harmless.

The judgment is affirmed.

CHAMBERS v. WYATT.

(Court of Civil Appeals of Texas. El Paso.
Nov. 14, 1912. Rehearing Denied
Dec. 18, 1912.)

1. CANCELLATION OF INSTRUMENTS (§ 59*)— FRAUD—IMPROVEMENTS.

Where a grantee obtained a conveyance by fraud, and entered into possession and made improvements while wrongfully in possession, he could not recover the value of the improvements on the setting aside of the deed.

[Ed. Note.—For other cases, see *Cancellation of Instruments*, Cent. Dig. §§ 119-125; Dec. Dig. § 59.*]

2. ESTOPPEL (§ 59*)—SILENCE—PERMITTING IMPROVEMENTS.

A grantee who obtained his deed by fraud cannot rely on an estoppel against the grantor

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

to deny his title, based on her silence while he was making improvements.

[Ed. Note.—For other cases, see *Estoppel*, Cent. Dig. §§ 146, 147; Dec. Dig. § 59.*]

2. CANCELLATION OF INSTRUMENTS (§ 24*)—CONDITIONS PRECEDENT—FRAUD.

An administrator of a deceased grantor, who sues to set aside a deed as having been procured by fraud of the grantee, need not offer to return the taxes paid on the property by the grantee.

[Ed. Note.—For other cases, see *Cancellation of Instruments*, Cent. Dig. §§ 33-38; Dec. Dig. § 24.*]

4. DEEDS (§ 165*)—CANCELLATION—GROUNDS.

Where a deed is absolute on its face, agreements by the grantee to support the grantor for life and pay her a specified sum are covenants only, and a failure to perform them will not alone authorize the cancellation of the deed; but an action lies for sum unpaid, secured by an implied lien on the premises.

[Ed. Note.—For other cases, see *Deeds*, Cent. Dig. § 521; Dec. Dig. § 165.*]

5. DEEDS (§ 70*)—CANCELLATION—GROUNDS—FRAUD.

The rule that the failure of a grantee to perform covenants binding him to support the grantor for life and pay to her a specified sum, in consideration of which a deed was executed, is not fraud justifying the cancellation of the deed does not apply where the promises are made to defraud and without any intent at the time of performing them; but an instruction authorizing a finding of fraud on such theory is fatally defective, where it ignores the element that, when made, the promises were fraudulent and without any intent of performing them.

[Ed. Note.—For other cases, see *Deeds*, Cent. Dig. §§ 165-182; Dec. Dig. § 70.*]

6. CANCELLATION OF INSTRUMENTS (§ 56*)—CANCELLATION—GROUNDS—FRAUD.

Where a grantee in a deed of a lot procured by fraud the insertion of a provision conveying also another lot, a recovery on the ground of fraud was limited to a cancellation of the deed as to the latter lot.

[Ed. Note.—For other cases, see *Cancellation of Instruments*, Cent. Dig. §§ 112, 113; Dec. Dig. § 56.*]

7. WITNESSES (§ 359*)—IMPEACHMENT—PROOF OF CONVICTION OF FELONY.

In the absence of proper objection, the fact that a witness has been convicted of felony may be shown by parol.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 1161, 1162; Dec. Dig. § 359.*]

8. APPEAL AND ERROR (§ 742*)—ASSIGNMENTS OF ERROR—REQUISITES.

Where assignments of error are submitted as propositions, and as such they are multifarious, they will not be considered on appeal.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 3000; Dec. Dig. § 742.*]

9. WORK AND LABOR (§ 22*)—RECOVERY FOR SERVICES RENDERED—PETITION—SUFFICIENCY.

A petition, in a suit for the cancellation of a deed and for recovery for services rendered by the grantor to the grantee, which alleges that after the conveyance and until a short time prior to the grantor's death she worked for the grantee as a servant, and that the reasonable value of her services was a specified sum per week, for which amount a recovery was demanded, stated facts supporting a finding for wages due for services performed.

[Ed. Note.—For other cases, see *Work and Labor*, Cent. Dig. § 41; Dec. Dig. § 22.*]

Appeal from District Court, Harris County; Wm. Masterson, Judge.

Action by P. B. Wyatt, administrator of Catherine Williams, deceased, against W. J. Chambers. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

W. H. Ward, of Houston, for appellant.
A. C. Van Velzer and Fred R. Switzer, both of Houston, for appellee.

HIGGINS, J. Catherine Williams, an aged and ignorant negress, owned and resided upon lots 4 and 5, in block 49, in the Baker addition to the city of Houston, and by general warranty deed, dated October 8, 1907, she conveyed the same to appellant, reciting a consideration of \$10 in cash, the payment by Chambers of taxes due the city of Houston, the county of Harris, and the state of Texas, and other valuable considerations in hand paid, the receipt of which was acknowledged. Chambers at once went into possession of the premises, built a residence upon lot 5, in which he and his family lived, and made other improvements. The house in which the negress had lived for many years was moved upon lot 4 and repaired by Chambers, and she continued to live therein until a few days before her death, when she was removed to another place in the city by a niece. She died during the month of July, 1910, and on August 2d of that year this suit was filed to recover said premises by the appellee, as administrator of her estate. A recovery of the premises is sought upon two theories: First, that Catherine Williams only intended to convey lot 5, and that lot 4 had been inserted in the deed without her knowledge or consent, and she had executed the same upon the fraudulent representation and under the belief that lot 5 only was conveyed by the deed; second, that the conveyance was made in consideration of representations and promises by Chambers that he would pay the back taxes due upon the premises, would support and care for the grantor during her lifetime, and would pay her the further sum of \$700 in cash; and there is a general allegation that these representations and promises were fraudulent, without particularizing in what the fraud consisted. In the petition it was further alleged that after the conveyance, and until a short time prior to her death, Catherine Williams had worked for Chambers as a servant, and the reasonable value of her service was \$3 per week, for which amount a recovery was also sought. Defendant answered by general demurrer, general denial, plea of estoppel predicated upon the theory that immediately after the execution of the deed he went into possession with the full knowledge and consent of Catherine Williams, made permanent and valuable improvements upon the land, exercised control of and asserted his ownership thereof without

protest on her part; wherefore he pleaded an estoppel to deny his ownership of the premises. He also pleaded permanent and valuable improvements made upon the premises in good faith, and prayed that he be allowed the value thereof, in the event of a recovery by plaintiff of the land.

[1, 2] As to those assignments relating to the plea of estoppel and the claim for the value of the improvements, it is sufficient to say that if the plaintiff was entitled to recover it was by virtue of fraud practiced by the defendant in obtaining a conveyance of the premises; and, his possession and apparent title being based upon his own fraud, the fact that he went into possession as a result of that fraud, and while wrongfully in possession thereof made such improvements and asserted such ownership, would give him no right to claim the value of his improvements, nor to assert an estoppel. Neither estoppel, nor a claim for valuable improvements made in good faith, could possibly be predicated upon rights which originated in fraud.

[3] Error is assigned to the action of the court in overruling the general demurrer, the proposition advanced being that the petition was insufficient, because appellee did not offer to return the taxes paid upon the property by the appellant. As above stated, appellee was asserting a legal right to recover the premises predicated upon fraud alleged to have been perpetrated by the grantee in obtaining the deed, and, under such circumstances, no equitable right of reimbursement for taxes paid existed in favor of appellant.

Error is assigned to the refusal of the court to give a special charge to the effect that a failure upon part of defendant to pay the cash consideration of \$700, in accordance with his agreement, would not alone be sufficient to authorize a recovery; and appellant also complains of paragraph 5 of the court's charge, wherein the jury, in effect, are instructed to find for the plaintiff if they believe from the evidence that it was agreed between Catherine Williams and appellant that appellant was to pay the sum of \$700 in cash, the back taxes on the premises, and to provide her with the necessaries of life as long as she lived, and that the said Chambers had failed to keep such promises. These assignments relate to what we conceive to be the controlling question in the case, and will be considered together.

[4] In the paragraph of the court's charge above referred to, the court proceeded upon the theory, and the jury were, in effect, charged, that mere failure upon the part of Chambers to comply with the promises made by him, and in consideration of which the deed was executed, was sufficient to authorize a cancellation of the deed and recovery of the premises. The deed, however, was absolute upon its face, and such agreements were covenants only upon the part of Chambers, and his failure to perform the same

would not alone authorize the cancellation of the deed and recovery of the premises. *Odom v. Odom*, 139 S. W. 900; *Mayer v. Swift*, 73 Tex. 369, 11 S. W. 378; *Byars v. Byars*, 11 Tex. Civ. App. 565, 32 S. W. 925; *Selari v. Selari*, 124 S. W. 997; *Rainey v. Chambers*, 56 Tex. 17; *Beaumont Carriage Co. v. Price*, 104 S. W. 499. We do not desire, however, to be construed as holding that appellant was entirely absolved from complying with his contract; upon the contrary, it is well settled that he could be forced to comply with his promises. He is, of course, relieved by the death of Catherine Williams from any further obligation to support her, and it is undisputed that he has paid the taxes which he contracted to pay; but as to the \$700, if it remains unpaid, a recovery therefor could be had. *Mayer v. Swift*, supra; *Rainey v. Chambers*, supra. And while there exists no express lien to secure its payment, yet he has an implied lien upon the premises, securing the same.

[5] From the authorities cited above, it will be noted that failure to keep a promise to perform some act in the future will not be regarded as fraud in its legal acceptation, although the failure to keep the promise is wholly without excuse; otherwise every breach of contract would amount to fraud, and the practical effect of the portion of the court's charge above referred to was to treat the failure of the defendant to keep his promises such fraud as would vitiate the conveyance. There is a well-recognized exception, however, to this rule, where the representations and promises are made for the purpose of defrauding and deceiving, and without any intention, at the time the same are made, of performing the same. *Railway Co. v. Titterington*, 84 Tex. 218, 19 S. W. 472, 31 Am. St. Rep. 39; *Railway Co. v. Smith*, 98 Tex. 553, 86 S. W. 322; *Mays v. Cearley*, 138 S. W. 165; *Ins. Co. v. Seidel*, 52 Tex. Civ. App. 278, 113 S. W. 945. If appellee was entitled to recover upon the allegation that fraudulent representations and promises made by Chambers were the consideration for which the deed was executed, it is by virtue of this exception to the general rule, and the court evidently predicated his charge upon the principle enunciated in the cases last cited; but it is fatally defective in entirely ignoring the essential element constituting fraud under such circumstances, which is that at the time the promises were made they must have been fraudulently made for the purpose of deceiving, and without any intention at the time of performing the same.

[6] The second, ninth, tenth, and eleventh assignments question the sufficiency of the testimony to authorize a verdict in favor of the plaintiff, and in view of a retrial we refrain from a discussion thereof. In this connection, however, it may be said appellee seems to be contending that, if lot No. 4 was fraudulently inserted in the deed, it

would authorize a recovery of both lots. In this view, however, we do not concur, and are of the opinion that it would only authorize a recovery of 4. It may be well, also, in considering the evidence bearing upon the allegation that the deed for the premises was obtained by fraudulent representations and promises made by the appellant, to call attention to the case of *Beaumont Carriage Co. v. Price*, supra, from which we quote with approval the following: "It must, however, be made to appear by some testimony, direct or circumstantial, that at the time the party gave the promise there was no intention on his part to perform it. It is clearly not enough to prove the nonperformance; and it will not do to say that from the bare fact of nonperformance it could be inferred that the intent not to perform originally existed, because, if this were allowed, any contemporaneous agreement could be attached to a writing by parol, and the rule of law on this subject would be useless."

[7] The defendant's witness Robert Clark was shown to have been convicted of a felony by his own testimony and admissions, and in the absence of proper objection this can be shown by parol, and we therefore overrule the seventh and eighth assignments.

[8] The fifteenth and sixteenth assignments are submitted as propositions. As such they are multifarious, and are not entitled to consideration, and are not considered.

[9] The seventeenth assignment is overruled, as we are of the opinion that the pleadings are sufficient to support a finding in favor of appellee for wages alleged to be due Catherine Williams for services performed.

For the errors indicated, the cause is reversed and remanded.

HARPER, C. J., did not sit in this case.

GORDON et al. v. STATE et al.

(Court of Civil Appeals of Texas. Galveston.
Nov. 23, 1912. Rehearing Denied
Dec. 12, 1912.)

1. APPEAL AND ERROR (§ 719*)—FUNDAMENTAL ERROR—AMENDMENTS TO PLEADINGS.

The error in allowing an amendment to a pleading is not error apparent of record, which must be considered without assignment of error, where the amendment is only made to appear by motion to correct the record and proceedings thereon.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2968-2982; Dec. Dig. § 719.*]

2. APPEAL AND ERROR (§ 773*)—FAILURE TO FILE APPELLANT'S BRIEF.

The court may dismiss an appeal for want of prosecution without looking into the record, where appellant's brief is not filed in time, and there is no agreement waiving the statutory requirement as to filing.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3104, 3108-3110; Dec. Dig. § 773.*]

3. TAXATION (§ 595*)—RECOVERY OF TAXES—LIABILITY OF VENDOR—JUDGMENT OVER.

Where a defendant in an action for delinquent taxes prayed that its vendors should be made parties, and that, if plaintiff should recover taxes, penalties, and costs or any part thereof, the defendant should recover judgment over against the vendors for such amount under their warranty, judgment could be rendered against the vendors for taxes, penalties, and costs.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1218; Dec. Dig. § 595.*]

Error from District Court, Sabine County; W. B. Powell, Judge.

Action by the State of Texas against the Angelina County Lumber Company, and it made W. D. Gordon and another parties. From a judgment for plaintiff against defendant, and in its favor against W. D. Gordon and another, the latter bring error. Affirmed.

W. D. Gordon and Thos. J. Baten, both of Beaumont, for plaintiffs in error. Mantooth & Collins, of Lufkin, for defendants in error.

REESE, J. The state of Texas brought suit in the district court of Sabine county against the Angelina County Lumber Company to recover state and county taxes delinquent for many years on a certain tract of land in Sabine county then owned by the Lumber Company, and to establish and foreclose the tax lien. The taxes and penalties amounted to \$444.13, which, with the interest due thereon, was sued for. The entire amount due, including interest to the date of trial and charges allowed by law, was \$780.54, for which amount judgment was rendered. The defendant filed its answer, alleging that it had bought the land from W. D. Gordon and E. A. Perry, paying therefor the sum of \$11,025 and that its said vendors had conveyed the land to it with covenants of general warranty. It was prayed "that the said Gordon and Perry be made parties, that service be had upon them, and that, in case the plaintiff should recover against this defendant for the said taxes, penalties, and costs, or any part thereof, this defendant the Angelina County Lumber Company recover judgment over against said W. D. Gordon and E. A. Perry for such amount as may be recovered against it by plaintiff herein, for all costs of suit, and for such other and further relief, general and special, as your defendant may be entitled to." Copies of this answer and of plaintiff's petition were served upon the said Gordon and Perry, who appeared and answered by general demurrer and general denial. Judgment was rendered in favor of the state against the Angelina County Lumber Company for taxes, interest, penalties, and costs, amounting to \$780.54, with foreclosure of tax lien. Judgment was also rendered in favor of the lumber company against Gordon and Mrs. Perry for the same amount. There is no statement of

facts, conclusions of fact and law, nor bills of exceptions in the record. The court filed conclusions of fact and law upon hearing the motion of Gordon and Mrs. Perry to correct the record as hereinafter set out.

Before the judgment was rendered, counsel for all of the parties except Gordon appeared, and agreed that the cross-petition of the Lumber Company might be amended by interlining after the figures \$444.13, where they occurred in the cross-petition against Gordon and Mrs. Perry, the words "with interest and penalty." The court supposed that these attorneys also represented Gordon, but upon the hearing of his motion to correct the record by erasing these words found as a fact that the interlineation was made without Gordon's knowledge or consent, and was, as to him, improper. The court further found, however, that this amendment by interlineation of the words referred to was immaterial, and refused to disturb the judgment.

[1] Prior to the submission of the case, on motion of appellee, the briefs filed for appellants Gordon and Perry were stricken out. The case was set for submission on the 14th of November, and the briefs were not filed until November 9th. There was no agreement waiving any of the requirements of the statute with regard to filing of briefs. *Niday v. Cochran*, 48 Tex. Civ. App. 259, 106 S. W. 462. Notwithstanding the absence of briefs, appellant in oral argument contends that the action of the court in allowing the amendment of the cross-petition referred to, particularly as to appellant Gordon, was fundamental error apparent on the face of the record which this court is required to consider without briefs. This amendment is only made to appear by the motion to correct the record and the proceedings thereon. Of course, this pleading as it is copied in the record does not in any way inform us that any amendment was made. It is only by examination of the motion to correct and the court's conclusion thereon that the error can be discovered, if in fact there was any error. If the proceedings in question in fact constituted error, certainly it is not such error apparent of record as we are required to consider without assignment. *Houston Oil Co. v. Kimball*, 103 Tex. 94, 122 S. W. 533, 124 S. W. 85. We are not certain that we are required to notice even fundamental error, if the judgment was such as the court was empowered to render, in the absence of briefs for appellants, in view of rule 34 (142 S. W. xiii).

[2] We might properly have dismissed the appeal for lack of prosecution without looking into the record at all. We will say, however, that an examination of the record shows that in fact no error apparent upon the record, or otherwise, was committed in the matter complained of.

[3] Appellants complain that without this

amendment of the cross-petition judgment could not be rendered against them for more than the taxes without penalty or interest. We have examined this pleading carefully, and our conclusion is that the allegations are sufficient, without the insertion of the words referred to by way of amendment, to authorize the judgment, especially under the prayer for general relief in addition to the prayer for specific relief.

We conclude that, first, there is no error; and, second, that, if there is, it is not such fundamental error apparent on the face of the record as would authorize a reversal of the judgment in the absence of briefs for appellants.

The appeal is without merit. No question is made as to the liability of appellants for the full amount of the judgment. They presented no defense to the action, and do not pretend that they have any.

The judgment is affirmed.
Affirmed.

LEE et al. v. SIMMONS.

(Court of Civil Appeals of Texas. Austin.
Oct. 30, 1912. Rehearing Denied
Dec. 11, 1912.)

1. APPEAL AND ERROR (§ 742*)—REVIEW—BRIEFS—RULINGS ON EVIDENCE—REVIEW.

Rulings on evidence will not be reviewed on appeal, where appellant's brief fails to disclose the grounds of objection made at the trial.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 3000; Dec. Dig. § 742.*]

2. TRESPASS TO TRY TITLE (§ 41*)—FINDINGS.

In trespass to try title, evidence held to sustain findings that the numbers of certain surveys in controversy were changed in the Land Office by the commissioner, and that direction was given by him to the surveyor to make similar changes in the field notes to conform them to the land office record.

[Ed. Note.—For other cases, see *Trespass to Try Title*, Cent. Dig. §§ 62, 63; Dec. Dig. § 41.*]

3. APPEAL AND ERROR (§ 1029*)—REVIEW—PREJUDICE.

Errors of law alleged to have been committed at the trial of an action of trespass to try title would not justify a reversal of the judgment for defendant, where the record failed to show that plaintiff had any title to the land.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4035, 4036; Dec. Dig. § 1029.*]

Error from District Court, Brown County; F. M. Newman, Special Judge.

Trespass to try title by Cumi Lee and others against T. N. Simmons. Judgment for defendant, and plaintiffs bring error. Affirmed.

C. L. McCartney, of Brownwood, for plaintiff in error. T. C. Wilkinson, of Brownwood, for defendant in error.

RICE, J. Plaintiffs in error brought this suit against defendant in error in trespass.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Index.

try title to recover 320 acres of land described as follows: About nine miles southwest from Brownwood, survey No. 4 in the name of the Gulf, Colorado & Santa Fé Railway Company, surveyed for the state of Texas, by virtue of certificate No. 3,152, beginning 384 varas S. 45° W. from the west corner of the F. M. Wilson pre-emption survey; thence N. 45° E., 1,056 varas, to the north corner of same; thence W. 369 varas, to the northeast corner of survey No. 287; thence S. 40¼° W., 3,144 varas, to the north corner of J. George survey; thence N. 45° E., 950 varas, to the north corner of W. J. Lee's pre-emption; thence S. 45° E., 950 varas; thence N. 45° E., 1,388 varas; thence N. 45° W., 950 varas, to the beginning. Defendant in error answered by general denial, pleas of not guilty, lis pendens, and res adjudicata. The case was tried by the court without the intervention of a jury, and judgment rendered in behalf of defendant in error, from which plaintiffs in error have appealed.

The court filed the following conclusions of fact and law:

"Findings of Fact.

"(1) On March 30, 1881, the Commissioner of the General Land Office issued to the Gulf, Colorado & Santa Fé Railway Company certificate No. 3,152 for 640 acres of land. The certificate provides that lands granted should be located in alternate sections and surveyed in two sections of adjoining and connecting land, one for the state and the other for the company, and that for convenience the surveyor should number the surveys in pencil temporarily, but, when field notes were returned to the land office, the commissioner should number the surveys and report the result to the surveyor, who would fill up blanks in his record for that purpose, and that in dividing surveys fractions of over 320 acres should be counted as a whole section, and that two fractions of less than 320 acres should be regarded as a whole section, and that the even numbers should be reserved for the state and the odd numbers to the company. The following indorsements appear on the face of the certificate: '320 acres patented Nov. 15/83. D. N. Robinson, Chief Clk.' '320 acres patented Dec. 4/84. D. N. Robinson, Clk.'

"(2) By deed dated April 16, 1881, the railway company conveyed the said certificate to Robert Low, which deed was filed in land office April 9, 1883.

"(3) March 26, 1883, Robt. Low made a quitclaim deed to W. B. Cross 'of all my right, title and interest in and to a certain tract or parcel of land situated in Brown county, and this day filed on by me by virtue of certificate No. 3,152, issued to the G. C. & S. F. R. R. Company and more particularly described as beginning at the N. corner of W. J. Lee's pre-emption; thence S. 45° E.; thence N. 45° E.; thence with the

lines of the surrounding surveys so as to include all the vacancy; one-half of said land to be located for the state of Texas and one-half for the said Robert Low.' This deed was filed for record in Brown county March 8, 1884.

"(4) On March 25, 1883, the surveyor of Brown county surveyed the body of land embraced in the description in the deed to Cross into two surveys, reciting each to contain 320 acres, each numbered, one (the land in controversy in this suit) as survey No. 3, and the other as survey No. 4. The field notes for the survey so numbered 3 were filed in land office April 9, 1883, and show to have been recorded in surveyor's office of Brown county in vol. B, p. 309, on March 29, 1883. The field notes in land office are indorsed, 'corrected on map of Brown county Septbr. 8/83,' and the survey number was changed in land office to 4, and same change was made in surveyor's records of Brown county. The surveyor's records of Brown county show that the survey number for the other survey (No. 4 as originally numbered by the surveyor) was also changed to 3. The tract that was changed from 4 to 3 by land office was patented to Robert Low, assignee of the Railway Company, on November 15, 1883. The tract that was changed from 3 to 4 (the land in controversy) has never been patented.

"(5) By deed dated —, W. B. Cross conveyed said patented land, survey 3, to W. J. Lee.

"(6) By special warranty deed, dated June 28, 1883, W. B. Cross conveyed said survey No. 4 (the land in controversy) to W. J. Lee, which deed was filed for record in Brown county June 30, 1883.

"(7) By special warranty deed dated November 28, 1893, W. J. Lee conveyed the land in controversy to plaintiffs in this case. This deed was not filed for record till August 22, 1904, and there was no evidence to show that any one except W. J. Lee, who was ever in any way connected with the land, had any knowledge or notice of this deed prior to time it was filed for record.

"(8) On his application to purchase the land in controversy as public school land, dated May 10, 1886, sworn to May 13, 1886, filed in land office June 8, 1886, the land was sold by the state land board to W. J. Lee May 20, 1886. This purchase was forfeited June 26, 1889, for nonpayment of interest for year 1886. The land was sold by the state as public school land to S. H. Hart May 12, 1899, on his application dated March 14, 1899, filed in land office March 15, 1899, at which time the land appeared on the records of land office classified as dry agricultural. By deed dated January 1, 1900, Hart conveyed to T. L. Hickson and the deed with Hickson's substitute obligation and application was filed in land office November 23, 1900. On June 27, 1900, the Hart sale was

canceled for abandonment and land awarded to W. J. Lee June 29, 1900, on his application dated June 27, 1900. On November 5, 1900, the said sale to Lee was canceled as erroneous, and the former sale to Hart reinstated.

"(9) Hickson conveyed 100 acres of the land to G. N. Harrison by deed dated December 27, 1907, and conveyed balance to King by deed dated November 28, 1904, and Harrison afterwards conveyed his interest to King, and King conveyed the whole to defendant.

"(10) I find in accordance with defendant's plea of *lis pendens* and *res adjudicata* in this cause that on November 20, 1900, W. J. Lee filed a suit in his own name in the district court of Brown county, Tex., against T. L. Hickson, which suit was for the identical land involved in this suit; that said suit was in the usual form of trespass to try title, and was styled 'No. 1763, W. J. Lee v. T. L. Hickson'; that upon a trial of said cause before a jury on January 3, 1903, a verdict was rendered for the defendant T. L. Hickson, upon which judgment was duly rendered and entered, which judgment is now in full force and effect; that W. J. Lee is the father of the plaintiffs herein, Clara Carey and Cumi Baygent; that the deed from said W. J. Lee to Clara Lee (now Carey) and Cumi Lee (now Baygent) the said plaintiffs herein, of date November 28, 1893, under and by which they claim title to said land from him has at all times since its date been in the actual possession and custody of said W. J. Lee, and was in his possession and custody, and unrecorded, during the entire time of the pendency of said suit, and its prosecution by him in his own name; that there is nothing to show that said T. L. Hickson ever knew of the existence of said deed, and that same was not filed for record until August 22, 1904, after the rendition of final judgment in said cause; that the defendant herein T. N. Simmons had no actual knowledge of said deed, and of plaintiff's claim to said land, at the time of his purchase of same.

"Conclusions of Law.

"(1) The land in controversy became school land, but title to same did not pass to W. J. Lee by the deed from Cross to Lee.

"(2) The W. J. Lee purchase from the state in 1886, having been forfeited, and land sold to Hart and that purchase being now in good standing, and held by defendant, he is entitled to the land.

"(3) If the claim of plaintiffs under the W. J. Lee 1886 purchase from the state was not legally canceled by the forfeiture of said sale, then plaintiffs are bound by the judgment in the case of Lee against Hickson,

and cannot now claim under the said Lee purchase."

We adopt and approve the foregoing conclusions, with the exception that we do not concur in the third conclusion of law reached by the trial court, which, however, we hold in no way affects the result reached.

Various assignments question the action of the trial court with reference to the introduction of certain evidence.

[1] A careful examination of the brief, however, fails to disclose what grounds of objection are made thereto, for which reason, under the rules prescribed for the preparation of briefs, we are not called upon to pass upon the error assigned. See rules 29 to 31 inclusive. To meet these requirements, the point of objection to the introduction or exclusion of evidence should be fully shown in the brief by the statement.

[2] The fifth, sixth, and seventh assignments, respectively, urge, first, that the court erred in his fourth finding of fact, to the effect that surveys 3 and 4 were changed, in that there was no legal evidence to show that the numbers of surveys 3 and 4 were changed, and further that there was no support in the evidence for the fourth finding that the land patented to Low was originally numbered 4 and changed to 3, and the sixth finding to the effect that the land conveyed to Cross by W. J. Lee was survey 4, instead of survey No. 3. We differ with counsel in this view, because we think the evidence does show that the changes were made in the land office by the commissioner, and that direction was given by him to the surveyor to make similar changes in the field notes of the respective surveys, thereby conforming same to the changes made in the land office, which appears to have been done; and the evidence amply supported the other finding complained of, for which reason we overrule these assignments.

[3] Without discussing the remaining assignments *seriatim*, we think it sufficient to say that if there be any error the same in our judgment is harmless, for the reason that the record fails to show any title whatever in plaintiffs to the land in controversy, and therefore no other judgment than the one entered could properly have been rendered. This being true, the judgment of the court below must be sustained. See *Tucker v. Smith*, 68 Tex. 473, 3 S. W. 671; *I. & G. N. R. R. Co. v. Moody*, 71 Tex. 614, 9 S. W. 465; *Railway Co. v. Milmo*, 79 Tex. 628, 15 S. W. 475; *La Vega v. League*, 2 Tex. Civ. App. 252, 21 S. W. 565.

Finding no error in the proceedings of the trial court, its judgment is affirmed.

Affirmed.

JENKINS, J., not sitting.

RUCKER v. BARKER.

(Court of Civil Appeals of Texas. Austin.
Oct. 23, 1912. Rehearing Denied
Dec. 4, 1912.)

1. FALSE IMPRISONMENT (§ 15*)—ARREST BY OFFICER—EMPLOYMENT BY PRIVATE INDIVIDUAL.

Where plaintiff was illegally arrested by a peace officer, who was also employed to preserve the peace by defendant, who was running a tent show, the fact that the person making the arrest was an officer was not sufficient in itself to show that he made the arrest in his official capacity, nor was the fact that the officer was in defendant's employ sufficient in itself to show that he made the arrest as defendant's servant.

[Ed. Note.—For other cases, see False Imprisonment, Cent. Dig. §§ 5-67; Dec. Dig. § 15.*]

2. FALSE IMPRISONMENT (§ 15*)—PUBLIC OFFICER DOING PRIVATE DUTY—LIABILITY OF EMPLOYER.

Defendant, while operating a show and selling medicine in a city, employed a peace officer to keep the peace in and about the show tent. A dispute arising as to a seat plaintiff was occupying, the officer was requested by defendant's wife to "settle it in a nice way." The officer asked plaintiff to vacate the seat, and, on his refusing, had a conversation with defendant, who instructed him to go and settle the dispute, whereupon the officer pulled plaintiff out of the seat, arrested, and incarcerated him for disorderly conduct. *Held*, that the officer's act in so doing was not in his official capacity, but in the prosecution of defendant's business, and that defendant was therefore liable for the consequences.

[Ed. Note.—For other cases, see False Imprisonment, Cent. Dig. §§ 5-67; Dec. Dig. § 15.*]

3. TRIAL (§ 252*)—REQUEST TO CHARGE—ABSTRACT INSTRUCTIONS.

Where an officer, while doing private duty at defendant's show, arrested and incarcerated plaintiff as the result of a dispute over a seat, acting entirely in defendant's service, and not as a peace officer, the court, in an action for false imprisonment, properly refused, as abstract, an instruction that it was the duty of every peace officer to preserve the peace within his jurisdiction, and that, to effect such purpose, he could use all lawful means.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 505, 596-612; Dec. Dig. § 252.*]

4. FALSE IMPRISONMENT (§ 36*)—COMPENSATION—EXCESSIVENESS.

Plaintiff, a young unmarried man of good habits, paid for a reserved seat ticket at defendant's tent show, and, on refusing to surrender it to another patron, was dragged out of the tent by a peace officer, arrested for disorderly conduct, struck over the eye with a pistol or other hard substance, causing a wound, which did not heal for two weeks afterwards, was thrown down by the officer, his clothes torn, taken to the police station in the hoodlum wagon, and locked up with negroes and Mexicans for about two hours. His arrest occurred in the presence of a crowd, a number of whom were friends and acquaintances, and also in the presence of a young lady to whom he was talking. *Held*, that a verdict allowing \$1,000 compensatory damages was not excessive.

[Ed. Note.—For other cases, see False Imprisonment, Cent. Dig. §§ 113-115; Dec. Dig. § 36.*]

5. FALSE IMPRISONMENT (§ 36*)—DAMAGES—EXEMPLARY DAMAGES.

Where, in an action for false imprisonment in causing plaintiff's arrest for disorderly conduct at a tent show, there was evidence of actual malice on defendant's part, in that he thought he recognized plaintiff at the time of his arrest as a person who had previously stolen a seat, it was not error to allow \$250 as punitive damages.

[Ed. Note.—For other cases, see False Imprisonment, Cent. Dig. §§ 113-115; Dec. Dig. § 36.*]

Appeal from District Court, McLennan County; Marshall Surratt, Judge.

Action by Jno. Dyer, by his next friend, A. M. Barker, against H. D. Rucker. Judgment for plaintiff, and defendant appeals. Affirmed.

O. L. Stribling, of Waco, for appellant. Hamilton & Kibler, of Waco, for appellee.

Findings of Fact.

JENKINS, J. John Dyer, by his next friend, A. M. Barker, brought suit against appellant for damages on account of alleged false imprisonment. Appellant was running a tent show and selling medicine in the city of Waco. Appellee, a resident of Waco, 18 years of age, and an electrician, attended appellant's show, and purchased a reserved seat. The price of admission was 10 cents, and reserved seats were 20 cents. The holder of a reserved seat was entitled to sit in a chair in the central portion of the tent, but was not entitled to any particular seat. The appellee took a seat by Mrs. Graves, who told him that she had a friend who wished to occupy that seat, and asked him to move. He did so, moving into the adjoining vacant seat. About this time Mr. Graves appeared with Mrs. Cates, the friend referred to, who took the seat vacated by appellee. Graves stated to appellee that he was occupying his seat, and asked him to move. Appellee replied that the seat was his. Graves said that he had bought it and paid for it. Appellee replied that he had also bought it and paid for it. Appellee was unacquainted with either Graves or his wife. Some words passed between Mrs. Graves and appellee with reference to appellee's moving, and Mrs. Graves told him she had a notion to slap him in the mouth. Appellee replied that that was all right; that he was too much of a gentleman to do anything to a lady. Graves said to his wife, "Don't talk to the fool," and said he would have the seat. He went and informed appellant that appellee was in his seat, and would not give it up. Appellant's wife sent for J. J. Roberts, a deputy constable, who had been employed by appellant to keep the peace while the show was going on, and had been in such employment for about two months. Roberts went with Graves to appellee, and requested appellee to move and give Graves the seat. Appellee re-

refused to do so. Roberts then went to appellant, who was some 25 or 30 feet away, and had a talk with him, and summoned one C. M. Crawford to assist him, and they returned to appellee, and Roberts caught him by the collar and pulled him out of the seat. Roberts and Crawford dragged appellee to the door, he struggling and protesting, took him through the door, passing within two feet of appellant, and to the outside of the tent, where they threw him down and then took him to a barn, phoned for the hoodlum wagon, turned him over to the police with instructions to lock him up, and make complaint against him for disturbing the peace.

Appellant defended upon the ground that what Roberts did was done in his official capacity, and not by any order or direction of his, and that appellee was arrested by Roberts for disturbing the peace by swearing, cursing, and using loud language. The court submitted the case to the jury upon special issues; the first and second of which are as follows: "(1) Did the plaintiff immediately before he was arrested by J. J. Roberts on the occasion in question swear or curse or use loud language in the presence of, and in a manner calculated to disturb, the people, or any of them, who were assembled on that occasion? If you should answer the foregoing issue in the affirmative, then you need not answer any of the following special issues, but return your verdict without looking further. If you should answer the foregoing issue in the negative, then you will find from the evidence and answer the following issues:

"(2) Did Roberts arrest plaintiff at the request of or under the direction and instruction of the defendant, or was he when making said arrest acting within the scope of his duties under any employment of him by the defendant in making such arrest, or did he make such arrest of his own volition as a peace officer in what he conceived to be the discharge of his duties as a peace officer? If you should find in answer to the foregoing issue that Roberts arrested plaintiff of his own volition in the discharge of his duties as a peace officer, then you need not find any answers to the following issues; but if you should find that he made such arrest at the request of or under the direction or instruction of defendant, or while acting within the scope of his duties under any employment by the defendant, and that plaintiff did not curse or swear or use loud language as submitted in issue No. 1 above, then in that event you will answer the following issues."

The jury in reply to special issue No. 1 answered, "No." In reply to special issue No. 2, answered: "Yes; we find that Roberts made the arrest by instruction of defendant." The evidence, which will be further discussed in the opinion, is sufficient to sustain these findings of the jury.

Upon the issue of actual damages the jury found for appellee in the sum of \$1,000, and

upon the issue of punitive damages, found for him \$250.

Opinion.

1. Appellant requested the court to instruct the jury to peremptorily return a verdict in his favor, and assigns error upon the refusal of the court so to do, and also upon the refusal of the court to set aside the verdict on motion for a new trial for the reason that the same was not sustained by the evidence.

[1] The fact that Roberts was an officer is not sufficient in itself to show that he made the arrest in his official capacity; nor is the fact that he was in the employment of appellant sufficient in itself to show that he made such arrest as the servant of appellant. As an officer it was his duty to preserve the peace, and it is immaterial that he was paid for his services by appellant. The facts in reference to his employment are that appellant, when he first opened his show, phoned to the chief of police to send an officer to his show to preserve the peace. The chief of police replied that he would not require an officer to be at his show at night unless appellant would pay for such services, and thereupon appellant agreed to and did pay \$10 a week, and Roberts was assigned to duty at appellant's tent.

[2] As such officer it was his right and his duty to arrest any one who committed a breach of the peace, but it was not his duty as such officer to determine who were entitled to seats, or to any particular seat. Such may have been his duty as the servant or employé of appellant. Both Roberts and appellant testified that appellant did not instruct him to arrest appellee. When Roberts first appeared at the summons of appellant's wife, appellant told him that there was a dispute over there as to a seat, and for him to go and settle it in a nice way. After Roberts had gone to appellee and appellee refused to vacate the seat, Roberts returned to appellant and they had a talk. The details of this conversation are not given, further than that appellant told Roberts to go and settle the dispute. Now, it was no part of Roberts' duty as an officer to settle this dispute, and the only authority which he had to do so was that which he derived from appellant. How did appellant expect him to settle the dispute? Appellee had positively refused to vacate the seat. There would seem to be but one way for Roberts to settle it, and that was the way in which he did settle it, namely, by taking appellee by the collar and dragging him out of the seat; and appellant must reasonably have anticipated that Roberts would forcibly remove appellee, if he decided that he was not entitled to the seat. Under such circumstances, it is not material that appellant did not instruct Roberts to forcibly remove appellee. Wood, in speaking of the liability of the master for the acts of the servant, lays down the rule as fol-

lows: "The simple test is whether they were acts within the scope of his employment, not whether they were done while prosecuting the master's business, but whether they were done by the servant in furtherance thereof, and were such as may fairly be said to have been authorized by him. By 'authorized' is not meant authority expressly conferred, but whether the acts were such as were incident to the performance of the duties intrusted to him by the master, even though in opposition to his express and positive orders." Wood on Master and Servant, § 307. Here the act was done while prosecuting the master's business—that is to say, in settling the dispute as to who was entitled to the seat—and forcibly removing appellee from the seat was incident to the performance of the duty intrusted to him by appellant. "The master can never escape liability for the abuse of authority by the servant. Therefore the question always is whether there was any authority, express or implied, on the part of the servant to do the act." *Id.* § 309; *Railway Co. v. Warner*, 19 Tex. Civ. App. 463, 49 S. W. 254; *Railway Co. v. Dean*, 98 Tex. 517, 85 S. W. 1135-1137; *Railway Co. v. Parsons*, 102 Tex. 157, 113 S. W. 914, 132 Am. St. Rep. 857; *Eichengreen v. Railway Co.*, 96 Tenn. 229, 34 S. W. 221, 31 L. R. A. 702, 54 Am. St. Rep. 833.

[3] 2. The court did not err in refusing the following special instruction: "It is the duty of every peace officer to preserve the peace within his jurisdiction, and to effect this purpose he shall use all lawful means. He shall, in every case where he is authorized by the provisions of the Penal Code, interfere, without warrant, to prevent or suppress crime." This is a mere abstract proposition of the issue submitted to the jury in special instructions above set out. No point was made in the case that the arrest was without warrant. Nor did the court err in refusing to give other special instructions requested by appellant for like reasons. *Moore v. Pierson*, 93 S. W. 1009; *Coal Co. v. Coal Co.*, 44 Tex. Civ. App. 369, 99 S. W. 411.

[4] 3. Appellant assigns error on the overruling of his motion for a new trial on the ground that the actual damages found by the jury were excessive. Appellee's testimony fully sustains the amount of actual damages found by the jury. It appears that he was a young man of good habits, had never been arrested before; that he was arrested in the presence of a crowd, a number of whom were friends and acquaintances, and in the presence of a young lady to whom he was talking at the time, and who the testimony strongly indicates was his sweetheart. He testified that he was dragged to the door, a distance of 30 or 40 feet, by Roberts and Crawford, whom Roberts had summoned to assist him; that he was struck over the eye with a pistol or some hard substance, making

a contused wound on his forehead which could be seen for two weeks afterwards; that he was thrown down on the outside, and Roberts' knee placed on his chest and his clothes torn, and that he was put in the hoodlum wagon and carried to the police station, and locked up with negroes and Mexicans for about two hours; that, when he was first seized by Roberts, he asked the privilege of explaining the situation, and that Roberts said, "Explain nothing."

[5] 4. Appellant contends that the testimony is wholly insufficient to warrant a verdict and judgment for exemplary damages. It appears from the evidence that all that occurred in the tent occurred in the presence of appellant; that he made no objection and made no inquiry as to the merits of the case, from which facts the jury might be justified in inferring legal malice. *Gold v. Campbell*, 54 Tex. Civ. App. 269, 117 S. W. 468. There is one portion of appellant's testimony which tends to show actual malice. In reply to the question as to why he did not interfere in the treatment of appellee, he stated that Roberts was protecting his patrons. He was then asked if appellee was not one of his patrons. He said yes, but that there were good patrons and bad patrons, and that he considered appellee a bad patron, for the reason that on the night before a stranger had approached him and told him that there was a young man there who had bought a circus ticket (a ten cent ticket) and was occupying a reserved seat, and that he pointed out appellee as the party, and that he approached appellee and asked him if he had paid for his seat, and that he said that he had, and that, if appellant was not satisfied, he would pay for it again, from which he inferred that appellee was stealing a seat, and that he recognized appellee at the time of his arrest as the party referred to. While appellee denied this occurrence, yet it might fairly be inferred that appellant thought that he was the man who had stolen the seat, and that he had actual ill will against him. We do not think that the remarks of appellee's counsel in his closing speech require a reversal of this case.

Finding no error in the record, the judgment of the trial court is affirmed.

Affirmed.

PRESNALL et al. v. STOCKYARDS NAT. BANK.

(Court of Civil Appeals of Texas. Texarkana. Nov. 21, 1912. Rehearing Denied Dec. 5, 1912.)

1. BANKS AND BANKING (§ 134*)—BANK DEPOSIT—BANK'S RIGHT OF SET-OFF.

Where, at the time a garnishment was served on defendant bank, it held for the debtor a balance of \$777.89 to the credit of his general account, the fact that the debtor was a nonresident of the state and was indebted to

the bank on notes not due did not authorize the bank to credit such balance on the indebtedness as against the plaintiff in garnishment.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 353-374; Dec. Dig. § 134.*]

2. GARNISHMENT (§ 29*)—PROPERTY SUBJECT—PERSONAL PROPERTY—EQUITY OF REDEMPTION.

Where a debtor's equity of redemption in mortgaged cattle was pledged to a bank for a loan, and such equity when liquidated by a sale of the cattle amounted to less than the amount due the bank, it was not subject to a prior garnishment against the bank.

[Ed. Note.—For other cases, see Garnishment, Cent. Dig. §§ 47, 50, 74, 98, 100; Dec. Dig. § 29.*]

3. CORPORATIONS (§ 174*) — "SHARES OF STOCK."

"Shares of stock" in a corporation are the aliquot parts of the corporation's capital, and merely give to the owner the right to a share of the profits of the corporation while a going concern and in its assets in case of dissolution. They give the owners no right in the property of the company as such, and the share certificates are a mere symbol or evidence of property, standing on the same footing as other muniments of title.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 649-652; Dec. Dig. § 174.*]

For other definitions, see Words and Phrases, vol. 7, pp. 6477-6480.]

4. GARNISHMENT (§ 27*)—CORPORATE STOCK—SERVICE.

Rev. Civ. St. 1911, art. 3745, provides that the shares of stock in a corporation are subject to levy and sale under execution. Article 3742 provides that the levy is made by leaving a notice with any officer of the company, and article 296 declares that the "share or interest of the defendant" in a corporation shall be subject to garnishment. Held, that the interest of the stockholder subject to garnishment was his rights in the corporation as distinguished from his share certificate, and hence, where a stockholder assigned his certificate to a bank as security for a loan, his corporate interest could not be subjected to garnishment by serving garnishment notice on an officer of the bank.

[Ed. Note.—For other cases, see Garnishment, Cent. Dig. §§ 45, 46; Dec. Dig. § 27.*]

5. GARNISHMENT (§ 191*) — GARNISHEE — HEARING—COSTS AND ATTORNEY'S FEES.

Where a garnishee answered setting up title in itself to property of the debtor in its hands, it became a party litigant and, on being cast, was not entitled to costs and attorney's fees.

[Ed. Note.—For other cases, see Garnishment, Cent. Dig. §§ 372-379; Dec. Dig. § 191.*]

Appeal from District Court, Tarrant County.

Garnishment proceedings by P. A. Presnall and others against the Stockyards National Bank, garnishee. Judgment for defendant, and plaintiffs appeal. Reversed.

The appellants, P. A. Presnall and S. B. Mossner, obtained a judgment in the district court of Nueces county against Hugh Rogers for the sum of \$1,921.90 with 10 per cent. interest. An execution was issued on May 28, 1908, and returned nulla bona. Thereafter, on January 16, 1909, the appellants applied for a writ of garnishment, which was issued and served on the Stockyards National Bank

of Ft. Worth on January 20, 1909. The garnishee made answer on July 5, 1909, in which the garnishee denied any indebtedness to Hugh Rogers, but alleged that Hugh Rogers owed it two notes; one note being for \$2,500, on which \$900 had been paid, and which was secured by certificate of shares of stock of the Barse Commission Company of the value of \$2,000, and the other note being for \$2,000, on which had been paid \$777, and which was secured by a transfer to the bank of Rogers' equity of redemption in certain live stock owned by Nalls & Rogers on Royer Ranch in Murray county, Okl. Appellants filed a controverting affidavit charging that Rogers had on deposit in the bank at the time the writ of garnishment was served the sum of \$777.89, and that the bank held as collateral security certificate of shares of stock in the Barse Commission Company owned by Rogers of the value of \$2,000 and an assignment of Rogers' equity of redemption in a mortgage on 2,000 head of cattle and 130 head of horses; and alleging that Rogers, since the writ of garnishment was served, had fully paid off and discharged the garnishee's notes without the application of the collateral security to the payment of the debt, and that the garnishee had voluntarily released and surrendered and delivered to Rogers, after service of the writ, his certificate of shares of stock in the Barse Commission Company, and that the garnishee had permitted the cattle to be sold by Rogers; and praying that the garnishee be made liable to appellants for the cash deposit and the value of the certificate of shares of stock in the Barse Commission Company, or so much as was necessary to satisfy the appellants' debt. The garnishee in reply admitted that at the time the writ of garnishment was served Rogers had on deposit in the bank the sum of \$777.89, but alleged that Rogers was indebted to the bank at the time of the service of the writ on a \$2,000 note, and that he was a nonresident of the state and had no property in Texas except that deposited with the bank, and that, as a consequence, and after the writ was served, the sum of the deposit was by the garnishee applied on the note as a credit; and further that Rogers had refused to pay his indebtedness unless the garnishee would first surrender the certificate of shares of stock held as collateral, and that by agreement with Rogers to pay his debt to the bank it surrendered to him the certificate of shares of stock in the Barse Commission Company. The cause was tried to the court without a jury, and judgment was entered in favor of the garnishee and also allowing it to recover of appellants \$250 as attorney's fees.

The testimony in the record admits that when the writ of garnishment was served Rogers had a general deposit in the Stockyards National Bank of \$777.89. Rogers wa-

indebted to the bank in the two notes mentioned in the pleading, neither of which had matured when the writ was served. One note was secured by an assignment of Rogers' equity of redemption in certain mortgaged live stock in the possession of Rogers in Oklahoma, and the other by a certificate for 20 shares of stock in the Barse Commission Company indorsed in blank. At the time the writ of garnishment was served, Rogers was a citizen of Oklahoma, and without property in Texas save that mentioned in the possession of the garnishee. The Barse Commission Company was a Missouri corporation, but had secured a permit under the laws of Texas to do business in Texas, and was at the time and has since been doing business in Texas. The certificate of shares of stock in the commission company held by the bank as collateral belonged to Rogers, and was, it was agreed, at the time of the delivery to the garnishee, and has been ever since, of the value of \$2,000. Rogers was not due the bank anything except the notes. Immediately after the service of the writ the bank applied the \$777.89, without Rogers' authority, as a payment on the \$2,000 note. After service of the writ, and after maturity of both notes, Rogers paid to the bank the balances due on both of the notes, upon condition that the bank deliver to him the certificate of shares of stock of the Barse Commission Company held by it; and the bank agreed to, and did, release and deliver the certificate of shares of stock, together with the canceled notes to Rogers. At the time the bank took the assignment of the equity of Rogers in the live stock in Oklahoma, the live stock was heavily mortgaged in Oklahoma. Rogers himself sold the live stock, and after paying the mortgage there was left from the proceeds of the sale of the same the sum of \$501.75. This sum of \$501.75 was the value of his assigned equity, and was applied by Rogers on the note held by the Stockyards National Bank.

Slay, Simon & Wynn, of Ft. Worth, for appellants. Wm. J. Berne, of Ft. Worth, for appellee.

LEVY, J. (after stating the facts as above). [1] By proper assignments of error the appellants contend that the court erred in rendering judgment for the garnishee, for the garnishee admitted that it held money and effects of the defendant Rogers at the time the writ was served, and by the undisputed evidence not showing any legal or equitable defense which entitled it as against the appellants to hold such money and effects. The several matters of contest were a general deposit in the bank of \$777.89, an assignment of an equity of redemption in mortgaged cattle, and a certificate for 20 shares of stock in the Barse Commission Company, a private corporation. It is an admitted fact that, when the writ of garnishment was served

Hugh Rogers, the defendant in the original judgment theretofore obtained by plaintiffs had standing to his credit in the garnishee bank on general deposit the sum of \$777.89. As against the right of the appellants to subject the deposit to garnishment, the garnishee set up and made the claim that it had the right to apply, and did so, the deposit as a credit payment on a note for \$2,000 previously executed to it by Rogers, because Rogers was a nonresident of Texas and without property in this state save that in the possession of the bank. Rogers' note to the bank was not due at the time the writ was served nor at the time of the answer. Immediately upon the service of the writ of garnishment, the bank, through its president, transferred and applied, without authority of Rogers, the deposit as a credit on the Rogers note. It being an admitted fact that the defendant Rogers had on general deposit in the bank when the writ was served the sum of \$777.89, it would appear that the bank was indebted to the defendant in that sum at the time of the service of the writ. The appellants' garnishment lien attached when the garnishment writ was served on the bank, and as a consequence the appellants would be entitled to have the sum paid to them, unless the garnishee had a superior right or claim to it. As against the appellants' lien, the garnishee only predicates the right to hold the deposit debt to partly satisfy its unmatured note upon equitable grounds. The garnishee relies, as the record admits, on the bare fact that the defendant was a nonresident of this state. Rogers was, it appears, a nonresident of this state, and was at the time the note was made to the bank. The bare fact that the defendant was a nonresident of this state would not of itself afford a valid equitable ground for subordinating the appellants' legal lien to the garnishee's claim for set-off of the deposit as a credit on its note not due. If the garnishee's debt had been due and Rogers had been insolvent, or if Rogers had been insolvent in connection with the fact of nonresidence, such special circumstances might have formed the basis for invoking equity; but no such equity is relied on in the pleading or proof. Appellants' contention should be sustained that they were entitled to have judgment for the debt of \$777.89.

[2] As to the equity of Rogers in the mortgaged cattle assigned to the bank as collateral security to the \$2,000 note, the court, we think, correctly rendered judgment for the garnishee; and the ruling is sustained. It is an admitted fact that the assignment was subject to prior liens, and that the cattle were sold by Rogers, and that out of the proceeds of the sale of the cattle there was coming to Rogers, over and above the mortgage debt, the sum of \$501.75 which was shown to be the value of the equity. Rogers testified, and it appears an admitted fact,

that he applied this \$501.75 on June 4, 1909, which date was prior to the garnishee's answer, on the note as a credit payment, and the bank received it as such. Assuming for the moment that the assignment of the equity to the bank as security for the note was a subject-matter of garnishment, the garnishment would hold to appellants only the balance or surplus of the value of the equity after the debt of the bank it was pledged to secure was paid out of it. *Carter v. Bush*, 79 Tex. 31, 15 S. W. 167; *Mensing v. Engelke*, 67 Tex. 537, 4 S. W. 202. It being an admitted fact that there had been a sale of the cattle, and the equity reduced to money and applied as a credit on the note, and there was no surplus remaining, before the answer of the garnishee, the garnishee was entitled to judgment, for it was conclusively shown that there was no excess in the value of the property over the amount it was pledged to secure to be subjected to garnishment.

The next point involves the liability of the bank as the possessor at the time of the garnishment of the certificate for 20 shares in the Barse Commission Company assigned and deposited with it by Rogers as security for the \$2,500 note. In the determination of the question it is merely assumed, without deciding the point, that the Barse Commission Company, the corporation issuing the certificate, has become so completely a resident of this state by coming into this state under its laws to do business, as that its stock may be garnished or levied upon in the mode prescribed by the statute. The question as to what classes of property or indebtedness may be reached by garnishment necessarily must depend upon the statute authorizing the issuance of the writ, as the remedy by garnishment is statutory. The statute makes shares of stock in any joint-stock or incorporated company a subject-matter of levy and sale under execution. Article 3745, R. S. The levy is made by leaving a notice with any officer of the company. Article 3742, R. S. With respect to shares in a corporation, under the garnishment statute it is the "share or interest of the defendant in such company" that is made of a garnishable character and subjected to sale under execution. Article 296, R. S.

[3] It is generally agreed that shares in an incorporated company are the aliquot parts of the capital stock, and merely give to the owner a right to his share of the profits of the corporation while it is a going concern and to a share of the proceeds of its assets when sold for distribution in case of its dissolution and winding up. The shares do not give to their owners any right in the property itself of the company. That remains in the artificial body called the corporation. The right of the individual shareholder, according to the amount put into the fund of the corporation, is therefore of an incorporeal nature, though of value, not ca-

pable of manual delivery. Considering that the share, or interest, of the owner in the corporation, is an incorporeal right, then the nature of a share certificate issued by the corporation, as here in controversy, is merely the symbol, or paper evidence, of property, and stands on a similar footing with that of other muniments of title. 2 *Thompson on Corp.* § 2348; *Burrall v. Railway Co.*, 75 N. Y. 211.

[4] Following the principle that a share certificate is merely the written evidence of the existence of shares and the ownership of them, then a levy of execution upon the certificate would not be, it is evident, equivalent to a levy on the share or interest of the owner in the corporation, any more than the levy on a bill of lading would be a levy on the goods therein described, or a levy on a chattel mortgage instrument itself would be a levy on the chattels mortgaged. It would be a valid levy only to the extent that such naked paper has a commercial value, and no further. Bearing in mind, therefore, that by a "share of stock" and "share" in a corporation, as used in the statute, is meant an intangible interest or right, in legal contemplation, of the owner in the corporation property or fund, and that a share certificate is merely written evidence of the existence and ownership of the share or interest of such owner, it is believed that the owner's stock or share in the corporation is not reached under the statute by either a levy of execution or garnishment upon a share certificate as such issued by the corporation. It is especially provided by the statute that, in order for the creditor to reach the shares or interest of any owner of shares or interest in any corporation by garnishment, the garnishment shall be served upon the incorporated company itself. Article 296, R. S. Under this mode of procedure given by statute, it was intended, we think, to regard the stock, for the purpose of garnishment proceeding, as being in the possession of the corporation itself. So it would follow that, if the corporation itself is deemed and regarded in law as being in possession of the share or right of the owner, the bank here could not be held to have any property or effects, beyond the value of the naked paper, of Rogers in the corporation, in its possession. There is no claim by pleading or proof here that the certificate itself as a naked piece of paper was of value; therefore no liability on that point is here involved. According to many authorities, it is announced that certificates of stock in the hands of a third person cannot be subjected to the debts of the owner by garnishment served on such third person. See *Winslow v. Fletcher*, 53 Conn. 390, 4 Atl. 250, 55 Am. Rep. 122; *Cooke v. Hollett*, 119 Mass. 148; *Armour Bros. v. Bank*, 113 Mo. 12, 20 S. W. 690, 35 Am. St. Rep. 691; *Bank v. Williams*, 112 Mich. 564, 71 N. W. 150; *Price v. Brady*, 21

Tex. 614; 2 Cook on Corp. § 491. Coming to the conclusion, as we have, that the bank could not be here held liable in garnishment, judgment was properly rendered for it, we think, by the court on this particular controversy.

It is quite common to deal with a certificate of stock as did Rogers and the bank here. In such transactions a purchaser under foreclosure undoubtedly acquires the equitable title to the stock in the corporation by reason of the assignment and power of sale, and such purchaser has a right to call upon the corporation to clothe him also with the legal title by permitting a transfer to himself on its books, and to demand a new certificate in his own name. 2 Thompson on Corp. § 2394. But it must be understood that the question here involved is not whether the bank or its assign is clothed in equity with all the rights of Rogers as against Rogers, but whether the garnishment of the certificate for shares as such was a valid seizure of the shares or stock of Rogers in the corporation.

As the court erred in not rendering judgment for appellants for the \$777.89, the judgment must be reversed, and, as the facts are admitted, be here rendered for appellants against the garnishee for that sum with legal interest from the date of the trial below.

[5] As the garnishee by its answer became itself a litigant with appellants, the attorney's fees must be denied, and as well the costs of the court below and of appeal will be taxed against the garnishee. Moursund v. Preiss, 84 Tex. 554, 19 S. W. 775; article 307, R. S.

CONLEY et al. v. DAUGHTERS OF THE REPUBLIC OF TEXAS.

(Court of Civil Appeals of Texas. San Antonio. Nov. 13, 1912. On Motion for Rehearing, Dec. 11, 1912.)

1. STATES (§ 88*)—PROPERTY—STATUTES—"CARE AND CUSTODY."

Acts Jan. 26, 1905 (Acts 29th Leg. c. 7), which provided that upon the state's receipt of title to the so-called "Alamo property" the Governor should deliver it, together with the Alamo church property already owned by the state, to the custody and care of the Daughters of the Republic of Texas, a private corporation, to be maintained by them in good order and repair without charge to the state, and to be remodeled only upon plans adopted by the corporation and approved by the Governor, and that all the property should be subject to future legislation, by the use of the words "care and custody" placed the corporation in the exclusive and absolute control within the conditions prescribed by the act; the "care and custody" of persons or property carrying the idea of exclusive possession.

[Ed. Note.—For other cases, see States, Dec. Dig. § 88.*]

2. STATUTES (§ 159*)—REPEAL—IMPLICATION.

Repeals by implication are not favored by the courts, and a statute will not be held to

repeal an existing one unless there is irreconcilable repugnancy between them, or unless there is an evident design on the part of the Legislature to supersede all prior legislation in connection with the subject-matter and to enact a complete law in regard to it.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 229; Dec. Dig. § 159.*]

3. STATES (§ 88*)—DISPOSITION OF PROPERTY—STATUTES—REPEAL.

Act Jan. 26, 1905 (Acts 29th Leg. c. 7), which gave to the Daughters of the Republic of Texas, a private corporation, the exclusive care and custody of the Alamo property owned by the state, charged with its repair and maintenance, was not repealed by an item in the appropriation act of 1911 (Acts 32d Leg. c. 3), which provided "for the improvement of the Alamo property belonging to the state of Texas, * * * to be expended under the direction of the superintendent of public buildings and grounds upon the approval of the Governor, \$5,000," the latter provision being in harmony with the existing law and merely supplementary thereto, so that before the appropriation could be used the plans therefor ought to be made by the corporation and approved by the Governor.

[Ed. Note.—For other cases, see States, Dec. Dig. § 88.*]

4. INJUNCTION (§ 85*)—TRESPASS TO PROPERTY—RIGHT OF ACTION—TITLE OF PLAINTIFF.

A private corporation given the exclusive care, custody, and possession of the so-called "Alamo property," owned by the state, by legislative consent, charged with its repair and maintenance, had the right and duty to protect its possession from a trespasser by action to enjoin the trespass.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 77; Dec. Dig. § 35.*]

5. CONSTITUTIONAL LAW (§ 26*)—LEGISLATIVE DEPARTMENT—SCOPE OF POWERS.

Within constitutional limits the power of the Legislature in the enactment of laws is supreme.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 30; Dec. Dig. § 26.*]

6. STATES (§ 88*)—CUSTODY OF PROPERTY—CONSTITUTIONALITY OF STATUTE.

The superintendency of public buildings is a legislative office which may have its powers increased or restricted or be abolished by the Legislature, and Act Jan. 26, 1905 (Acts 29th Leg. c. 7), which gave the Daughters of the Republic of Texas, a private corporation, the exclusive care and custody of the so-called "Alamo property," charged with its care and maintenance for historical and patriotic purposes, was constitutional.

[Ed. Note.—For other cases, see States, Dec. Dig. § 88.*]

7. STATES (§ 191*)—ACTIONS—RIGHT OF "SUIT AGAINST STATE."

State officers, who without legislative authority or sanction trespass upon state property given by express enactment into the exclusive possession of a private corporation, do not represent the state, and may be sued as any other trespassers upon the rights of possession would be sued: a suit against them not being a suit against the state.

[Ed. Note.—For other cases, see States, Cent. Dig. §§ 179-184; Dec. Dig. § 191.*]

For other definitions, see Words and Phrases, vol. 7, p. 6778; vol. 8, p. 7809.]

8. CORPORATIONS (§ 499*)—CORPORATE POWERS—CAPACITY TO SUE AND BE SUED.

A private corporation, in the absence of charter or statutory provisions to the contrary,

has the same capacity to sue and be sued as a natural person; the power to sue and be sued are among its incidental and implied powers which need not be expressly conferred.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1910, 1911, 1913-1919, 2030; Dec. Dig. § 499.*]

9. INJUNCTION (§ 35*)—PREVENTION OF TRESPASS—SUIT BY CORPORATION—CONDITIONS PRECEDENT.

A private corporation, vested by the Legislature with the exclusive possession and control of property belonging to the state, to sustain a suit to enjoin a trespass need not show express statutory authority, since the statute carried with it the grant of every power needed to carry its purpose into effect.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 77; Dec. Dig. § 35.*]

10. CORPORATIONS (§ 519*)—CIVIL ACTION—PRESUMPTION—SUIT AUTHORIZED BY CORPORATION.

A suit by a corporation sanctioned by its president and other officers will be presumed to have been authorized by the corporation.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2085, 2088-2093; Dec. Dig. § 519.*]

11. STATES (§ 88*)—CONTROL OF PUBLIC PROPERTY—EXECUTION OF CORPORATE PURPOSES.

It was not a condition precedent to suit to enjoin a trespass to real property owned by the state and given by it into the exclusive possession and control of plaintiff, a private corporation, that plaintiff should allege or prove that it was executing the charge reposed in it; that being a matter only between it and the state, to be inquired into by the Legislature.

[Ed. Note.—For other cases, see States, Dec. Dig. § 88.*]

12. PERPETUITIES (§ 4*)—CONSTITUTIONAL AND STATUTORY PROVISIONS—CUSTODY OF STATE PROPERTY.

Act Jan. 26, 1905 (Acts 29th Leg. c. 7), which gave to a private corporation the exclusive possession and control of the so-called "Alamo property," belonging to the state, charged with its repair and maintenance for historical and patriotic purposes, and provided that "all of said property being subject to future legislation of the state of Texas," did not violate Const. art. 1, § 26, which declares that perpetuities are contrary to the genius of free government and shall never be allowed.

[Ed. Note.—For other cases, see Perpetuities, Cent. Dig. §§ 4-44; Dec. Dig. § 4.*]

13. MONOPOLIES (§ 3*)—CONSTITUTIONAL AND STATUTORY PROVISIONS—CUSTODY OF PUBLIC PROPERTY.

A "monopoly," in the sense forbidden by Const. art. 1, § 26, consists in the ownership or control of so large a part of the market supply of a given commodity as to stifle competition, restrict the freedom of commerce, and give the monopolies control over prices; and hence Act Jan. 26, 1905 (Acts 29th Leg. c. 7), which granted to a private corporation property owned by the state charged with its repair and maintenance for historical and patriotic purposes, subject to future legislation, did not violate the constitutional provision, since it was but the assumption of a burden which deprived no citizen of any privilege or right and brought no financial gain to the corporation.

[Ed. Note.—For other cases, see Monopolies, Dec. Dig. § 3.*]

For other definitions, see Words and Phrases, vol. 5, pp. 4570-4574.]

14. CORPORATIONS (§ 28*)—INCORPORATION AND ORGANIZATION—"DE FACTO CORPORATION."

Although a private corporation may not have complied with all the statutory requirements, it is a "de facto corporation."

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 28, 70; Dec. Dig. § 28.*]

For other definitions, see Words and Phrases, vol. 2, pp. 1841-1843.]

15. CORPORATIONS (§ 29*)—INCORPORATION AND ORGANIZATION—VALIDITY—COLLATERAL ATTACK.

The corporate existence of a private corporation cannot be attacked in a collateral proceeding.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 77-79, 2504; Dec. Dig. § 29.*]

16. CORPORATIONS (§ 513*)—ACTIONS—NECESSITY FOR ALLEGING AUTHORITY TO BRING SUIT.

It is not necessary in a suit by a private corporation to allege that the suit is authorized by the board of directors.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2017-2027, 2031-2034, 2036-2045; Dec. Dig. § 513.*]

17. INJUNCTION (§ 46*)—TRESPASS TO REAL PROPERTY—GROUNDS.

A private corporation vested by legislative enactment with the exclusive possession and control of property belonging to the state, charged with its care and maintenance, on showing that its possession had been invaded and injured by state officers, was entitled to an injunction restraining the trespass.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 98, 99, 107; Dec. Dig. § 46.*]

On Motion for Rehearing.

18. STATUTES (§ 150, New, vol. 2 Key-No. Series) — REPEAL — CONSTITUTIONAL PROVISIONS.

Const. art. 3, § 35, which provides that "no bill (except general appropriation bills, which may embrace the various subjects and accounts for and on which moneys are appropriated) shall contain more than one subject which shall be expressed in its title," does not authorize the passage of new laws or the repeal of old ones by a general appropriation bill.

19. STATUTES (§ 154*)—REPEAL—CONSTITUTIONAL PROVISIONS—RE-ENACTMENT.

An item in a general appropriation act which makes no reference by title or otherwise to a previous legislative act could not amend such act, since Const. art. 3, § 36, provides that no law shall be amended by reference to its title, but that in such case the act reviewed or the section or sections amended shall be re-enacted and published at length.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 221; Dec. Dig. § 154.*]

20. STATES (§ 88*)—CIVIL ACTIONS—DENIAL OF CORPORATION'S GOOD FAITH.

In an action by a private corporation vested by the Legislature with the exclusive possession and control of public property belonging to the state, charged with its care and maintenance for historical and patriotic purposes, to enjoin a trespass, the objection that the corporation has not acted in good faith with the state cannot be considered; that being a matter to be addressed to the Legislature.

[Ed. Note.—For other cases, see States, Dec. Dig. § 88.*]

Appeal from District Court, Bexar County;
J. L. Camp, Judge.

Injunction by the Daughters of the Republic

lic of Texas against A. B. Conley and others. From an order perpetuating a temporary injunction, defendants appeal. Affirmed.

J. F. Carl, of San Antonio, for appellants. Webb & Goeth and Denman, Franklin & McGown, all of San Antonio, for appellee.

FLY, C. J. Appellee, a private corporation duly incorporated under the laws of Texas, instituted this suit to enjoin Dr. A. B. Conley, individually and as superintendent of public buildings and grounds, J. B. Nitschke, individually and as state inspector of masonry, and J. M. English, individually and as foreman of the workmen engaged in trespassing upon certain property, from so trespassing. It was alleged that, by an act of the Legislature of Texas dated January 26, 1905 (Acts 29th Leg. c. 7), the Governor was authorized to purchase the property known as the Hugo-Schmeltzer property, formerly a part of the Alamo Mission and adjoining the Alamo Church, which was the property of the state; that the Governor bought the property, and by the act of the Legislature of 1905 he was required to deliver the property, known as the Hugo-Schmeltzer property, as well as the Alamo Church property, to the custody and care of the Daughters of the Republic of Texas, and under the provisions of the act the custody, care, and possession of the property were duly delivered by the state of Texas to appellee; that appellants wrongfully and unlawfully, and without the consent of appellee, had entered upon the property and were engaged in tearing down the improvements and were threatening to remodel the same and erect improvements thereon without the consent of appellee and without the authority of law. A temporary writ of injunction was granted against appellants, which, on a final hearing, was perpetuated.

The court filed the following findings of fact, which are adopted by this court, with the emendation of a few unnecessary words:

"(1) The Daughters of the Republic of Texas is a private corporation, duly incorporated under the laws of the state of Texas, for the purpose set forth and alleged in plaintiff's petition herein.

"(2) Under the act of the Legislature of the state of Texas, approved January 26, 1905, as averred in plaintiff's petition herein, the state of Texas through its Governor purchased the property known as the Old Hugo & Schmeltzer Building in plaintiff's petition fully described, and being a part of what is commonly known as the 'Alamo property,' and previous to such purchase, the state of Texas had acquired what is known as the 'Alamo Mission' property proper in said city of San Antonio; the two properties together constituting what is commonly known as the Alamo property in the city of San Antonio.

"(3) In accordance with the provisions of

said act of the Legislature, said two properties were delivered by the state of Texas into the custody and care of plaintiff prior to any of the trespasses alleged in plaintiff's petition, and at the time of the said alleged trespasses said plaintiff was in possession of said property, holding the care and custody of same under the terms of the act of the Legislature above referred to.

"(4) No plan for any changes or alterations or remodeling of any of the buildings upon said property has been made or adopted by plaintiff and approved by the Governor of the state of Texas.

"(5) No plan or any alteration or changes or remodeling of any of said buildings had been prepared by the Governor of the state of Texas and submitted to plaintiff for consideration by plaintiff.

"(6) Plaintiff has never surrendered said property nor the care or custody of same to any one, but has retained such possession, care, and custody ever since the delivery of the property to plaintiff.

"(7) The defendants in their official capacities alleged in plaintiff's petition entered upon the said property prior to the filing of plaintiff's petition, and without the consent of plaintiff were at the time of the filing of said petition engaged in tearing down certain of the improvements upon said property, making excavations thereon for rebuilding certain of the improvements thereon and for the erection of new improvements thereon, and were rebuilding certain of the improvements thereon and remodeling certain of the improvements thereon.

"(8) This work was being done without any plan as to what future improvements would be made upon the property or what remodeling of the property would be done, the evidence showing that the work was being done without any fixed or definite plan, and the defendants were unable to inform the court what remodeling of any improvements was contemplated, nor what improvements were contemplated, nor what changes in the present building were contemplated by them or by the Governor of the state."

Appellee was incorporated for the purposes, and given the authority, as follows: "First, to perpetuate the memory and spirit of the men and women who have achieved and maintained the independence of Texas. Second, to encourage historical research into the earliest records of Texas, especially those relating to the Revolution of 1835, and the events which followed; to foster the preservation of documents and relics, and to encourage the publication of records of individual service of soldiers and patriots of the Republic. Third, to promote the celebration of March 2d (Independence Day), and April 21st (San Jacinto Day); to secure and hallow historic spots by erecting monuments thereon; and to cherish and preserve unity of Texas, as achieved and established by the fathers and mothers of the Texas Revolu-

tion. This association may have and hold, by purchase, grant, gift, or otherwise, real estate on which battles for the independence of Texas were fought; such monument or monuments as may be erected thereon; and burial grounds where the dead, who fought and died for Texas independence, are buried; and personal property, consisting of books, manuscripts, and other historical records, relating to the early history of Texas; and relics."

[1] After providing for the purchase of the land causing this controversy, the act of January 26, 1905, provided: "Upon the receipt of the title to said land, the Governor shall deliver the property thus acquired, together with the Alamo Church property already owned by the state, to the custody and care of the Daughters of the Republic of Texas, to be maintained by them in good order and repair, without charge to the state, as a memorial to the heroes who immolated themselves upon that hallowed ground; and by the Daughters of the Republic of Texas to be maintained or remodeled upon plans adopted by the Daughters of the Republic of Texas, and approved by the Governor of Texas; provided that no alterations shall be made in the Alamo Church proper, as it now stands, except such as are absolutely necessary for its preservation. All of said property being subject to future legislation by the Legislature of the state of Texas." Undoubtedly, that law, in plain and unequivocal terms, gave appellee the custody of the property in question and imposed upon it the duty and burden of keeping it in good order and repair without expense to the state, and under that law appellee took possession of the property and assumed the responsibility of maintaining it in good order and repair. It is apparent that by "care and custody" the state intended to place appellee in possession and give it exclusive and absolute control, within the limitations prescribed in the law, over the property. The state intended to and did lift the responsibility from itself of caring for and maintaining the property and placed those burdens upon appellee. No other reasonable intentment can be deduced from the language of the act. No limitations of the powers granted to appellee were made except that its manner of maintenance or remodeling of the property or its improvements should meet with the approval of the Governor, and that the Mission Church should not be changed or altered unless it was absolutely necessary for its preservation. Within those limitations the possession and authority over the property were exclusive and supreme. Those statutory checks and limitations of the power of the custodian of the Alamo property were enacted to prevent any ill-considered change being made in the property which the state desired to be preserved and cherished "as a sacred memorial to heroes who immolated themselves upon that hallowed ground."

[2, 3] Under the act of 1905, appellee had the right of possession, custody, care and control of the Alamo property, and has to this day, unless the authority has been canceled and destroyed by subsequent legislation, and that is the contention of appellants. The law relied on as a repealing act is an item in the appropriation act of 1911 (Laws 1911, p. 6) which is: "For the improvement of the Alamo property belonging to the state of Texas, in the city of San Antonio, to be expended under the direction of the superintendent of public buildings and grounds, upon the approval of the Governor, \$5,000.00." There is no mention of the statute of 1905 giving the Daughters of the Republic of Texas control of the property, and the contention is that by implication it deprives it of the custody given to it by the former law.

Repeals by implication are not favored by the courts of the country, and a statute will not be held to repeal an existing one unless there is an irreconcilable repugnancy between them, or unless there is an evident design upon the part of the Legislature to supersede all prior legislation in connection with the subject-matter and to enact a complete law in regard to it. The item from the appropriation bill will not stand such a test; but, on the other hand, it is in perfect harmony with the existing law and is merely supplementary thereto. There is not one word in it that indicates any desire or intention to take the custody of the Alamo property from the hands of the association of Texas women which had accepted the burdens imposed upon it by the state, but, on the other hand, it merely loosened the purse strings of the state in order to assist in the belated work of preserving these relics of our heroic dead.

The only change, if any, made by the appropriation item of 1911, was to give the superintendent of public buildings the right to enter the Alamo property for a specific purpose, that of directing the expenditure of the money appropriated. The general custody of the property was not disturbed. The right of maintenance and remodeling the improvements remained the same. Before the appropriation could be used, and before the state officer could direct its disbursement, appellee had to make plans for remodeling, and those plans had to be approved by the Governor. No one had the power and authority to provide plans or to have them executed but the Daughters of the Republic of Texas. To the amount of \$5,000 the superintendent of public buildings, with the approval of the Governor, could superintend the disbursement of the money in making changes or improvements in the property. His authority began and ended with the direction of the disbursement of the \$5,000.

[4] Appellee being undoubtedly in exclusive possession and having the care and cus-

tody of the Alamo property, by the consent of the state of Texas, expressed through its legislative department, had the right and authority to repel the invasion of the property by any trespasser. It stood in the same relation to the property that any other actual, exclusive possessor of land does against any mere stranger or wrongdoer, who has neither title to the possession, nor authority from the owner. No one but the state of Texas, the owner of the land, could oust it of its rightful possession, and it was not only the privilege, but the duty, of the custodian of the property to defend its possession against any trespasser. *Linard v. Crossland*, 10 Tex. 462, 60 Am. Dec. 213; *Wilson v. Palmer*, 18 Tex. 592; *Bonner v. Wiggins*, 52 Tex. 125; *Parker v. Railway*, 71 Tex. 132, 8 S. W. 541; *Pacific Express Co. v. Dunn*, 81 Tex. 85, 16 S. W. 792; *National Bank v. Brown*, 85 Tex. 80, 23 S. W. 862; *Watkins v. Smith*, 91 Tex. 589, 45 S. W. 560.

The title to the Alamo property is in the state of Texas, and it alone has the right and authority to place the possession, control, and custody of it in the hands of another; such permission to control and possess being expressed through its only medium of expression, in such case, the legislative branch of the government. It alone can legislate, and to it and the Constitution of the state the other branches of the government must look for power, guidance, and authority.

[5] Within constitutional limits its power in the enactment of laws is supreme.

[6] It had the power and authority to create the office of superintendent of public buildings and grounds, and to clothe him with authority to take charge and control of all public buildings, grounds, and property, and it seems clear that it could take the charge and control of any public property away from him and place such custody in the keeping of some other agency. The superintendent of public buildings is a legislative office, which may have its powers increased or restricted, or the office altogether abolished, by the Legislature, and the Legislature was acting within its constitutional powers when it placed the custody of the Alamo property in other hands than those of the superintendent of public buildings. This is what the Legislature intended to do by the act of 1905, and this is clearly evidenced by its adoption of the Revised Civil Statutes, at the regular session of 1911, containing the law of 1905 as to the Alamo property, which is made article 6394, in title 113, relating to public buildings, grounds, and parks, wherein is found the only authority for the appointment of the superintendent of public buildings. Under that same title are provisions for the appointment of San Jacinto park commissioners, who are not given the care and custody of the park, but who are au-

thorized "to advise with and assist the superintendent of public grounds in the improvement, care, and preservation of the lands now owned and hereafter acquired by the state, known as the San Jacinto Battlefield." No such divided or concurrent authority is given by article 6394, relating to the Alamo.

We do not think that the contention that, although the Alamo property was "delivered to the care and custody of the Daughters of the Republic of Texas," the custody was not exclusive, can be sustained. The care and custody of person or property carries with it the idea of exclusive possession. This may be illustrated by our divorce laws, which authorize district courts to "give the custody and education of the children to either father or mother," and which, every one is constrained to admit, carries with it authority to one of the spouses not conferred on the other. It means a custody exclusive of the other. We cannot conceive of one person having the "care and custody" of property, charged with repairing and maintaining it, and another without a grant of authority taking possession and making changes and improvements in the property. This could not be done even by the owner of the property who had placed his property indefinitely in the hands of another, to care for it, unless done in a legal way to protect the property. The state of Texas had recognized the exclusive possession of the property by the Daughters of the Republic of Texas ever since the passage of the law of 1905, and the officers sued only claim the right to disturb that possession by authority of the quoted clause in the appropriation bill of 1911.

[7] The state has not attempted by legislative action to resume possession of the Alamo property, and has not authorized appellants to interfere in any manner with the possession and custody of the property unless appellee should invoke such interference by inviting the expenditure of the money appropriated by the Legislature. It has not done this, and the officers sued, acting without legislative sanction or authority, can be sued as any other trespasser upon the rights of possession would be sued. They are in no sense representing the state of Texas, and a suit against them is not a suit against the state. *United States v. Schwalby*, 8 Tex. Civ. App. 679, 29 S. W. 90; *Id.*, 87 Tex. 604, 30 S. W. 435. In that case Gen. Stanley and other military officers of the United States were trespassers upon land owned by Mrs. Schwalby and they were sued by her. This court held that the United States was not sued, but that the officers were sued as trespassers. The Supreme Court of Texas refused a writ of error, and in its opinion on the application it was held: "The proposition that Stanley and his co-defendants, although officers of the United

States, and in possession of the lot under and by virtue of the authority of the United States, could not be sued for the property and rents, is no longer open to contention." That cause was taken by writ of error to the Supreme Court of the United States (147 U. S. 508, 13 Sup. Ct. 418, 37 L. Ed. 259; 162 U. S. 255, 16 Sup. Ct. 754, 40 L. Ed. 960), and that tribunal agreed with this court that the officers could be sued as trespassers, but held that the title of the United States to the land was good, and that judgment should have been rendered in favor of the officers. There are other points discussed in that case, but none, except that mentioned, is applicable to this case.

The noted case of *United States v. Lee*, 106 U. S. 196, 1 Sup. Ct. 240, 27 L. Ed. 171, involving Arlington, the estate of Gen. Robert E. Lee, fully sustains the judgment of this court in the *Schwalby* Case, and that court quoted this strong presentation of the matter raised in this case, from Chief Justice Marshall in *Osborn v. U. S. Bank*, 9 Wheat. 738, 6 L. Ed. 204: "If the state of Ohio could have been made a party defendant, it can scarcely be denied that this would be a strong case for an injunction. The objection is that, as the real party cannot be brought before the court, a suit cannot be sustained against agents of that party; and cases have been cited to show that a court of chancery will not make a decree, unless all those who are substantially interested be made parties to the suit. This is certainly true where it is in the power of the plaintiff to make them parties, but if the person who is the real principal, the person who is the true source of the mischief, by whose power and for whose advantage it is done, be himself above the law, be exempt from all judicial process, it would be subversive of the best-established principles to say that the laws could not afford the same remedies against the agent employed in doing the wrong, which they would afford against him could his principal be joined in the suit." We need not go to that extent in this case, because no authority was shown to have been given by the state of Texas to appellants to invade the rightful possession of the property by appellee. Again, in the *Osborn* Case the Supreme Court said: "In deciding who are parties to the suit, the court will not look beyond the record. Making a state officer a party does not make the state a party, although her law may have prompted his action, and the state may stand behind him, as a real party in interest. A state can be made a party only by shaping the bill expressly with that view, as where individuals or corporations are intended to be put in that relation to the case."

In the *Lee* Case Mr. Justice Miller said: "In the case supposed, the court has before it a plaintiff capable of suing, a defendant who has no personal exemption from suit,

and a cause of action cognizable in the court; a case within the meaning of that term, as employed in the Constitution and defined by the decisions of this court. * * * What is the right as established in this case? It is the right to the possession of the homestead of plaintiff, a right to recover that which has been taken from him by force and violence and detained by the strong hand. This right being clearly established, we are told that the court can proceed no further, because it appears that certain military officers, acting under the orders of the President, have seized this estate, and converted one part of it into a military fort and another into a cemetery. It is not pretended, as the case now stands, that the President had any lawful authority to do this, nor that the legislative body could give him such authority, except upon payment of just compensation. The defense stands here solely upon the absolute immunity from judicial inquiry of every one who asserts authority from the executive branch of the government, however clear it may be made that the executive possessed no such power." The suit was sustained by that court.

[8] Appellee is a private corporation chartered by the state of Texas, and, in the absence of charter or statutory provisions to the contrary, has the same capacity to sue and be sued as a natural person. The powers to sue and be sued are among the incidental and implied powers, from the earliest period attributed to corporations, and need never be expressly conferred. *Clark & Marshall, Priv. Corp.* § 258. Having a possessory right in the property, the corporation had the authority to prosecute a suit against a trespasser on the property as hereinbefore indicated.

[9] It was not necessary, in order to sustain a suit to prevent a trespass, that authority should be given by the statute giving the corporation the custody of the property. That statute carried with it the grant of every power needed to carry into effect the purposes of the statute. Such power was incidental to powers granted. The case of *Charles River Bridge v. Warren Bridge*, 11 Pet. 420, 9 L. Ed. 773, has no application to the facts of this case.

[10] It will be presumed that the suit was authorized by the corporation, as it was sanctioned by its president and other officers. *Olcott v. Gabert*, 86 Tex. 121, 23 S. W. 985. Appellants had no right to inquire into such authority and did not, on the trial, attempt to do so.

[11] It was not a condition precedent to instituting the suit that appellee should allege or prove that it was executing the trust reposed in it. If it is not performing the trust, that is a matter between it and the state of Texas, to be inquired into and met by the Legislature. No power has been vested in any officer of the state government to set aside the law and take possession of

the property because the corporation is not living up to its agreement. The state has the authority to legislate further in regard to the matter, but it has not done so in a way to interfere with the law of 1905.

[12, 13] The claim that the act of 1905 is contrary to and in violation of article 1, § 26, of the Constitution of Texas, in regard to perpetuities and monopolies, cannot be sustained. That section is: "Perpetuities and monopolies are contrary to the genius of a free government, and shall never be allowed." The power granted to the Daughters of the Republic of Texas was not a perpetuity, because appellants are contending that they could put an end to it, and the law itself states "all of said property being subject to future legislation of the state of Texas." The definition of a monopoly precludes it from being applied to a grant of power to an association to assume the burden of caring for, preserving, and repairing a piece of property belonging to the state. "A monopoly consists in the ownership or control of so large a part of the market supply or output of a given commodity as to stifle competition, restrict the freedom of commerce, and give the monopolist control over prices." *Black's Law Dictionary*: *Queen Ins. Co. v. State*, 86 Tex. 250, 24 S. W. 397, 22 L. R. A. 483. That is the monopoly the Constitution condemns, and not the assumption of a burden which deprives no citizen of any privilege or right, and brings no financial gain to the person granted certain authority. The cases cited have no application to a case of this character. No credit or aid was given by the state to the corporation. If the property was, or is, revenue producing, the revenue belongs to the state of Texas, for the simple and plain reason that no revenues have been granted to appellee. That is a matter which can have no bearing on this suit.

The act of 1905 is a general and not a special act. It applies to the whole state, and not any particular community or particular persons. This question is not raised by any proper assignment of error, but is sought to be presented by a proposition under an assignment which refers to an entirely different matter.

The eighteenth assignment cannot be sustained. The evidence failed to show that any plan had been proposed by the Governor for the improvement of the property, and therefore there could have been no ratification of the same. The matter ratified was the tearing away of the woodwork and other rubbish but the record fails to indicate any ratification of any plans for improvement or repairs.

[14, 15] No attempt was made to prove that appellee had not elected a board of directors; but, if the testimony had shown that fact, it would not have deprived appellee of the right to prosecute the suit. Although appellee may not have complied

with all the statutory requirements, it would still be a *de facto* corporation, and its corporate existence cannot be attacked in a collateral proceeding. *Clark & Marshall, Priv. Corp.* § 80, pp. 226, 227. The corporate existence of appellee has been fully recognized by the state. The facts show a board of directors was in existence under the name of executive committee.

[16] This has been fully recognized in *De Zavala v. Daughters of the Republic*, 124 S. W. 160, and writ of error denied by the Supreme Court. As held in that case, it was not necessary to allege nor prove that the suit was authorized by the board of directors.

[17] Appellee did show that the plans being followed by appellants were injurious, and that its lawful possession had been invaded, and that was a sufficient basis for a restraining order. *Burnley v. Cook*, 13 Tex. 586, 65 Am. Dec. 79; *Buskirk v. King*, 72 Fed. 22, 18 C. C. A. 418.

We have given all of the assignments careful attention, and have arrived at the conclusion that the exclusive custody and care of the Alamo property has been given to appellee by the state; that it alone can make plans, which, to be effective, must be approved by the Governor; that the appropriation item of 1911 did not repeal any part of the law of 1905; that the custody and care of the Alamo property is still confided to the Daughters of the Republic of Texas; and that appellants were trespassers thereon.

The judgment is affirmed.

On Motion for Rehearing.

Appellants pretermit all other questions raised in the brief by stating: "The sole question to be determined is: Did the court err in holding that the act of the Thirty-Second Legislature of Texas did not repeal the entire act of January 26, 1905?"

[18] In article 3, § 35, of the Constitution of Texas, it is provided that "no bill (except general appropriation bills, which may embrace the various subjects and accounts for and on which moneys are appropriated) shall contain more than one subject, which shall be expressed in its title." That section does not give any authority to pass new laws or repeal old ones through the medium of a general appropriation bill, and even if the Legislature had intended to repeal the act of 1905, by an item in the appropriation bill, it would be invalid and unconstitutional, for such bills are excepted from the general rule only for the reason that they might appropriate money for the various purposes of government, without naming each item in the title, which would render them cumbersome and very onerous. It was never contemplated that a valid existing law should be repealed by an appropriation of money, even though, as is not the case in this instance, it be totally inconsistent with the terms of the existing law. No case has been cited, or

has come to our notice, where an existing law has been repealed by the appropriation of money in connection with the subject-matter of the existing law. A statute might be brought into a state of "innocuous desuetude," so that it might languish, and, languishing, perchance might die of inanition by a failure to appropriate funds necessary to put it into operation, but the Legislature attempted a novel performance if it endeavored to destroy a law by the appropriation of money to carry it into effect.

Admitting that a repealing act might be sandwiched among the various and sundry items of a general appropriation act, still such an act would not be a subject or account for and on which moneys are appropriated, and should be expressed in the title. It was never contemplated that an act should be repealed by an item in an appropriation bill, and there is nothing in the item appropriating the \$5,000 to improve the Alamo property that evinces any desire upon the part of the Legislature to take the custody of the property from those to whom it had been intrusted by law. We must presume that, if the Legislature desired to relieve the association of Texas women of the custody and care of the Alamo property, it would have met the question in an open, manly way, and would not, at a called session, convened for certain purposes, have slipped an item into a general appropriation bill, in order to repeal one of the statutes of the state.

[18] Even if the item, which is dignified by appellants by being called a "repealing act," had been intended as an amendment of the act of 1905, it would not be in harmony with article 3, § 36, of the Constitution, which provides that no law shall be amended by reference to its title, "but in such case the act reviewed or the section or sections amended shall be re-enacted and published at length." No reference whatever is made in the appropriation item to the act of 1905, by title or otherwise. The sole object of the appropriation of 1911 was to assist the trustees and custodians of the Alamo in caring for and improving the property.

[20] As to the charge that the Daughters of the Republic of Texas have not made any efforts to improve the property, and have not acted in good faith with the state, this court has nothing to do; but that matter, if deserving of presentation to any branch of the state government, must be addressed to the Legislature, which gave appellee its authority and alone can take it away.

This court has not held, as so zealously, if not intemperately, asserted by appellants in their motion, that the money appropriated should be distributed by the Daughters of the Republic of Texas, but have held that no officer of the state government has the authority to dispossess that organization of the

custody of property confided to it by the Legislature. This court has nothing to do with the question of the expenditure of the money appropriated, and does not propose to be led off into the consideration of such questions, which have no bearing whatever upon the law and merits of this case.

The motion for rehearing is overruled.

COMPTON v. AHRENS & OTT MFG. CO.

(Court of Civil Appeals of Texas, Galveston, Nov. 22, 1912.)

1. PAYMENT (§ 39*)—APPLICATION—RIGHT OF CREDITORS.

Where a debtor making a payment gives no direction as to the application thereof, the creditor may generally do so; and the application need not be made by him at the time of payment, provided it is done within a reasonable time thereafter.

[Ed. Note.—For other cases, see Payment, Cent. Dig. §§ 104-114; Dec. Dig. § 39.*]

2. PAYMENT (§ 75*)—APPLICATION—EVIDENCE.

The application by a creditor of a payment, where the debtor gives no directions as to application, may be established by circumstances.

[Ed. Note.—For other cases, see Payment, Cent. Dig. 239; Dec. Dig. § 75.*]

3. PAYMENT (§ 75*)—APPLICATION—EVIDENCE.

A guaranty covered \$1,200 of an account of \$1,450.53. The debtor made a partial payment of \$500, without direction as to its application. The guarantor was advised of the payment, and three months thereafter the creditor demanded payment of the balance due on the account, and the guarantor replied that a remittance would be made about a designated future date. *Held*, that the creditor first applied the partial payment to the amount in excess of the guaranty, and the balance on the guaranty, so that the guarantor was liable for the balance.

[Ed. Note.—For other cases, see Payment, Cent. Dig. § 239; Dec. Dig. § 75.*]

Error from Galveston County Court; James B. Stubbs, Special Judge.

Action by the Ahrens & Ott Manufacturing Company against E. H. Compton and another. There was a judgment for plaintiff, and defendant named brings error. *Affirmed*.

Geo. G. Clough, of Galveston, for plaintiff in error.

REESE, J. This is an appeal from a judgment of the county court. E. H. Compton was sued, along with his principals, by Ahrens & Ott Manufacturing Company as guarantor of a certain account for goods and merchandise sold by appellee Ahrens & Ott Company to the Compton Plumbing Company, or Compton & Athey. The entire account amounted to \$1,450.53. The guaranty of appellant covered \$1,200 of the account. The principal debtors made, at three different times, payments amounting in the aggregate to \$940, which appellees claimed should be applied, or had been applied by them, to that

part of the account not covered by the guaranty, leaving the guarantor liable for the entire balance of \$510. On the other hand, appellant contends that the amounts paid should be applied to that part of the account secured by the guaranty, which would have left only \$280 for which he would be liable. The case was tried without a jury, and the court held with appellees, and rendered judgment against the principal debtor, appellant (the guarantor), for \$510.53, from which judgment he appeals by writ of error. We use the terms of appellant and appellees for brevity.

The debtor gave no directions as to the application of the several payments. So far as the books of appellees show, they were credited generally upon the account of \$1,450.53. If this were all that there was on this point, we would be confronted with the vexatious question, upon which there is so much conflict in the authorities, at least in the practical application of principles to the concrete facts of particular cases, of the application of payments by the court, as between several items of indebtedness, when no application has been made by either debtor or creditor before suit brought.

[1] The debtor having made no application, the creditor had the right, generally, to do so; and it is not necessary that such application should have been made by him at the time of payment, provided it be done within a reasonable time thereafter. *Stone v. Petrus*, 47 Tex. Civ. App. 14, 103 S. W. 415; 30 Cyc. 1238.

[2] Such application may also be established by circumstances. *Bray v. Crain*, 59 Tex. 652; 30 Cyc. 1237.

[3] Three months after the first payment of \$500 had been made, and of which appellant had been advised, reducing the entire account to \$974.43 (interest included), appellees wrote to appellant as follows: "As you have not seen fit to reply to our recent communication relative to the account of Athey & Compton of \$974.43, which was guaranteed by you, we are surprised at your ignoring our letter, and we take this means of advising that unless we receive some assurance from you that this account will be paid within a short time it is our intention to place same in the hands of our attorney. We hope that you will not permit matters to be brought to this issue but that you will arrange to see that check is forthcoming without delay." Appellant replied to this letter as follows: "Yours of the 30th inst. is at hand, and I have written you on different occasions in regard to Athey & Compton's account and I assure you that everything is all O. K. Their collections have been very slow in the past month. I think they will be able to make a remittance about the 20th of this month. Hoping this is satisfactory, I remain."

Appellant knew that \$500 had been paid on the entire account. If this had been applied to that part secured by his guaranty, it would have reduced the amount for which he was liable to \$700. This letter is a demand upon appellant for \$974, and indicates that so much of the \$500 as was required for that purpose had been applied to the payment of the unsecured part of the account, and the balance applied to that part secured by the guaranty. In no other way would appellant's liability be the amount for which demand was made on him by appellees. We think it a reasonable inference or deduction from this circumstance that appellees had at the time of, or previous to, the date of this letter made such application of the \$500. The letter was certainly sufficient to so inform appellant, who in his reply made no objection thereto, but apparently acquiesced therein. The trial court so construed this correspondence, and found that there had been such application of this payment. We think this conclusion was correct. This left the entire balance of \$974 then due secured by the guaranty. Subsequent payment reduced this amount to the amount for which judgment was rendered against appellant, as guarantor. We find no error, and the judgment is affirmed.

Affirmed.

ROYAL NEIGHBORS OF AMERICA v. BRATCHER.

(Court of Civil Appeals of Texas. Texarkana. Dec. 17, 1912. Rehearing Denied Dec. 19, 1912.)

1. INSURANCE (§ 723*)—BENEFIT CERTIFICATE—"ABORTION"—"MISCARRIAGE."

Decedent, having applied for insurance in a mutual benefit society, answered that she had never had any local disease, personal injury, or illness of any kind, but in answer to the medical questions stated that her last confinement was in 1908, and that she had had two miscarriages from overexertion. In an action on the certificate, it was shown that in 1903, about seven years prior to decedent's death, she suffered an abortion when she was about three months advanced in pregnancy, and that about three years later another occurred at about the same stage. *Held*, that since the words "abortion" and "miscarriage" are synonymous, both meaning premature parturition, there was no breach of warranty or misrepresentation.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1859-1865; Dec. Dig. § 723.*]

For other definitions, see Words and Phrases, vol. 1, pp. 20, 21; vol. 5, pp. 4530, 4531.]

2. INSURANCE (§ 723*)—MISREPRESENTATION—MATERIALITY.

Where insured denied that she had had any illness within seven years prior to her application, proof that her physicians treated her for headache three years prior to the date of the policy did not necessarily defeat plaintiff's right to recover, the jury being authorized to find that such illness, if any, was not material to the risk assumed within Acts 31st Leg. (2d Ex. Sess.) c. 22.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1859-1865; Dec. Dig. § 723.*]

Appeal from District Court, Cooke County; Clem B. Potter, Judge.

Action by Andy Bratcher against the Royal Neighbors of America. Judgment for plaintiff, and defendant appeals. Affirmed.

Stuart, Bell & Moore, of Gainesville, for appellant. Davis & Davis, of Gainesville, for appellee.

HODGES, J. The appellant is a fraternal benefit insurance society, of which Mrs. Carrie Bratcher, the deceased wife of the appellee, was a member in good standing at the time of her death. This suit is to recover the amount due upon a policy of insurance issued on the life of Mrs. Bratcher, payable to the appellee. A trial before a jury resulted in a verdict against the appellant for the full sum sued for.

[1] The first error assigned is the refusal of the court to grant the motion for a new trial, based upon the ground that the verdict was against the great weight and preponderance of the evidence. The principal defense urged in the trial court was the falsity of answers made by the deceased in her application for the insurance. The particular questions referred to and discussed in appellant's brief are the following: "Have you within the last seven years consulted any person, physician, or physicians in regard to a personal ailment? Have you ever had any local disease, personal injury, illness of any kind or nature, serious or otherwise?" To both of these questions the applicant answered, "No." It is claimed that these answers were false, and for that reason the policy was void under the terms of the conditions upon which it was issued.

The evidence shows that in 1903, about seven years prior to her death, Mrs. Bratcher suffered an abortion when she was about three months advanced in pregnancy, and that about three years later another occurred at about the same stage. Neither of these appears to have been attended with any consequences which affected her health. Some time after the last miscarriage a physician was called in upon one occasion to treat her for sick headache from which she also fully recovered. The record does not inform us whether she called in the physician, or that it was done by her husband. The testimony all indicates that at the time this policy was issued Mrs. Bratcher had fully recovered from the effects of her previous ailments, and was in good health. Her death was due to ulceration of the stomach, according to the testimony of the physician who attended her. On the reverse side of her application for insurance appears a list of questions under this heading: "Camp physician to fill in this page." In a subdivision of the questions which follow is a group to be answered by female applicants. The record there shows the following ques-

tions and answers: "Give date of last confinement—1908; How many miscarriages—2 times; Give cause of miscarriages—overexertion." The camp physician who inserted those answers testified as follows: "At the time I examined her she was in good health. I was fairly positive she was in good health. These answers on this application * * * are in my handwriting. She told me about the two miscarriages she had. I did not give the date at the time. They sent the paper back for correction, and I got the paper and corrected it. I got that from the family physician, Dr. Seagraves." Unless there is a substantial and generally recognized distinction between the meaning of the words "abortion" and "miscarriage," appellant was fully and truthfully informed of the two abortions relied on to prove falsity in the answers made. In the standard dictionaries one is treated as a synonym of the other. Both mean premature parturition. As to these ailments there was no ground for holding the policy void because of incorrect answers. *Supreme Lodge v. Jones*, 143 S. W. 247.

[2] The jury might easily have concluded that the calling in of a physician to treat her for headache three years prior to the date of the policy was, even if incorrect, not "material to the risk assumed." *Acts 31st Leg. (2d Ex. Sess.) p. 443*. The jury was charged in accordance with the provisions of the statute. *United N. B. A. v. Baker*, 141 S. W. 541. There was no error in giving the charge complained of, nor in refusing the special charges presented.

The judgment is affirmed.

ALBRECHT et al. v. LIGNOSKI.

(Court of Civil Appeals of Texas. San Antonio. Dec. 4, 1912.)

APPEAL AND ERROR (§ 560*)—STATEMENT OF FACTS—PREPARATION—FORM.

Where a statement of facts consisting of 59 pages, 6 of which contained documentary evidence, and of the remaining 53 over 30 contained questions and answers, and about 20 consisted entirely of questions and answers, objections and rulings, apparently copied from the stenographer's transcript, two pages being taken up by a single controversy between counsel with reference to the admissibility of certain evidence, interspersed with questions and remarks by the court, instead of the whole being reduced to a distinct statement in narrative form, it was a violation of district court rules 72-78 (142 S. W. xxii) and *Acts 32d Leg. c. 119, § 6*, and was subject to a motion to strike.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 2490-2493; Dec. Dig. § 560.*]

Appeal from District Court, Dimmit County; J. F. Mullally, Judge.

Action between C. A. Albrecht and others and Charles Lignoski. From a judgment in favor of Lignoski, Albrecht and others ap-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

peal. On motion to strike the statement of facts. Granted.

Wm. H. Davis, of Crystal City, Colon Schott, of Cincinnati, Vandervoort & Johnson, of Carrizo Springs, and Magus Smith, of Pearsall, for appellants.

MOURSUND, J. Pursuant to appellee's motion to strike out the statement of facts filed in this cause, we have examined the same, and find that it does not comply with the rules, in that much of it consists of questions and answers, interspersed with objections by counsel and rulings by the court. About 6 pages contain documentary evidence. Out of the remaining 53 pages, over 30 contain questions and answers, and about 20 consist entirely of questions and answers, objections and rulings, apparently copied from the stenographer's transcript. About 2 pages are entirely taken up by a single controversy between counsel in regard to the admissibility of certain evidence, interspersed with questions and remarks by the court. We cannot agree with appellants' contention that questions and answers were only copied when necessary to an understanding of the testimony of the witnesses. In our opinion, practically all the questions and answers could have been reduced to a succinct statement in narrative form.

We conclude that the rules have been flagrantly violated in the preparation of this statement of facts, and that it is our duty to grant the motion to strike same from the record. Rules 72 to 78 of the district court (142 S. W. xxii); Acts 32d Leg. c. 119, § 6; *Brown v. Vizcaya*, 54 S. W. 636; *Caswell v. Hopson*, 43 S. W. 549; *Wentworth v. King*, 49 S. W. 696; *Heidenheimer v. Tannenbaum*, 23 Tex. Civ. App. 587, 56 S. W. 776; *Albers v. Roberts*, 150 S. W. 596.

Motion granted.

HOUSTON OIL CO. OF TEXAS v. POWELL, District Judge.

(Court of Civil Appeals of Texas. Galveston. Nov. 9, 1912.)

1. APPEAL AND ERROR (§ 655*)—RECORD—CORRECTION—JURISDICTION.

The district court has jurisdiction to correct on motion the record on appeal, by striking therefrom conclusions of fact and law not signed and filed within the time allowed by law.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 2823-2825; Dec. Dig. § 655.*]

2. MANDAMUS (§ 57*)—COMPELLING CORRECTION OF RECORD ON APPEAL—REMEDY.

Mandamus lies to compel the district court to correct the record on appeal, when necessary to have the error corrected.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. §§ 68, 114-120; Dec. Dig. § 57.*]

3. MANDAMUS (§ 16*)—COMPELLING CORRECTION OF RECORD ON APPEAL—REMEDY.

Where the record on appeal conclusively shows that the conclusions of fact and law were

not filed within the statutory time, and that the indorsement of filing within the time was pursuant to an order of the court made under the belief of the existence of an agreement of the parties, mandamus does not lie to compel the district court to correct the record by striking therefrom the conclusions of fact and law.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. §§ 48, 59, 60; Dec. Dig. § 16.*]

Appeal from District Court, Sabine County; W. B. Powell, Judge.

Mandamus by the Houston Oil Company of Texas against W. B. Powell, District Judge, to compel the judge to hear and determine the question of the correctness of the record on appeal. Denied.

Hightower, Orgain & Butler and W. H. Davidson, all of Beaumont, for relator. J. S. Wheless, of Beaumont, for respondent.

REESE, J. The record on appeal in this case contains conclusions of fact and law signed by Hon. W. B. Powell, District Judge. The file mark of the district clerk shows that this paper was filed on April 6, 1912. The term of the court at which the case was tried adjourned March 28, 1912. Claiming that this paper was not in fact filed until after April 16, 1912, being after the expiration of the 10 days after adjournment of the court allowed by law, and that by order of the district judge the same was indorsed by the district clerk filed on April 6th, and should therefore be stricken from the record, appellant presented an application to the district judge, then holding a term of his court in Jasper county, setting out the facts as claimed by it, and praying that the record be corrected, and the document stricken from the record. The judge sustained a general demurrer by appellee to the application, holding that he had no jurisdiction, sitting in Jasper county, to hear and determine the question presented. Afterwards appellant presented another application to the district court of Sabine county, where the case was tried, to the same effect, and subsequently still another to the district judge, holding court in Newton county, in the same district, both of which the district judge refused to hear and determine, whereupon appellant presents to this court its application for a writ of mandamus, setting up the facts stated, and praying for a writ of mandamus requiring the respondent to hear and determine the question presented with regard to the date of the filing of the conclusions of fact and law in this cause.

[1] We have no doubt of the right of appellant to take this course to have the record corrected. That it is the only course, and certainly the proper course, has been settled by the decisions of the Supreme Court and Courts of Civil Appeals. *Railway Co. v. Walker*, 39 Tex. Civ. App. 53, 87 S. W. 194, citing cases; *Harris v. Stark*, 101 Tex. 587, 110 S. W. 737; *Maxson v. Jennings*, 19 Tex.

Civ. App. 700, 48 S. W. 781; *Boggess v. Harris*, 90 Tex. 476, 39 S. W. 565; *Willis Bros. v. Smith*, 90 Tex. 636, 40 S. W. 401.

[2] We think that a proceeding of this kind would have to be instituted in the court in which the case was tried, and if it were necessary, in order to have the error here alleged corrected, that it be done by such proceedings, the mandamus would be ordered.

[3] The record before us, however, consisting of the answer of respondent to this application for mandamus, the bill of exceptions approved by the respondent to his action upon the application presented to him in Jasper county, with the affidavit of appellee's counsel, a part of the record in that proceeding and incorporated in this application, in fact, the entire record, contains such indubitable proof that the conclusions of fact and law were not filed on the day shown by the indorsement of the clerk, but were in fact filed more than 10 days after the adjournment of the court, and that the date of filing was, by order of the judge to the district clerk, made to appear as of the 6th of April, in accordance with what he was led to believe was an agreement of counsel for both parties, that it appears to us that it would be altogether unnecessary to have the fact finally adjudicated by the court below. To do so would be a mere idle form, entailing an unnecessary consumption of time, labor, and expense, for no useful purpose. We have, in the record, substantially an admission of all parties that the conclusions were not in fact prepared or filed until more than 10 days after the adjournment, and that the filing was dated back by the clerk, by order of the judge, in accordance with a supposed agreement of counsel. Counsel for the parties are at serious issue as to such agreement, an issue which we do not pass upon, as it is unnecessary to do so in this proceeding.

In this state of the record, we must refuse the writ of mandamus; and it is so ordered.

THOMPSON BROS. LUMBER CO. v. LONGINI et al.

(Court of Civil Appeals of Texas. Galveston. Nov. 21, 1912. Rehearing Denied Dec. 12, 1912.)

1. APPEAL AND ERROR (§ 750*)—ASSIGNMENTS OF ERROR—SCOPE AND EFFECT OF ASSIGNMENTS.

On appeal, in an action for cutting timber, an assignment of error that the testimony conclusively established that the timber was cut more than two years before the commencement of the action, and that, there being no evidence to the contrary, the verdict and judgment for plaintiff was not supported by it, and was against preponderance of the evidence, raised only the question whether the undisputed evidence showed that the timber was cut more than two years before the commencement of the action, especially where defend-

ant in its brief waived all questions, except that whether the cause of action was barred by limitations "as shown by the undisputed evidence."

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3074-3083; Dec. Dig. § 750.*]

2. APPEAL AND ERROR (§ 742*)—ASSIGNMENTS OF ERROR—PROPOSITIONS.

Where an assignment of error only raised the question that there was no evidence to support the verdict, a proposition, if intended to attack the verdict as against the preponderance of the evidence, was not germane to the assignment, and would not be considered.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 3000; Dec. Dig. § 742.*]

3. LIMITATION OF ACTIONS (§ 199*)—EVIDENCE—WEIGHT AND SUFFICIENCY.

In an action for cutting timber on another's land, in which defendant pleaded limitations, evidence held to present a question for the jury whether the timber was cut within two years before the commencement of the action.

[Ed. Note.—For other cases, see *Limitation of Actions*, Cent. Dig. §§ 727-730; Dec. Dig. § 199.*]

Appeal from District Court, Tyler County; W. B. Powell, Judge.

Action by E. Longini and others against the Thompson Bros. Lumber Company and others. Judgment for plaintiffs, and the defendant named appeals. Affirmed.

J. A. Mooney and J. J. Goodwin, both of Woodville, and Lane, Wolters & Storey and Wm. A. Vinson, all of Houston, for appellants. W. A. Johnson and Joe W. Thomas, both of Woodville, for appellees.

McMEANS, J. This is a suit of trespass to try title for the recovery of lot No. 2 of the E. T. Hanks league, in Tyler county, brought on July 9, 1909, in the district court of Tyler county, by E. Longini, Frederick Milheiser, and W. H. Howard, against Thompson Bros. Lumber Company, Cave Johnson, W. G. Pennington, Mrs. Annie Cruse, and Ruth and John Knight Cruse. Plaintiffs alleged that Thompson Bros. Lumber Company had cut and removed the timber from said land, and sought by appropriate allegations to recover from said company the manufactured value thereof, or, in the alternative, the stumpage value. The Cruses disclaimed, and went out on their disclaimer. The plaintiffs admitted that defendants Pennington and Johnson were entitled to the portion of the land sued for described in their answers, and judgment was accordingly awarded them therefor. Defendant Thompson Bros. Lumber Company pleaded not guilty, and interposed a plea of the statute of limitations of two years to the plaintiffs' claim for damages. The case was tried before a jury, and resulted in a verdict and judgment for plaintiffs against Thompson Bros. Lumber Company for 113 acres of the land sued for and for the sum of \$3,955 damages, being the manufactured value of the timber cut from said 113 acres. From

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

this judgment the defendant, after its motion for a new trial had been overruled, has appealed.

[1] The only question presented by appellant for our consideration is embraced in its first assignment of error. The assignment is as follows: "The defendant pleaded the statute of limitation of two years, and the testimony established conclusively that all the timber cut by defendant had been cut for more than two years prior to July 9, 1909. There being no evidence to the contrary, the verdict and judgment is not supported by it, and is against a preponderance of the evidence." Under this assignment appellant urges the following proposition: "The undisputed evidence, or at least the great preponderance of the evidence, shows that the plaintiffs' claim for damages for cutting the timber was barred by the statute of limitations of two years interposed by the defendant." As we understand the assignment of error, it assails the verdict on the sole ground that there is no evidence to support it.

[2] There is a further proposition, advanced in the assignment, that the verdict and judgment are against the preponderance of the evidence; but it is clear that the reason given for this is that the evidence conclusively established that the timber was cut by defendant more than two years prior to July 9, 1909 (the date when the suit was filed), and that there is no evidence to the contrary. We think, then, that the only question presented by the assignment for our consideration is this: Does the undisputed evidence show that the timber was cut by defendant prior to two years before July 9, 1909? That it was the intention of appellant to present this question only is manifest from a statement in its brief immediately preceding the page on which the assignment is copied, wherein it says: "In the presentation of this case to this court, we will waive all other matters, and will present this single question, viz.: The plaintiffs' cause of action for damages for cutting the timber was barred by the statute of limitations of two years, as shown by the undisputed evidence." If by the proposition following the assignment it is intended to attack the verdict and judgment as being against the great preponderance of the testimony, it is not germane to the assignment, and will not be considered.

[3] As before stated, this suit was filed July 9, 1909. Appellant does not deny that it cut and removed the timber, and the testimony clearly shows that it did so. Its only contention is that the undisputed proof shows it cut and appropriated the timber prior to two years before the filing of the suit. If, therefore, there is any testimony in the record sufficient to justify the jury in concluding that the timber was taken within two years prior to July 9, 1909, their

verdict should be upheld. Under the assignment of error presented, we are not concerned with or called upon to settle any conflict of the evidence on this point.

Much of the testimony relied upon by plaintiffs is confusing and unsatisfactory; but we think the clearest is that given by the witness W. G. Pennington, and we here copy his testimony in full: "I am acquainted with the E. F. Hanks league of land. I live on some of it. I own some of the league of land. * * * I am acquainted with the strip there west of me, the whole tract. Thompson Bros. Lumber Company cut that timber. I could not say just exactly what time that timber was cut really. The best I remember it was cut either in the spring of 1907 or in the fall of 1907; that is as near as I could come at it, but I think it was in the fall of 1907. They crossed my land in the fall of the year, and they had to cross my land before they entered the land sued for. They passed my land some time between October and December. I could not say which. They built a tram. They put the tramroad there, and crossed my land. I believe it was in 1907, either in October, November, or December. They cut that timber after they cut mine. I could not say how long afterwards, but it was after they cut my timber. I don't know whether they ran a tramroad up north there, and cut some timber before they came back down there, and cut that timber west, and entered onto the Blount league. I was not working in the woods, and really don't know which tram they ran first outside of the main line. Whether they ran south of me, or north, right or left, I don't know which tram they ran first. They cut this particular timber on this 113-acre strip west of me when they ran south. It was south of the main line. They crossed my land, the south part of that tract of land. This tract in the suit is about one and a half miles west of Duccette."

On cross-examination he testified: "I do not remember when the Thompson Bros. Lumber Company tramroad crossed the Texas & New Orleans Railway. I am not sure, but I think it was in the fall of 1907. If I am correct about that time, then I am correct with reference to the date on which this timber was cut. I merely know they cut this other timber on the Hanks league. If the tramroad crossed the Texas & New Orleans Railway in 1907, as to whether I am correct, then, with reference to when the timber on the 113 acres was cut, will say that I don't know what time it was cut. I think it was cut the same year the tramroad crossed, but I don't know how long afterwards. As to whether it is a fact that the tramroad crossed there in 1906, will say that I probably might be mistaken. I don't know what year. If it did cross in 1906, then the timber was not cut in the fall of

1907, not unless they were there a year in there on that land. I wasn't in the woods, and had no occasion to be there when they were working at it. I have nothing to fix the date exactly. As to whether I mean to tell this jury I don't know when it was, and told Mr. Thomas a while ago, will say I said I thought, to the best of my knowledge, it was in the fall of 1907, or spring of 1908. I think I said I knew it was cut after they cut mine; that is what I said. They went from my land onto the 113 acres sued for. I am not positive what year. If the tramroad crossed the Texas & New Orleans in 1906, then this timber would have to have been cut along about the spring of 1907. Since I have been studying about it, I really believe it was 1907 that the tramroad crossed the Texas & New Orleans Railway. If it crossed in 1906, then the cutting was done in the fall of 1906 and the spring of 1907; if it crossed in 1907, it was done in the fall of 1907 and spring of 1908; that is my belief."

On redirect examination he testified: "It is my best recollection about it that the tramroad passed through my land October, November, or December of 1907. Since I studied about it the last two or three days, it appears to me it was in the fall of 1907. This timber that is under investigation was cut some time after that, some part of it. The balance of the Hanks survey was cut after mine was cut. They built the tramroad right off of mine onto that. Mine was cut first, and this timber was cut after that, which was cut after October, November, or December, 1907. That is my best recollection about it. I think I am correct about that, after studying over the matter thoroughly."

On recross-examination he testified: "As to what timber was cut when the tramroad crossed the Texas & New Orleans Railway track, will say they cut mine, some I had sold to S. F. Carter, the party that owned it before the Thompson Bros. Lumber Company came there. They got that by purchase from the Carters after they got mine. Mine was the first timber they cut after they crossed the Texas & New Orleans Railway track. They cut the right of way timber first. They cut this timber immediately after they got through cutting mine. That was the first cutting they done immediately after they got through cutting mine."

From the foregoing testimony it will be seen that the witness testified that according to his best recollection appellants' tramroad was constructed through his land in October, November, or December, 1907, and that the timber in question was taken after the road was built, and that after studying over the matter thoroughly he thinks he is correct in this statement. If he was correct, then the timber was taken within two years

next before the filing of the suit, and the bar of the statute was not complete. It was the province of the jury to weigh his testimony and judge of its accuracy and reliability, and their verdict based upon it cannot be said to be without evidence to support it. Were we authorized, under any assignment of error properly raising the point, to consider whether the verdict and judgment are contrary to the great weight and preponderance of the testimony, we might feel constrained to hold in the affirmative; but, as before shown, the only question presented for our determination is whether there is any evidence to warrant the verdict. Believing that the verdict and judgment were supported by the evidence, we can only affirm the judgment; and it has accordingly so been affirmed.

Affirmed.

CONTINENTAL OIL & COTTON CO. v. GILLIAM.

(Court of Civil Appeals of Texas. Texarkana. Nov. 22, 1912. On Motion for Re-hearing, Dec. 5, 1912.)

1. MASTER AND SERVANT (§ 288*)—INJURIES TO SERVANT—MINORS—ASSUMED RISK.

Plaintiff, a boy 19 years of age, while endeavoring to oil certain cogs connected with a line shaft, slipped from a conveyer box, whereupon his hand was caught in the cogs and crushed. The situation was obvious, and he had oiled the machinery in the same way before, and knew that the cogs were unprotected, and that, if his hand should be caught therein, he would be injured. He had never been warned, however, of the dangers of such work, nor instructed as to a safer way to do the work, and he testified that he did not know of any safer way. Held that, since it did not appear that his mind was sufficiently developed to appreciate the risk, he did not therefore assume the risk as a matter of law.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1088-1088; Dec. Dig. § 288.*]

2. MASTER AND SERVANT (§ 289*)—INJURIES TO SERVANT—CONTRIBUTORY NEGLIGENCE.

Where a minor servant was injured while oiling a bearing the same as he had done many times before in the presence of defendant's superintendent, and, though the method adopted was dangerous, he had never been told of any other way, the fact that he adopted such method of his own volition did not render him negligent as a matter of law.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1089, 1090, 1092-1132; Dec. Dig. § 289.*]

3. APPEAL AND ERROR (§ 1066*)—HARMLESS ERROR—INSTRUCTIONS.

Where, in an action for injuries to a servant, the negligence claimed was in failing to instruct the servant as to a safe way of oiling certain machinery, and in failing to warn him of the danger of the method he adopted, an instruction that a servant could assume that the machinery, tools, and appliances with which he is called upon to work were reasonably safe, and that the business was conducted in a reasonably safe manner, that he need not exercise ordinary care to see whether this had been done, but that the master must use reasonable care to furnish a reasonably safe

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

place in which the servant may perform the contemplated services, while erroneous as not applicable to the issues, was harmless; the jury having been otherwise fully instructed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4220; Dec. Dig. § 1066.*]

4. MASTER AND SERVANT (§ 293*)—INJURIES TO SERVANT—INSTRUCTIONS—CONSTRUCTION.

In an action for injuries to a servant by his hand being crushed in a shaft bearing, the court charged that if plaintiff was directed to oil the bearing, and was given no directions as to how he should place himself while so doing, and it reasonably appeared to him necessary to stand on a conveyer box, and reach between the bearing and the pinion on a cooker shaft, and, if in doing so plaintiff's foot slipped and his hand was caught in the machinery and injured, and if in doing so he was not negligent, he did not assume the risk, and if in directing plaintiff to perform the service defendant was negligent, and the injury was the proximate result of such negligence, then the jury should find for plaintiff, etc. *Held*, that such instruction was not erroneous as in effect authorizing the jury to find that defendant was negligent in requiring plaintiff to oil the machinery, the duty he was employed to perform.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1148-1156, 1158-1160; Dec. Dig. § 293.*]

5. DAMAGES (§ 216*)—PERSONAL INJURIES—INSTRUCTIONS.

In an action for injuries to a servant, an instruction that, if the jury found for plaintiff, they should allow him such a sum as in their judgment would fairly compensate him in money for the physical and mental pain, if any, from the injuries, and if they believed the injuries were permanent, and would diminish his earning capacity in the future, then, in addition, they should allow such sum as would reasonably compensate him for the diminution, if any, in his capacity to labor and earn money consequent on such permanent injuries, if any, from the time when his disabilities of minority were removed to the end of his life. *Held*, that such instruction was not objectionable as authorizing the jury to calculate the amount plaintiff would lose annually during life, and allow him that sum, instead of a sum which, if paid, at once would reasonably compensate him for the injuries received.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 548-555; Dec. Dig. § 216.*]

6. DAMAGES (§ 132*)—EXCESSIVENESS—PERSONAL INJURIES.

Plaintiff, 19 years of age and employed as an oiler in defendant's oil mill, lost his left hand by having it caught in the bearing of a shaft. *Held*, that a verdict for \$8,000 was not excessive.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 372-385, 396; Dec. Dig. § 132.*]

Appeal from District Court, Taylor County; Thomas L. Blanton, Judge.

Action by W. H. Gilliam against the Continental Oil & Cotton Company. Judgment for plaintiff, and defendant appeals. Affirmed.

J. M. Wagstaff and Hardwicke & Hardwicke, all of Abilene, for appellant. Cunningham & Sewell, of Abilene, for appellee.

WILLSON, C. J. At about 5:30 o'clock of the afternoon of October 26, 1910, appellee, then 19 years of age, in an effort, in the

discharge of his duty as an employé of appellant, to oil machinery in appellant's oil-mill at Abilene, had his left hand caught by parts of the machinery, and thereby so crushed and injured as to necessitate its amputation. He contended that the injury he had suffered was caused by negligence on the part of appellant, and as his damages recovered the judgment for \$8,000, from which this appeal is prosecuted.

[1, 2] Appellant requested the trial court to instruct the jury to return a verdict in its favor, and complains of the refusal of the court to grant its request. It is insisted that it conclusively appeared from the testimony that the risk incurred by appellee in his effort to oil the machinery was one he had assumed, and, further, that it conclusively appeared that in making the effort as he made it he was guilty of negligence which was a proximate cause of the accident which occasioned the injury he sustained. From testimony in the record it appeared that in appellant's mill was a conveyer box used to carry meal. The box extended north and south, and was situated about twelve feet above the floor. It was made of boards two inches thick, and was about twelve inches wide and twelve inches deep. It was not covered. Two or three feet above and about a foot east of this box was another like it. Still further east, and at about the same height, was the "line shaft," used in operating a meal cooker situated thereunder; and still further east and about the same height was the "countershaft." On the line shaft were some uncovered cogs. At a time when the machinery was in operation appellee, for the purpose of oiling same, by means of a ladder, climbed to the top of the lower one of the two conveyer boxes, and, standing with the tips of his toes on the east side thereof, with his right arm resting on the cooker and his body against the other conveyer box, attempted, with an oil can having a spout about two feet long, held in his left hand, to oil a bearing on the countershaft. The spout of the can came in contact with and was caught by the cogs on the line shaft. As a result appellee's feet were caused to slip forward on the box he was standing on, and, as he fell or leaned east over the other box as a consequence of his feet slipping, his hand was caught and crushed by the cogs. There was nothing to prevent appellee from seeing the situation and condition of the machinery as described, and it conclusively appeared he did see same. He had oiled the machinery as many as twelve times before the time of the accident, and each time had oiled it as he was then attempting to. It may be said, therefore, to have conclusively appeared that he knew the conveyer boxes were uncovered and the cogs unprotected. It further may be said to have conclusively appeared that he knew if his hand should be caught by the

cogs as they revolved he would be injured. If it had further appeared that appellee was an adult at the time of the accident, we would be of the opinion that appellant's contention that the risk he incurred was one he had assumed should be sustained. But it conclusively appeared that he was then under 21 years of age, and had never been warned of the dangers of the work he was engaged in, and had never been instructed how to avoid those dangers. Therefore, notwithstanding he knew the situation and condition of the machinery, and that, if his hand should be caught by the cogs, he would suffer injury, it cannot be said as a matter of law that he assumed the risk of the accident. That he may have known the work was dangerous was not sufficient to put him in the attitude of having assumed the risk incurred in doing it. His discretion must have been sufficiently developed to enable him to know and appreciate the nature and extent of the risk he incurred. Whether his judgment was so developed or not was a question for the jury to determine with reference to all the facts of the case, and we think the court below did not err in refusing to treat and determine it as a question of law. *T. & P. Ry. Co. v. Brick*, 83 Tex. 598, 20 S. W. 511. Nor do we think the court erred in refusing to instruct a verdict for appellant on the ground that it conclusively appeared that appellee was guilty of negligence which contributed to cause the accident. While there was another and safe way to oil the bearing, appellee testified he knew of no other way than the one he pursued—that he had oiled it that way before, in the presence of the superintendent of the mill, and had never been told there was another way. Whether under all the circumstances shown by the testimony he acted as a reasonably prudent person of his age should have acted we think was a question about which reasonable minds might well have differed, and that the court properly submitted it to the jury.

We think the testimony was sufficient to support the findings involved in the verdict (1) that appellant, in directing appellee to oil the machinery without first warning him of the danger he would incur and instructing him how to avoid it, was guilty of negligence which was a proximate cause of the accident resulting in the injury he suffered; (2) that the risk of the accident was not one appellee had assumed; and (3) that appellee was not guilty of negligence which was a proximate cause of the accident, and we find the facts so to be.

[3] The court instructed the jury as follows: "When a servant enters the employment of the master, he has the right to rely upon the assumption that the machinery, tools, and appliances with which he is called upon to work are reasonably safe, and that the business is conducted in a reasonably safe manner. The servant is not required

to use ordinary care to see whether this has been done or not, but the master is required only to use ordinary care in furnishing to such servant machinery, tools, and appliances which are reasonably safe, and in furnishing such servant with a reasonably safe place in which to perform the contemplated services." The instruction is attacked as erroneous, because, it is contended, "the evidence and pleadings do not raise the question of safe machinery, tools and appliances," and because it was, it is contended, "in effect a charge to the jury that the plaintiff had a right to believe and to assume that the machinery with which he was called to work would not injure him and that it was not dangerous." We think the instruction was inapplicable to the case made by the testimony, and should not have been given. But the error, for that reason, in giving it, we think should be held to have been harmless. It was an abstract statement—whether an accurate one or not need not be determined—of rules of law inapplicable to the facts, which, in view of the other instructions given to the jury, we think could not have misled them, to the prejudice of rights of the appellant.

In his charge the trial court instructed the jury as to the meaning of the words "ordinary care," "negligence," "contributory negligence," "assumed risk," and "proximate cause," used therein, as to the duty of a master to warn and instruct a young and inexperienced servant assigned to a hazardous service, as to the duty of the servant to use care to avoid injury to himself while engaged in such service, and then further instructed them as follows:

[4] "Now if you should believe and find from the evidence that the plaintiff was employed by the defendant's superintendent, John Sorrells, in the capacity of an oiler in a mill, and that said plaintiff was directed by said John Sorrells to oil a certain bearing on what is termed the "counter-shaft" located east of what is termed the shaft on the "meal cooker," and that said plaintiff was given no directions with regard to the manner in which he should place himself when oiling said bearing, and that in performing said duty it then reasonably appeared to said plaintiff that it was necessary for him to stand upon what is known as the lower conveyer, and by reaching between a bearing and a pinion on said meal cooker shaft thus oil the said bearing on said countershaft, and that in so doing the plaintiff's foot slipped and his hand was caught in the machinery and thereby injured, and as a proximate result of such injuries the same had to be amputated, and you further believe that in so doing, if he did so, the plaintiff was not himself guilty of negligence, and that the risk incident to such accident was not assumed by plaintiff, and you should further believe that in directing the said plaintiff to perform said service

the said defendant was guilty of negligence, if it were so guilty, and that the injuries, if any, of the plaintiff were the proximate result of the negligence of said defendant, then in such events you will find for the plaintiff, and in such events would allow him damages in such sum as in your judgment would reasonably and fairly compensate him in money for the physical and mental pain, if any, consequent upon his injuries received, and if from the evidence you believe from the testimony that plaintiff's injuries, if any, are permanent, and will diminish his ability to labor and earn money in the future, then, in addition to the above, allow him such a sum as will reasonably and fairly compensate him for the diminution, if any, in his capacity to labor and earn money, consequent upon such permanent injuries, if any, from September 1, 1911, the time when his disabilities of minority were removed, until the end of his life."

It is insisted that the portion of the charge copied is erroneous, "in that it authorized the jury to find defendant was negligent in requiring plaintiff to do the work of oiling the machinery, a duty which he was employed to perform and which he agreed to perform."

We do not so understand the instruction. As we understand it, the jury were not authorized to find for appellee, unless they believed that in doing the work as he attempted to do it he did not assume the risk he thereby incurred and was not himself negligent, and further believed that appellant was guilty of negligence in directing him to do same without first instructing him as "to the manner in which he should place himself when oiling said bearing." In a paragraph of the charge immediately following the one in question the jury were told: "You are further instructed that if you believe from the evidence that the plaintiff knew, or had the same means of knowing as his employer, of the danger to which he would be exposed in performing services at said place, and further believe from the evidence that the plaintiff failed to exercise that degree of care that a man of ordinary prudence would have used under the circumstances to avoid injuries from such danger, if any, and that by reason of the omission to observe that measure of caution he was injured, he cannot recover unless you believe from the evidence that at the time plaintiff was hurt he was a young man of immature judgment and experience in such business in which he was employed, and that the perils of his undertaking were not communicated or known to him, and that, by reason of such immaturity of judgment, inexperience, and want of information as to the perils of his employment he was incapable of understanding the nature and extent of the hazards to which he was subjected, and that his em-

ployer knew or by the exercise of ordinary care should have known of these facts, then, in such events, in order to prevent a recovery, you must believe that he failed to exercise that degree of care that persons of his age, undeveloped judgment, and want of information (if his judgment were undeveloped and if he did labor under a want of information) would ordinarily use under such circumstances, and that his injuries, if any, were the proximate result of negligence of the defendant, if any. It is not merely the fact of plaintiff's minority at the time he was hurt that you relieve from the care demanded of an adult, but such immaturity of judgment, inexperience, and lack of information as has been defined to you would be necessary to relieve him from that degree of care." And in succeeding portions of the charge they were told to find for appellant if they believed appellee was himself guilty of negligence which "proximately caused or contributed to his injury," or if they believed he "assumed the risk incident to his employment," or if they believed he had been warned of the "danger of oiling said machinery in the way and manner that he attempted to oil same." At the request of appellant, the jury were further specially instructed to find for it if they believed appellee "was a minor, but knew of the danger of oiling the machinery in the way and manner he oiled it," or if they believed he "was injured in some way or manner not alleged in his petition and not testified to by him." When the instructions referred to are construed together, we do not think the jury could have understood the court to have meant that they were authorized to find appellant to have been negligent merely because they believed appellee had been required to do work he had engaged to do.

The objection to the portion of the charge in question, that it was "on the weight of the evidence, in that the effect thereof is to tell the jury that the defendant was guilty of negligence in not directing the plaintiff to oil the bearing in some other way than the way he did oil it," we think is also without merit. The theory, and only theory as we understand the charge, upon which the jury were authorized to find that appellant had been guilty of negligence, was that it directed him to oil the machinery, without discharging a duty it owed him to instruct him as "to the manner in which he should place himself" while performing the service. Plainly, so instructing the jury was not equivalent to telling them appellant was guilty of negligence in not directing appellee to oil the bearing in some way other than the way he attempted to oil it.

[5] It is next insisted that the court erred in the portion of the charge in question in his statement as to the measure of the damages recoverable by appellee—the specific complaint being that the effect of the in-

struction "was to authorize the jury to calculate the amount the plaintiff would lose annually for the period of his natural life, and allow him this sum of money," whereas "the rule is that plaintiff should have been allowed such sum of money as, if paid now, would reasonably and fairly compensate him for injuries received." We think the jury as reasonable men must have contemplated that the damages recoverable by appellee when lawfully ascertained would be paid, and could not have been so misled as to base their finding as to the amount thereof on any other theory. *Railway Co. v. Lester*, 84 S. W. 404.

[8] The verdict and judgment are attacked as excessive. There is nothing in the record indicating that the jury in determining the amount thereof may have been improperly influenced. The amount found represents, it seems, the unbiased judgment of the jury. If, therefore, we regarded the sum found by them as excessive, we would not feel warranted in setting aside their finding and substituting one of our own for it.

The judgment is affirmed.

On Motion to Correct a Finding Made, Make Other Findings, and for a Rehearing.

In the opinion is this statement: "The spout of the can came in contact with and was caught by the cogs on the line shaft; as a result appellee's feet were caused to slip forward on the box he was standing on, and as he fell or leaned east over the other box, as a consequence of his feet slipping, his hand was caught and crushed by the cogs." So far as the statement is to the effect that appellee was caused to slip on the conveyer because the spout of the oil can was caught by the cogs it is erroneous. The testimony showed, instead, that the spout was caught by the cogs because appellee slipped on the conveyer.

Of findings requested we make the following: (1) That on his application therefor the district court of Taylor county on April 6, 1911, rendered a judgment removing appellee's disabilities as a minor. (2) That appellee in the fall of 1908 and spring of 1909 worked at a packer in a gin, and in the spring of 1910 worked in the linter room of a gin, where there was machinery. (3) That appellee knew if his feet should slip into the conveyer he was standing on at the time he had his hand crushed, they would be injured by an iron shaft which revolved therein.

The correction as specified of a finding made when the record was first before us, and the additional findings now made do not, we think, furnish a reason for setting aside the judgment rendered here. Therefore, the motion for a rehearing is overruled.

HAMILTON v. D. S. CAGE & CO.

(Court of Civil Appeals of Texas. El Paso. Dec. 5, 1912.)

APPEAL AND ERROR (§ 80*)—FINAL JUDGMENT.

Where the judgment, in an action where in one defendant by a cross-action sought to recover on a claim against his codefendants, failed to dispose of such defendants' cross-action, it was not a final judgment, from which he could appeal.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 429, 432, 433, 450, 456, 457, 494-509; Dec. Dig. § 80.*]

Appeal from District Court, Harris County; Norman G. Kittrell, Judge.

Action by D. S. Cage & Co. against L. G. Hamilton and others. From judgment for plaintiff, Hamilton appeals. Appeal dismissed.

Terry, Cavin & Mills, of Galveston, for appellant. L. B. Moody, of Houston, for appellees.

HIGGINS, J. Appellees filed suit against R. E. Grotkass, H. W. Schwartz, and L. G. Hamilton, alleging that Grotkass and Schwartz were indebted to them in the sum of \$10,384.80 for goods, wares, and merchandise sold and delivered, the payment of which was secured by chattel mortgage on certain personal property not necessary here to particularly mention, and also on the entire crop of rice raised on section 121, T. & N. O. Ry. Co. survey, in Chambers county: that 350 sacks of rice raised on said premises, on October 26, 1910, were delivered to the defendant Hamilton, who was a common carrier operating a line of boats to Houston, Tex.; that said rice was delivered to Hamilton as such common carrier, to be delivered to the plaintiffs at Houston, Tex., and Hamilton accepted and promised to so deliver the same; but, instead of so doing, he retained the same in his possession and refused to deliver the same to plaintiffs. Judgment was prayed against Grotkass and Schwartz for said sum of \$10,384.80, and for foreclosure of lien on all of the property covered by said mortgage, including said 350 sacks of rice. Judgment against Hamilton was sought for the possession of said 350 sacks of rice and for the sum of \$200, the same being the difference between the market price thereof when delivered to Hamilton and the market price at that date; and, in the alternative, judgment was prayed against Hamilton for the sum of \$1,000, the same being the market price of the rice.

Defendant Hamilton answered, denying that he was a common carrier for hire, or that said rice had been delivered to him by Grotkass and Schwartz for transportation and delivery to plaintiffs. He averred that on December 1, 1909, he was part owner of

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Index

the premises described in the plaintiffs' petition, and as such part owner and as agent for the other owners he contracted and agreed with Grotkass and Schwartz, whereby the said Grotkass and Schwartz were to cultivate a rice crop upon said premises, which agreement was in writing, and a copy thereof was attached to the answer and made a part thereof. It was further alleged: "This defendant further alleges that, during the term of the aforesaid lease, he advanced to and paid out for and on behalf of his codefendants various sums of money in the total amount of \$834.42, for uses and purposes necessary for the said codefendants for the proper farming and harvesting of their said rice crop, and that the said sums of money paid out and advanced as aforesaid are more specifically shown in a certain itemized statement, attached hereto, marked 'Exhibit B,' and specifically made a part hereof; that on or about October 28, 1910, the said defendants Grotkass and Schwartz delivered to this defendant 350 sacks of rice, with the distinct understanding and agreement that this said defendant was to hold the said 350 sacks of rice as security for the said advances above mentioned, which were thereafter made by this said defendant; that the market value of the said 350 sacks of rice was \$803.10, and that that sum was insufficient to reimburse this defendant for the amounts advanced to his codefendants as above set out; that by reason of the above facts and circumstances there remains due to this defendant from his said codefendants, Grotkass and Schwartz, the sum of \$31.32, all as more particularly made to appear in the itemized statement attached hereto and marked 'Exhibit B.' Further pleading herein, this defendant respectfully shows to the court that the said above advances made by him to his codefendants were made in the due course of relationship between them as landlord and tenant; that the said defendant herein, by reason of the aforesaid facts, hath a landlord's lien upon the said 2,250 sacks of rice now in the possession of the plaintiff herein to secure to this defendant the sum of \$31.32 due him by reason of the aforesaid advances. Wherefore defendant, having fully answered herein, prays that upon a hearing hereof the plaintiff take nothing in this suit as against this defendant, and that this defendant have judgment against his said two codefendants, Grotkass and Schwartz, in the sum of \$31.32, together with a foreclosure of this defendant's said landlord's lien upon the said 2,250 sacks of rice now in the plaintiff's possession. But if it be held by the court that the lien of plaintiff herein was superior to the right of this defendant to appropriate the said above-mentioned 350 sacks of rice, this defendant prays that he have judgment against said codefend-

ants, Grotkass and Schwartz, for any and all sums or amounts of money which may be adjudged to be due by this defendant to the plaintiff herein. This defendant prays for all such other and further orders and decrees, general and special, in law and in equity, as the facts may warrant."

Supplemental pleadings filed by the parties relate to matters not material to a consideration of this appeal. Upon trial before the court, without a jury, judgment was rendered in favor of plaintiff against Grotkass and Schwartz for the sum of \$5,529.04, with interest from date of judgment at the rate of 6 per cent. per annum, foreclosing their chattel mortgage lien as against all of the defendants upon the 350 sacks of rice in possession of the defendant Hamilton, and an order of sale therefor directed to be issued, and, if the said 350 sacks of rice could not be found, then that the plaintiffs have judgment against the said Hamilton for the sum of \$997.50, with interest from October 28, 1910, at the rate of 6 per cent. per annum, amounting in the aggregate to the sum of \$1,037.40.

It will be noted, from the statement made of the pleading of the appellant, that an indebtedness is asserted by him against his codefendants, Grotkass and Schwartz, and judgment therefor is prayed, together with lien foreclosure. It will likewise be noted that the judgment in no wise disposes of this cross-action, and, since it fails to dispose of this issue, it is not a final judgment, from which an appeal could be prosecuted. It is therefore ordered that this appeal be, and the same is hereby, dismissed. *Williams v. Bell*, 53 Tex. Civ. App. 474, 116 S. W. 837, on rehearing; *Bushong v. Alderson*, 143 S. W. 200; *Daugherty v. Daugherty*, 145 S. W. 642.

HOLLOWAY et al. v. HALL et al.

(Court of Civil Appeals of Texas. Galveston.
Oct. 20, 1912. Rehearing Denied
Dec. 5, 1912.)

1. APPEAL AND ERROR (§ 554*)—FINDINGS OF FACT—CONCLUSIVENESS.

The findings of fact are in the absence of a statement of facts conclusive.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2472-2477; Dec. Dig. § 554.*]

2. PARTITION (§ 85*)—IMPROVEMENTS—EFFECT.

A tenant in common who has improved the land, not to embarrass his cotenant, is entitled to have the improvements set apart to him if it can be done without injury to the cotenant, and, if it cannot be done, he is entitled to compensation from the cotenant in the partition.

[Ed. Note.—For other cases, see Partition, Cent. Dig. §§ 236-245; Dec. Dig. § 85.*]

3. APPEAL AND ERROR (§ 984*)—PRESUMPTIONS—JUDGMENT—RECORD.

In the absence from the record of the pleadings, the court on appeal will presume in sup-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

port of the judgment that the pleadings on file authorized the judgment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3777-3781, 3782; Dec. Dig. § 934.*]

4. APPEAL AND ERROR (§ 1028*)—HARMLESS ERROR—INFORMALITY OF PROCEDURE.

Where the unchallenged findings attain justice, the judgment thereon will not be reversed merely because of informality of procedure, not affecting the merits or the substantial rights of the parties.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4034; Dec. Dig. § 1028.*]

Appeal from District Court, Tyler County; W. B. Powell, Judge.

Action by Mrs. C. L. Holloway and another against H. L. Hall and others for partition. From a judgment overruling objections to the report of commissioners partitioning the land and approving the partition made by them, plaintiffs appeal. Affirmed.

Crow & Phillips, of Groveton, for appellants. Joe W. Thomas, of Woodville, for appellees.

McMEANS, J. This is the second appeal of this case. See *Holloway v. Hall*, 136 S. W. 488. On the former appeal it was decided on the undisputed facts that the appellants Holloway were entitled to five-eighths of the land in controversy and the appellees Kirkland to three-eighths thereof, and the judgment of the trial court was reversed, and the cause remanded, with instructions to the district court to render judgment accordingly, and to cause the land to be partitioned between the parties according to law. Upon the filing in the court below of the mandate of this court, the district court entered its decree in accordance with such instructions, and appointed commissioners of partition, ordering them "to make a fair, just, impartial, and equitable division of said tract of land in accordance with the provisions of said decree and the law—that is to say, that you are to apportion said land as above instructed, five-eighths to the plaintiffs and three-eighths to the defendants—and this you shall do equitably." The commissioners of partition, after being duly commissioned, entered upon the land, surveyed it to ascertain the exact number of acres in the tract, made partition thereof, and then made their report to the court. They reported that the tract contained 41½ acres, that the land without the improvements was of the uniform value of \$7 per acre, and they apportioned to the Holloways 26 acres, and to the Kirklands 15½ acres thereof. They further reported that the defendants Kirkland occupied and had made permanent and valuable improvements on a part of the land, which they held as tenants in common with the Holloways, of the value of \$200, and that in making partition they had set aside and apportioned to the Kirklands the land upon which such improvements had been erected

by them. After the commissioners had made their report, and before it had been acted upon by the court, the plaintiffs Holloway filed their objections thereto, the objection in the main being, substantially, that, as the commissioners found that the improvements on the land were worth \$200, this added that much to the value of the land as a whole, and that the commissioners should have considered the value of both the land and improvements in making a fair and equitable partition and not the value of the land alone. Their contention, in other words, is that they were entitled to a greater number of acres than were apportioned to them to offset the tract, made more valuable by the improvements, which was set apart to the Kirklands. In answer to this contention, the Kirklands filed a plea in which they set up that, being tenants in common with the Holloways, they entered upon the land and placed improvements thereon, and that such improvements were made in good faith, and not with the intent to embarrass their cotenants, and that the same in no way affected the rights of the Holloways, and that the latter had in no wise been prejudiced by reason of the making of said improvements, and that such improvements do not extend over, affect, or interfere with the Holloways in the use and enjoyment of the land set apart to them by the commissioners of partition; and they prayed that the report allotting to them the 15½ acres, including the value of their improvements, be confirmed. The pleadings of the parties, other than those filed subsequently to the filing of the report of the commissioners of partition, are not incorporated in the record. The court, after hearing the exceptions and objections of the plaintiffs, and the evidence adduced thereon, overruled the same, and entered judgment approving the report of the commissioners of partition, and vesting in the parties title to the land apportioned to them respectively. From this judgment the plaintiffs Holloway have appealed.

No statement of facts accompanies the record, but upon proper request the trial judge filed his findings of fact and conclusions of law, from which we copy so much as we think essential to an understanding of the grounds upon which this decision is based:

"(4) I find that on July 25, 1911, this cause being reached for trial, this court entered its judgment in obedience to said order and decree of the Court of Civil Appeals, adjudging and decreeing to Mrs. C. L. Holloway and R. R. Holloway a five-eighths of the land in controversy and to the defendants Ed Kirkland and Alta Kirkland three-eighths of said land, etc.

"(5) I find that also at the same time, to wit, July 25, 1911, this court also by its order and decree, in obedience to said order of the Court of Civil Appeals, ordered that the land in controversy be partitioned between

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

the parties in the proportionate shares, to wit, to said plaintiffs five-eighths, and to said defendants three-eighths of the land in controversy, and this to be done equitably, and at the same time appointed E. H. Hopson, Wm. McCreedy, and T. M. Hyde as commissioners to go upon the land and partition same in accordance with this court's decree.

"(6) I find that said commissioners did enter upon said land, and, after viewing same, partitioned the land, setting apart to the plaintiffs Mrs. C. L. Holloway and R. R. Holloway 26 acres of land off the east, and to the defendants Ed Kirkland and wife, Alta Kirkland, 15½ acres of the land off the west portion of said land in controversy.

"(7) I find that the said partition by said commissioners, upon a hearing of the exceptions filed by plaintiffs thereto, is a fair, just, and equitable division of the land.

"(8) I find that the 15½ acres set apart and partitioned to said defendants, including a dwelling house, one acre of land under fence, and some other small improvements, are of the value of \$200, and I find that said improvements were placed thereon by said defendants and paid for by them, and that said improvements were not placed thereon by the defendants for the purpose of embarrassing the plaintiffs or the plaintiffs' rights, and I find that said improvements do not diminish the value of the other land in controversy nor affect the property set apart to the plaintiffs.

"(9) I find that the 26 acres set apart and partitioned to the plaintiffs has no improvements thereon, and said land is unaffected by any acts of the defendants or improvements placed on the other parts of the land by the defendants.

"(10) I find that said partition by said commissioners of said land was a fair, just, and equitable division of the land in controversy and in accordance with the decree of the court, and the land set apart to the respective parties is of equal value per acre, independent of the improvements.

"(11) I find that the 15½ acres awarded to the defendants is the homestead of the defendants, and I find that by actual survey there are 41½ acres of land in controversy."

Upon the facts found the court based the following conclusions of law:

"(1) I conclude that the land in controversy is susceptible of division and partition between the parties herein.

"(2) I conclude that the commissioners fairly, justly, and equitably partitioned the land in controversy between the parties herein, and that the 15½ acres set apart to the defendants and the 26 acres set apart to the plaintiffs is a fair and equitable division between said parties, and that the said report should be in all things approved and affirmed and entered of record by the clerk of this court, and that the title to such proportional shares and the land so set apart to the re-

spective parties be vested in them respectively.

"(3) I conclude that the improvements placed on the 15½ acres allotted to defendants properly go with the land to the defendants, being placed thereon by the defendants, not for the purpose of embarrassing plaintiffs and without prejudice or injury to plaintiffs."

[1, 2] We will not discuss appellants' assignments of error in detail. The facts, as we understand them, are simply these: The Holloways and the Kirklands were the owners, as tenants in common, of a tract of 41½ acres of land, the former owning ¾ and the latter ¼. The Kirklands, without any purpose of embarrassing their cotenants, moved upon the tract and made improvements thereon of the value of \$200. The land which they thus occupied and improved was wholly within the 15½ acres set apart to them in the partition. The findings of fact of the court, which, in the absence of a statement of facts, are conclusive, are that the partition made by the commissioners was a fair, just, and equitable division of the land and in accordance with the decree of the court. The court concluded as a matter of law that the improvements placed on the 15½ acres allotted to the Kirklands, go to them with the land, having been placed thereon by them, not for the purpose of embarrassing their cotenants, and without prejudice or injury to them. That this is the law is not an open question in this state. In *Whitmire v. Powell*, 103 Tex. 236, 125 S. W. 889, our Supreme Court, in passing upon a similar question, says: "But as tenant in common of the tract he (Whitmire) had a right reasonably to improve it and to be reimbursed for the expense in partition, provided the improvements were not placed upon it for the purpose of embarrassing his cotenants in the assertion of their rights. A tenant in common who has improved the land, not for the purpose of embarrassing his cotenants, is entitled to have them set apart to him, providing it can be done in justice to his cotenants. If this cannot be done, then he is entitled to compensation for them in the partition." To the same effect are *Burns v. Parker*, 137 S. W. 707; *Robinson v. McDonald*, 11 Tex. 385, 62 Am. Dec. 480; *Lewis v. Sellick*, 69 Tex. 383, 7 S. W. 678; *Johnson v. Bryan*, 62 Tex. 627. We think that under the facts found by the court and under the foregoing authorities the judgment setting apart to the Kirklands the portion of the land improved by them was in all things correct.

[3] But appellants contend that there were no pleadings in the case to authorize the jury or the court to take into consideration the question of improvements made by appellees in making the partition, or in entering the decree. As we have before stated, none of the pleadings filed anterior to the filing of

the report of the commissioners of partition is incorporated in the record, and we cannot say, therefore, that no such pleadings were filed. In the absence from the record of the pleadings in the case, it will be presumed, in support of the judgment, that the pleadings on file at the time of the appointment of the commissioners authorized the rendition by the court of the judgment appealed from.

[4] However that may be, we think that in view of the fact findings of the court, which are unchallenged, the justice of the case has been attained, and that the judgment should not in such case be reversed and a new trial ordered because of some informality of procedure which cannot affect the merits of the controversy or the substantial rights of the parties. We have examined all of appellants' assignments of error, and are of the opinion that none of them presents reversible error, and they are severally overruled. The judgment of the court below is affirmed.

Affirmed.

GARRISON v. STOKES et al.

(Court of Civil Appeals of Texas. Amarillo. Nov. 30, 1912.)

1. VENUE (§ 41*)—CHANGE OF VENUE—PLEA OF PRIVILEGE—EFFECT.

Where plaintiff joined as defendant a party who was clearly entitled to a change of venue to another county, and did not dismiss as to such party, the court, having no power to dismiss as against that party, properly transferred the suit as to all parties, especially where the other parties defendants had pleaded privilege to be sued in such other county.

[Ed. Note.—For other cases, see Venue, Cent. Dig. §§ 62, 63; Dec. Dig. § 41.*]

2. VENUE (§ 5*)—NATURE OF SUBJECT OF ACTION—ACTION RELATING TO REAL PROPERTY.

Tested by the averments of a petition to the effect that defendants contracted with plaintiff to convey to him certain lands, the breach by defendants, that defendant bank was instrumental in delaying the completion of the contract, and in causing its final breach by the other defendants, with a claim, usual in trespass to try title, of the legal and equitable ownership of the land described, and a prayer for specific performance, and, in the alternative, for title and possession, for rent, damages and costs, the suit was for specific performance of a contract to convey land, and not an action in the alternative to recover land, and, as such, required the court to sustain a defendant's plea of privilege to be sued in the county of his residence.

[Ed. Note.—For other cases, see Venue, Cent. Dig. §§ 4-11; Dec. Dig. § 5.*]

Appeal from District Court, Floyd County; L. S. Kinder, Judge.

Action by J. M. Garrison against D. R. Stokes et al. From an order transferring the suit to the district court of Motley county, Texas, for trial, plaintiff appeals. Affirmed.

Houghton & Hall, of Floydada, for appellant. T. T. Bouldin, of Matador, and Randolph & Randolph, of Plainview, for appellees.

PRESLER, J. This suit was filed by appellant (plaintiff below) against appellees (defendants below), alleging, in substance, that on or about the 1st day of November, A. D. 1911, appellees, D. R. Stokes, Miss Petie Stokes, and Mrs. Mary I. Stokes, entered into a contract with appellant, in which appellees agreed to convey certain lands located in Floyd county, Tex., as described in appellant's petition, alleging specifically said contract and the breach thereof by said appellees, and further alleging that appellee the First State Bank of Matador was instrumental in "procuring" said contract on the part of the other appellees by phoning to Floydada, Tex., and hindering and delaying the completion of the contract and causing the same to be finally breached by the other appellees, and sought damages against said appellee by reason thereof. Later in his petition, by general allegations, usual in an action of trespass to try title, appellant claimed to be the legal and equitable owner of the land described in the first part of his petition, prayed for specific performance of the contract of sale and judgment for his damages, and, in the alternative, prayed judgment for title and possession of the land referred to, for rent and damages and costs of suit.

[1] Appellees below filed their pleas of privilege (the First State Bank of Matador filing its plea separate from the other three named appellees), each setting up the fact that they resided in Motley county, Tex., and the First State Bank of Matador further alleging in said plea that it had no agent or local representative in Floyd county, Tex., said pleas of privilege in all respects complying with the statute, and the court, after considering the same, sustained said pleas, and ordered said suit transferred to the district court of Motley county, Tex., for trial. From this order appellant duly appeals to this court. We are of the opinion that there was no error in the action of the court complained of. It clearly appears from the record that the appellee the First State Bank of Matador resided in Motley county, Tex., and that there was no exception under the statute that would give the district court of Floyd county jurisdiction of said bank, appellant's petition clearly showing that said appellee bank owned no interest in said land, was not a party to the contract, the specific performance of which is the primary purpose of this suit, and was neither a necessary nor proper party to this suit, and the appellant having joined this appellee with the others and having failed to dismiss his suit as to said

appellee who clearly had the right as against appellant to have the suit tried in the county of its residence, and the court having no authority under the statute to dismiss said suit against said appellee, appellant is in no attitude to complain of the action of the court in transferring the case as against all of the appellees to Motley county, if its action had been based upon the plea of the appellee bank alone. As stated by the court in the case of *Luter v. Ihnken*, 143 S. W. 676: "Both of the parties sued in this case live in Medina county, and appellant deemed it necessary to join them in his action for specific performance, and, when the plea of privilege was sustained as to one of them, it had the effect of changing the venue to Medina county. No provision is made in the law of 1907 for the dismissal as to one of the parties in whose favor the plea of privilege is granted, but the statute was passed to prevent dismissals for it is mandatory that 'the cause shall not be dismissed on that account.' The court, acting under that statute, had no right or authority to dismiss the cause as to one of the parties, and neither does it seem that he had the authority to change the venue as to one party and refuse it as to another, especially when that other does not object to such action. The law has provided for no such contingency as arises in this case, but imperatively demands that, whenever a plea of privilege to a venue is sustained, the venue must be changed."

[2] We are further of the opinion that appellant's contention that said pleas of privilege should have been overruled by the court because his action in the alternative is one to recover the land with the usual allegations and indorsements of an action of trespass to try title cannot be sustained upon the record in this case. Tested by the averments of the petition, we think that the primary and manifest purpose of the suit was to compel the appellees to specifically perform the contract to convey the land in question and to transfer a lease to certain other lands referred to. Such suit should be brought in the county of appellee's residence (*Hearst v. Kuykendall*, 16 Tex. 327; *Mixan v. Grove*, 59 Tex. 573), unless appellees had agreed in writing to perform the contract in some other county, which is not alleged. As is stated in the opinion of the court, in *Cavin et al. v. Hill*, 83 Tex. 76, 18 S. W. 324: "The prayer is for a judgment for the possession of the land and for a specific performance of the contract before described. It is an elementary rule of pleading that specific allegations will control those of general character. It is also well settled that if the other party pleads, even when not bound to do so, his right or title specially, he will be bound thereby, and must be confined to the proof of the facts

thus specifically alleged, for the reason that he has thus notified his adversary of the exact nature and extent of his claim. It is likewise the established doctrine in this state that, under the general averments of a petition in trespass to try title, the plaintiff cannot have special equitable relief, such as the reformation of a deed, on the ground of mistake, etc., without distinctly alleging the facts upon which he relies in addition to the usual averments in a judgment." And here, as in the case above referred to, it is apparent from the petition itself that the only right or title to the land in question which appellant claims is such as he derives through the contract of sale which is made the basis of his action, and that to establish and have performed that contract is the real and sole purpose of the suit. We regard the allegations of appellant's seizure and title otherwise and of the trespass by the appellees as mere surplusage. The character of the suit is determined as a matter of law by the facts stated in the petition, and not by the indorsements thereon. Any other view of this petition would place the appellant in an inconsistent and untenable position; for, if he already owns the land in fee simple, the appellee could not be compelled in equity to specifically perform the contract for the conveyance of the land.

We are therefore of the opinion that the jurisdiction of the court cannot be maintained upon the ground that appellant's suit is one for the recovery of the land, and that the judgment appealed from should be in all things affirmed, and it is so ordered.

PHILADELPHIA UNDERWRITERS AGENCY OF FIRE ASS'N OF PHILADELPHIA v. BROWN.

(Court of Civil Appeals of Texas. Texarkana. Nov. 21, 1912.)

1. PLEADING (§ 360*)—MOTION TO STRIKE—DETERMINATION—TAKING ALLEGATIONS AS TRUE.

In passing upon a defense upon a motion to strike, the trial court was required to look alone to the facts alleged, and to take them as true in determining its legal sufficiency.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1129-1146; Dec. Dig. § 360.*]

2. ARBITRATION AND AWARD (§ 8*)—SUBMISSION—POWER OF COURT TO REVOKE.

Though Sayles' Ann. Civ. St. 1897, art. 61, in the chapter relating to arbitration in general, provides that nothing therein shall be construed as affecting the right of parties to arbitrate in such way as they may select, an agreement that a majority of the jurors impaneled at the trial should return a verdict, and that the court should render the usual judgment thereon to have the force of a regular verdict and judgment, does not conclude the court, and it has power to set aside the verdict rendered and grant a new trial.

[Ed. Note.—For other cases, see Arbitration and Award, Cent. Dig. § 29; Dec. Dig. § 8.*]

3. APPEAL AND ERROR (§ 113*)—DECISIONS REVIEWABLE—SETTING ASIDE JUDGMENT.

An order setting aside a judgment entered at the same term under a verdict rendered in pursuance of an agreement of the parties that a verdict might be returned by a majority of the jurors on which judgment might be entered, and granting a new trial, is not appealable.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 758-785; Dec. Dig. § 113.*]

4. ARBITRATION AND AWARD (§ 8*)—OUSTING JURISDICTION OF COURT.

In the absence of clear and specific averments showing that the effect of an agreement of the parties that a majority of the jurors might return a verdict, on which judgment should be entered was to oust the jurisdiction of the court, it will not be assumed that the court and jury abdicated their official position and assumed the role of private arbitrators, so as to deprive the court of jurisdiction to set aside the judgment entered, and grant a new trial, and one relying on such a state of facts as a defense must show it beyond reasonable doubt.

[Ed. Note.—For other cases, see Arbitration and Award, Cent. Dig. § 29; Dec. Dig. § 8.*]

5. PLEADING (§ 183*)—SUPPLEMENTARY ANSWER—PURPOSE.

Supplementary answers are permitted for the purpose of meeting matters appearing for the first time in a supplemental pleading filed by the opposite party, and facts pleaded in defense for the first time should not be incorporated in a supplemental answer.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 389-396; Dec. Dig. § 183.*]

6. EVIDENCE (§ 159*)—BEST EVIDENCE—CONTRACT OF INSURANCE—OTHER INSURANCE.

In an action on a policy of fire insurance, where defendant pleaded avoidance of the policy by breach of a provision against other insurance, the execution of other policies was only collaterally involved, and parol evidence offered not to show the contents of such policies, but that other policies had been issued, was admissible.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 471, 474; Dec. Dig. § 159.*]

7. EVIDENCE (§ 222*)—ADMISSIONS BY PARTY INTERESTED.

In an action on a policy of insurance, defended on the ground of its avoidance by breach of a condition against other insurance, an admission by plaintiff that he had obtained other insurance was competent as original evidence.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 788-800, 803-808; Dec. Dig. § 222.*]

8. INSURANCE (§ 653*)—INCENDIARISM—EVIDENCE—MOTIVE.

In an action on a policy of fire insurance, where the evidence strongly tended to show that loss was occasioned by incendiarism committed by plaintiff or at his instance, evidence as to the existence of a mortgage on the property was admissible as tending to show a motive.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1678, 1679; Dec. Dig. § 653.*]

Appeal from Wise County Court; E. M. Allison, Judge.

Action by J. B. Brown against the Philadelphia Underwriters Agency of the Fire Association of Philadelphia. From an order sustaining a motion to strike out an answer, defendant appeals. Reversed and remanded.

Carswell & Carswell, of Decatur, and Crane & Crane, of Dallas, for appellant. McMurray & Gettys, of Decatur, for appellee.

HODGES, J. This suit was instituted by the appellee against the appellant in the county court of Wise county upon two policies of insurance, one for \$550 and the other for \$250. By the terms of these policies the appellant insured the appellee in an amount not exceeding the sums therein stated against loss or damage by fire to a certain two-story shingle-roof store building situated in Boyd, Tex. About the 2d of December, 1900, and during the period covered by the policies, the property was totally destroyed by fire. Upon a refusal of the company to pay the amount of the insurance, the appellee instituted this suit. Appellant answered by a general demurrer and a general denial, and by special answer averred that each of the contracts sued on contained the following stipulation: "This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void if the insured now has or shall hereafter make or procure any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy." It was further alleged that plaintiff had another contract of insurance on the property in the sum of \$400; that defendant was informed and believed that this other policy was issued by the Texas Fire Insurance Company of Ft. Worth; and that this insurance was issued either prior or subsequent to the issuance of the policies sued on, and for that reason the policies here involved were null and void. It was also charged that the fire originated by the act, design, or procurement of the plaintiff for the purpose of collecting the insurance. Appellee filed a supplemental petition wherein he denied generally all of the allegations contained in defendant's answer, and further pleaded a waiver by the insurance company of the provisions in the contract sued on with reference to other insurance, alleging that appellant's local agent knew of the existence of this additional insurance and consented thereto. On April 27, 1911, which appears to have been the term at which this case was tried, the appellant filed a supplemental answer wherein it alleged that on the 26th of January preceding this suit was called for trial the parties appeared and announced ready, the jury was impaneled, the evidence presented, and the argument of counsel heard, and the jury was charged and retired to consider its verdict; that, after the jurors had been deliberating for some time, they returned into open court, and reported that it was impossible to agree upon a verdict; that, the court being on the point of discharging the jury without a verdict, counsel for plaintiff and defendant then and there mutually agreed, the plaintiff being present and assenting thereto, that the jury

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes.

retire and a majority bring in a verdict, by which each party would abide, and a judgment should be rendered upon the same which would be conclusive between the parties as to matters involved in that suit; that in pursuance with that agreement the jury retired, and a majority thereof brought into court a verdict for the defendant; that this verdict was received and filed, and a judgment thereon was duly entered on the minutes of the court for the defendant. It is further alleged that the judgment rendered thereon was binding upon the parties to this suit, and that the action of the court in setting aside said verdict and judgment and granting a new trial after the verdict had been returned and received and the judgment rendered and entered upon the minutes of the court, over the objection of defendant and without its consent, was *coram non iudice* and void. The appellee filed a motion to strike this answer out (1) because it was not a proper pleading and did not constitute a supplemental answer, it not being in reply to anything set up by plaintiff in his supplemental pleadings; and (2) because the allegations set forth in this supplemental answer were not true in fact. The motion then proceeds to set out in detail what it is claimed the facts really were. The court sustained the motion without hearing any evidence, and that ruling is assigned as error.

Appellant contends that the facts alleged in its supplemental answer, if true, constituted a common-law arbitration in which an award had been made according to the agreement of the parties; that this, having been done and entered by the court, was binding on the parties, and the court had no power to set it aside; that, by reason of that fact, the award still subsists as a final settlement of this controversy, and is now an effectual bar to a prosecution of this suit. It is not claimed that this answer sets up a statutory arbitration of the subject-matter in controversy. If it describes an arbitration at all, it is one of the parties' own selection, and one which the statute permits but does not prescribe. Revised Civil Statutes, art. 61.

[14] In passing upon this defense, the trial court was required to look alone to the facts alleged, and they should have been taken as true in determining the legal sufficiency of the answer. If in construing the averments of this answer the court was justified in concluding that it set forth an agreement between the parties at a former term of the court and at a time when it was apparent that there would be a disagreement among the jurors—that a majority of the jurors might render a verdict in the case and a judgment be entered thereon which should have the binding force of a judgment regular in all respects—he was fully warranted in his action. Conceding it to be true that such a verdict was rendered and a judgment for the defendant entered in accordance therewith, the court at the same term would

have the judicial power to set that judgment aside and grant a new trial, and from such a ruling, though it may have been erroneous, there would be no appeal. The only view of the case which could deny the court that power would be one regarding the jurors and the judge as merely actors in a private arbitration, and the judgment as simply a private record of an award made. In the absence of clear and specific averments showing that such was the effect of what was done, it will not be assumed that the court and jury in the midst of a public trial abdicated their official positions and assumed the role of private arbitrators. One relying upon such a state of facts as a defense should urge it with such certainty and clearness as to leave no reasonable ground for a contrary construction. From an examination of the facts alleged in the supplemental answer, we think they might have been construed as alleging an agreement that the finding of a majority of the jurors impeached upon that occasion should return a verdict, and that the court might render the usual judgment thereon, and that such verdict and judgment should have the effect which usually attaches to verdicts and judgments in all respects regular and in conformity with law.

[5] Another reason sufficient to sustain the action of the court in striking out this supplemental answer is this: Even if the facts pleaded constituted a defense, they should have been incorporated in an amended original answer, and not in a supplemental pleading. They could only operate as a defense to the action as stated in the plaintiff's original petition, and were available, if at all, as a plea in bar to the cause of action there set forth. Supplemental answers are permitted for the purpose of meeting matter appearing for the first time in a supplemental pleading filed by the opposite party. *Townes' Texas Plead.* pp. 307, 308, 321; rule 8, 142 S. W. xvii. Admitting that a good defense was stated, the irregularity of its introduction justified the court in striking it from that position.

[6, 7] Upon the trial the defendant offered to prove by its witness G. P. Cooke, the agent who issued the policies sued on, that on the night of the fire he was present and heard the plaintiff make the statement that he (plaintiff) had other insurance upon this property besides the two policies sued on, and that this was the first notice that Cooke, the agent, had of such additional insurance. On cross-examination defendant himself was asked if he did not at the time of the fire have additional insurance upon this property. In both instances objections were made and sustained by the court. The grounds upon which the objections were based were that the policies of insurance were themselves the best evidence. The bills of exceptions reserved by the appellant showed that after the fire one of the policies referred to had been delivered to the company from which it

emanated, and the other had been sued on and was in the possession of the district clerk, and within easy reach of the parties at the time this trial was in progress. That provision of the policies specially pleaded which provided for the avoidance of these policies in case any other insurance was held at that time or thereafter procured upon the property made the evidence of such outstanding policies material. We think the court erred in excluding the testimony offered. The existence of other insurance was only collaterally involved, and might have been proven by parol. This was not an effort to show the contents of other written policies, but merely to establish that such policies had been issued and were in existence. An admission by the plaintiff that he had this additional insurance would be original evidence. *Dooley v. McEwing*, 8 Tex. 307; *Hoefling v. Hambleton*, 84 Tex. 517, 19 S. W. 689; *Oaks v. West*, 64 S. W. 1033; 2 Ency. Ev. 306, and cases referred to in notes. The court erred in sustaining the objections.

[§] We think there was also error in refusing to permit the plaintiff to be interrogated on cross-examination as to the existence of a mortgage on the property. There was strong evidence upon the trial that this loss was occasioned by incendiarism, and appellant had charged in its pleadings that this was committed by the plaintiff or at his instance. The existence of any fact or condition tending to show a motive for the burning, if not otherwise objectionable, would be admissible in determining that issue.

For the errors discussed, the judgment is reversed, and the cause remanded.

ST. LOUIS & S. F. RY. CO. v. KNOX.

(Court of Civil Appeals of Texas. Texarkana. Nov. 15, 1912. Rehearing Denied Nov. 28, 1912.)

1. EVIDENCE (§§ 538, 544*) — OPINION EVIDENCE—EXPERTS.

Cattlemen, who for a number of years had been engaged in shipping and marketing stock to a given point, and were acquainted with the market reports and prices at the time the shipment was made, are competent to testify as experts whether or not it was necessary to feed and water cattle at a given point, and whether depreciation in price and loss in weight was due to rough handling and delay.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2348, 2356; Dec. Dig. §§ 538, 544.*]

2. TRIAL (§ 194*)—INSTRUCTIONS—WEIGHT OF EVIDENCE.

In an action against a railroad company for injuries to a shipment of cattle from delay, a charge that if the cattle were fed and watered at a certain point, and it was made necessary by the negligence of defendant in delaying the cattle, if it did delay them, then plaintiff, if he paid for feeding the cattle, would be entitled to recover the sum paid, is not erroneous as on the weight of the evidence in telling the jury that the delay in transporta-

tion was caused by the negligence of the defendant.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 413, 439-441, 446-454, 456-466; Dec. Dig. § 194.*]

3. CARRIERS (§ 229*)—CARRIAGE OF LIVE STOCK—INJURY TO ANIMALS—MEASURE OF DAMAGES.

Where a common carrier of live stock delayed a shipment so as to injure them, the shipper's measure of damages is the difference between the market value of the stock at the time they arrived at the point of consignment and what would have been their market value had they arrived without delay.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 930, 963, 964; Dec. Dig. § 229.*]

4. TRIAL (§ 194*)—INSTRUCTIONS—WEIGHT OF EVIDENCE.

In an action against a railroad company for negligent delay in shipment of cattle, an instruction that, if there was a finding for the shipper, then the measure of his damages is the difference between the market value, if any, of the cattle at the time of arrival in the condition they were in and what would have been their market value, had there been no delay or negligence, is not erroneous as on the weight of the evidence.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 413, 439-441, 446-454, 456-466; Dec. Dig. § 194.*]

5. TRIAL (§ 260*)—INSTRUCTIONS—REQUESTS COVERED BY CHARGES GIVEN.

In an action against a railroad company for damages to cattle in shipment, occasioned by its negligent delay, where the court repeatedly told the jury that plaintiff could not recover anything, unless the company had been guilty of negligence, a request that the plaintiff cannot recover, unless defendant was negligent, and that such negligence was the proximate cause of the injury to the cattle, being covered by the charges given, was properly refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651-659; Dec. Dig. § 260.*]

Appeal from District Court, Jack County; J. W. Patterson, Judge.

Action by S. W. Knox against the St. Louis & San Francisco Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Stark & Stark, of Jacksboro, and Andrews, Ball & Streeman, of Ft. Worth, for appellant. Sporer & McClure, of Jacksboro, for appellee.

WILLSON, C. J. January 29, 1909, appellee delivered to the Chicago, Rock Island & Gulf Railway Company 141 head of steers, to be transported by said company and its connecting lines from Jacksboro, Tex., to the National Stockyards in East St. Louis, Ill. Appellee accompanied the cattle, and at the time he delivered them to said railway company, in a writing separate from the bill of lading covering them, waived the requirement of the federal statute (Act June 29, 1906, c. 3594, § 1, 34 Stat. 607 [U. S. Comp. St. Supp. 1911, p. 1341]) that they should not be confined in the cars for a longer period than 28 hours without unloading, feeding, and watering them, and agreed that such time of

confinement might be extended to 36 hours. The cattle left Jacksboro over said railway company's line at 4:30 p. m. of said January 29th, and reached Chickasha, where they were delivered to appellant for transportation to their destination over its line of railway, at 4:30 o'clock of the morning of January 30th. At Chickasha appellee surrendered to appellant the bill of lading issued to him by the Chicago, Rock Island & Gulf Railway Company, and the waiver referred to, and received from appellant its bill of lading covering the transportation of the cattle on to St. Louis. The cattle left Chickasha, over appellant's line of railway, at about 5:10 o'clock of said morning of January 30th, and reached Sapulpa at 3:50 o'clock of the afternoon of that day. At Sapulpa they were detained about 11 hours, during which time they were unloaded, fed, and watered. There was testimony authorizing a finding that the cattle were roughly handled at this point, and that because of negligence on the part of appellant they were delayed there longer than was necessary to comply with the requirements of the federal statute referred to. The cattle left Sapulpa at 2:30 o'clock of the morning of January 31st, were then carried to Afton, where they were detained 2½ hours, when they were carried to Monett, where they were detained 1 hour, then to Springfield, where they were detained 1 hour and 15 minutes, and then to Newberg, a point 117 miles south of St. Louis. They reached Newberg at 2:10 o'clock on the morning of February 1st, having then been confined in the cars, after leaving Sapulpa, 23 hours and 40 minutes. At Newberg, over appellee's protest, they were detained 7 hours and 20 minutes, during which time they were unloaded, fed, and watered. For the feeding and watering of the cattle at that point, appellee was compelled to pay \$21. There was testimony authorizing a finding by the jury that the pens into which the cattle were unloaded at Newberg were in such a condition as to cause injury to them. The cattle left Newberg at 9:30 o'clock of the morning of February 1st, reached St. Louis at 4:30 o'clock of the afternoon of that day, and the National Stockyards in East St. Louis at 6:30 o'clock of the same afternoon. It was shown that the usual running time of trains carrying live stock between Newberg and St. Louis was from 30 to 40 miles an hour. Appellee's contention, supported, we think, by testimony, was that the delays mentioned were due to negligence on the part of appellant; that as a result thereof the cattle did not reach their destination in time to be sold on February 1st, but had to be sold on February 2d, when the market price had declined; that the market price of the cattle was injuriously affected by the condition the cattle were in on account of negligence of appellant in handling them; and that they had lost in weight, on account of such delays and rough handling, about 70

pounds each more than they otherwise would have lost. He sued for \$1,465.96 as his damages, and recovered a judgment for \$950.

[1] In the first 18 assignments complaint is made of the action of the court in admitting, over appellant's objection thereto on the ground, in some instances, that the witnesses had not qualified as experts, and in others that same was their opinions on mixed questions of law and fact, testimony that it was not necessary to feed and water the cattle at Newberg; that but for the delays and rough handling the cattle would have reached their destination in good condition for the market of February 1st; that on that day they could have been sold for 6 cents a pound, whereas on February 2d the market had declined, and they could be sold for only 5.54½ cents a pound; that the cattle had lost in weight about 70 pounds each more than they would have lost but for the delays and rough handling they were subjected to; that the cattle would have sold for from 25 to 45 cents a hundred pounds more than they did sell for if they had been in good condition, etc. It appeared that the witnesses who gave the testimony objected to were experienced cattlemen, and for a number of years had engaged in shipping and marketing such stock; that they accompanied the cattle while they were being transported from Jacksboro to the National Stockyards, and from inquiries made and market reports examined were acquainted with the prices of such cattle on that market at that time. We think the admission of the testimony does not furnish a reason for reversing the judgment. *Railway Co. v. Allen*, 117 S. W. 923; *Railway Co. v. Henson*, 56 Tex. Civ. App. 468, 121 S. W. 1128; *Railway Co. v. Irvine*, 73 S. W. 540; *Railway Co. v. Scoggin*, 57 Tex. Civ. App. 349, 123 S. W. 229; *Railway Co. v. Crowley*, 86 S. W. 342; *Railway Co. v. Gober*, 125 S. W. 383; *Railway Co. v. Hallsell*, 35 Tex. Civ. App. 126, 80 S. W. 140; *Railway Co. v. White*, 35 Tex. Civ. App. 521, 80 S. W. 641; *Railway Co. v. Gray*, 145 S. W. 729; *Railway Co. v. Saunders*, 141 S. W. 829; *Railway Co. v. Jones*, 118 S. W. 759; *Lay v. Railway Co.*, 157 Mo. App. 467, 138 S. W. 884.

[2] It is insisted that the trial court, in the third paragraph of his charge, told the jury that the delay in the transportation of the cattle shown to have occurred was due to negligence on the part of appellant, and that therefore that portion of the charge was erroneous because on the weight of the evidence. As we understand the language used, the court did not so instruct the jury. On the contrary, he told them appellee was not entitled to recover the sum he paid on account of the feeding and watering of the cattle at Newberg, unless such feeding and watering "was made necessary by the negligence of defendant in delaying the cattle after it received them, if it did so delay them." Said paragraph of the charge was as fol-

lows: "If you believe and find from the evidence that the cattle were fed and watered at Newberg, Missouri, and if you believe said watering and feeding was necessary, as hereinafter explained, and if you believe that said feeding and watering was made necessary by the negligence of the defendant in delaying said cattle after it received them, if it did so delay said cattle, and if you believe plaintiff paid for feeding said cattle, and if you believe it was necessary for him to pay for same under his contract, he would be entitled to recover the sum he so paid, provided you believe the sum was reasonable; or if you find it was not necessary or required to so feed and water said cattle at Newberg, and that same was done without the consent of plaintiff, and that the plaintiff was compelled to pay therefor, he would be entitled to recover therefor the reasonable value thereof."

[3, 4] The eighth paragraph of the charge also is attacked as erroneous because on the weight of the evidence, and on the ground that it "did not correctly state the law of the case." While not as clear as it should have been in the statement of the measure of the damages recoverable, we think the measure was not incorrectly stated; and certainly the instruction was not on the weight of the evidence. It was as follows: "If you find for the plaintiff by reason of injury to his cattle, then the measure of his damages is the difference between the market value, if any, of the cattle at the time they arrived at the National Stockyards in Illinois in the condition they were in and what would have been their market value at the time they should have arrived there, had there been no delay caused by the negligence of said defendant, if there was such delay and negligence, and the condition they should and would have been in had there been no such delay or negligence."

Appellant next insists that "there was no evidence that plaintiff's cattle sold for less, nor that their market value was less, when they reached their destination in the condition they were then in than it would have been had they reached the market or destination in ordinary time and condition," and complains of the action of the court in refusing to give to the jury a special charge to that effect requested by it. The testimony was that the market value of such cattle on February 1st, when the steers should have reached said National Stockyards, was 6 cents a pound, and that on February 2d, when they reached said stockyards and were sold, the market had declined to 5.54½ cents a pound. The testimony, further, was that on account of the rough handling the cattle were subjected to and the delay in transporting them each of the steers had lost 70 pounds more in weight than it otherwise would have lost.

[5] Finally, it is insisted that the court erred in refusing a charge requested by appellant as follows: "Before the plaintiff can recover in this case, you must find and believe from the evidence that the defendant was negligent in the said shipment; that the plaintiff received some injury to his cattle; that the negligence of the defendant was the proximate cause of such injury; and the evidence must show that the negligence of the defendant was the direct and proximate cause of such injury." The contention is that it was error to refuse this charge, because in his main charge the court "omitted to instruct the jury upon proximate cause." The court was careful to repeatedly tell the jury that appellee was not entitled to recover anything, unless appellant had been guilty of negligence in transporting the steers, and that he was entitled to recover, if at all, only such damages as were caused to him by appellant's negligence. We think the contention should be overruled.

There is no error in the judgment; and it is affirmed.

WESTERN UNION TELEGRAPH CO. v. VANCE.

(Court of Civil Appeals of Texas, Galveston. Oct. 29, 1912. On Motion for Rehearing. Nov. 27, 1912.)

1. TELEGRAPHS AND TELEPHONES (§ 66*)—DELAY IN DELIVERY—ACTIONS—SUFFICIENCY OF EVIDENCE—NEGLIGENCE.

Evidence in an action for negligent delay in delivering a telegram *held* to sustain a finding of negligence in transmitting and delivering the message.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. §§ 61-63; Dec. Dig. § 66.*]

2. TELEGRAPHS AND TELEPHONES (§ 66*)—DELAY IN DELIVERY—CAUSE OF INJURY.

Evidence in an action for negligent delay in delivering a telegram announcing the probable death of plaintiff's daughter *held* to show that plaintiff's inability to reach his daughter's bedside before her death was proximately caused by the negligent transmission and delivery.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. §§ 61-63; Dec. Dig. § 66.*]

3. TELEGRAPHS AND TELEPHONES (§ 38*)—DELAY IN DELIVERY—NEGLIGENCE—DEFENSES.

That the sender of a telegram did not advise the company that the addressee lived beyond the free delivery limits, nor offer to pay the extra charges for service, was no defense to an action for negligent delay in delivery.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. § 33; Dec. Dig. § 38.*]

4. APPEAL AND ERROR (§ 1078*)—PRESENTATION BELOW—EXCEPTIONS TO PLEADING.

In absence of any ruling shown by the record upon a special exception to the answer, it will be presumed that such exception was waived, since the record must show that a

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

ruling upon an exception was made in order to authorize the appellate court to review it.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4256-4261; Dec. Dig. § 1078.*]

5. APPEAL AND ERROR (§ 1050*)—HARMLESS ERROR—ADMISSION OF EVIDENCE.

Any error in admitting evidence was harmless to defendant, where a witness for defendant testified to substantially the same fact.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4153-4160, 4166; Dec. Dig. § 1050.*]

6. APPEAL AND ERROR (§ 728*)—BRIEFS—ANSWERS TO QUESTIONS.

Error in overruling objections to questions cannot be held prejudicial, where appellant's brief and assignments of error do not show what answers were made.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3010-3012; Dec. Dig. § 728.*]

7. APPEAL AND ERROR (§ 728*)—RECORD.

The exclusion of a question cannot be held prejudicial to appellant, where the assignment of error does not show what witness' answer would have been.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3010-3012; Dec. Dig. § 728.*]

8. TRIAL (§ 256*)—INSTRUCTIONS—REQUESTS—"ORDINARY CARE"—"REASONABLE CARE."

An instruction, in an action for negligent delay in transmission and delivery, on the measure of the telegraph company's duty in delivering, was not erroneous for requiring it to transmit in "due time (that is, such time as it would have been delivered by the exercise of reasonable care and diligence in getting it through and delivered)," on the ground that it was only required to use "ordinary care," in absence of a request for a more specific charge; the terms "reasonable care" and "ordinary care" having substantially the same meaning (citing 7 Words and Phrases, 5955).

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 623-641; Dec. Dig. § 256.*]

For other definitions, see Words and Phrases, vol. 6, pp. 5029-5042; vol. 8, pp. 7739-7740, 7779.]

9. APPEAL AND ERROR (§ 1064*)—REVIEW—HARMLESS ERROR—INSTRUCTIONS.

An instruction, in an action for negligent delay in transmitting and delivering a telegram announcing the probable death of plaintiff's daughter, that if plaintiff could, after the receipt of the message, "by the usual and regular means of travel," have reached his daughter's bedside before her death, and failed to make use of such means as he could or should have done, he could not recover, was not affirmative error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4219, 4221-4224; Dec. Dig. § 1064.*]

10. TELEGRAPHS AND TELEPHONES (§ 37*)—MESSAGES—DELIVERY.

If the recipient's residence beyond the free delivery limits was not known to the sender of a telegram at the time of its delivery to the telegraph company's agent for transmission, the agent at the receiving office should notify the sender of such fact, so that he might have an opportunity to pay the extra charges.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. §§ 24, 29, 32; Dec. Dig. § 37.*]

11. TELEGRAPHS AND TELEPHONES (§ 37*)—DELIVERY—BEYOND FREE DELIVERY LIMITS.

A telegraph company was not justified in abandoning all effort to deliver a telegram merely because the recipient was not found at the address stated, and his actual address was beyond the free delivery limits.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. §§ 24, 29, 32; Dec. Dig. § 37.*]

12. TELEGRAPHS AND TELEPHONES (§ 71*)—DAMAGES—NEGLIGENT DELIVERY.

A verdict for \$947.50 for failure to promptly deliver a telegram announcing the death of plaintiff's 17 year old married daughter between whom and plaintiff the deepest affection existed was not excessive, though the daughter was unconscious from the sending of the message until she died, and could not have recognized plaintiff.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. § 74; Dec. Dig. § 71.*]

13. TELEGRAPHS AND TELEPHONES (§ 70*)—DAMAGES—MENTAL ANGUISH—DISCRETION OF JURY.

The jury has a large discretion in estimating damages to be awarded for mental anguish, as from the negligent delivery of a telegram.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. §§ 72, 73; Dec. Dig. § 70.*]

14. APPEAL AND ERROR (§ 742*)—RECORD.

Error in admitting evidence cannot be reviewed, where there is no showing in the assignments of error that witness gave the objectionable testimony, except certain statements from the motion for a new trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 8000; Dec. Dig. § 742.*]

On Motion for Rehearing.

15. APPEAL AND ERROR (§ 742*)—BRIEFS—ASSIGNMENTS OF ERROR—PROPOSITION.

The office of a proposition under an assignment of error is to specifically present the question of law intended to be covered by the assignment, and the Appellate Court cannot consider any question not suggested by a proposition if the assignment is not relied on as such, nor need appellee answer such questions.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3000; Dec. Dig. § 742.*]

Appeal from District Court, Orange County; W. B. Powell, Judge.

Action by F. Vance against the Western Union Telegraph Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Holland & Holland, of Orange, and F. J. & C. T. Duff, of Beaumont, for appellant. Bisland, Adams & Bruce, of Orange, for appellee.

REESE, J. F. Vance instituted this action against the Western Union Telegraph Company in the district court of Orange county to recover damages alleged to have been caused by the negligent failure of defendant promptly to transmit and deliver a telegraphic message sent to him at Orange by his son-in-law, Will Langston, from Cool-edge, Tex., informing him that his, plaintiff's, daughter was not expected to live, and noti-

fying him to come to Cooledge at once. The damages were laid at \$1,995. A trial with a jury resulted in a verdict and judgment for plaintiff for \$947.50, from which defendant prosecutes this appeal.

Will Langston, the husband of the "Ollie" named in the message, who lived at the town of Cooledge, Tex., about 12 o'clock noon on January 2, 1911, delivered to the agent of the appellant at Cooledge for transmission and delivery to appellee, who lived at Orange, Tex., the following message: "Cooledge, Texas, Jan. 2nd, 1911. F. Vance, c/o Orange Power Co., Orange, Texas. Come to Cooledge at once. Ollie is not expected to live. [Signed] Will Langston."

Appellee was the father of the said Ollie. It is not shown exactly when the message was put upon the wire at Cooledge, but, when it reached Houston, it had to be transmitted from that point to New Orleans and back to Orange on account of the wires being "grounded" between Houston and Orange. It appears from the evidence that the wire from Houston to Beaumont between Houston and Orange was grounded east of Beaumont between 4 o'clock and 6 o'clock p. m., on the 2d of January. At 4:15 p. m. and at 5 o'clock p. m. it was grounded east of the Southern Pacific depot at Beaumont and west of Beaumont. The circuit was thus cut off, and messages could not be transmitted from Houston to Orange. The wire was broken and down, caused by the cold weather. The message reached Orange at 6:10 o'clock p. m. on January 2d, and was not delivered to appellee until some time between 9 and 10 o'clock the next morning. Appellee lived in Orange at a place called the Cove, three-fourths of a mile from the telegraph office, and outside of the established free delivery limits. There was a train leaving Orange for Houston at 8:45 o'clock p. m. on January 2d, and, if appellee had received the message before 8 o'clock p. m., he could and would have, by taking this train, been able to leave Houston at 8:15 the next morning for Cooledge, and to have reached the bedside of his dying daughter between 3 and 4 o'clock p. m. the same day, and about 24 hours before her death, which occurred at 4 o'clock on January 4th. There was a train leaving Orange for Houston at 12 o'clock noon on the day the message was received, but the evidence shows that, if appellee had taken this train, he could not have left Houston or reached Cooledge any sooner than he did do by taking the train leaving Orange between 5 and 6 o'clock in the afternoon. Appellee did not take this train leaving at 12 o'clock noon; the reason being that he did not have, and was not able to procure, money sufficient to pay his expenses in time. He, in fact, reached Cooledge as soon as he could after the receipt of the message. His daughter was dead when he reached her. She was unconscious for at least 24 hours

before her death, and so remained until her death.

[1, 2] We find that appellant was guilty of negligence in the transmission and delivery of the message as found by the jury, and that as a proximate consequence appellee was unable to reach the bedside of his daughter before her death, and to be with her in her last moments. The evidence is sufficient to support the verdict of the jury as to the amount of damages recovered.

By the first assignment of error appellant complains of the ruling of the court in sustaining plaintiff's special exception to the eighth paragraph of appellant's answer. It is stated in the assignment: That "said special exception and the eighth paragraph of the defendant's second amended original answer being in regard to the defendant's plea that at the time the message in question was delivered to it for transmission to the plaintiff it was given a certain address where plaintiff could be found. That said address was a place within the free delivery limits fixed by the defendant company for the city of Orange. That said address was incorrect, and that the plaintiff could not be located there, but that he was at a point outside of the free delivery limits of the city of Orange, and that the defendant was not under any duty or obligation to deliver the telegram sued on to the plaintiff at such place. That, after the defendant found that the plaintiff lived beyond the free delivery limits, it did not have opportunity and could not demand payment of the extra charges required by the rules of the company for the delivery of messages to such places, and that after it, the defendant, had delivered or attempted to deliver the message at the address given, and it found out that the plaintiff was outside of the free delivery limits of the city of Orange, that it had then discharged its contract, and was no further liable to the plaintiff."

The first and second propositions under the assignment are as follows:

"Where a message is delivered to a telegraph company for transmission at a place within the free delivery limits of the point of destination and the addressee is not found at the address given, but resides beyond the free delivery limits, before delivering the message, the company is entitled to reasonable time after ascertaining the correct address to demand its proper charge for such delivery beyond the free limits.

"It is not negligence for a telegraph company to fail in the delivery of a message where the addressee resides and is found at a different point from the address given in the message, and where a delivery at such different point is upon a different charge and for a different and greater rate from the charge for a delivery at the place addressed."

The third presents substantially the same proposition as the second.

The special exception referred to is as follows, as stated in appellant's brief: "Plaintiff excepts to said answer, the last paragraph thereof, whereby and wherein the defendant alleges that Will Langston did not advise this defendant that the plaintiff lived beyond the limits for the free delivery of such messages, and did not pay or offer or promise to pay to this defendant any sum, etc., because plaintiff's suit herein is upon a contract for the transmission and delivery of a telegraph message, and said petition contains no allegations that the defendant required or demanded any sum whatever from the sender of said message, to wit, Will Langston, for the trouble and expense, if any, in sending said message beyond the full delivery limits, if any, of the city of Orange."

[3] It will be seen that the exception was directed solely to the allegations of the answer, setting up as a defense that the sender of the message did not advise the defendant that the addressee lived beyond the free delivery limits, nor pay, nor offer to pay, the extra charges for such service. This was in fact no defense to the charge of negligence. *Telegraph Co. v. Harris*, 132 S. W. 878. It will be seen that the exception does not, by any means, go to the extent set out in the assignment and propositions. If it did, it would be a sufficient answer to the assignment that it is nowhere shown in the record that the court did, in fact, make the ruling complained of.

[4] It has been too often decided to require citation of authority that, in order to have the appellate court revise the ruling of the trial court in passing upon exceptions in pleadings it must be shown by some judgment or order of the court that the ruling complained of was in fact made. This is not done with regard to the error complained of in the statement. The rule would be different in case of a general demurrer which was improperly overruled. In the absence of any ruling shown by the record upon this special exception, it will be presumed that it was waived. The assignment is overruled.

[5] If there was any error in allowing appellee to testify, over appellant's objection, as set out in the second assignment of error, as to what the agent at Houston told him with regard to the time of departure of trains by which he could reach Coolege, the error was not prejudicial in view of the testimony of the witness Kossbiel, joint agent of the railroad company and appellant at Coolege, as to such fact, his testimony being, in substance, identical with what the agent at Houston told appellee. The assignment is without merit, and is overruled.

[6] The third and fourth assignments of error complain of the action of the court in overruling objections of appellant to questions propounded by appellee to certain wit-

nesses. It does not appear anywhere in the brief, either in the bill of exceptions set out in the assignments of error, or elsewhere in the statements under the propositions, what answers the witnesses made to the questions. Obviously we cannot say that the testimony was prejudicial. It only inferentially appears from the bill of exceptions, set out in the assignments, that the witnesses answered at all. We cannot be required to examine the statement of facts to determine, first, whether the witnesses answered the questions objected to, and, second, what the testimony was. The assignments must be overruled with the several propositions thereunder.

[7] As to the fifth assignment, it is nowhere shown what the witness' testimony would have been if he had been permitted to answer the question objected to. We cannot assume that his answer would have been material, or of such a nature that its exclusion was prejudicial to appellant. The assignment is overruled.

The sixth assignment of error is without merit, and is overruled without discussion.

There is nothing in the charge referred to in the seventh assignment of error which could be construed as assuming that defendant had admitted its liability.

[8] By the eighth assignment of error appellant complains of the tenth paragraph of the court's charge, on the ground that in instructing the jury as to the measure of appellant's duty in the transmission and delivery of the message the court uses the language "due time (that is, such time as it would have been delivered by the exercise of reasonable care and diligence in getting it through and delivered)." The ground of objection is that appellant was required by law to transmit and deliver the message in such time as it could be done in the exercise of ordinary care, under all the circumstances and conditions existing at the time. We think the terms "reasonable care" and "ordinary care" have substantially the same meaning. *Black v. Railway Co.*, 30 Neb. 197, 46 N. W. 480; *Railway Co. v. Faith*, 175 Ill. 58, 51 N. E. 807; 7 Words and Phrases, 5955. If it was desired that the jury be more fully instructed as to the effect of the extraordinary conditions prevailing as affecting such ordinary care, a special charge should have been requested. The court elsewhere in the charge properly defines negligence to be the want of ordinary care, and properly defines ordinary care, and in that connection instructs the jury that, if it found that defendant was not negligent in the transmission and delivery of the message, the plaintiff could not recover.

[9] It was not error prejudicial to appellant to tell the jury that if appellee could, after the receipt of the message "by the usual and regular means of travel," have reached the bedside of his daughter in time

to have reached her before her death, and fails to make use of such means as he could or should have done, he could not recover, as set out in the ninth assignment. Certainly it was not affirmative error. The assignment is overruled.

The tenth, eleventh, and twelfth assignments are addressed to certain portions of the charge of the court and present no error. That portion of the charge complained of in the twelfth assignment is not susceptible of the construction sought to be given to it. The copy of the charge as given in the brief is entirely misleading. The charge, as shown by the record, instructs the jury that, under the facts indicated, the law presumes that plaintiff "suffered mental anguish and he would be entitled to damages therefor, if you should find for the plaintiff under the instructions hereinafter given you," etc. As given in the brief, this portion of the charge is so punctuated (incorrectly) as to wholly distort its meaning.

We might very well refuse to consider the thirteenth assignment for want of a sufficient statement of the evidence upon which it is predicated. The assignment complains of the refusal, upon request of appellant, to charge the jury to return a verdict for the defendant. The evidence clearly raises the issue of negligence on the part of appellant in the failure both to transmit the message to Orange, and in its delivery to appellee after its receipt by the agent there. At least four hours elapsed after the delivery of the message to the agent at Cooledge before the transmission of messages direct from Houston to Orange was interrupted by the grounding of the wires between those points, so far as is shown by the evidence. It was delivered at Cooledge about noon, and did not reach Orange until 8:10 p. m. It is true that it was found that appellee could not be found at the place which the agent at Orange took to be the "power house," and that he lived outside of the free delivery limits at a place known as the Cove, but this place was only three-fourths of a mile from the telegraph office. Admitting that on account of the 2d of January being authorized by orders of appellant to its employes to be taken as a legal holiday, on account of the 1st of January falling on a Sunday, and the change in the office hours, appellant's agent testified that he was informed before he closed the office at 7 o'clock that appellee lived in the Cove, and that he so informed the messenger boy. If inquiry had been made in that section of the town, the evidence leaves no doubt that appellee could have been very easily found, and the telegram delivered, in ample time for him to have taken the 8:45 train that night. It is true that this was outside of the free delivery limits, and, admitting that this entitled appellant to demand an additional charge for the delivery of the message, it is not shown that by the terms of the contract or

by any rule of the company known to appellee or his agent, the sender, at the time, this additional charge had to be paid before delivery of the message.

[10] Nor was any such contract alleged. *Telegraph Co. v. Harris*, supra. Even if such contract had been alleged and proven, we think that it is the law that, if the fact of the residence of the addressee of the message beyond the free delivery limits is not shown to have been known to the sender of the message at the time of its delivery to the agent for transmission, it would be the duty of the agent at the receiving office to notify the sender of such fact so that he might have opportunity to pay the increased charge, and if there is not time to do so, in case of such a message as this, we are inclined to think that the residence of the addressee, so short a distance beyond the free delivery limits, would not excuse the agent from making any effort to deliver the message. It does not appear that the fact that appellee lived beyond such free delivery limits, in fact, had anything to do with the delay, for the messenger boy was instructed to deliver the message that night about 6:30 o'clock, before the agent left at 7 o'clock, and after the agent was informed that appellee lived at the Cove, and the next morning (but too late) the agent took steps to apprise appellee of the receipt of the message so that he might get it. The evidence, we think, was sufficient to raise the issue of negligence, and the court did not err in so holding and in refusing the requested charge. It would not have enabled appellee to reach Cooledge any sooner if he had taken the train leaving at 12 o'clock noon, as we have shown, and there was no error in refusing the requested charge referred to in the fourteenth assignment.

There was no prejudicial error in giving the charge referred to in the fifteenth assignment, nor in refusing to give the charges requested, the refusal of which is complained of by the sixteenth assignment. Whether or not the office at Orange should have been kept open, as on ordinary business days, until 8 o'clock p. m., or might have been closed at 6 o'clock, it was undisputed that it was kept open until 7 o'clock, that this message was received at 6:10, was given to the messenger boy for delivery, and that before closing and leaving the office the agent was informed that appellee lived at the Cove, and so informed the messenger boy. It does not appear that this difference in office hours, whether or not it would have excused the delay, had anything to do therewith. Appellant requested the court to charge the jury, in substance, that, if they believed that appellee lived beyond the free delivery limits in Orange, their verdict should be for defendant. We do not think this charge is a correct measure of appellant's liability under the facts of this case, and it was not error to

refuse it. *Telegraph Co. v. Ayres*, 47 Tex. Civ. App. 557, 105 S. W. 1166. It is not shown that any effort was made to deliver the message on the evening of its receipt, further than to inquire for appellee at the ice plant, and at the light plant, where he was not known, but it is undisputed that it was known to the agent before he closed his office at 7 o'clock, in fact at 6:30, when the messenger boy returned after going to the two places referred to, and that he told the messenger boy that appellee lived at the Cove, which was not about a mile beyond the free delivery limits, as stated in appellant's brief, but only about three-quarters of a mile from the telegraph office. It does not appear but that any sort of inquiry at the Cove that evening would have disclosed the exact place where appellee could be found and resulted in prompt delivery of the message.

[11] As we have said, appellant's agent was not justified in abandoning all efforts to deliver the telegram merely because appellee was not found at the address given, and his address when learned, was found to be beyond the free delivery limits. The court did not err in refusing to give the special charge requested, as set out in the eighteenth and nineteenth assignments of error.

[12] Appellant complains that the verdict is excessive in view of the fact that appellee's daughter was unconscious from the time the message was sent until she died, and could not have recognized nor communicated with him. We do not think the assignment can be sustained. A verdict for \$1,000 was allowed by the court to stand in the case of *Telephone Co. v. Gehring*, 137 S. W. 754, the writer dissenting, in which the facts were similar. *Telegraph Co. v. Sloss*, 45 Tex. Civ. App. 153, 100 S. W. 354. The deceased Mrs. Langston, although married, was a mere child of 17 years of age. There was shown to have existed the deepest affection between appellee and his children.

[13] As long as damages are allowed to be recovered for mental anguish alone in this class of cases, juries must be allowed a large latitude in estimating the damages. The assignment is overruled.

[14] What we have already said renders a discussion of the twenty-first assignment of error unnecessary, if we were required to consider it as it is presented. There is no statement showing that the witness gave the testimony objected to, save certain statements from the motion for a new trial. This is not sufficient.

We have considered all of the assignments of error and the several propositions thereunder, and have concluded that none of them presents any ground for reversing the judgment.

Finding no error in the record the judgment is affirmed.

Affirmed.

On Motion for Rehearing.

It is urged on motion for rehearing that this court erred in overruling appellant's eleventh, fifteenth, and sixteenth assignments of error. These assignments relate to the charge of the court and the refusal of special charges as to the effect of the order of appellant authorizing employes to treat January 2d, the day the message was sent, as a legal holiday, the first falling on a Sunday, and to keep the office of appellant open only from 8 o'clock to 10 o'clock a. m., and from 4 o'clock to 6 o'clock p. m. on that day. It will be seen from the opinion that the message in question was received at 6:10 p. m., when it was delivered to the messenger, and that the office at Orange was then open and remained open until 7 o'clock p. m. It was further shown, which is however not stated in the opinion, that the messenger was engaged in delivering messages at least up to 7 o'clock. The point now urged in this motion for a rehearing is that any service performed by the agent after 6 o'clock p. m. was a gratuitous service on his part which appellant was not obligated to perform, and that it is therefore not liable for any negligence of its agents in the performance of this service. The following cases are cited in the motion in support of this contention: *Telegraph Co. v. Rawls*, 62 S. W. 136; *Telegraph Co. v. Weeks*, 128 S. W. 674; *Telegraph Co. v. May*, 8 Tex. Civ. App. 176, 27 S. W. 760; *Telegraph Co. v. Neel*, 86 Tex. 368, 25 S. W. 15, 40 Am. St. Rep. 847. By referring to appellant's brief, it will be seen that none of the propositions stated under the several assignments referred to even suggest the question here presented. They refer only to the duty of the appellant to keep its office open after 6 o'clock p. m., and none of the authorities cited in the motion for rehearing are cited in the brief, nor any authorities, in fact, bearing upon this question. Of the cases cited the strongest is *Telegraph Co. v. Neel*, supra, which arose upon a certified question. After reviewing the cases and referring to the conflict of authorities, the Supreme Court concludes its opinion as follows: "In the application of the principles of law to new cases, we should proceed with caution, and therefore we deem it proper to say that our ruling is restricted to the question submitted. Whether the rule we have announced should be applied to other regulations by telegraph companies we leave for decision when the question may arise." The question submitted and answered can only be intelligently applied by reference to the state of facts upon which it was based, which were as follows, as correctly stated in the syllabus: "A telegram was sent from Yoakum to Cuero, Tex., July 29, 1891, at 4 o'clock a. m. The message reached Cuero at 4:50. The office hours at Cuero were from 7 a. m. to 7 p. m.

The carrier boy did not reach the office before 7 a. m., and the message was promptly delivered after the opening of the office." In the present case it appears from the undisputed evidence that the office at Orange was kept open until 7 o'clock. The message was not received until 6:10. The messenger boy was on hand, and, as stated by the agent, had other messages, some of which the agent telephoned to the addressees. In short, it appears that the office was open and the usual work of a telegraph office was being done until 7 o'clock. There is nothing to indicate that the order of the appellant with regard to office hours, differing from those on ordinary business days, on January 2d, was anything more than to authorize agents to observe these hours. The rule was for their benefit, and did not require the office to be closed, except between the hours named. In the Neel Case the messenger boy did not come to the office until the time for opening, when the message was promptly delivered. The telegraph company was without means of such delivery until the office actually opened in accordance with the established rule. The facts, we think, distinguish this case from the Neel Case and others cited, even conceding that appellee was bound by the rule authorizing employees to treat the 2d of January as a legal holiday. It is true that the evidence would have authorized a finding of negligent delay in the transmission of the message from Coolidge to Orange, but we do not think that it required such finding as a matter of law, and therefore we cannot say that the jury did not base their verdict on the negligent delay in delivering the message after it reached Orange. In such case, if this case falls under the rule laid down in the Neel Case, and is not distinguishable, some of the assignments of error referred to should have been sustained, if the question had been properly presented in the brief. But we doubt very much whether this question can be raised for the first time in a motion for a rehearing.

[15] The office of a proposition under an assignment is to specifically present the question of law intended to be embraced by the assignment, and where an assignment is not relied upon as in itself a proposition, but the pleader undertakes to state propositions thereunder, we think that this court is not authorized to consider any question not suggested by such propositions, nor is the appellee expected to make answer to them. Rule 30 (142 S. W. xii). Any other rule would not be fair to appellee, who is only required to answer the question presented by such propositions.

We conclude that the motion for rehearing should be overruled, and it is so ordered.

BLEDSON et al. v. THOMPSON BROS. LUMBER CO.

(Court of Civil Appeals of Texas. Galveston.
Nov. 15, 1912. Rehearing Denied
Dec. 12, 1912.)

1. MASTER AND SERVANT (§ 278*)—INJURY TO SERVANT—SAFE PLACE TO WORK—EVIDENCE.

An employé in a sawmill handled the lever controlling rollers carrying from a saw planks as fast as sawed to an edger, and afterwards they were placed on a transfer chain and carried out into the yard. The transfer chain broke, and a coemployé, who was not able to take the planks off as fast as they came, on seeing a plank about to pass him on the rollers, seized the lever and reversed the rollers, so that they revolved toward the saw, and the plank was rapidly carried toward the saw and struck the employé, killing him. *Held*, that the employer was not, as a matter of law, negligent in operating the mill while the transfer chain was broken, and in failing to furnish the employé a safe place to work, but the accident was directly caused by the negligence of the coemployé in reversing the rollers.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 954, 956-958, 960-969, 971, 972, 977; Dec. Dig. § 278.*]

2. MASTER AND SERVANT (§ 197*)—FELLOW SERVANTS—WHO ARE.

Employés in a sawmill, engaged in removing planks from a saw as fast as they are sawed, are fellow servants.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 489, 490; Dec. Dig. § 197.*]

3. APPEAL AND ERROR (§ 1001*)—VERDICT—CONCLUSIVENESS.

A verdict sustained by evidence is conclusive on appeal.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3922, 3928-3934; Dec. Dig. § 1001.*]

4. APPEAL AND ERROR (§ 1029*)—HARMLESS ERROR—ERRORS NOT AFFECTING RESULT.

Where, under the facts, plaintiff could not recover, any error of procedure on the trial was not prejudicial to him.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4035, 4036; Dec. Dig. § 1029.*]

5. DAMAGES (§ 14*)—RIGHT OF ACTION—STATUTES.

An action against an employer, for the death of an employé, caused by the negligence of a fellow employé, not occupying the position of vice principal, is not maintainable under Sayles' Ann. Civ. St. 1897, art. 3017, subd. 2, authorizing an action for death caused by the negligence of another.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. § 356; Dec. Dig. § 14.*]

Appeal from District Court, Tyler County; W. B. Powell, Judge.

Action by Mrs. F. A. Bledson and others against the Thompson Bros. Lumber Company. From a judgment for defendant, plaintiffs appeal. Affirmed.

I. D. Fairchild, of Lufkin, and Joe W. Thomas and J. A. Harper, both of Woodville, for appellants. J. A. Mooney, of Woodville, and Crook, Lord, Lawhon & Ney, of Beaumont, for appellee.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

McMEANS, J. The appellee, a private corporation, was engaged in operating a sawmill, and Felix A. Bledsoe, the husband of F. A. Bledsoe and the father of the other appellants, was, on the 18th day of January, 1910, in the employment of said corporation, and on the date last named, while engaged in the services for which he was employed, received injuries which resulted in his death. This suit was instituted in the district court of Tyler county against the appellee to recover damages for the death of said Bledsoe. A trial before a jury resulted in a verdict and judgment for the defendant, and the plaintiffs have appealed.

The grounds of negligence charged against the appellee are substantially: (1) In operating the sawmill at a time when the transfer chains were broken; (2) in failing to furnish the deceased, Bledsoe, a safe place in which to work; and (3) in employing one Griffin, a negro boy of about the age of 18 years, whose negligence is alleged to have been the immediate cause of Bledsoe's injury, and who, it is alleged, was incompetent to perform the duties assigned to him on that occasion.

[1] The facts, as we gather them from the record, in substance are: Bledsoe was engaged in talling the saw. By this is meant that he received the planks as fast as they were sawed and placed them on the live rollers, which carried them away from the saw. The live rollers consisted of a succession of rollers, all of which revolved at the same time and in the same direction from the saw, so that planks placed upon them are carried by their action away from the saw and to the "edger." After the planks are carried through the edger, they are placed upon what is called a "transfer chain," and are carried by this chain out into the yard, where the lumber is to be stacked. When this chain becomes broken, the planks are not permitted to reach the edger, but are taken from the live rollers, in order that the latter may not become blocked by the sawed lumber. The motion of the live rollers is controlled by a lever, and by its proper use the rollers may be started and stopped, or made to revolve towards the saw. In Bledsoe's work of talling the saw, it was his duty to handle this lever, and not the duty of the person to whom was assigned the task of removing the planks from the live rollers at times when the transfer chain was broken. Griffin's usual duties consisted of talling the "trimmer," but on the occasion when the transfer chain was broken it was his duty to remove the planks from the live rollers as fast as they came from the saw. On January 18, 1910, while Bledsoe was engaged in talling the saw, the transfer chain broke, and Griffin, as was his duty, began to remove the planks from the live rollers before they reached the edger, and pile them upon the floor. He was not able, however,

to take the planks off as fast as they came, and seeing a plank about to pass by him on the live rollers he negligently seized the lever and reversed the rollers, so that they revolved toward the saw, and the plank was thus carried rapidly toward the saw and toward Bledsoe, and the end of it struck Bledsoe and so injured him that he afterwards died.

It is substantially upon these facts that the appellants base the alleged negligence of appellee in operating the mill while the transfer chain was broken, and in failing to furnish the deceased a safe place in which to work. The court refused to submit these grounds of negligence to the jury, and in this, we think, there was no error. The other ground of negligence charged, viz., the negligent employment and retention of the boy, Griffin, in its service by appellee, was submitted to the jury by an appropriate charge, and by their verdict in favor of the defendant the jury must have found that there was no negligence in this regard, and the evidence in the record warranted them in so finding. We also find that the negligence, and only negligence, which proximately resulted in the injury and death of Bledsoe was that of the boy, Griffin, in reversing the lever and causing the plank to be carried by the live rollers back to and striking Bledsoe, and that the proof shows that the corporation was not negligent in failing to furnish Bledsoe a safe place in which to work, nor in operating its sawmill at a time when the transfer chain was broken.

[2, 3] We further conclude that Griffin was a fellow servant of Bledsoe, and that for an injury to the latter through the negligence of the former the appellee would not be liable in damages, unless it be further shown that Griffin was incompetent to perform the duties assigned to him, and that appellee was negligent in employing and retaining him in its service. As we have before stated, the jury upon sufficient evidence, found that appellee was not negligent in this regard, and its finding is conclusive of that question. This leaves to be settled only the question of whether the court should have submitted to the jury the issues of negligence of appellee in operating its sawmill at a time when the transfer chain was broken, and in not using ordinary care to furnish Bledsoe a safe place in which to work.

The submission of these issues was requested by appellants by several special charges, all of which the court refused to give to the jury, and in this we think there was no error. The evidence leaves us no doubt that the alleged negligence of defendant in the regards stated was remote in its relation to the injury and death of Bledsoe, and upon which no cause of action could be based.

[4, 5] But independently of all the alleged

errors complained of by appellants in their brief, we think that, under the facts of this case, appellants could sustain no recovery; and therefore, if any error of procedure was committed on the trial, a reversal of the judgment would not be required. The injury to Bledsoe resulted in his death, and was directly caused by the negligence of Griffin in reversing the live rollers and thereby running a plank back and striking him. Whether or not Griffin was a fellow servant of Bledsoe is not material in this connection; for the testimony shows that Griffin was not the vice principal of appellee. All actions for injuries resulting in death must be brought under article 3017, Sayles' Civil Statutes, which reads as follows: "An action for actual damages on account of injuries causing death of any person may be brought in the following cases: 1. When the death of any person is caused by the negligence or carelessness of the proprietor, owner, charterer, (or) hirer of any railroad, steamboat, stage-coach, or other vehicle for the conveyance of goods or passengers, or by the unfitness, negligence or carelessness of their servants or agents; when the death of any person is caused by the negligence or carelessness of the receiver or receivers or other person or persons in charge or control of any railroad, their servants or agents, and the liability of receivers shall extend to cases in which the death may be caused by reason of the bad or unsafe condition of the railroad or machinery or other reason or cause by which an action may be brought for damages

on account of injuries, the same as if said railroad were being operated by the railroad company. (2) When the death of any person is caused by the wrongful act, negligence, unskillfulness or default of another."

It is clear that appellants could not base their cause of action upon the first subdivision of the article; the appellee belonging to none of that class of corporations or persons to which it is applicable. It is also clear that, the cause of action being based upon the second subdivision, and the negligence which resulted in the death of Bledsoe being the negligence of Griffin, who was not a vice principal of the corporation, and as to whom the rule respondeat superior does not apply, there could be no recovery in favor of appellants, who sue as the surviving wife and children of the deceased, Bledsoe. We will not in this opinion undertake to give the reasons for this conclusion, but content ourselves with a reference to the case of *Sullivan-Sandford Lumber Co. v. Cooper et al.*, 142 S. W. 1168, a case very similar in its facts to this, wherein Chief Justice Brown of our Supreme Court, in a well-considered opinion, goes elaborately into the subject and reaches the conclusion upon which we base our decision of this case. We have, however, examined all the assignments of error presented by appellants in their brief, and are of the opinion that none of them points out errors which require a reversal; and the judgment of the court below will be in all things affirmed.

Affirmed.

CROPPER et al. v. GAAR'S EX'R et al.
(Court of Appeals of Kentucky. Dec. 20, 1912.)

1. CONVERSION (§ 15*)—PROVISIONS OF WILL—EFFECT.

Where a testator devised his entire estate, real and personal, to his wife for life, and directed that at her death it should all be sold and the proceeds equally divided among his children, each child while taking a vested remainder, subject to the life estate of the widow, received no title to the real and personal property of the testator as such, the direction to sell and distribute the proceeds working an equitable conversion.

[Ed. Note.—For other cases, see Conversion, Cent. Dig. §§ 28-37, 52; Dec. Dig. § 15.*]

2. EXECUTION (§ 45*)—INTEREST SUBJECT.

The interest of a legatee in the proceeds of property which is directed to be converted into money and distributed is not subject to levy under an ordinary execution, and a judgment against the legatee does not create any lien on his interest in the land.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 141, 142; Dec. Dig. § 45.*]

3. JUDGMENT (§ 853*)—DORMANT JUDGMENT.

A lapse of more than 15 years from the issuance of an execution will bar any to subject the debtor's property to the judgment.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1535-1570; Dec. Dig. § 853.*]

4. ESTOPPEL (§ 91*)—EQUITABLE ESTOPPEL.

Where a will gave a legatee an interest in the proceeds of property which was to be converted into money, the failure of the legatee to object to the attempted levy of an execution on his share in the property, which share was not subject to that process, will not estop him or his successors from denying the validity of the execution.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 257-259; Dec. Dig. § 91.*]

Appeal from Circuit Court, Jefferson County, Chancery Branch, First Division.

Action by John C. Miller, as administrator, etc., of Raleigh Kendall, against Lorena Kendall Cropper and another, and S. A. Gaar's executor. From a judgment for the last-named defendant on their cross-petition, the first-named defendants appeal. Reversed and remanded, with directions.

Wm. McKee Duncan, of Louisville, for appellants. Arthur M. Wallace, of Louisville, for appellees.

SETTLE, J. Raleigh Kendall, a resident of Jefferson county, Ky., died in 1870, testate, and on February 13, 1871, his will was duly probated in the Jefferson county court.

The will is as follows: "I, Raleigh Kendall, being sound in mind at this time make this my last will for the better disposition of my property for the benefit of my family. I will all my real estate and personal property to my wife, Lucinda Kendall to have and to hold the same for her use and my minor children during her life, and after her death the whole property, real and personal is to be sold and equally divided among my children, except the house and lot on the south side of Walnut Street, between Center and Sixth Street, which I will to my young-

est daughter Anna Bell Kendall for her share of my estate. I appoint my son Edward Kendall as executor for the better purpose of executing this my will."

On the same day that the will was admitted to probate, the testator's son, Edward Kendall, named in the will as executor, duly qualified as such. On June 9, 1879, Edward Kendall was by an order of the Jefferson county court removed as executor and H. S. Irvin appointed administrator de bonis non with the will annexed of the testator's estate, who duly qualified as such and continued to act until May 23, 1907, when he resigned, and John C. Miller was by the same court appointed administrator de bonis non with will annexed of the estate. Edward Kendall died in 1905, intestate, survived by two children, the appellants Lorena Cropper and Lou Kendall Stevens. His mother, the widow of the testator, died in 1906. Shortly after the appointment and qualification of John C. Miller as administrator de bonis non with the will annexed of Raleigh Kendall's estate, he, in his fiduciary capacity, sold the devised real and personal estate as directed by the will and brought this action for a settlement of his accounts and for the purpose of distributing the proceeds thereof among the testator's children, according to the provisions of the will. All the devisees were made parties, as were the children of Edward Kendall, deceased.

It was alleged in the petition that the heirs at law of S. A. Gaar were setting up some sort of claim to whatever interest Edward Kendall, deceased, had he lived, would have been entitled to receive from the estate as a devisee under the will. Hence, they, together with the executor of the will of S. A. Gaar, were also made defendants and called upon to assert their alleged claim, which they did by filing an answer that was made a cross-petition against the heirs at law of Edward Kendall, the devisees under the will of Raleigh Kendall, deceased, and the administrator de bonis non with the will annexed of the estate. It was alleged in the answer and cross-petition that Edward Kendall in 1878 executed a note to one Early Smith for \$600, upon which S. A. Gaar became his surety; that, when this note became due, Edward Kendall, the principal, failing to pay it, suit was brought thereon by Smith, the payee, and judgment obtained against Kendall and Gaar, the surety; that soon thereafter execution issued upon the judgment which the sheriff of Jefferson county levied upon what in the execution return was called the one-seventh undivided interest of Edward Kendall in the real estate left by his father, Raleigh Kendall, deceased, and at a sale, July 1, 1878, under the execution, of such supposed interest, S. A. Gaar became the purchaser thereof at the price of \$450, for which he executed bond payable to Smith, and, in

addition, paid him the residue of the judgment amounting to \$383; that Smith thereupon assigned him that much of the judgment; and that subsequently, on February 27, 1885, S. A. Gaar caused the sheriff of Jefferson county to execute to him a deed conveying what was therein represented to be the one-seventh undivided interest of Edward Kendall in the real estate in question sold under the execution, and this deed was put to record in the office of the clerk of the Jefferson county court.

It was further alleged in the answer and cross-petition that S. A. Gaar, by his purchase at the execution sale and the deed subsequently executed to him by the sheriff, became the owner of Edward Kendall's interest in the real estate left by his father, Raleigh Kendall, deceased, and that the fee-simple title thereto upon the death of S. A. Gaar, passed to his children and heirs at law, which entitled them to a one-seventh part of the proceeds realized from the sale of the Raleigh Kendall lands. It was asked in the answer and cross-petition that, if the court should be of opinion that no title passed to S. A. Gaar by the execution sale and sheriff's deed, it be adjudged that a lien was acquired by virtue of the levy of the execution, which would entitle his heirs to have applied to the payment of the execution debt one-seventh of the proceeds arising from the sale of the Raleigh Kendall lands. The appellants, children of Edward Kendall, by answer to the petition of the administrator de bonis non, with the will annexed, of Raleigh Kendall's estate, and the cross-petition of the heirs at law and executor of S. A. Gaar, attacked the validity of the execution levy and sale, and also the deed from the sheriff to S. A. Gaar, alleging that each was void, and that no lien was acquired by virtue of the execution levy or sale upon any part of the proceeds of the real estate left by Raleigh Kendall, deceased, and asking that the sheriff's deed be canceled. To this end the answer was made a cross-petition against the executor of the will of S. A. Gaar, his heirs at law, the administrator de bonis non, with the will annexed, of Raleigh Kendall and his devisees. It was further alleged in their answer and cross-petition that Edward Kendall during his lifetime owned no interest in the real estate left by his father, Raleigh Kendall, which could be levied upon or sold under execution; that, under the will of the father, he took no interest in the real estate devised, but only a vested remainder in an undivided seventh of the proceeds thereof, the enjoyment of which was postponed by the will until the death of the testator's widow, which was fixed as the time of the sale of the real estate for a division of the proceeds among the devisees; and that the widow's death did not take place until after his death. Therefore, his interest was never

such an interest as could be levied upon or sold under execution. The answer also relied upon the statute of limitations, which was pleaded in bar of the claim asserted by the Gaar heirs.

The court below overruled a demurrer filed by appellants to the answer and cross-petition of the appellees, S. A. Gaar, executors and heirs at law, and sustained a demurrer filed by the latter to the answer and cross-petition of the appellants. Appellants excepted to these rulings and refused to plead further. whereupon the court rendered judgment dismissing their cross-petition, declaring that Edward Kendall at the time of the levy of the execution in favor of Early Smith owned an undivided one-seventh interest in the real estate devised by Raleigh Kendall, subject to the widow's life estate; that S. A. Gaar, by virtue of his purchase at the execution sale, acquired a lien on such interest for what was due him of the execution debt, which entitled appellees to receive a seventh part of the proceeds of the real estate devised, and this seventh the administrator, with the will annexed, was ordered to pay them. From that judgment this appeal is prosecuted.

[1, 2] In our opinion the judgment appealed from did not properly determine the rights of the parties. The will of Raleigh Kendall devised his entire estate, real and personal, except a house and lot in the city of Louisville given his youngest daughter as her share of his estate, to his widow for life, and directed that at or after her death it should all be sold and the proceeds equally divided among the testator's children, exclusive of the youngest daughter mentioned, whose share was given her in the city house and lot. The will appointed the testator's son, Edward Kendall, executor, and by clear implication conferred on him the power to sell the devised estate for a division of the proceeds as by the will directed.

It is clear that Edward Kendall was one of the seven children to share in the proceeds of the estate devised, after the death of the testator's widow. He therefore took under the will a vested remainder, subject to the life estate of the widow, not in the real or personal estate as such, but in its proceeds: hence his right to receive his one-seventh part of the estate devised was by the will postponed until there could be a sale made of the property after the death of the widow. and, as his death occurred before that of the widow and consequently before the time when the property devised could be sold and divided, as directed by the will, his undivided one-seventh interest therein descended under the statute of descent and distribution to his two daughters, the appellants, Lorena Cropper and Lou Kendall Stevens.

It is a well-settled rule in the construction of wills that, when land is directed to be sold and turned into money, courts of equity

in dealing with the subject will consider it a personality, and, to that end, treat its conversion into money as having taken place immediately following the death of the testator. An excellent illustration of our meaning may be found in the case of *Hocker et al. v. Gentry et al.*, 3 Metc. 463, wherein it was held that, if a direction to an executor to sell land or slaves is positive, the right of the legatee will in equity be regarded as a right to money from the time of the testator's death, though the time of sale is remote, and the conversion cannot, in fact, be made until the time of sale arrives. In that case there was a devise "to the children of my said son Thomas J. Gentry the following slaves, (naming them). These slaves and their income I direct my executor to hire out until the youngest of said children attain the age of twenty one years; then I direct my executor to sell all of said slaves, and divide the proceeds equally among said children." There were four legatees, one of them being a daughter, who married after the death of the testator and died, before the youngest child attained the age of 21 years, survived by her husband. It was held that the legatees took a vested interest in the proceeds of the slaves which, in equity, was to be regarded as a right to money from the time of the testator's death, and that the husband of the legatee who died was entitled in her right to one-fourth of the proceeds, the division to take place at the time mentioned in the will at which the legatees were also entitled to the hire of the slaves.

The same doctrine was announced in *Geddes v. Western Baptist Theo. Ins.*, 13 B. Mon. 530, the opinion declaring, in substance, that, where a will peremptorily directs the sale of land, a court of equity regards the land as converted into money even before the sale; moreover, that a gift of the proceeds of land directed to be sold is a legacy, and its transmissibility determined by the rules applicable to legacies of money or other personality. In *Porter v. Porter*, etc., 135 Ky. 813, 123 S. W. 302, a more recent statement of the rule referred to is to be found. In that case the testator directed in his will that at the death of his wife his land be sold and the proceeds equally divided between all of his children. By another clause of the will the executor was given power to sell the land and divide the proceeds between the children equally. The action was instituted by the children after the death of their mother to obtain a sale of the land and division of the proceeds as directed by the will. In the opinion it is said: "The doctrine that land directed to be converted into money by a testator is to be regarded as a money legacy is well established and has been long recognized by the courts of this state, subject it is true to an election by the devisees whether to treat it as realty or personality; but in the absence of an election to regard it as realty the law stamps it

as a money bequest. *Jarmon on Wills*, 756; *Arnold's Ex'rs v. Arnold's Adm'r*, 11 B. Mon. 89; *Williams on Executors*, 767; *Bowling's Heirs v. Dobyns' Adm'r's*, 5 Dana, 434; *Fields' Heirs v. Hallowell*, 12 B. Mon. 517; *Hocker et al. v. Gentry et al.*, 3 Metc. 473."

After commenting at length upon the case of *Rawlings' Ex'r v. Landes*, 2 Bush, 158, and *Holeman v. Landes*, 2 Bush, 158, and demonstrating their applicability to the case in hand, the court in the opinion further said: "Appellee's counsel admit the correctness of the rule above stated, but claim there has been a reconversion by the devisees; that they elected to take the land, instead of the proceeds thereof. It is true that it is a well-established rule that the devisees may elect to do so, but the facts do not support the contention of appellee's counsel in this case. The authorities seem to consider it necessary, in order to create a reconversion of property, for all the devisees to join in the election, which was not done in this case. On the contrary, this action was brought to carry out the intention of the testator by selling the land and dividing the proceeds as directed by the will. It is true Sam (Porter) received many deeds or writings from his brothers and sisters which had the effect to convey or transfer to him their interests in the land or the proceeds thereof, but this fact does not show an election to change the devise from one of personality to one of realty. Some of the heirs did not convey their interest to any one, but held it under the will until their mother's death."

The same question arose in *Miller's Ex'r v. Sageser*, 99 S. W. 913, 30 Ky. Law Rep. 837. F. S. Miller's will devised the 250-acre farm on which he lived to his wife for life. Another clause of the will disposed of the farm after the widow's death as follows: "After the death of my wife, I will and direct that the farm on which we reside shall be sold, and the proceeds divided among my children so as to make them all equal, and I authorize my said executor to convey the same to the purchaser." Nannie Rosa Miller, a daughter of the testator, after the death of the latter, intermarried with A. J. Sageser. She, however, died intestate while her mother, the testator's widow, was still living, but left surviving her a son and her husband. Within a few months of her death the son also died, and his death was followed by that of F. S. Miller's widow. After her death A. J. Sageser, in his own right and as administrator of his deceased wife and son, brought suit against F. S. Miller's executor and the legatees under his will for a settlement of the executor's accounts and a sale of the farm, which had been devised the testator's widow for life, and also for a judgment in his own right, or in his fiduciary capacity, for that proportion of the proceeds of the farm which would have gone to his wife had she been living at the time the

suit was brought. The executor resisted the claim of Sageser, but the circuit court sustained it, and the executor appealed. On the appeal this court affirmed the judgment upon the ground that the interest of Sageser's wife in the farm referred to was, under the will of her father, an interest in the proceeds of the land, and that the land, in so far as it related to the testator's children, was, under the doctrine of equitable conversion, changed from realty to personalty at the date of the death of the testator, when the will became effective. The opinion, after citing *Rawlings v. Landes*, *Hocker v. Gentry*, supra, and numerous other authorities, closes with the following statement: "Under these authorities, there is no doubt about the principle of equitable conversion. This 250 acres of land was changed from real estate to personal property when the will of F. S. Miller became effective. At the death of her father Nannie Rosa Sageser took a vested interest in the proceeds of the home farm under her father's will, which, by the will, and under the authorities cited, was converted into personalty. When she died intestate, it passed to her surviving husband and child under the statute; and when this child died, leaving no issue, the whole of the interest passed to the appellee A. J. Sageser." The above case, and the several other authorities to which we have referred, are conclusive of the instant case, as the doctrine of equitable conversion they announce establishes beyond doubt appellants' contention, that Edward Kendall's interest in the estate devised by his father's will was not an interest in the tangible property itself, whether real or personal, but an interest in its proceeds—that is, the money for which it might be sold—and, this being so, it is equally certain that such interest was not subject to levy or sale under an execution in favor of Smith or his assignee, S. A. Gaar, the appellee's ancestor. Therefore both the levy and sale were void. *Mudd v. Durham*, 33 S. W. 1116, 17 Ky. Law Rep. 1202; *Roberts' Ex'rs v. Brinker*, 4 Dana, 570. It is also well-settled that "where land has been equitably converted into money a judgment against the beneficiary does not create any lien upon his interest in the land, nor is his interest subject to sale on execution." 7 *American & English Encyclopedia of Law*, 476.

[3] Whether Smith or Gaar could by attachment have subjected Edward Kendall's interest in the devised estate to the payment of the judgment obtained by Smith against him it is unnecessary to decide, as that question is not before us. Such interest cannot now be subjected to the satisfaction of the appellees' judgment, for, more than 15 years having elapsed since execution was issued upon it, it is barred by the statute of limitations.

[4] There is no merit in the estoppel pleaded by appellees. The fact that Edward Kendall made no objection to the attempted levy of the Smith execution, or the sale thereunder, or that he thereafter took no steps to have the levy and sale quashed, gave no validity to the void levy or sale; nor was there any act upon his part which can be said to have constituted an election to take his interest under the will in land, instead of its proceeds. Indeed, in view of the conclusion expressed in *Porter v. Porter*, supra, an election to do so could not have been made by him, without a like election on the part of the other devisees under the will. It follows from what we have said that as Edward Kendall died before there could be, under the provisions of his father's will, a sale of the property therein devised, appellants, as his only heirs at law, became at his death entitled under the statute to the undivided one-seventh interest in the proceeds of the devised estate, of which he would have been the beneficiary had he lived.

For the reasons indicated, the judgment is reversed and cause remanded, with directions to the circuit court to enter judgment in conformity to the conclusions expressed in the opinion.

CARROLL v. BOSWORTH, State Auditor.

(Court of Appeals of Kentucky. Dec. 20, 1912.)

1. STATUTES (§ 107*)—TITLE OF ACT—VALIDITY.

Under Const. § 51, providing that no law shall relate to more than one subject, and that shall be expressed in its title, an act entitled "An act permitting C. C. to sue the state for a fee for legal services performed" is not invalid, though it provides not only for the maintenance of the suit, but validates a contract between the plaintiff and the Attorney General providing the fee for such services, the inhibition of the statute being leveled against the inclusion in one act of unrelated matters, and not preventing the enactment under one title of several remedies which all apply to the same subject-matter.

[Ed. Note.—For other cases, see *Statutes*, Cent. Dig. §§ 121-134; Dec. Dig. § 107.*]

2. STATUTES (§ 104*)—SPECIAL LEGISLATION.

A special act in favor of an attorney, validating a contract made between him and the state for rendition of services, is not invalid under Const. § 59, subsec. 13, providing that the Legislature shall pass no local or special acts to legalize, except as against the commonwealth, the unlawful or unauthorized act of any officer of the same; the constitutional provision itself inferentially giving the Legislature the power to enact a local law to legalize the contract.

[Ed. Note.—For other cases, see *Statutes*, Cent. Dig. § 116; Dec. Dig. § 104.*]

3. STATUTES (§ 104*)—AUDITING OF CLAIMS.

While Const. § 58, prohibits an act to audit or allow private claims against the commonwealth, a special act validating a contract made by plaintiff with the state officers, and giving him permission to sue the State Auditor, does not fall within its inhibitions, because

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

showing on its face that the claim must be audited by the Auditor himself.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 116; Dec. Dig. § 104.*]

Appeal from Circuit Court, Franklin County.

Action by Charles Carroll against H. M. Bosworth, as State Auditor. From a judgment for defendant, plaintiff appeals. Reversed, with directions to enter judgment for plaintiff.

D. L. Hazelrigg, of Frankfort, and T. C. Carroll, of Louisville, for appellant. Jas. Garnett, Atty. Gen., and O. S. Hogan, Asst. Atty. Gen., for appellee.

TURNER, J. During the 1904 session of the Legislature an investigation was instituted as to certain alleged overpayments to one Henry Bacon, who was at the time a contractor with the state as to a certain class of printing. Appellant was then a state senator. He was a member of that investigating committee, and, as such, became very familiar with the transactions between Bacon and the commonwealth. As a result of that investigation the Attorney General of Kentucky, N. B. Hays, thereafter determined to institute an action against Bacon and his sureties, seeking to have paid back to the state certain moneys improperly collected by Bacon. By reason of appellant's familiarity with the transactions, acquired through the legislative investigation, the Attorney General sought to employ him as an assistant in the proposed litigation; but it being the opinion of both the Attorney General and appellant at the time that, under the existing statutes, the Attorney General had no right to employ him in such way as to bind the state, and possibly for other reasons, the appellant at the time declined the employment. But subsequently some parties in Louisville sought also to employ appellant to assist the Attorney General, proposing to pay him a fee of \$500 to aid in the prosecution of the suit. He accepted the employment upon condition that the Attorney General was still willing to employ him for the state, and at once notified the Attorney General of his employment by these Louisville parties, and indicated to him that he was then willing to accept an employment from the Attorney General upon behalf of the state, as had been previously proposed, and fully acquainting the Attorney General with the nature of his agreement with the Louisville parties. Shortly thereafter the suit was instituted against Bacon and his sureties, and was vigorously prosecuted, both in the circuit court and in this court; the appellant, apparently by reason of his detailed knowledge of the transactions, taking the leading part. The final judgment of the court was that the state recover of Bacon about \$24,000, but released his sureties from liability. The Louis-

ville parties paid appellant the fee which they agreed to pay him; and at the 1912 session of the Legislature the following act was passed, authorizing him to sue the state, to wit:

"An act permitting Charles Carroll to sue the state for a fee not exceeding \$500.00 for legal services performed.

"Whereas, in December, 1904, the Attorney General of the state employed Charles Carroll to assist in the prosecution of a suit against Henry Bacon, accepted bidder for the second-class printing and binding for the state for two years from January, 1902, said suit being in the name of the commonwealth of Kentucky on the relation of the Attorney General against said Bacon and his sureties, and in said suit it was sought to construe the printing laws of the state, and to recover of Bacon an alleged overcharge against the state, which was paid to him by reason of his claim for said printing. Said Carroll accepted said employment, and assisted in said suit from its inception in the Franklin circuit court to its final determination in the Court of Appeals, covering a period of nearly four years, and in said litigation said Carroll assisted in the preparation of the pleadings, and took an active part in the examination of the witnesses and orally argued the case in the Franklin circuit court, and orally argued and briefed it in the Court of Appeals, which on the 20th of June, 1908, in an opinion which will be found in 111 Southwestern, beginning on page 387, reversed the judgment of the Franklin circuit court, and sustained the contention of the commonwealth and ordered judgment against Bacon for money collected from the state without warrant of law for \$23,992.69 with interest from August 29, 1902, and the result of said litigation was of great benefit to the state. Said suit was prosecuted under section 340a, Kentucky Statutes, and whereas, it was agreed between the Attorney General and said Charles Carroll at the time of the employment of said Carroll that he should receive for his services in said litigation the sum of \$500.00, but there being some question whether under said section 340a of Kentucky Statutes, the contract between the Attorney General and said Charles Carroll is binding upon the state, and it appearing in equity and good conscience that said Charles Carroll is entitled to the fee agreed upon between him and the Attorney General in said litigation and having rendered services to the state in same to amount greater in value than said amount of \$500.00, therefore,

"Be it enacted by the General Assembly of the commonwealth of Kentucky:

"That said Charles Carroll is hereby permitted to sue the commonwealth of Kentucky in the Franklin circuit court under the style of Charles Carroll, Plaintiff, v. Henry M. Bosworth, Auditor, Defendant, in order

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

that said court may determine and allow after hearing the proof as to the value of said services a reasonable fee to said Carroll not exceeding \$500.00 for his services in the above mentioned litigation, and when said judgment becomes final the Auditor is directed to issue to said Charles Carroll his warrant upon the treasurer of the state for the amount of said judgment, and said treasurer is directed to pay said warrant out of any funds in his hands not otherwise appropriated.

"Approved by the Governor, March 12, 1912." Laws 1912, c. 37.

Thereafter the appellant instituted this action in the Franklin circuit court, and, his petition having been dismissed, he appeals.

There is no doubt of the reasonableness of the fee in this case under the evidence, and it appears that the services of appellant have resulted in great benefit to the state by reason of the fact that in the action against Bacon the printing laws of the state were construed in such way as to reduce the printing expense since that time, although it appears that the judgment against Bacon has never been collected. We are therefore confronted with these questions, to wit:

(1) Was the title of the act sufficient, under the provisions of section 51 of our Constitution, to authorize the Legislature in the body of the act to validate an invalid contract between the Attorney General and appellant?

(2) Under the provisions of section 59 of the Constitution, did the Legislature have the power by special enactment to validate the invalid contract between the Attorney General and appellant, and did the act in fact have that effect?

(3) Was the effect of the legislative act to audit or allow appellant's claim against the commonwealth as is prohibited by section 58 of the Constitution?

We will discuss these questions in the order named.

[1] 1. Section 51 of the Constitution is as follows: "No law enacted by the General Assembly shall relate to more than one subject, and that shall be expressed in the title. * * * " The proper interpretation of this section has frequently been before this court. The section is in exactly the same language as section 37, art. 2, of the Constitution of 1850. In the case of *Phillips v. Cov. & Cin. Bridge Co.*, 2 Metc. 219, this court had before it the same question which we here have, and the determination of the question in that case has been uniformly followed since. There the act was entitled "An act to amend the charter of the Covington & Cincinnati Bridge Company." Laws 1855-56, c. 185. Section 1 of the act increased the capital stock of that company to \$700,000. The second section of the act authorized the company to sell, and the city of Covington to buy, \$100,000 of the capital stock, and in

payment thereof authorized the city to sell her bonds to that amount for that purpose. And it was urged that the act, in so far as it related to the city of Covington, was entirely foreign to the subject-matter of the title, and therefore invalid. The court in discussing the history of this constitutional provision said: "A practice had become prevalent of uniting in the same act of the Legislature subjects which had no relation to each other, and which were wholly dissimilar and unconnected. Hence it not unfrequently happened that the title of an act gave no indication whatever of some of the subjects to which its provisions related. And by permitting amendments to be made to a bill, by which distinct and unconnected matters might be introduced into and made a part of it, an improper influence was sometimes brought to aid in its final passage. To remedy this evil, the constitutional provision under consideration was adopted. Such a construction should therefore be given to it as is necessary to render it effectual in accomplishing the object for which it was designed. But it should not be so construed as to restrict legislation to such an extent as to render different acts necessary where the whole subject-matter is connected, and may be properly embraced in the same act. It is not necessary for the accomplishment of the purpose contemplated to go from one extreme to the other, nor would such a course be consistent with the intention of the framers of the Constitution. This prohibition should receive a reasonable, and not a technical construction; and, looking to the evil intended to be remedied, it should be applied to such acts of the Legislature alone as are obviously within its spirit and meaning. None of the provisions of a statute should be regarded as unconstitutional where they all relate directly or indirectly to the same subject, have a natural connection, and not foreign to the subject expressed in its title." And again in the same case the court said: "The power to sell stock to the city of Covington necessarily requires that a power should be conferred on the latter to subscribe and pay for it; for without such power the power to sell would be nugatory. The subject is the same, although it relates to a transaction to which two corporations are parties, one of whom only is named in the title of the act. If by the act a power had been conferred on the city of Covington to subscribe for the stock of any other corporation but the one named in the title of the act, then the provision would fall within the constitutional prohibition, and be clearly null and void. But as it is restricted in its operation to matters pertaining to the bridge company, and the provisions of the act, so far as they relate to the city of Covington, are apposite to the purpose which was intended to be effected by its passage, and are sufficiently indicated in its title, it is not liable to this constitutional objection. It was certainly not

necessary for the Legislature to pass two separate acts to effect the object it had in view—one to enable the company to sell the stock to the city, and another to enable the city to subscribe and pay for it. The constitutional provision relied upon must receive a rational construction, and not one that would lead to such an unnecessary and absurd result.”

That is the leading case in Kentucky interpreting that provision of the Constitution, and the broad rule laid down therein has never been departed from, and has been followed and upheld in the following cases: *Johnson v. Higgins*, 3 Metc. 569; *O'Bannon v. Railroad Co.*, 8 Bush, 353; *McReynolds v. Smallhouse*, 8 Bush, 453; *Howland C. & I. Works v. Brown*, 13 Bush, 685; *Hoke v. Commonwealth*, 79 Ky. 573; *City of Covington v. Voskotter*, 80 Ky. 221; *Citizens' Gaslight Company v. Louisville Gaslight Company*, 81 Ky. 270; *Gayle v. Owen County Court*, 83 Ky. 67; *Wulftange v. McCollom*, 83 Ky. 364; *Ky. Union R. Co. v. Bourbon County*, 85 Ky. 112, 2 S. W. 687, 8 Ky. Law Rep. 881; *Burnside v. Lincoln County Court*, 86 Ky. 426, 6 S. W. 276, 9 Ky. Law Rep. 635; *Rogers v. Jacob*, 88 Ky. 508, 11 S. W. 513, 11 Ky. Law Rep. 45; *Board of Trustees v. Maysville, etc., R. Co.*, 97 Ky. 150, 30 S. W. 1, 16 Ky. Law Rep. 890; *Conley v. Commonwealth*, 98 Ky. 130, 32 S. W. 285, 17 Ky. Law Rep. 678; *Smith v. Commonwealth*, 8 Bush, 112; *Bierley v. T. P. Co.*, 29 S. W. 874, 17 Ky. Law Rep. 36; *White v. Commonwealth*, 50 S. W. 678, 20 Ky. Law Rep. 1944; *Henderson Bridge Co. v. Alves*, 122 Ky. 46, 90 S. W. 995, 28 Ky. Law Rep. 996. In this case the title to the act indicates that the General Assembly is dealing with the general subject of authorizing appellant to sue the state for a fee which he claims against it, and there is in the body of the act not only an authority to sue, but in addition thereto a provision directing the court in which he is authorized to enter suit to ascertain merely the amount of the claim, not to exceed \$500, and to render judgment therefor; and a further provision directing the Auditor upon the rendition of the judgment to issue his warrant. The act throughout is dealing with the single subject of permitting appellant to get from the commonwealth a fee to which in justice he is entitled, and the mere fact that the act in addition to authorizing him to sue went further and validated an incomplete contract between him and the state is not in violation of either the letter or spirit of section 51. It is merely dealing with two aspects of the same general subject, namely, the authority to sue, and the validating of a contract which is an incident to the authority to sue.

We cannot assume that the Legislature meant to do a vain thing, viz., to authorize appellant to sue the state on a contract which was by all the parties connected with it recognized as invalid, unless at the same time it took some action to validate the incomplete contract. The enforcement of the invalid contract between appellant and the commonwealth was the subject of that act; and it was permissible for the Legislature, under the general title, to deal with all phases of it.

[2] 2. Section 59 of the Constitution provides: “The General Assembly shall not pass local or special acts concerning any of the following subjects, or for any of the following purposes, namely: * * * Subsec. 13. To legalize, except as against the commonwealth, the unauthorized or invalid act of any officer or public agent of the commonwealth. * * *” We have here by inference express authority for the Legislature to legalize or validate as against the commonwealth the unauthorized or invalid acts of its officers or agents; and the act in this case, taken and read as a whole, cannot be interpreted in any other way than to legalize the unauthorized contract between the Attorney General and appellant. The preamble of the act refers to the circumstances under which the agreement between the Attorney General and appellant was made, and also to the fact that under the then existing statutes there was a doubt as to whether it was binding upon the state; and in the body of the act the court in which appellant is authorized to sue is left only the duty of hearing proof as to the value of his services, and it is in effect directed to render judgment for a reasonable fee, not to exceed \$500. There can be no doubt of the legislative purpose to legalize the contract between the Attorney General and appellant so as to allow him to recover against the commonwealth.

[3] 3. The claim that this act undertakes to audit or allow a private claim against the commonwealth, which is prohibited by section 58 of the Constitution, cannot be maintained. As we have said, the purpose of the act was to permit appellant to sue the state and to validate his incomplete contract with the Attorney General; and the act on its face shows that, after the allowance of the fee by the circuit court, the same was to be audited and warrant issued by the Auditor.

The judgment is reversed, with directions to enter a judgment for appellant in the sum of \$500, with interest from the date of the judgment.

CARROLL, J., not sitting.

VIOLET v. PURDY et al.

(Court of Appeals of Kentucky. Dec. 20, 1912.)

DEEDS (§ 125*) — CONSTRUCTION — ESTATES CREATED — REMAINDER — CONDITIONAL LIMITATIONS.

Grantees under a deed conveying real property to them and their heirs forever, subject to a life estate reserved by the grantor, and providing that, on the death of either without bodily heirs or issue, her share should become the absolute property of the survivor, took a remainder subject to defeasance upon their death within the lifetime of the grantor, but, on surviving the grantor, the defeasible estate ripened into a fee simple.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 356; Dec. Dig. § 125.*]

Appeal from Circuit Court, Marion County.

Action between Lige Violet and Edna Daniel Purdy and others. Judgment for Edna Daniel Purdy and others, and Violet appeals. Affirmed.

S. A. Russell, of Lebanon, for appellant. William W. Spalding, of Lebanon, for appellees.

NUNN, J. The question involved upon this appeal is: What character of estate did appellees receive under the following deed: "This deed made out and entered into by and between R. C. Daniel of Marion county, Kentucky, party of the first part, and Miss Edna Daniel and Mrs. Setta Putnam of the same county and state, parties of the second part, witnesseth: That for and in consideration of one dollar, cash in hand paid, the receipt whereof is hereby acknowledged, and the further consideration of the natural love and affection I, R. C. Daniel, bear for the second parties, my granddaughters, the party of the first part, said R. C. Daniel, by these presents sells, aliens and conveys unto the said Edna Daniels and Mrs. Setta Putnam the following real estate, to wit: [Here follows description.] To have and to hold unto said parties of the second part and their bodily heirs, forever, with covenant of general warranty. This conveyance is subject to the following stipulation and conditions: First, the first party, R. C. Daniel, reserves in said property a life estate and the use, management, control and products of said land so long as he lives. Possession to be surrendered to second party at the death of the first party. Secondly, should either of the second parties die without leaving bodily heirs or issue, then in such event the share of the one so dying shall pass to and become the absolute property of the survivor. Said second parties are hereby vested with title to said property jointly and equally. Thirdly, should both the second parties die without bodily heirs or issue, in such event said property shall pass to and become the property of my grandson R. M. Bannister and his bodily heirs; and if said Bannister shall be dead on the happening of such con-

tingency, then said property shall pass to and vest in his said R. M. Bannister's bodily heirs or issue of his body," etc.

It will be observed that appellees alone were named as the second parties in the caption and granting clause, but the habendum clause is restricted by the following conditions: First, the grantor reserved a life estate and the management, use, control, and products of the land so long as he lived; second, he provides that, if "either of the second parties should die without leaving bodily heirs or issue, then in such event the share of the one so dying shall pass to and become the absolute property of the survivor"; third, he provides that, in case both the second parties should die without issue, then the property should go to his grandson, R. M. Bannister, etc. The real and only question is: What did the grantor mean by the expression "should both the second parties die without leaving bodily heirs or issue," as used in the third condition referred to? Did the grantor have reference to them dying during his lifetime, or did he mean, if they should die at any time without bodily heirs or issue, the property should pass to his grandson, R. M. Bannister, or to his bodily heirs or issue if he be dead? In the case of *Gibson v. Thompson*, 83 S. W. 138, 26 Ky. Law Rep. 1065, this court conclusively settled this question in construing the deed under consideration therein. The part of the deed construed in that case, as copied in the opinion, is as follows: "And it is distinctly understood that she reserves to herself a life estate in both aforesaid tracts of land. To have and to hold said undivided two-thirds (that is to say, the undivided one-third to each of them) to the said William Gibson and the said Fanny Goodwin and their heirs and assigns forever after the death of the party of the first part, and not before, it is hereby understood that in the event that the said Fanny Goodwin, her said granddaughter, dies without children, then the said interest of said Fanny Goodwin shall vest in the survivors, that is to say, one-half of the undivided one-third of said tracts of land hereby conveyed to said Fanny Goodwin shall vest in said William Gibson and his heirs and the other half of said one-third shall vest in my grandchildren, Fanny Gaines and Bernard Gaines, and their heirs." The question in that case was whether the grantor in referring to Fanny Goodwin's death meant her death at any time or within the lifetime of the grantor, and the court said: "The rule is that if a vested remainder be limited by deed or will on a particular estate, with the condition that, if the remainderman die without heirs (or other words of like import), then his estate shall vest in a third person or class, such remainderman takes a defeasible fee, conditioned upon his dying without heirs during the continuance

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

of the particular estate; and, after the falling in of the latter, he surviving, his defeasible fee ripens into a fee-simple title." Fanny Goodwin did not die without heirs during the life of her grandmother, the grantor, and upon the death of her grandmother that which had been a defeasible fee in Fanny Goodwin ripened into a fee-simple title, and in support of this conclusion the court cited a dozen or more cases. That case is a facsimile of the case at bar.

Appellees survived their grandfather, the grantor, and their title, which was a defeasible fee so long as he lived, ripened into a fee simple upon his death. Therefore their sale and conveyance to appellant of the land conveyed to them by the deed of their grandfather passed to appellant a fee-simple title, and the lower court did not err in so adjudging.

Judgment affirmed.

MARPLE v. BANISTER et al.

(Court of Appeals of Kentucky. Dec. 20, 1912.)

Appeal from Circuit Court, Marion County. Action between J. M. Marple and R. M. Banister and another. From a judgment for the latter, the former appeals. Affirmed.

H. W. Rives, of Lebanon, for appellant. H. S. McElroy and W. W. Spalding, both of Lebanon, for appellees.

TURNER, J. In the case of Violet v. Purdy, etc., 151 S. W. 920, in an opinion this day rendered by Judge Nunn, the precise question involved in this appeal is determined. The two appeals are from the same court, and the deed construed in that opinion is a companion one to the deed involved herein, having been made by the same grantor, at the same time, and in each case made by him to his grandchildren. For the reasons given therein, the appellee Banister took a defeasible fee under the deed from his grandfather, which upon the death of the grandfather ripened into a fee simple; and therefore he had a good title to the land involved, and appellant should be required to accept the deed tendered therefor.

Judgment affirmed.

ANDONIQUE v. CARMEN.

(Court of Appeals of Kentucky. Dec. 17, 1912.)

1. PROCESS (§ 58*)—SERVICE-AGENCY—"ENGAGED IN BUSINESS IN THE STATE."

A nonresident owner of real estate in a city, who employs a resident as agent in charge of the property to rent the same and collect rents, is engaged in the business in the state of renting real estate within Civ. Code Prac. § 51, subsec. 6, providing that, in actions against a nonresident engaged in business in the state, the summons may be served on the agent, and in an action against her for damages to a tenant by defects in the premises process is properly served on the agent.

[Ed. Note.—For other cases, see Process, Dec. Dig. § 58.*]

For other definitions, see Words and Phrases, vol. 3, pp. 2392-2394; vol. 8, pp. 7649-7651.]

2. APPEAL AND ERROR (§ 204*)—RULINGS ON EVIDENCE—PARTY ENTITLED TO COMPLAIN.

A party who, on the cross-examination of a witness, brings out incompetent testimony, and who does not object or except to it nor move to exclude it, may not complain on appeal of the admission of the testimony.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1258-1280; Dec. Dig. § 204.*]

3. LANDLORD AND TENANT (§ 169*)—INJURY TO TENANT—MISLEADING INSTRUCTIONS.

An instruction in an action against a landlord for injuries to a tenant by defects in the premises that if the landlord or her agent "had actual knowledge or such notice as would cause a reasonable person to act upon it of the defective condition" of the premises, and concealed the defective condition from the tenant, the tenant could recover, was misleading, as imposing on the landlord the duty of exercising ordinary care to discover defects.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 644-646, 663-667, 681-684; Dec. Dig. § 169.*]

4. LANDLORD AND TENANT (§ 164*)—INJURIES TO TENANT—LIABILITY OF LANDLORD.

Where a landlord or his agent is notified that the premises are in a dangerous condition, and the notice is sufficient to apprise a person of ordinary prudence that the premises are in a dangerous condition, such notice will be deemed knowledge rendering the landlord liable for injuries to a tenant from whom the condition of the premises is concealed.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 630-641; Dec. Dig. § 164.*]

5. LANDLORD AND TENANT (§ 164*)—INJURIES TO TENANT—LIABILITY OF LANDLORD.

A tenant who knows of the defective condition of the premises, or who may have known thereof by a reasonable inspection, may not recover from the landlord for injuries sustained in consequence thereof, since the liability of the landlord rests on the element of deceit.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 630-641; Dec. Dig. § 164.*]

6. LANDLORD AND TENANT (§ 169*)—INJURIES TO TENANT—KNOWLEDGE OF DEFECTIVE PREMISES—QUESTION FOR JURY.

Whether a tenant, injured by a defect in the premises, knew of the defect or could have discovered it by reasonable inspection, *held*, under the evidence, for the jury.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 644-646, 663-667, 681-684; Dec. Dig. § 169.*]

Appeal from Circuit Court, Jefferson County, Common Pleas Branch, Second Division.

Action by Ida Carmen against Annie L. Andonique. From a judgment for plaintiff, defendant appeals. Reversed and remanded for new trial.

Burwell K. Marshall and John L. Woodbury, both of Louisville, for appellant. Flexner & Gordon and J. L. Richardson, all of Louisville, for appellee.

CLAY, C. Plaintiff, Ida Carmen, fell into a privy on premises which she rented from defendant, Annie L. Andonique, and was injured. She brought this action against defendants, Annie L. Andonique and the Fidelity Trust Company, to recover damages.

The cause of action is predicated on the fact that the flooring, sills, and platform of the privy gave away by reason of their dangerous and defective condition, and precipitated her into the vault; that she did not know of such dangerous and defective condition, and could not have discovered same by the exercise of ordinary care; that such dangerous and defective condition was known to the defendant and her agent, the Fidelity Trust Company, and its servants, agents, officers, and employes, prior to the time plaintiff leased the premises; and that they concealed such dangerous and defective condition from her. At the time the action was instituted Annie L. Andonique was a non-resident, and process was served on the Fidelity Trust Company, which company it is conceded was defendant's agent for the purpose of leasing the property, collecting the rents, and looking after the property. The defendant Annie L. Andonique, without entering her appearance to the action, moved to quash the service of summons on the ground that the Fidelity Trust Company was not her agent for the service of process, but was only her agent for the purpose of renting out and taking charge of the real estate owned by her in the city of Louisville. At the same time she filed a special demurrer to the jurisdiction of the court. Both the motion to quash and the special demurrer were overruled. The action was dismissed as to the Fidelity Trust Company. The defendant Annie L. Andonique filed an answer, denying the allegations of the petition, and pleading contributory negligence on the part of the plaintiff. The plea of contributory negligence was denied by reply. Trial was had, which resulted in a verdict and judgment in favor of plaintiff in the sum of \$1,999.99. Defendant appeals.

The property in question is a small cottage, and is located at the southwest corner of Twentieth and Chestnut streets in the city of Louisville. The defendant, Annie L. Andonique, lived in St. Louis. The Fidelity Trust Company was her agent in charge of her property, and as such agent rented the property to the plaintiff by written lease dated January 23, 1910. The privy is located at the extreme rear of the property. The accident occurred on July 19, 1910. Plaintiff testifies that she had no knowledge, either at the time the lease was executed or at the time of the accident, of the dangerous and defective condition of the privy, and that there was nothing in the appearance of the privy to indicate that it might be dangerous or defective. The wood underneath the floor was decayed, but this condition was not apparent from an inspection of the floor. This condition was concealed from her. On the day of the accident she went into the closet, and the whole floor gave away, precipitating her into the vault. She fell a distance of 12 or 14 feet into the fecal matter. It got

all over her clothing and person. She remained in the vault about 20 or 30 minutes, when she was rescued by one of the men connected with the fire department. Her left arm and right side were injured, and her eyes were affected for a while. The principal injury was to her spine and head. Since the injury she has been unable to do her household work. After the accident the joist, or sleeper, was brought to her, and it was decayed. There was nothing in the looks of the flooring to indicate that there was any danger there. Daniel Leahan, a member of the fire department, testified that he rescued plaintiff from the vault in question. The vault had caved in from what he judged to be rotten joists. Dr. Robert E. Gatz testified to the extent of her injuries, and gave it as his opinion that the injury to her spine was permanent. Mrs. Maggie Carmen, a sister-in-law of plaintiff, and Mamie Mitchell, a domestic, testified to plaintiff's suffering and her inability to do her household work after the injury. Emmett B. Jeffries testified that he occupied the premises in question during the year 1908, and during the year 1909 up until a day or two before Christmas. He says that prior to the time he left the premises he complained to the employes of the Trust Company that the privy was dangerous. The person he made the complaint to was Kinser, the collector. Thereafter he made a second complaint of the dangerous condition of the privy. On cross-examination he stated that the privy needed everything new. It was all rotted down, and there was no top on it, and the sides were all off. He told the man at the Trust Company that the privy was liable to fall in and cause trouble. Upon being asked if anybody had gone there if the condition was such that they could have seen it, he replied: "Anybody that didn't understand it would not, I reckon." On re-direct examination he testified that there was no evidence on the top covering of the vault to indicate that it was rotten underneath, but that the shaky condition was what alarmed him. Plaintiff was then recalled, and testified that none of the officers or agents of the Fidelity Trust Company ever informed her of the dangerous condition of the privy. On cross-examination she was asked how she got into communication with Mr. Jeffries. She replied that one of the young gentlemen who collected the rent for the Fidelity Trust Company came to her house just after she got hurt and said: "Mr. Jeffries told me yesterday: 'I told you some one was going to get hurt there.'" The young man who made this statement was not Mr. Kinser, but was the boy who collected for him.

For the defendant, D. F. Murphy, the manager of the real estate department of the Fidelity Trust Company, William Newhall, the assistant manager, William H. Wis-

er, who had charge of the repairs for that company, and N. R. Kinser, the collector, all testified either that no complaint was made to them of the dangerous condition of the vault in question, or that they had no recollection of a complaint being made. They further testified that all complaints for necessary repairs were registered by the company and immediately acted upon. Had a complaint been made, it would have been attended to promptly. J. H. Miller, a carpenter, who was sent to examine the privy just after the accident, testified that the flooring was sound, but the joists underneath the floor were decayed.

[1] The first question to be determined is: Was the defendant properly before the court? Subsection 6 of section 51, Civil Code, provides: "In actions against an individual residing in another state, * * * engaged in business in this state, the summons may be served on the manager or agent of or person in charge of said business in this state, in the county where the business is carried on or in the county where the cause of action accrues." In the case of *Nelson, Morris & Co. v. Rehkopf & Sons*, 75 S. W. 203, 25 Ky. Law Rep. 352, it was held that where the defendants, Nelson, Morris & Co., nonresidents, had, through an agent at Paducah, made a sale of certain goods, wares, and merchandise, there being only one transaction, the service upon their agent was authorized under the provision of the Code, *supra*, and such service brought the defendants personally before the court. In the case of *Commonwealth v. Bullock*, 58 S. W. 429, 22 Ky. Law Rep. 528, the defendants were residents of the state of Ohio, and were indicted in the Kenton circuit court for maintaining a nuisance by renting and leasing certain property for improper purposes. Summons was served on their agent in charge of the property. This court held that the defendants were engaged in business in this state within the contemplation of the code provision, and that the service upon their agent in charge of the property was sufficient.

In this case the defendant lives in St. Louis. She owned the property in question and other property in the city of Louisville. The Fidelity Trust Company, as her agent, has charge of the property, and rents it, and collects the rents as they accrue. The defendant being engaged in the business of renting real estate in this state, and the cause of action growing out of the dangerous and defective condition of property thus rented, we conclude that she was engaged in business in this state within the meaning of the code provision, and that service of process on her agent, the Fidelity Trust Company, was sufficient to bring her before the court. It follows that the trial court did not err in overruling the special demurrer to the jurisdiction of the court, and the motion to quash the process.

[2] It is next insisted that the court erred in permitting plaintiff to testify to the statement made by the collector for the Trust Company to the effect that "Mr. Jeffries told me yesterday: 'I told you some one was going to get hurt there.'" This evidence was not an admission of the fact that Jeffries told the collector that some one was going to get hurt there. It was simply the statement of the collector that Jeffries said that he had told him that some one was going to get hurt there. While this evidence was not admissible, it appears that it was brought out by defendant on cross-examination, and was not objected or excepted to, nor did defendant move to exclude the evidence from the jury. Under these circumstances, defendant cannot complain of the fact that the evidence was improperly admitted.

[3] At the conclusion of the evidence, the defendant requested the court to give the following instruction: "Unless the jury shall believe from the evidence that at the time the premises were rented to the plaintiff that the defendant, the landlord, had actual knowledge of the defective condition of the floor, or seat or timbers supporting them, of the privy on said premises, and having such knowledge concealed said defective condition from the tenant, the plaintiff herein, the law is for the defendant, and the jury should so find." This instruction was refused, and the court, in addition to an instruction on the measure of damages, gave the following instruction: "If you believe from the evidence that at the time the premises were rented to the plaintiff that the defendant, the landlord or her agent, the Fidelity Trust Company, had actual knowledge (or such notice as would cause a reasonable person to act upon it), of the defective condition of the floor, or seat, or timbers supporting them, of the privy on the premises in regard to which you have heard testimony and having such notice or knowledge concealed said defective condition from the tenant, the plaintiff herein, the law of the case is for the plaintiff and you will so find. But, unless you believe from the evidence that at the time the premises were rented to the plaintiff the defendant, the landlord, or her agent, the Fidelity Trust Company, had actual knowledge or such notice as would cause a reasonable person to act upon it of the defective condition of the floor, or seat, or timbers supporting them, of the privy on said premises, and having such notice or knowledge concealed said defective condition from the tenant, the plaintiff herein, the law of the case is for the defendant, and you should so find." The first complaint of the instructions is the insertion of the words, "or such notice as would cause a reasonable person to act upon it." In this connection it is earnestly insisted that, under the rule laid down in *Franklin v. Tracy*, 117 Ky. 267, 77 S. W. 1113, 78 S. W. 1112, 25 Ky. Law Rep. 1409,

1909, 63 L. R. A. 649, and the cases therein cited, the landlord is under no obligation to exercise ordinary diligence to discover defects in the premises which he lets, and in no event can he be held liable unless he has knowledge of the defective condition, and conceals it from the tenant, and that the words complained of, fairly construed, impose upon the defendant the duty of exercising ordinary diligence to discover defects in the premises. On the other hand, counsel for plaintiff insist that notice should be regarded as knowledge, and that the words, "or such notice as would cause a reasonable person to act upon it," refer to action on the part of the defendant in giving to the plaintiff the information brought home to her by such notice. In view of the fact that the words complained of are of doubtful meaning, and are fairly susceptible of the construction that it was the duty of the defendant to act upon the notice received by making an inspection of the premises, we conclude that they are misleading, and should not have been incorporated in the instruction.

[4] We do not mean to hold, however, that the knowledge of the landlord must be limited to such knowledge as he acquires by the use of his senses alone. On the contrary, if the landlord or his agent is notified that the premises are in a dangerous condition, and the notice which he receives is sufficient under all the circumstances to apprise a person of ordinary prudence that the premises are in a dangerous condition, then such notice will be regarded as knowledge. Having this view of the law, the court, on another trial, will omit the words complained of above, as well as the word "actual" and give the following additional instruction: "No. 2. If you believe from the evidence that defendant's agent, prior to the time of the renting, was notified that the privy was in a dangerous condition, and that such notice, if any, was sufficient, under all the circumstances, to apprise a person of ordinary prudence that the privy was in a dangerous condition, then such agent had knowledge of such dangerous condition within the meaning of instruction No. 1."

[5] The instruction is erroneous for another reason. It will be observed that a recovery is authorized notwithstanding the fact that plaintiff may have known of the defective condition of the premises, or could have discovered such defective condition by a reasonable inspection. In the case of *Franklin v. Tracy*, supra, the court quoted with approval from the following language of *Shearman & Redfield on Negligence* (5th Ed.) § 709: "Where, however, there is some latent defect—e. g., an original structural weakness or decay, or the presence of an infectious disease, or other injurious thing rendering the occupation of the premises dangerous—which were known to the lessor and were not known to the lessee or discov-

erable by him on a reasonable inspection, then it was the duty of the lessor to disclose the defect; and, if an injury results therefrom, he is liable as for negligence." And in the more recent case of *Holzhauser v. Sheeny*, 127 Ky. 28, 104 S. W. 1034, 31 Ky. Law Rep. 1238, the court said: "If the landlord knows that the premises are defective or dangerous, and such defect is not discoverable by the tenant by ordinary care, and the landlord conceals or fails to disclose the dangerous condition, he is liable to the tenant, his family and servants, and even his guests, for injuries sustained therefrom." *Coke v. Gutkese*, 80 Ky. 598, 44 Am. Rep. 499; *Franklin v. Tracy*, supra. The reason for the rule is that the liability of the landlord in such cases rests entirely upon the notion of deceit; that is, knowledge on the part of the landlord of the defective condition, and fraudulent concealment from the tenant. Manifestly, if the tenant knows of the defective conditions, or could discover them by a reasonable inspection, the element of deceit is lacking, and there can be no recovery.

[6] The witness Jeffries testified in one place that the floor was all rotten. Subsequently he said that the shaky condition of the privy was what alarmed him. Plaintiff occupied the premises for six months before she was injured. Manifestly, on this evidence, the question whether or not plaintiff knew of the defective condition of the privy, or could have discovered same by a reasonable inspection, was for the jury. On the return of the case, the court will qualify the instructions so as to present this phase of the case, which, under the facts, is just as essential to a recovery as knowledge on the part of the landlord of the defective condition and his concealment thereof from the plaintiff.

This conclusion makes it unnecessary for us to consider other questions that are urged as grounds for reversal.

Judgment reversed, and cause remanded for new trial consistent with this opinion.

GAMBLE v. COMMONWEALTH.

(Court of Appeals of Kentucky. Dec. 20, 1912.)

1. CRIMINAL LAW (§ 1137*)—ADMISSION OF EVIDENCE—RIGHT TO COMPLAIN.

Accused may not complain of evidence brought out on the cross-examination of a state's witness.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 3007-3010; Dec. Dig. § 1137.*]

2. CRIMINAL LAW (§ 369*)—EVIDENCE OF OTHER OFFENSES—ADMISSIBILITY.

On a trial for rape on a female 14 years old, the admission of testimony that accused had committed a second offense a few weeks after the commission of the offense for which he was tried, and that prosecutrix complained of the second assault shortly after its commis-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

sion, was admissible, as against the objection that it was error to admit evidence that accused had committed the second offense.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 369.*]

3. CRIMINAL LAW (§ 814*)—EVIDENCE—INSTRUCTIONS—ISSUES.

Where prosecutrix, 14 years old, insisted that accused raped her, while he insisted that he had had nothing to do with her beyond making an improper proposal, instructions that, if accused had intercourse with her with her consent, he should be acquitted, and that, if he unlawfully detained her with a felonious intent to have intercourse with her, he should be found guilty of that offense, were properly refused because presenting issues not raised by the evidence.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 814.*]

4. CRIMINAL LAW (§ 1173*)—APPEAL—HARMLESS ERROR—REFUSAL OF INSTRUCTIONS.

Where accused, convicted of raping a female under the age of 14 years, was sentenced to the penitentiary from 10 to 20 years, he could not complain of the refusal of an instruction that, if he was found guilty of unlawfully detaining prosecutrix with intent to have intercourse with her, he should be found guilty of that offense, and sentenced to the penitentiary, since the verdict found conformed to the verdict which he asked if he was found guilty of the lesser offense.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3164-3168; Dec. Dig. § 1173.*]

5. RAPE (§ 52*)—EVIDENCE—SUFFICIENCY.

Evidence held to justify a conviction of rape on a female 14 years of age.

[Ed. Note.—For other cases, see Rape, Cent. Dig. §§ 71-74, 76; Dec. Dig. § 52.*]

Appeal from Circuit Court, Marion County.

Harry Gamble was convicted of crime, and he appeals. Affirmed.

S. A. Russell, of Lebanon, for appellant. James Garnett, Atty. Gen., and D. O. Myatt, Asst. Atty. Gen., for the Commonwealth.

MILLER, J. The appellant, Harry Gamble, was convicted of rape, committed on his stepdaughter Catherine Smith, aged 14, and given an indeterminate sentence of confinement in the penitentiary from 10 to 20 years at hard labor. He appeals, and alleges four grounds for reversal.

[1, 2] 1. He insists that incompetent testimony was admitted over his objection. The crime of which appellant was convicted is alleged to have been committed in February, 1912, in the barn of John W. Mouser, where appellant and Catherine Smith were bulking tobacco. She did not tell any one at the time, but, when she was asked upon cross-examination by appellant's attorney as to when she told her mother of the assault, she answered that she told her mother immediately after Gamble had committed a second assault upon her a few weeks later. Appellant insists that the latter part of this answer was not responsive to the question, and should have been excluded. Upon the direct examination the commonwealth offered to prove the second assault, but the court

excluded the testimony; but, when appellant's counsel asked the question upon cross-examination, the court overruled the objection and permitted the witness to answer; and it is insisted that this ruling constituted a reversible error, since appellant was charged with one crime, and evidence was admitted showing that he had also committed another crime. This answer, however, was brought out by the appellant's cross-examination; and, that being true, he cannot complain. Moreover, it is almost impossible at times to keep from the attention of the jury at all stages of the trial evidence of offenses which were so closely connected as they were in this case. Under the circumstances, we do not think the court erred in allowing the question to be answered. *Miracle v. Commonwealth*, 148 Ky. 453, 146 S. W. 1146; *Gross v. Commonwealth*, 151 Ky. 89, 151 S. W. 36.

[3] 2. It is further contended that the court erred in not giving instructions C and D, asked by the appellant, which read as follows:

"(C) Although you may believe that defendant had carnal knowledge of Catherine Smith, yet, if you further believe that defendant had such carnal knowledge of her with her consent, you should find defendant not guilty.

"(D) Although you may not find defendant guilty as set out in instruction No. 1, yet, if you do believe to the exclusion of a reasonable doubt that defendant in Marion county before the finding of this indictment herein did unlawfully detain Catherine Smith with the intent to have carnal knowledge of her against her will, you will find him, defendant, guilty, and, so finding, you shall say in your verdict: 'We, the jury, find defendant guilty of detaining Catherine Smith against her will with the intent to have carnal knowledge of her, and fix his punishment at confinement in the penitentiary.'"

Instruction "C" was properly refused, because there was no evidence whatever that Catherine Smith consented to the act of appellant. She insists that he raped her, while appellant insists that he had nothing whatever to do with her beyond making an improper proposal to her. He denies all carnal knowledge of Catherine Smith; and, that being true, the only question to be presented to the jury was that of rape. For the same reason, instruction "D" was properly refused, since the evidence clearly shows that appellant was either guilty of rape, or he was not guilty at all. It is a well-settled rule of practice that the court should not give an instruction upon a theory of the case that is without evidence to sustain it.

[4] Furthermore, by the rejected instruction "D," appellant asked the court to in-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

struct the jury that, if they should find him guilty of detaining Catherine Smith against her will, with intent to have carnal knowledge of her, it should fix his punishment at confinement in the penitentiary, and not at death, which they were authorized to do in case they should find him guilty of rape. Appellant cannot, therefore, complain of the court's refusal to give this instruction, since the verdict actually found conformed to the verdict which he asked in case they should find him guilty of the lesser offense. The six instructions given by the court properly covered the law of the case, and there is no substantial criticism made against them. It is only claimed that the court refused to give instructions "C" and "D" above set out, and that the court improperly overruled appellant's motion for a peremptory instruction on his behalf. The latter question, however, will be considered later.

[5] 3. It is again insisted that the verdict and judgment are not sustained by the evidence. The evidence concerning the act charged was confined to the testimony of Catherine Smith and John W. Mouser for the commonwealth, and that of the appellant in his own behalf. Catherine Smith testified unequivocally that appellant raped her as laid in the indictment. Mouser, after testifying to an earlier conversation with appellant, relates a subsequent conversation with him as follows: "A. An hour after that conversation I saw this girl he had been talking about here going down through the bottom, about 400 yards away, and I looked up and seen her going the way he had gone. I was fixing to go to Veech's blacksmith shop. I went and got my mare, and I had to go by Mr. Gamble's house. I looked down in the field, and seen the girl in there. Just as I passed the gate and got up beside the gate that goes into the lot I heard Harry remark. He says, 'Oh, Mr. Mouser, I want to see you.' I looked around. I couldn't tell where the voice was coming from. I couldn't see him, and I seen the top of a cedar tree shaking, and he come down out of the tree, and he come out in the road, and I says, 'What are you doing up in that tree?' He says, 'Damn it, don't you know I got that girl and sent her over here through the field, and I guess she got with her mother when she got here. I stopped to talk to Grant Hays, and they beat me here, and she has gone; and, God damn her, I will have her or die.' I says, 'Harry, you have asked me for advice, and I tried to give it to you the best I knew how.' I says, 'You had better let that girl alone. You have no business with her.' I says, 'Her mother has got her, and you had better not try to get her. If she gets a writ out for you, you will be in serious trouble.' He says, 'I am not afraid of her getting out a writ; but, God damn Ann [that is his wife]! God damn her! She is mean enough

to do most anything; but I am not afraid of the girl's swearing out a writ.'"

Mouser further says that appellant admitted to him in the conversation referred to that he had been intimate with his step-daughter. The only other testimony upon this subject is that of appellant. He denies that he made the statement related by Mouser, and denies that he ever had carnal knowledge of Catherine Smith. He admits, however, that on the second occasion on which Catherine claims he outraged her he made an improper proposal to her, and that she declined to yield. Not only was there ample testimony to take the case to the jury, but in our opinion it sustains rather than discredits the verdict. The motion of appellant for a peremptory instruction was properly overruled.

4. Finally, appellant contends that the conduct of the attorney for the commonwealth in his closing argument to the jury was prejudicial to appellant's rights. Upon this subject it is sufficient to say that the language in question did not transcend the bounds of legitimate argument.

Judgment affirmed.

McCLAIN v. McCLAIN et al.

(Court of Appeals of Kentucky. Dec. 20, 1912.)

DESCENT AND DISTRIBUTION (§ 9*)—REAL ESTATE—SALE UNDER ORDER OF COURT—PROCEEDS AS REAL ESTATE.

Under the statute providing that a wife may have dower out of the surplus of the proceeds of land sold to satisfy a mortgage in which she joined, and independent thereof, the proceeds on the sale of real estate of a lunatic, under order of court, to satisfy mortgages thereon in which the wife joined are, on his death, real estate, and she is entitled only to a third thereof for life; and that he became sane after the sale, and so remained for a short time, when he became insane again, and died while insane, does not change the rule, though while sane he asked that the proceeds be turned over to him, but no order granting such relief was made.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. §§ 7-9; Dec. Dig. § 9.*]

Appeal from Circuit Court, Montgomery County.

Proceedings by J. Will Clay as administrator of John McClain, deceased, for the distribution of the assets of the estate between Mamie L. McClain, widow, and Fay C. McClain and others, children. From a decree of distribution, Mamie L. McClain appeals. Affirmed.

John A. Judy, of Mt. Sterling, for appellant. Lewis Apperson, of Mt. Sterling, for appellees.

OLAY, C. John McClain was the owner of a farm in Montgomery county, Ky. On December 10, 1908, he was adjudged insane by

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

the Montgomery county court, and J. Will Clay was appointed his committee. Prior to the time that he was adjudged insane, he had executed and delivered three mortgages on his farm, one for \$5,000 to the Northwestern Mutual Life Insurance Company, one for \$1,500 to H. Clay Turner, and one for \$500 to the Exchange Bank of Kentucky. His wife, Mamie L. McClain, united in these mortgages.

On December 28, 1906, J. Will Clay, as committee for John McClain, brought this action against John McClain and the wife and creditors of John McClain for the purpose of selling the farm in question, in order to pay the debts of John McClain, and to provide for the maintenance and support of his wife and children. The petition alleged and the proof showed that the land could not be divided without materially impairing its value. The case was referred to the master commissioner of the Montgomery circuit court, and after proper steps had been taken before him the land was ordered sold as a whole, and so much of the proceeds as was necessary was applied to the payment of John McClain's debts. To this action Mamie L. McClain, the wife, filed answer, relinquishing her potential right of dower, and asking that the funds remaining after the payment of the debts of John McClain be invested for the support of herself and the infant children of John McClain.

On February 12, 1910, John McClain was adjudged of sound mind. At the April term, 1910, of the Montgomery circuit court, John McClain appeared and filed in this action his petition and answer, setting forth the fact that he had been adjudged of sound mind, and asking that the balance of the proceeds of his property be turned over to him. Thereupon the court entered an order, directing he funds in the hands of the committee to be turned over to John McClain. This was done. At that time the last bond executed or the purchase of the farm was not due, and McClain never collected any of its proceeds.

On September 15, 1910, John McClain was again adjudged insane by the Montgomery circuit court, and M. C. Clay was appointed its committee. Thereupon M. C. Clay qualified and filed his petition in this action, asking to be made a party. An order was entered making him a party, and he then proceeded, under the order of the court, to collect the last sale bond due on the farm in question.

John McClain died in November, 1911, and J. Will Clay qualified as his administrator. Thereupon J. Will Clay, as such administrator, filed his petition and answer in this action, setting out the fact that there were no assets belonging to John McClain, except the funds in the hands of his committee, and asking that the court disburse the sum to the widow and children of John McClain, according to their respective rights. The chancellor adjudged that the widow, Mamie

L. McClain, was entitled to one-third of the proceeds for life, and this sum he ordered invested in real estate for the use and benefit of the widow for and during her natural life, with remainder to the five children of John McClain. The balance of the proceeds he ordered divided equally between the children. From that judgment the widow, Mamie L. McClain, prosecutes this appeal.

The sole question to be determined is whether or not the proceeds of the last sale bond should be treated as realty or personalty. If the former, Mamie L. McClain is entitled to one-third thereof for life, as provided in the judgment of the chancellor. If the latter, she is entitled to one-half thereof absolutely.

Where real estate of a lunatic is sold by his committee under the statute or by order of court, the better doctrine is that the proceeds of such sale remain realty for the purpose of distribution upon the death of the lunatic. 9 Cyc. 848; Holmes' Appeal, 53 Pa. 339; Lloyd v. Hart, 2 Pa. 473, 45 Am. Dec. 612; In re Tugwel, 27 Ch. D. 309; In re Barker, 17 Ch. D. 241. Counsel for appellant insist that the above rule should not apply in this case, for the reason that after the sale was ordered by the chancellor John McClain was adjudged of sound mind, and filed an answer, asking that the proceeds of the sale be turned over to him. In this way it is insisted that he ratified and approved the sale, and virtually consented to the conversion of the realty into personalty. While this may be true as to the funds which were actually turned over to him, we do not think it is true as to the proceeds of the last sale bond, which were not turned over to him, and over which he never had any control. The sale was made while John McClain was incompetent. It was made without his consent. It was valid, whether he assented to it or not. The sale being valid, he was in a position where he could only lay claim to the proceeds. He remained sane but a short time. The last sale bond not being due, and no order having been made giving him control over it, it remained in the hands of the court; and it was impossible for him to dispose of it or invest it in a way that would determine its character. His mere act in asking that the proceeds be turned over to him was not sufficient to convert the proceeds from realty into personalty. We are led to this conclusion not only for the reasons given, but for the reason that we have in force in this state the following statute: "The wife shall not be endowed of land sold, but not conveyed by the husband before marriage, nor of land sold, in good faith, after marriage, to satisfy a lien or incumbrance created before marriage, or created by deed in which she joined, or to satisfy a lien for the purchase money; but if there is a surplus of the land or proceeds of sale after satisfying the lien, she may

have dower out of such surplus of the land or compensation out of such surplus of the proceeds, unless they were received or disposed of by the husband in his lifetime."

It will be observed that the statute provides that the wife shall not be endowed of land sold to satisfy a lien or incumbrance created before marriage, or created by deed in which she joins.

In interpreting this statute it has been held that the wife was not entitled to dower in the land sold to satisfy a lien created by mortgage in which she joined; the mortgage being a "deed," within the meaning of the statute. *Schweitzer v. Wagner*, 94 Ky. 458, 22 S. W. 883, 15 Ky. Law Rep. 229. In this case the land was sold to satisfy three mortgages in which the wife joined. The statute, however, provides that if there is a surplus of land or proceeds of sale, after satisfying the lien, she may have dower out of the surplus of the land, or compensation out of such surplus of proceeds, unless they were received and disposed of by the husband in his lifetime. Here the land was sold to discharge the mortgages in which the wife had united. Under this statute, whether John McClain was sane or insane, she is entitled to dower out of the surplus of such proceeds as were not received or disposed of by him in his lifetime. As the proceeds of the last sale bond were not received or disposed of by him in his lifetime, it follows that the statute applies, and that Mamie L. McClain, the widow of John McClain, is entitled only to dower in such proceeds. By giving the widow dower out of the surplus of such proceeds, it is plain that the Legislature intended that the surplus of such proceeds should retain the character of realty. That being true, she is not entitled to one-half thereof absolutely, as in the case of personality.

Judgment affirmed.

WEST KENTUCKY COAL CO. et al. v. KUYKENDALL'S ADM'R.

(Court of Appeals of Kentucky. Dec. 20, 1912.)

1. MASTER AND SERVANT (§ 276*)—INJURIES TO SERVANT—ACTIONS—EVIDENCE.

In an action against a master for the wrongful death of a servant, evidence held to show that the proximate cause of the servant's death was a disobedience of orders.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 950-952, 954, 959, 970, 976; Dec. Dig. § 276.*]

2. MASTER AND SERVANT (§ 248*)—INJURIES TO SERVANT—DISOBEDIENCE OF ORDERS—EFFECT.

Where a servant of an electric light company was killed by a high tension wire because of his disobedience of orders, the master was not liable where it did not learn of the danger in which the servant had placed himself by his negligence in time to avoid the injury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 801-804; Dec. Dig. § 248.*]

3. MASTER AND SERVANT (§ 243*)—INJURIES TO SERVANT—DUTY OF SERVANT TO EXERCISE CARE.

In handling so dangerous an instrumentality as a high tension electric wire the utmost care must be used, not only by the master, but by the servant, and the servant or his personal representative cannot recover where his negligent disobedience of orders caused personal injury or death.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 682, 759-775; Dec. Dig. § 243.*]

Appeal from Circuit Court, Union County.

Action by W. M. Kuykendall's administrator against the West Kentucky Coal Company and the Sturgis Electric Light Company. From a judgment for plaintiff, defendants appeal. Reversed and remanded, with directions.

Allen & Miller, of Morganfield, and Clay & Clay, of Henderson, for appellants. George S. Wilson, of Owensboro, and Morton & Morton, of Morganfield, for appellee.

HOBSON, C. J. The West Kentucky Coal Company and the Sturgis Electric Light Company operate an electric light plant in Sturgis, Ky. They had a crew of men consisting of Otis Hoover, as foreman, William Kuykendall and Byers Nunn, who for two or three months had been engaged in wiring and installing electric light fixtures in dwelling houses in Sturgis, and on March 28, 1911, were so engaged in the residence of a Mr. Simpson. On that afternoon Hoover directed Kuykendall and Nunn to attach some wires which were to lead out of the Simpson house to the electric light wires leading into Dr. Humphrey's house. They went out to make the attachment. The wires leading into the Humphrey house were low tension wires carrying 110 volts of electricity, and there were along the street high tension wires carrying 2,200 volts of electricity. They did not attach the wires leading from the Simpson house to the wires leading to Dr. Humphrey's house, but attached them to one of the high tension wires carrying 2,200 volts of electricity. The next morning after they came back to work, and when they were getting ready to make some attachments in the Simpson house, Kuykendall picked up the two wires which he and Nunn had attached the evening before, holding one in each hand, and was instantly killed by the electricity. This suit was brought against the company to recover for his death. On the first trial of the case there was a verdict in favor of the plaintiff for \$15,000. The court granted a new trial, and on the next trial a verdict was rendered and judgment entered for \$12,000. The defendants appeal.

[1] The only question we deem it necessary to consider on the appeal is whether the court should have instructed the jury peremptorily to find for the defendants. The foreman, Hoover, was sworn as a witness by

the plaintiff, and his testimony is practically the only evidence offered by the plaintiff to make out his case. Hoover's testimony, so far as material, put in narrative form, is as follows: "As near as I can remember, I told Will Kuykendall, I am not sure whether Nunn was in there or not, but I told him to go out and connect the wires that go into Dr. Humphrey's residence. I had no conversation with him, only simply the directions I gave him. He did connect the wires at the point where he was directed to connect them. I knew there were three wires coming up that lead, and one of them was an arc light one. The wire that they connected to did not run into Dr. Humphrey's house. I never gave a thought about it at the time. I knew that Dr. Humphrey's house wires came up that lead, but I never thought but that these other wires went in there at the time. Taking the usual arrangement, it would look like the wire they connected to was a secondary wire or low voltage wire. I saw Mr. Nunn out on the pole while he was on the pole. I don't think they had time to make the connection to the wires up at Dr. Humphrey's residence while they were gone. When I left the Simpson house that evening, I passed under the pole where they had made the connection and passed under it the next morning. When Kuykendall came back to the house while Nunn was still up on the pole, he came in where I was, laughing, and said: 'I have got Sandy scared. I told him he was working on 2,200.' I said he ought to know better; we never run 2,200 into a house. He went to the window and said to Nunn: 'All right, go ahead. You are only working on 110.' Kuykendall and I about a month prior to this accident, or six or eight weeks, did some work on the pole near Dr. Humphrey's house; changed a cross-arm, and the wires ran the same then as at the time Mr. Kuykendall was killed. At that time the wires were attached there and came directly from that into Dr. Humphrey's residence. In working there we were bound to see where the wires went. I instructed Kuykendall to connect with the wires that went into the Humphrey residence, and if he had gone there he could have seen the wires. I did not discover that the connection had been made to the high tension wire until after the accident. He knew that low voltage wires were used in electric light wiring and furnished current to the residences, and that high voltage was reduced by means of a transformer."

Nunn testified, in substance, that he was not present when Hoover talked to Kuykendall; that Hoover simply told him to go with Kuykendall. There was a pole back of the Simpson house, also another pole at Main street about 150 feet away, and a pole near the Humphrey residence about the same distance away. Nunn said that when they got out to the pole back of Simpson's house

Kuykendall went down to Main street, and when he came back told him to connect with the wire there—that is, the wire on each side of the pole, and he did this—that he went up on the pole and did the work while Kuykendall stood on the pavement below, and that he worked under Kuykendall's directions.

If Kuykendall, instead of going to Main street, had gone to the other pole which was about the same distance away, he would have seen the wires leading into the Humphrey house, and could have made the connection as he was directed to do by Hoover. If the connection had been made thus, there would have been no danger in the wires the next morning, and he would not have been killed. He had worked on the pole next to the Humphrey residence with Hoover about six weeks before, and knew that the wires went from this pole into the Humphrey house. He seems to have assumed that these wires came from Main street, and for that reason directed Nunn to make the connection as he did, when as a matter of fact the wires that lighted the Humphrey house came from Adams street, and the wires that came from Main street were all high tension wires. The proof leaves no doubt that Kuykendall knew the difference between high tension and low tension wires, and that the entire cause of the trouble was his not making the connection to the wires which led into Dr. Humphrey's house. It is also evident that he would not have made the mistake if he had gone to the pole where he had worked a few weeks before and looked at the wires there. It is therefore insisted for the defendants that his death was due to his own failure to obey his instructions and his own want of care in failing to make the connection to the wires to which he was told to make it. But it is insisted for the plaintiff that the foreman, Hoover, knew that he had made the connection at the pole back of the Simpson house, and that this was notice to him that the connection had not been made to the right wires. These facts also appear: The night after this connection was made, the lights went out on that lead. The superintendent, the foreman, Hoover, Kuykendall, and Nunn, were all out looking for the trouble. They found the trouble to be in the cut-out block just across the street from this pole. They refused this cut-out block and put the plug back in the block and the trouble disappeared. It is insisted that these facts, as well as some things that happened at the Simpson house the next morning, were sufficient to put Hoover on notice that the connection had not been made right. But as a matter of fact he did not so conclude at the time. All the things that happened might have come from one of two different causes, and it was only after the accident that they were ascribed to the true cause. So summing the whole case up, we think the proximate cause

of the unfortunate man's death was his making the connection to the wrong wire, and the proximate cause of this was his disobeying his instructions. It is insisted that there was negligence on the part of appellants in that Kuykendall was not warned or instructed as to the danger in handling the wires. But his own declaration shows he understood the danger. The thing he did not know was what wires ran into the Humphrey house, and this he should have learned before making the connection. They all knew there were high tension wires on this lead. They all knew that there was danger from these high tension wires. Kuykendall knew the Humphrey house very well. He had worked only a few weeks before on the wires leading into that house, and, when he was told to make the connection to the wires leading into the Humphrey house, he understood perfectly what he was told to do. His death was due to his assuming that the wires which came from Main street went into the Humphrey house, without going to the other pole and looking and learning for himself what wires went into the Humphrey house. It is true Hoover knew he had made the connection back of the Simpson house, but Hoover at the time did not have in his mind how the wires which went into Dr. Humphrey's house ran.

[2] The rule is that if a servant disobeys his orders, and by his disobedience brings a peril upon himself which he would not otherwise have encountered, the master in a case like this is not liable, unless he learns of the danger in which his negligence has placed him in time to avoid injury to him. *Cleveland, etc., R. R. Co. v. Workman*, 68 Ohio St. 509, 64 N. E. 582, 90 Am. St. Rep. 602; *Rumians v. Keller, etc.*, 141 Ky. 827, 133 S. W. 860; *Straight Creek Coal Co. v. Haney's Adm'r*, 87 S. W. 1114, 27 Ky. Law Rep. 1117; *Cincinnati, etc., R. R. Co. v. Yocum's Adm'r*, 137 Ky. 117, 123 S. W. 247, 1200; *Id.*, 143 Ky. 700, 137 S. W. 217.

[3] In handling so dangerous an instrumentality as currents of electricity of 2,200 volts, the utmost care must be used by those having charge of it, and a corresponding degree of care should be used by the servants for their own safety in handling it. A disobedience of orders not only endangers themselves, but endangers the lives of others. By the act of Kuykendall in making the connection to the wrong wire, the lives of a number of other persons were placed in imminent peril. His personal representative stands in no better position than he would if he had survived and brought an action for his injuries; and certainly one who puts others in such danger by disobedience of orders should not be allowed to recover for an injury which he himself received simply by reason of his failure to obey his orders, and make the connection to the wires leading into the Humphrey residence—

a thing he would have had no difficulty in doing if he had walked down to the other place and looked at the wires before making the connection at the pole back of the Simpson house. We therefore conclude that under the evidence the court should have instructed the jury peremptorily to find for the defendant.

Judgment reversed, and cause remanded for further proceedings consistent herewith.

MURPHY et al. v. NEWINGHAM et al.
(Court of Appeals of Kentucky. Dec. 20, 1912.)

1. ADVERSE POSSESSION (§ 64*)—PAROL GIFT—OCCUPATION BY PERMISSION.

An unconditional parol gift of a well-defined body of land, accompanied by actual possession for 15 years or over, with claim of ownership, transfers the title as against the donor; but if the occupant enters under the owner's permission, expecting only that the owner will give the land to him, then his possession is not hostile and will not ripen into title.

[Ed. Note.—For other cases, see *Adverse Possession*, Cent. Dig. §§ 358-364; Dec. Dig. § 64.*]

2. ADVERSE POSSESSION (§ 85*)—PERMISSIVE OCCUPANCY—EVIDENCE.

Evidence held to sustain a chancellor's finding that plaintiff occupied the land in question by defendant's permission only, and not under an unconditional parol gift.

[Ed. Note.—For other cases, see *Adverse Possession*, Cent. Dig. §§ 498-503, 656, 660, 668; Dec. Dig. § 85.*]

Appeal from Circuit Court, Pike County.

Action by Alex Murphy and others against W. J. Newingham and others. Judgment for defendants, and plaintiffs appeal. Affirmed.

O'Rear & Williams, of Frankfort, and F. W. Stowers, of Pikeville, for appellants. Butler & Moore, of Pikeville, and B. F. Combs, of Prestonburg, for appellees.

CLAY, C. John Rutherford owned a large body of land in Pike county, Ky., on Pigeon Roost fork of Pond creek. He had several children. As each of these children became of age, or was married, he settled them on different portions of his farm. Alex Murphy married Polly Rutherford, daughter of John Rutherford, in the year 1878. Nine children were born to them. Soon after their marriage, Alex Murphy and his wife, Polly, settled on the tract in controversy, which consists of about 202 acres of land. In the year 1903 John Rutherford gave to W. J. Newingham, Charles S. Thorn, and A. J. King an option on the coal lying on his farm, including the land in controversy. He executed a deed on August 12th to the persons holding the option. In October of the same year, the vendees in the deed sold and conveyed the coal to the Williamson Coal Company. Alleging that the land was given equally to Alex Murphy and Polly Murphy

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Index

by John Rutherford, that Polly Murphy died in the year 1893, and her interest descended to their children, subject to Alex Murphy's curtesy therein, and that Alex Murphy and his children were the joint owners of the tract in controversy, this action was brought against W. J. Newingham and others to quiet plaintiffs' title. It was further alleged that, at the time defendants acquired title, plaintiffs were in adverse possession of same, and that the deed to defendants was champertous. By answer, defendants denied the allegations of the petition and pleaded title in themselves. They also set up certain facts in estoppel of plaintiffs' claim and alleged that they acquired title without notice or knowledge of plaintiffs' claim. On final hearing, plaintiffs' petition was dismissed, and they appeal.

The evidence for plaintiffs shows that, soon after the marriage of Alex and Polly Murphy, in the year 1878, they settled on the land in dispute. John Rutherford marked the lines for them. In 1884 John Rutherford gave the lands to Alex and Polly Murphy. Since that time they had paid the taxes on the land. After taking possession of the land, they built a dwelling house, which they added to from time to time. They also built tenant houses, barns, and outhouses. They planted a fruit orchard and cleared and fenced about 75 acres of land. They also cut and sold timber from the land in quantities for sawlog purposes. These acts of possession were known to John Rutherford. John Rutherford had other children, to whom he deeded the lands upon which they had settled. When Alex and Polly Murphy settled on the land, he stated that he intended to give it to them. Subsequently he pointed out their lines, and said the land was Alex's and Polly's, and not his. The foregoing facts appear from the testimony of Alex Murphy and other witnesses: On cross-examination, Alex Murphy stated that he knew that John Rutherford had optioned and sold the land in question to Newingham and others in 1903, and understood that he got \$10 per acre for it. He saw Dr. Deaton make a survey of the land at that time. Upon being asked, "Did you object to Mr. Rutherford, or make any complaint to Mr. Rutherford's selling this land to Mr. Newingham?" he answered: "Yes, sir; I told him to make a reserve of the property around my house and property, that is, of the surface. Mr. Rutherford told me he intended to put me on level land." On redirect examination, he was asked, "What caused you to ask Mr. Rutherford to reserve you a boundary around your house in the sale to defendants?" He answered: "Because he tried to make me believe that I couldn't hold the land without a deed, and I was ignorant of the law. I claimed the land then as I do now."

For defendants, John Rutherford testified that he never gave anything to Alex Murphy.

He settled Alex's wife on the land, telling them to go live on it and have what they could make on it. So far as he was concerned, he did not intend to make a title until he got ready. He intended to let them live on it until he got ready to dispose of his estate. He also said that, at the time Alex and his wife were put on the land, he did not mark any boundary. For a while he paid the taxes for his children, but afterwards concluded that, as they were getting the benefit of the land, they ought to pay the taxes. He intended the title to pass to his children whenever he got ready to make it. He first made a will, but afterwards got dissatisfied and tore the will up. He then turned in and made deeds to some of his children. In 1903 he gave defendants an option on the land and afterwards deeded the land to them. He received for the coal on the land in controversy \$2,000. He took \$1,500 of this sum and paid for a tract of 25 acres of land which plaintiffs had purchased from W. A. Rutherford. Of the balance he gave \$450 to Alex Murphy, who distributed it among his nine children, giving them \$50 apiece. Witness retained \$50 of the amount of the purchase price, because he felt like he was entitled to that much. The deed from W. A. Rutherford and wife was made to plaintiffs and put to record. Witness also conveyed the surface of the land in controversy to the children of Polly Murphy. He knew that Alex Murphy was selling timber off the land, and also knew that in the year 1881 Alex Murphy and W. A. Rutherford exchanged tracts. He permitted them to trade among each other, and permitted Alex Murphy to use the timber from the land for the purpose of raising his children. While he could not say for certain that plaintiffs knew of the option he gave to defendants, it was talked about at the time, and was generally understood by everybody. The surveyors boarded with him at the time the land was surveyed, and were there for a week or 10 days, and passed by Alex Murphy's house in making the survey. On cross-examination, witness stated that he bought a farm on Blackberry and gave it to his daughter Jane Hatfield. He deeded to William A. Rutherford the home place. He further gave to Parlee Riddle a portion of the land. He also gave to Floyd Rutherford's heirs a portion of his land. Witness said that at one time Alex Murphy and W. A. Rutherford swapped places for a while. Certain of the defendants also testified that they had no notice or knowledge of plaintiff's claim; that the title to the land was in John Rutherford.

A number of Alex Murphy's children testified to their acts of possession, and to the fact that they never made the trade with W. A. Rutherford for the 25 acres of land, and did not know what the \$50 apiece was paid to them for. The husband of one of the

girls testified that the 25-acre tract conveyed by W. A. Rutherford was worth only about \$300.

[1] It is well settled that where there is an unconditional parol gift of a well-defined body of land, accompanied by an actual possession for 15 years or over, with claim of ownership, such possession ripens into title, and the donor cannot recover the land. If, however, one enters upon land by the owner's permission, expecting that the owner will give it to him, then such possession is not a hostile holding. *Commonwealth v. Gibson*, 85 Ky. 666, 4 S. W. 453, 9 Ky. Law Rep. 205; *Thompson v. Thomson*, 93 Ky. 435, 20 S. W. 373, 14 Ky. Law Rep. 513; *Owsley v. Owsley*, 117 Ky. 47, 77 S. W. 397, 25 Ky. Law Rep. 1186.

[2] The main question in this case is: Was there an unconditional parol gift of the land, or did Alex Murphy and his wife and children hold merely by permission of John Rutherford? Alex Murphy does not contend that John Rutherford gave him and his wife the lands at the time they took possession. He does say, however, that John Rutherford marked out the boundary, and that in the year 1884 John Rutherford made a gift of the lands to him and his wife. If the gift was made at that time, then the holding of the plaintiffs was adverse from that moment, and, having held the land for more than 15 years, their possession ripened into title. It appears that prior to his wife's death Alex Murphy controlled the lands, and that after his wife's death he controlled and managed the lands for the benefit of his children. Alex Murphy himself testifies that at the time of the sale of the coal to defendants he told John Rutherford to make a reserve of the property around his house—that is, of the surface—and that Mr. Rutherford told him he intended to put him on level ground. It is true that he afterwards stated that the reason he asked Mr. Rutherford to reserve the boundary around the house was that Mr. Rutherford tried to make him believe that he could not hold the land without a deed; that he was ignorant of the law, and claimed the land then as he did when he testified. Notwithstanding this explanation, however, his conduct on the occasion when the mineral was sold is certainly a circumstance going to show that his and his children's holding was merely by permission of John Rutherford, and was not adverse to him. In addition to this, we have John Rutherford's sworn statement that he never gave anything to Alex Murphy; that he placed him and his wife on the land, and gave them permission to occupy and use it for the purpose of supporting themselves and their children. He first intended to will it to them, but afterwards changed his mind. He did make deeds to those children to whom he gave title. He never made any deed to Alex Murphy or his children.

The evidence upon the question of a parol gift being equiponderant, and the circumstances and relations of the parties being such as to indicate a permissive rather than an adverse holding, we see no reason to disturb the finding of the chancellor.

Judgment affirmed.

SPERRY & HUTCHINSON CO. v. CITY OF OWENSBORO et al.

(Court of Appeals of Kentucky. Dec. 20, 1912.)

1. LICENSES (§ 7*)—BUSINESS LICENSE—IMPOSITION—REQUISITES.

Under Ky. St. § 3290, subsec. 12, authorizing cities to impose license fees on franchises, trades, occupations, and professions, and providing for the collection thereof, a city is authorized to classify different kinds of business, provided a reasonable basis for classification exists, and to levy the tax on business as classified.

[Ed. Note.—For other cases, see *Licenses*, Cent. Dig. §§ 7-15, 19; Dec. Dig. § 7.*]

2. LICENSES (§ 7*)—BUSINESS—CLASSIFICATION—TRADING STAMP CONCERNS.

The business of a concern engaged in furnishing trading stamps to merchants to be redeemed with goods being entirely different from that of an ordinary merchant, there was a proper basis for classification by a city in fixing the amount of license tax on such business.

[Ed. Note.—For other cases, see *Licenses*, Cent. Dig. §§ 7-15, 19; Dec. Dig. § 7.*]

3. LICENSES (§ 15)—BUSINESS—REGULATION—POLICE POWER.

A concern engaged in furnishing trading stamps to merchants is engaged in a lawful business, and cannot be taxed by a city under the exercise of the police power, but may be taxed a reasonable amount, as any other lawful business is taxed under the city's power to tax franchises, trades, occupations, and professions.

[Ed. Note.—For other cases, see *Licenses*, Cent. Dig. §§ 30-35; Dec. Dig. § 15.*]

4. LICENSES (§ 7*)—BUSINESS TAX—REASONABLENESS.

An ordinance imposing a business tax in a city provided that a brewery should be taxed \$50, a bottling establishment \$25, soda fountain \$10, restaurant \$10, butcher shop, commission merchants, secondhand dealers, pawnbrokers, and auctioneers \$25 each, and itinerant merchants, stockbrokers, private scales, and trading stamp concerns \$300. Complainant did a trading stamp business in the city amounting to \$5,000 per annum, with a net profit of about \$500. Held, that the license was invalid as unreasonable, oppressive, and prohibitory.

[Ed. Note.—For other cases, see *Licenses*, Cent. Dig. §§ 7-15, 19; Dec. Dig. § 7.*]

Appeal from Circuit Court, Daviess County.

Suit by the Sperry & Hutchinson Company against the City of Owensboro and others to enjoin the enforcement of an ordinance imposing a license tax on persons engaged in the business of selling trading stamps. Judgment for defendants, and plaintiff appeals. Reversed and remanded.

Birkhead & Wilson, of Owensboro, and John Hall Jones, for appellant. R. S. Todd, of Owensboro, for appellees.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

HOBSON, C. J. The common council of the city of Owensboro enacted an ordinance, which was approved by the mayor, levying license taxes on trades, professions, and occupations in the city of Owensboro during the year commencing on May 1, 1910, and ending April 30, 1911. Section 26 of the ordinance is in these words: "To engage in the business of selling or giving stamps, known as trading stamps, to be used in connection with the sale of goods, wares or merchandise, \$300.00." The Sperry & Hutchinson Company brought this suit against the city of Owensboro and its officers to enjoin the collection of the tax on the ground that the ordinance is void, in that it is discriminatory, and the amount fixed to be paid is unreasonable, oppressive, and prohibitory. The appellant is a corporation formed under the laws of the state of New Jersey, and has complied with the laws of the state of Kentucky relating to foreign corporations doing business here. It is authorized to buy, sell, and exchange merchandise, to do a general advertising business, to contract and be contracted with. It is carrying on business in the city of Owensboro, where it maintains a store similar to other housefurnishing stores, stocked with goods, wares, and merchandise for household use and ornamentation, and it disposes of its goods in the following manner: It enters into contracts with various merchants in the city of Owensboro called subscribers, who desire to give their customers attractive articles of merchandise as an inducement for cash trade. Under these contracts, it furnishes its subscribers stamps which they agree to deliver to their customers at the rate of one stamp for each 10 cents represented in a cash purchase. It agrees with its subscribers that it will give in exchange for these stamps in certain specified numbers the articles of merchandise carried by it in its store. The subscribers pay for the stamps at so much a thousand; and it also delivers to them books in which the stamps are to be placed by the customers of the subscribers, and, when a book is filled, the book may be presented to it and an article of merchandise obtained. The subscribers are furnished with metal and card advertising signs to display in their stores to inform the public that they are offering this inducement for cash trade. For a number of years it has not been uncommon for a merchant to give coupons to his customers making cash purchases, and agreeing when a certain number of these coupons are presented to deliver to the purchaser free of charge some household article kept in the store. The business of the plaintiff seems to have taken its origin from this custom. It relieves the merchant of keeping the articles in stock to be delivered to his customers, and it offers the customers a wider range of choice in the articles to be obtained. In addition to this

under the old system, the coupons issued at each store could only be redeemed at that store, but, under the plaintiff's plan, it furnishes its stamps to grocers, butchers, bakers, dry goods merchants, druggists, and all other trades, and the stamps obtained in any of these stores can be put in the same book, and presented to the plaintiff for redemption. In this way a book can be filled out very much more quickly, and all the stamps received by a customer anywhere may be used.

Section 4224, Ky. St., provides: "All resident or foreign trading stamp companies or corporations doing business in this state shall annually pay a license tax to the county court clerk of each county wherein such business is conducted, ten dollars." We had this statute before us in *Commonwealth v. Gibson*, 125 Ky. 440, 101 S. W. 385, 31 Ky. Law Rep. 51, and it was there held that a company conducting a general retail merchandise business that gave to a cash purchaser a check representing 4 per cent. of his purchase, which could be exchanged for articles in the store or for cash, did not come within the statute; and in that case the difference between a merchant and a company like the plaintiff was pointed out, it being held that the statute was intended to cover such a business as is done by the plaintiff. The circuit court dismissed the plaintiff's petition, and it appeals.

[1, 2] Under subsection 12 of section 3290, Ky. St., pursuant to section 181 of the Constitution, the city may impose license fees "on franchises, trades, occupations, and professions, and provide for the collection thereof." The business of the appellant is substantially different from that of an ordinary merchant. The city may classify business and levy the tax on business as classified. There must be a reasonable basis for the classifications; but, as appellant's business is entirely different from that of an ordinary merchant, we agree with the circuit court that there is a reasonable basis for the classification, and that the ordinance is not void on the ground that it is discriminatory. In *Covington v. Dalhelm*, 126 Ky. 26, 102 S. W. 829, 31 Ky. Law Rep. 466, and in *Read v. Graham*, 102 S. W. 860, 81 Ky. Law Rep. 569, it was held that an ordinance taxing grocers or milk vendors using a delivery wagon, and not taxing those who did not use a wagon, was void because based on no reasonable ground of classification. But that is not this case. Plaintiff is not a merchant selling goods as other merchants. It sells trading stamps to its customers, and redeems these stamps from their customers, under certain conditions, in merchandise. Stamps not presented for redemption are clear profit. Stripped of all circumlocution, it simply maintains a system by which purchasers for cash from its subscribers get a discount on their purchases. Its business is as distinct

from that of a merchant as the business of a pawnbroker or factor.

[3] The objection that the tax is unreasonable, oppressive, and prohibitory presents a more difficult question. The taxing of trading stamp companies has led to a considerable amount of litigation. It is generally held that the business is a lawful business, and that it may not be taxed under the exercise of the police power. *State v. Shugart*, 138 Ala. 86, 35 South. 28, 100 Am. St. Rep. 17; *Drexel v. Holland*, 147 Cal. 763, 82 Pac. 429, 2 L. R. A. (N. S.) 588, 3 Ann. Cas. 873; *Long v. State*, 74 Md. 565, 22 Atl. 4, 12 L. R. A. 425, 28 Am. St. Rep. 268; *O'Keeffe v. Somerville*, 190 Mass. 110, 76 N. E. 457, 112 Am. St. Rep. 316, 5 Ann. Cas. 684; *State v. Ramseyer*, 73 N. H. 31, 58 Atl. 958, 6 Ann. Cas. 445; *People v. Gillson*, 109 N. Y. 389, 17 N. E. 343, 4 Am. St. Rep. 465; *State v. Dalton*, 22 R. I. 77, 46 Atl. 234, 48 L. R. A. 776, 84 Am. St. Rep. 818, and cases cited. But, while plaintiff's business may not be taxed under the police power, it may be taxed as any other lawful business is taxed under the power to tax franchises, trades, occupations, and professions. But an unreasonable or prohibitory tax under this power will not be sustained.

[4] In *Fiscal Court v. Cox Co.*, 132 Ky. 738, 117 S. W. 296, 21 L. R. A. (N. S.) 83, we said: "It may be conceded that ordinarily the reasonableness of a license fee imposed as a tax is a question for the taxing power, and the courts will not interfere with its discretion. *Hall v. Commonwealth*, 101 Ky. 382 [41 S. W. 2, 19 Ky. Law Rep. 578]. This rule we think, however, is subject to the limitation that the tax imposed shall not amount to a prohibition of any useful or legitimate occupation. [Citing authorities.] While there are numerous authorities to the contrary, it will be found that the license fee involved in those cases was not prohibitive, and the courts simply declared the general rule that the reasonableness of the tax was a matter within the discretion of the taxing power." See, also, *Hager v. Walker*, 128 Ky. 1, 107 S. W. 254, 32 Ky. Law Rep. 748, 15 L. R. A. (N. S.) 195, 129 Am. St. Rep. 238; *Chicago v. Netcher*, 183 Ill. 104, 55 N. E. 707, 48 L. R. A. 261, 75 Am. St. Rep. 93. In *Ex parte Hutchinson* (C. C.) 137 Fed. 949, the court had before it the validity of a franchise ordinance, which imposed an annual tax of \$100 on pawnbrokers, and \$700 on trading stamp companies in Seattle. The ordinance was held invalid as to trading stamp companies on the ground that it was prohibitive. In view of the size of the two cities, a tax of \$300 in Owensboro, a city of third class of this state, is more oppressive than a tax of \$700 in a city the size of Seattle. In *Humes v. Little Rock* (C. C.) 138 Fed. 929, a license tax of \$50 a week on all persons engaged in the business of selling or giving away premium stamps was held void as pro-

hibitive. While this is an extreme case, it illustrates the principle that the courts will not sustain prohibitive regulations made under the guise of taxation. The plaintiff's business is not unlawful. It is a business which the state itself licenses. And, while the city may also tax it, the tax must be imposed in good faith under the taxing power, and not for the purpose of prohibiting the business. When we read the ordinance as a whole, it is hard to escape the conclusion that it was intended to prohibit the business. To illustrate, to construct or operate a brewery in the city is taxed \$50; to conduct the business of putting up in bottles beer, wine, cider, pop, or other soft drinks is taxed \$25; to maintain a soda fountain \$10; to keep a restaurant \$10; butcher shop \$25; commission merchants \$25; secondhand dealers \$25; pawnbrokers \$25; auctioneers \$25. Excepting licenses for selling intoxicants, which may be regulated under the police power, the only thing we find in the ordinance high as \$300 are itinerant merchants, stockbrokers, receiving orders for the purchase for a future delivery in margins, and private scales. We think it evident from the ordinance as a whole that the tax of \$300 on stamp companies was intended to be prohibitive and break up the business. Appellant's gross business per annum under the evidence amounts to about \$5,000, and its net profits amount to about \$500 per annum. To tax such a business \$300 per annum must have been intended to break it up, and it is not difficult to understand why this sentiment existed on the part of the merchants in the city who did not handle the stamps. It is true the business may increase, and there may be more profit in it than is shown by the evidence; but the ordinance was evidently aimed at it as it is, and no facts being shown, justifying such a tax on it, it must be presumed that the intention was to burden and so break up the business. We therefore conclude that the ordinance is void as imposing an oppressive and prohibitory tax.

Judgment reversed, and cause remanded for a judgment as above indicated.

LOUISVILLE & N. R. CO. v. COMMONWEALTH.

(Court of Appeals of Kentucky. Dec. 20, 1912.)

1. CORPORATIONS (§ 434*)—REAL PROPERTY—RIGHT TO VOTE—CONSTITUTIONAL PROVISIONS—CONSTRUCTION.

Const. § 192, prohibiting any corporation from holding any real estate, except such as may be proper or necessary for the carrying on of its legitimate business, for a longer period than five years under penalty of escheat, was not intended to deny to a corporation the right in good faith to acquire real estate for a proper and necessary future use, and to hold the same longer than five years. It is not so much the time for which real estate is held, as the purpose for which it is acquired, the intention with which it is held, the use to which it is to

be put, and the necessity therefor, that determine the right of such corporation to hold it.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 1763-1771; Dec. Dig. § 434.*]

2. ESCHAT (§ 3*)—PROPERTY SUBJECT TO ESCHAT—RAILROAD PROPERTY—REASONABLE AND PROPER USE.

In a proceeding to escheat a number of lots of land because held in violation of Const. § 192, prohibiting any corporation from holding real estate for more than five years, except such as may be proper or necessary for carrying on its legitimate business, lots lying along and near defendant railroad's right of way at an important and growing railroad point, including the only available site for a needed passenger depot, lots occupied by a section foreman and his garden under a custom of the company to furnish houses and gardens for section foremen, lots used for storing cross-ties, lots near its freight station, leased, until necessary for railroad use, to a lumber and coal dealer who was an extensive shipper and which accommodated business which otherwise would be a greater expense to the road, a lot on which there were frame buildings occupied by section foremen and sectionmen, a lot originally acquired as a borrow pit in constructing a cut-off, on the top surface of which the railroad had planted locust trees to be used for ties, a lot, partly covering the right of way, and occupied by an embankment, an oil depot, and locust trees, and narrow strips of land adjoining its right of way, planted with locust trees or occupied by section foremen, were necessary or proper for carrying on the company's legitimate business, and hence not subject to escheat, but a lot conveyed by the railroad reserving a lien on the purchase price to a company whose stock was originally held by the railroad, but which was afterwards distributed among such stockholders, not held for any present or reasonably necessary future use, was subject to escheat.

[Ed. Note.—For other cases, see *Escheat*, Cent. Dig. §§ 3-5; Dec. Dig. § 8.*]

3. ESCHAT (§ 6*)—PETITION—NEGATING REASONABLE NECESSITY.

A petition by the state to escheat property held by a corporation for over five years, and not proper or necessary for carrying on its business, in violation of Const. § 192, need only describe the property, and allege that it has been held for more than five years, and that it is not proper or necessary for carrying on its legitimate business, and need not negative the idea of a reasonable necessity for future use; that being a matter of defense.

[Ed. Note.—For other cases, see *Escheat*, Cent. Dig. §§ 7-17, 24; Dec. Dig. § 6.*]

Appeal from Circuit Court, Shelby County.

Action by the Commonwealth of Kentucky, by, etc., against the Louisville & Nashville Railroad Company and another. From the judgment, the Commonwealth and the Louisville & Nashville Railroad Company appeal. Reversed on original and cross appeals, and cause remanded, with directions.

Luther C. Willis, of Shelbyville, and Benjamin D. Warfield, of Louisville, for appellant. Geo. L. Pickett, Pickett & Barrickman, and Beard & Marshall, all of Shelbyville, for appellee.

CLAY, C. This is an action by the commonwealth against the Louisville & Nashville Railroad Company to escheat numerous parcels of land on the ground that they

were held contrary to section 192 of the Constitution, providing that no corporation shall "hold any real estate except such as may be proper or necessary for carrying on its legitimate business for a longer period than five years, under penalty of escheat." Several of the tracts are town lots located in the city of Shelbyville. They are designated in the petition and discussed in the evidence as lots Nos. 1, 2, 3, 4, 5, 6, 7, 8, and 9. By amended petition it was sought to escheat certain narrow strips of land lying out in the country and adjoining the railroad right of way; also a lot in Bagdad, Ky. The original suit, which was filed in 1907, was against the railroad company. On February 17, 1909, an amended petition was filed making the Louisville Property Company a party defendant. In the amended petition it was charged that the Louisville Property Company was organized by the stockholders of the Louisville & Nashville Railroad Company, and was created, organized, and existed for the sole and only purpose of a buying and holding company for the Louisville & Nashville Railroad Company; that the only purpose of its organization and existence was that the Louisville & Nashville Railroad Company might own and hold real estate contrary to the laws of the state of Kentucky, and not necessary for carrying on its legitimate business, and the said corporation, Louisville Property Company, was organized and existed for the purpose of enabling the Louisville & Nashville Railroad Company by that device to carry on its legitimate business contrary to the laws of the state of Kentucky. On final hearing the court escheated all of lot No. 1 except a strip 11½ feet wide adjoining its passenger station, and all of lots Nos. 4 and 5, and refused to escheat all the other lots and tracts involved. From the judgment escheating lots Nos. 1, 4, and 5, the railroad company appeals. From that part of the judgment dismissing the petition as to the other lots and tracts involved, the commonwealth prosecutes a cross-appeal.

[1] In the recent case of *German Insurance Co. v. Commonwealth*, 141 Ky. 606, 138 S. W. 793, where a question of escheat was involved, the court used the following language: "We do not think that a corporation is in all cases to be deprived of its real property merely because it has owned it for more than five years, without applying it to some proper or necessary use in connection with its business. The purpose of its acquisition, the intention with which it is held, and the use to which it may be and is designed to be put, are to be considered in connection with the time of the holding in determining whether or not the provision of the Constitution has been violated. * * * A corporation organized for business purposes, and with the power to carry on business

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-Ne. Series & Rep'r Indexes

enterprises, should be allowed the same liberty within the scope of its charter rights and subject to the limitations imposed by law as would be permitted to an individual engaged in a similar business. It is not the purpose of the Constitution or the law to place in the way of the success of corporations unreasonable obstacles, or to hinder them from acting as prudent business men would act under like or similar circumstances. Having this view of the privileges that corporations should enjoy, we do not think the Constitution should be so construed as to deny a corporation the opportunity to look forward to the time when its needs in the conduct of its business will be greater than at present or to deprive it of the right to prepare in advance for conditions that it may reasonably expect will come up in the future. If a corporation was not allowed to carry into execution plans that the good judgment of its officers believe to be essential to its growth and prosperity, it would discourage people from investing their money in these agents that are so indispensable to the business of the state and country. From these considerations and others that might be mentioned we conclude that the time limitation imposed by the Constitution was not intended to deny a corporation the right in good faith to acquire real estate for a proper and necessary future use in the transaction of its legitimate business, and hold the same for a longer period than five years, if it is so held with the intention in good faith of devoting it to a proper and necessary use, and it will be necessary for such purpose when so used. It is not so much the time for which real estate is held, but the purpose for which it was acquired, the intention with which it is held, and the use to which it is to be put and the necessity for this use, that determines the right of the corporation to hold it." The rule above announced was subsequently adhered to and applied in the case of the Louisville Property Co. v. Commonwealth, 146 Ky. 827, 143 S. W. 412, 38 L. R. A. (N. S.) 830.

[2] With these principles in mind, let us consider the various lots and tracts of land involved. In the first place, it is proper to say that Shelbyville is a prosperous and growing town, and an important railroad point. The traffic, both freight and passenger, to and from that point is large and is growing larger. The Louisville & Nashville Railroad Company has three railroads entering Shelbyville, to wit, the Shelby Branch, the Bloomfield Branch, and the Shelby Cut-Off. Having three sections of track at that point, it employs three foremen and three separate gangs of men. We shall consider the lots in their order.

Lot No. 1. This lot fronts on Main street 98½ feet, and is 234 feet in depth. The last-mentioned distance it lies on Eleventh street, and along the side of the Bloomfield Branch

of the defendant's right of way. All of defendant's trains stop at Eleventh street, and at this point defendant maintains only a platform as a passenger station. In order to avoid driving upon the railroad track, 11½ feet of lot No. 1 are necessarily used by the patrons of the railroad to reach the station. Defendant's superintendent and section foreman gave it as their opinion that the railroad ought to have a regular depot building at that point instead of a platform, and lot No. 1 was the only available site for that purpose. If such a depot was erected, it would be necessary to use all or a larger part of lot No. 1. There is no evidence to the contrary. On these facts, we conclude that the defendant showed a reasonable necessity for a future use of the property, and that the court erred in escheating any portion of this lot.

Lots Nos. 2 and 3. Lot No. 2 fronts 50 feet on Main street, and extends back along Eleventh street for a distance of 178 feet. It adjoins the Bloomfield Branch of defendant's right of way. This lot is occupied by defendant's section foreman on the Bloomfield section. It was occupied by him before suit was brought, and has been continuously occupied by him since that time. Lot No. 3 lies near lot No. 2, and a portion of it is used as a garden for the section foreman, and the other portion of it is used as a place for storing cross-ties and ballast. The evidence shows that it was customary for the railroad company to furnish its section foremen with houses and gardens wherever practicable to do so. Defendant's witnesses testified that both these lots were absolutely necessary to the conduct of defendant's business at that point. There is no evidence to the contrary. We think the evidence sufficiently shows a past, present, and necessary legitimate use of these two lots. The trial court, therefore, did not err in refusing to escheat them.

Lots Nos. 4 and 5. Lot No. 4, consisting of a little over a quarter of an acre, adjoins the Shelby Branch of defendant's right of way. It lies only a few feet from defendant's freight depot. At present it is under lease to Hall & Sons, who use it in connection with land of their own in carrying on a lumber yard. Lot No. 5 also adjoins the Shelby Branch of defendant's right of way, and is leased to Hall & Sons for the purpose of carrying on a coal yard. The evidence shows that Hall & Sons are extensive shippers, and that the defendant leased lots Nos. 4 and 5 to Hall & Sons until it should become necessary for the railroad to use them. It also appears that the lumber and coal were hauled in carload lots, and that the presence of the lumber and coal yards near defendant's tracks was not only a convenience to Hall & Sons, but enabled defendant to handle the traffic more conveniently and at less expense, thus contributing to the successful operation

of the road. The evidence also shows that there are tracks running to lots Nos. 4 and 5 rented by Hall & Sons. If the defendant did not have tracks to these lots from which to unload coal and lumber, it would have to provide other facilities at Shelbyville for that purpose, and, in order to do so, would either have to use the identical lots leased to Hall & Sons, or purchase for such purpose other land less favorably situated, for which it would have probably to pay an exorbitant price. Defendant's superintendent testifies that in the event of the double tracking of the Shelby Cut-Off, or the extension of the defendant's yards at Shelbyville, which the increased traffic and railroad development will require, both lots 4 and 5 would become necessary for the tracks and yards of the railroad company. The evidence being sufficient to show a reasonable necessity for the future use of lots 4 and 5, we do not think they should be escheated merely because the railroad in the meantime is leasing them to its shippers, in order not only to encourage the business of its patrons, but to enable it to handle the business more conveniently and at less expense. We conclude that the court erred in escheating lots 4 and 5.

Lot No. 6. On this lot there are six frame dwellings, occupied by section foremen and sectionmen. Here we have a past, present, necessary, and legitimate use of this lot, and the trial court properly adjudged that it was not subject to escheat.

Lot No. 7. This lot was originally acquired as a borrow pit to enable defendant to make a large embankment in constructing the Shelby Cut-Off. After the top surface was removed, defendant planted that part of the lot not embraced in its right of way in locust trees. The trees numbered about 2,000. The evidence shows a necessity on the part of railroad companies to grow their own trees for cross-ties, because of the increasing scarcity of timber, and the great difficulty of supplying their wants in the market. The evidence also shows that the defendant would need in its own business all the cross-ties that it could get out of the locust trees thus planted. As a reasonable and proper use has been, and is now being, made of this lot, and as the evidence shows there is a reasonable probability that it will again come into use as a borrow pit, we conclude that the court properly refused to escheat it.

Lots Nos. 8 and 9. The title to these lots appears to be in the Louisville Property Company, a corporation originally organized by the officers and stockholders of the Louisville & Nashville Railroad Company. The Louisville & Nashville Railroad Company conveyed to it certain real estate owned by it in Kentucky, and certain real estate located elsewhere. In the conveyance a lien was reserved in favor of the railroad company to

secure the purchase price. The indebtedness of the Louisville Property Company to the Louisville & Nashville Railroad Company on December 1, 1910, was \$1,721,111.57. When the Louisville Property Company was first formed, and for some time thereafter, all its stock was held by the Louisville & Nashville Railroad Company and its officers. In the year 1908 the stock of the Louisville Property Company was distributed among the stockholders of the Louisville & Nashville Railroad Company, in accordance with their respective holdings of Louisville & Nashville Railroad Company stock. The trial court was of the opinion that the distribution of the Louisville Property Company's stock among the stockholders of the Louisville & Nashville Railroad Company was lawful and proper, and that neither before nor after that time was the Property Company a holding company for the use and benefit of the Louisville & Nashville Railroad Company. As to the effect of such distribution of the Louisville Property Company's stock on suits brought thereafter we express no opinion. It is sufficient in this case to say that suit was filed in the year 1907. At that time the Louisville & Nashville Railroad Company owned all the stock of the Louisville Property Company, and must be regarded for the purpose of this case as the real owner of the property conveyed by it to the Louisville Property Company. Being the real owner of the property in question at the time suit was brought, the subsequent distribution of the Louisville Property Company's stock among the stockholders of the Louisville & Nashville Railroad Company cannot defeat a recovery in this action if the lots in controversy were subject to escheat at the time the suit was brought. With this view of the case, it becomes necessary to consider lots 8 and 9 from the same standpoint as the other lots and tracts in controversy.

It is shown that lot No. 8 extends both north and south of defendant's right of way, and perhaps one-fourth of it covers the right of way. One-fourth of the lot is taken up by the embankment of the railroad. A portion of this lot is used by the Standard Oil Company as its oil depot in Shelbyville, in connection with the oil hauled by that company to that place, and was and is necessary for the defendant for that purpose. The evidence also shows that this lot adjoins defendant's right of way, and, in the event of double tracking, will necessarily be used for that purpose. A portion of the lot is also planted in locust trees for the purpose of getting timber for cross-ties. We conclude that a legitimate past and present use of this lot is shown, and a reasonable necessity for its future use. For these reasons this lot should not have been escheated.

No present or reasonably necessary future use of lot No. 9 being shown, it follows that this lot should have been escheated.

Additional Tracts. As to the narrow strips of land adjoining defendant's right of way, and described in the amended petition, the evidence shows that they are planted in locust trees for the purpose of raising timber for ties. As passing or side tracks are required, they will be necessary for that purpose. The evidence shows that the lot in Bagdad is occupied by a section foreman. It was proper to refuse to escheat those lots.

[3] The petition is not defective because it fails to negative the idea of a reasonable necessity for the future use of the property for railroad purposes. In such an action, all that is necessary is to describe the property and to allege that it had been held for a longer period than five years, and was not proper or necessary for carrying on the legitimate business of the corporation. The reasonable necessity for its future use is a matter of defense.

Judgment reversed, both on original and cross appeals, and cause remanded, with directions to enter judgment escheating lot No. 9.

PROVIDENT SAV. LIFE ASSUR. SOC. OF NEW YORK v. SHEARER.

(Court of Appeals of Kentucky. Dec. 20, 1912.)

1. EVIDENCE (§§ 432, 434*)—DOCUMENTARY EVIDENCE—PAROL EVIDENCE—RULE.

Despite the general rule rejecting parol evidence to vary a written contract, such evidence in an action to cover premiums paid under an insurance policy is admissible to show want of consideration and fraud, and thus vary the terms of the written policy and a note executed by plaintiff.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1981-1989, 2005-2020; Dec. Dig. §§ 432, 434.*]

2. EVIDENCE (§§ 432, 434*)—APPLICATION FOR INSURANCE—CONTRADICTION OF TERMS.

While Ky. St. § 679, provides that every policy of insurance shall have attached to it a correct copy of the application, and unless so attached the application shall not be received as evidence in any controversy between the parties, the application, when made a part of the policy, is part of the contract, and, if the contract is assailed upon the ground of fraud and want of consideration, the application must go with it, and hence in such case it is not improper to admit parol evidence to contradict the terms of the application.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1981-1989, 2005-2020; Dec. Dig. §§ 432, 434.*]

3. INSURANCE (§ 198*)—FRAUD—EQUITABLE ESTOPPEL.

Where, through the false representations of an insurance agent, plaintiff was induced to accept a policy and pay premiums thereon, his acceptance and retention of the policy which correctly stated the terms of the contract will not estop him from maintaining an action to recover such premiums.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 457-467; Dec. Dig. § 198.*]

4. INSURANCE (§ 198*)—ACTIONS TO RECOVER PREMIUMS—FRAUD.

In an action to recover premiums paid on insurance on the ground that it was without

consideration and induced by fraudulent representations, evidence held insufficient to support the verdict for plaintiff.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 457-467; Dec. Dig. § 198.*]

5. EVIDENCE (§ 596*)—WEIGHT AND SUFFICIENCY—PAROL EVIDENCE OVERTURNING WRITTEN CONTRACT.

Parol evidence sufficient to overturn a written contract should be clear and convincing, especially where it destroys the written contract or gives to the attacking party advantages that he could not have obtained unless the conditions and stipulations of the writing constituted the real contract between the parties.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2446-2448; Dec. Dig. § 596.*]

6. INSURANCE (§ 198*)—ACTIONS TO RECOVER PREMIUMS.

In an action against an insurance company to recover premiums paid on a life policy alleged to have been induced by fraudulent representations, defendant, which carried insurance on plaintiff's life for five years, is entitled to compensation therefor on recovery by plaintiff.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 457-467; Dec. Dig. § 198.*]

Appeal from Circuit Court, Kenton County, Criminal, Common Law, and Equity Division.

Action by Patrick H. Shearer against the Provident Savings Life Assurance Society of New York. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

Wm. Marshall Bullitt and Alexander G. Barret, both of Louisville, for appellant. Hall & Adams, of Covington, for appellee.

CARROLL, J. In March, 1896, the appellee, Shearer, procured from the appellant company a 10-year term policy for \$5,000 in which the company obligated itself to pay the amount of the insurance only in the event the insured died before the expiration of the 10 years. In October, 1905, a few months before this policy expired, the appellant company proposed to issue to Shearer a new form of insurance for \$5,000 under the 20-payment life plan, the policy to be dated back to March, 1896, in order that Shearer might have the benefit of the premium rate based on his age in 1896 in place of the higher rate he would be required to pay if his policy was dated in 1905. As a result of conferences between Sprout, the agent of appellant, and Shearer, the latter on October 26, 1905, made a written application to surrender his old policy and take out the new 20-payment life, which was to be dated March 27, 1896, to correspond with the date of the old policy. Soon after this the application was accepted and the new policy issued. As a part of the plan by which the old policy was surrendered and the new one issued, Shearer executed his note to the company for \$1,826; this amount representing the reserve against the policy, which under the law the company was required to have either in money or in a secured note. The ap-

plication made by Shearer for the new policy contained among others this clause: "The Provident Savings Life Assurance Society of New York agrees to loan to the assured the sum of \$1,826 upon the security of said policy, and the said amount shall be a lien upon said policy when issued until the same is paid, and it is also understood and agreed that the said assured is hereby authorized to sign a collateral loan note to secure the repayment of said sum in the form in use by said society." The note Shearer signed was dated October 26, 1905, and reads in part: "For value received, I promise to pay to the Provident Savings Life Assurance Society of New York, or order, \$1,826, with interest at the rate of 5% per annum, payable on the 27th day of March in each year. * * * The policy and all amounts payable thereon are hereby assigned, pledged and hypothecated to said society. * * * The assured has the privilege of paying this loan at any time prior to the termination of the policy. Should the policy become payable while this note is outstanding, the amount of the note, with any additional loans, and all interest due thereon, shall be deducted by said society from the amount due on this policy."

The new policy issued to Shearer obligated him to pay on the 27th day of March in each year an annual premium of \$287.60, and Shearer paid these premiums for four years, which carried this policy up until March 27, 1910, at which time the fifth premium became due. On March 7, 1910, Shearer wrote to the company a letter in which he said, in substance, that he understood the value of the policy at the expiration of the 20 years would be \$5,000 less the amount of the note he had executed for \$1,826, and requested the company to advise him what the total amount of the indebtedness against the policy at that time was, and what it would be on each succeeding year until the expiration of the 20 years. In answer to this the company on March 16th wrote him and gave him the information he inquired for. On March 22d Shearer paid to the company \$71.90 in cash, and executed his note for \$215.70, the remainder of the premium due on March 27, 1910. This note was due on June 27, 1910, and on June 25th Shearer advised the company that he had concluded not to carry the insurance any longer, and did not pay the note. In January, 1911, he brought this suit against the company to recover from it \$1,222.30, the full amount of the premiums he had paid each year from 1906 to 1910, inclusive, with interest thereon from the date of each payment, and in addition thereto \$750 which he alleged was the value to him of the old policy which he surrendered to the company. His action was based on the ground that the company by false and fraudulent representations induced him to surrender his old policy and accept in place of it the new one. He averred that it was represented to him

that the note he executed would not be a lien against the policy or an indebtedness against him, and that it was only required that he execute it to go through the form of complying with certain laws of the state of New York. He further averred that it was represented to him that the new policy in 20 years from its date, or in March, 1916, would become a paid-up policy for the face value of \$5,000, with a cash surrender value of \$3,620, and that he was induced by these representations to surrender his old policy and accept the new one, and did not learn of the deception and fraud that had been practiced on him until 1910 when he received the letter before mentioned from the company advising him that the note he executed was a lien against the policy and would be deducted from it. To this suit the company made a number of defenses, and upon a trial before a jury a verdict was returned in favor of Shearer for the premiums paid by him in 1906, 1907, 1908, 1909, and 1910, with interest on each from the date of its payment. A reversal is asked on several grounds, but we will only notice two—one that the request of appellant for a peremptory instruction should have been granted, and the other that the verdict is flagrantly against the evidence.

[1] In support of the proposition that a verdict should have been directed in its favor, the argument is made by counsel for appellant that it was not competent to contradict, by parol evidence, the stipulations in the note of \$1,826, or the conditions of the application made by Shearer, because it is said the terms of a written contract cannot be impeached by parol evidence. The rule is elementary that the terms or conditions of a written contract, in the absence of fraud or mutual mistake in its execution, cannot be varied, or contradicted, or added to, or subtracted from, by prior or contemporaneous parol agreements or arrangements between the parties to the written memorial. *Farmers' Bank of Wickliffe v. Wickliffe*, 131 Ky. 787, 116 S. W. 249; *Anthony v. Hudson*, 131 Ky. 185, 114 S. W. 782, 133 Am. St. Rep. 231; *Salzer v. Salzer*, 141 Ky. 648, 133 S. W. 556; *Sackett v. Maggard*, 142 Ky. 500, 134 S. W. 888.

But the broadest application of this rule does not deny to a party the right to attack, in its entirety, with parol evidence, a contract for fraud or want of consideration. Any written contract, without reference to what form it may be put in, and without regard to the circumstances attending its execution, can be assailed as a whole with parol evidence for fraud or for want of consideration. If this were not true, a written contract, however fraudulent or destitute of consideration, could be enforced, and the party who signed a written obligation would be helpless to protect or defend himself against its enforcement, although he might be able to show, by the most convincing parol

evidence, that it was procured by fraud or that there was no consideration for its execution. The exception that we have stated to the general rule rejecting parol evidence to vary a written contract is too well settled to need more than the mere citation of authorities. *Stone v. Ramsey*, 4 T. B. Mon. 236; *Tribble v. Oldham*, 5 J. J. Marsh. 137; *Doyle v. Offutt*, 135 Ky. 296, 122 S. W. 156; *Cummings v. Cass*, 52 N. J. Law, 77, 18 Atl. 972; *Page on Contracts*, § 1207; *Greenleaf on Evidence*, § 284; *Lavalleur v. Hahn*, 152 Iowa, 649, 132 N. W. 877.

[2] Equally untenable is the proposition that the admitted evidence was made incompetent by section 679 of the Kentucky Statutes providing, in substance, that every policy of insurance shall have attached to it a correct copy of the application, and, unless so attached, such application shall not be received as evidence in any controversy between the parties. The argument upon this point is that, as the application signed by Shearer stipulated that this note should be a lien upon the policy, it was not competent to contradict by parol this condition. Generally speaking, this is true, but when the entire contract of which the application is a part is attacked for fraud, as may be done, and the contract set aside upon this ground by parol evidence, if it be sufficient in quantity and quality, the application, being a part of the contract, must go with it, and the rule laid down in *Southern States Mutual Life Ins. Co. v. Herlihy*, 138 Ky. 359, 123 S. W. 91, and *Prov. Savings Co. v. Withers*, 132 Ky. 541, 116 S. W. 350, has no application. The court, therefore, did not commit error in refusing, at the instance of appellant, to take the case from the jury, as of course should have been done if the parol evidence offered by Shearer was incompetent.

[3] Nor should Shearer be estopped to seek a cancellation on the ground that he elected to keep the policy after notice of its conditions as the facts do not bring the case within the principle laid down in *Hartford Life Ins. Co. v. Hanlon*, 139 Ky. 346, 104 S. W. 729.

[4] The contention that the verdict was flagrantly against the evidence is more meritorious. The case for Shearer is put upon the ground that he was induced to surrender his old contract of insurance and accept the new by the false and fraudulent representations of the agent of appellant—and upon which he relied—that the note for \$1,826, executed by him, would not be a lien upon the new policy or an obligation that he would be required to pay. The only evidence introduced to support this contention was the testimony of Shearer and his son, both of whom stated that the agent said that the only reason for requiring the note was to enable the insurance company to comply with certain laws of the state of New York, and that the note would not be a lien

upon the policy or an obligation that the maker would be expected to pay. In contradiction to this evidence there is the written application signed by Shearer in which it is expressly stipulated that the note (describing it) shall be a lien upon the policy until paid, and the note itself sets out that Shearer agrees to pay the amount of it, with interest at the rate of 5 per cent., and that the policy is assigned and pledged to secure it. In addition to this, the evidence shows that each year before the annual premium became due the company sent Shearer a notice informing him when his premium would be due, as well as the interest on the note. The interest, however, was never paid. The agent who negotiated the transaction also flatly contradicts Shearer and his son and testifies that both of them fully understood the terms and effect of the writings, and that he made no statement whatever in conflict with these papers. As a circumstance tending strongly to support the testimony of the agent, it appears that, if Shearer's understanding of the contract was correct, he would have insurance when he was the age of 57 at the same rate that insurance was issued to persons 47 years of age, and in addition to this the policy would have a loan, as well as a cash surrender value, much larger than such policy would ordinarily have.

[5] The parol evidence sufficient to overturn a written contract should be clear and convincing, and especially should this be so when the parol evidence not only destroys the written contract but gives to the party attacking it advantages that he could not have obtained unless the conditions and stipulations of the writing constituted the real contract between the parties. Our opinion is that the parol evidence in behalf of Shearer, an intelligent, educated man, was not sufficient, under the circumstances of this case, to overcome the written evidences of the contract deliberately executed by him. The contract made by Shearer was not harsh or unreasonable. There was no hurry, or overreaching, or other badge of fraud in its execution. Shearer continued for about five years to receive protection under it, and annually, during this time, paid his premiums, and paid the last one in part after he had become dissatisfied with the policy, if he did not actually know all its conditions and terms. Written contracts would be virtually as insecure as parol contracts if they might be set aside under circumstances and facts such as appear in this case. We think the verdict was flagrantly against the evidence, and that the lower court should have granted a new trial on this ground.

[6] There is another feature of this case that needs to be noticed. If the judgment appealed from should be allowed to stand and the company be required to return to

Shearer the premiums he paid, with interest thereon, the necessary effect would be to give Shearer the full benefit of the policy during the time it was in force without any cost to him. During this time Shearer was protected by the policy, and if he had died the company would have been compelled to have paid the amount it agreed to pay in the contract of insurance. It is therefore very plain that, if this contract is to be canceled and rescinded, it should be done upon equitable terms. The insurance company should not be required to carry insurance upon the life of Shearer for nearly five years without receiving any premium therefor, nor should Shearer be allowed to recover the premiums and yet not pay the insurance company anything for the insurance he had upon his life during the period covered by these premiums. Therefore, if, upon another trial of the case, there is a verdict against the insurance company, as there was on the last trial, the lower court, before entering a judgment on this verdict, should ascertain from the pleadings and evidence the amount that Shearer should pay the company for the insurance he had during the time the policy was in force, and deduct this amount from the finding of the jury, and enter judgment for the remainder. He may also ascertain and give Shearer credit by the value of his old policy, if it had any, when he surrendered it. The parties, on a return of the case, may file such additional pleadings, and take, at the proper time, such evidence as may be necessary to enable the court, if the contract is rescinded, to rescind it upon equitable terms.

The judgment is reversed, with directions for a new trial in conformity with this opinion.

MEYER v. UNION LIGHT, HEAT & POWER CO.

(Court of Appeals of Kentucky. Dec. 20, 1912.)

1. NEGLIGENCE (§ 23*)—"TURNTABLE DOCTRINE"—KNOWLEDGE OF OWNER.

The "turntable doctrine" is based upon the idea that a dangerous instrumentality has been constructed where children were in the habit of congregating, or at a place inviting to children, to the owner's knowledge, so that he ought to have anticipated that they would be attracted to it.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 33, 34; Dec. Dig. § 23.*]

2. NEGLIGENCE (§ 24*) — LANDOWNER'S KNOWLEDGE OF DANGER.

Plaintiff, a boy 10 years of age, while playing near a church lot, climbed over the brick wall surrounding it to get a ball, and accidentally caught hold of electrical apparatus placed in the yard by defendant, which injured him. Plaintiff was enabled to climb over the brick wall, which was 7 feet 8 inches high, by first climbing upon some rock piled against it, and thence upon a board fence close to the wall, and thence over the wall; but defendant

had no knowledge that the rock was piled against the wall, or that a boy could climb over it, or that boys were in the habit of entering the churchyard from the adjacent lot. Held, that defendant was not liable for plaintiff's injuries, having no reason to anticipate that children would go into the churchyard and be injured.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 24; Dec. Dig. § 24.*]

Appeal from Circuit Court, Kenton County, Common Law and Equity Division.

Action by B. A. Meyer, Jr., by his next friend, against the Union Light, Heat, & Power Company. From a judgment for defendant, plaintiff appeals. Affirmed.

Myers & Howard, of Covington, for appellant. Robert C. Simmons, of Covington, for appellee.

NUNN, J. Appellee was paid for lighting a church on Fifth street, in the city of Covington, and for the purpose of doing this it suspended its electric light wires from near the top of the building, down the east wall thereof, through a transformer which was located within about 1½ feet of the ground, and then into the basement of the building through a window directly under the transformer. This transformer, as we understand it, was for the purpose of regulating the electric current going into the building. There was built, we presume by the church people, on the east side of the church building a brick wall, about 7 feet 8 inches high. This wall began at the northeast corner of the building, extended east several feet to a board fence; thence ran south to a point where it connected with another wall of the church building, thus inclosing a small yard wherein appellee's electric wires and transformer were located. The board fence, which was about 3 feet lower than the brick wall, connected with the northeast corner thereof, and continued on the same line as the north wall of the small inclosure. It appears that for about two years prior to the injury herein complained of loose rock had been piled up against the rear of this brick wall and board fence to a depth of about 3 feet; that by going upon this rock, then to the top of the board fence, then to the top of the brick wall, an entrance could be easily had into this yard by going down a plank, one end of which was resting upon the ground within the yard, and the other against and near the top of the wall. Appellant, who was about 10 years of age at the time, and another little boy were playing ball in the vacant lot which was immediately back of the wall and board fence. One of them threw the ball, and it fell into the churchyard and stopped at a point near appellee's wires and transformer. Both of the boys started after the ball, but appellant reached it first, picked it up, started to return to his play, but stumbled in some way, lost his

balance, and in an attempt to save himself from falling caught hold of the electric wires with his right hand, and the electric current burned his fingers, thumb, and arm, rendered him unconscious for a time, and crippled him for life.

Appellant instituted this action by his next friend to recover for his injuries, which he alleged were caused by appellant in negligently placing its wires and in leaving them unguarded, as they were dangerous, and further in allowing the insulation on the wires to become so decayed that it dropped off, leaving the wires exposed, thus rendering them more dangerous.

The testimony, without contradiction, showed the facts above stated, and that a number of children, before and after school hours and on Saturdays, used this vacant lot for a playground; that they would frequently enter the churchyard in playing their games; that this had been going on for at least two years prior to appellant's injury; and that none of them knew, especially appellant, that there was any danger in touching appellee's wires or transformer. Appellant's testimony showed that the transformer should have been placed 12 or 14 feet above the ground, instead of within $1\frac{1}{2}$ feet thereof; that the wires should have been incased in a pipe of some kind, or guarded by a netting in some way, so that a person could not come in contact with them; and that the insulation on the wires should have been kept in repair.

At the conclusion of the testimony, upon appellee's motion, the court gave the jury a peremptory instruction to find for appellee. This instruction was given upon the idea, as we understand it, that there was not the slightest proof showing that any one connected with appellee, or any of the church people, for that matter, had any knowledge or information that appellant, or any of the children mentioned, had been in the habit of entering this churchyard or that they had entered it at all for any purpose.

Appellant's counsel contends that the case should have been submitted to the jury, as the boy's testimony showed that appellant had so placed and left its wires and transformer as to render them dangerous; that the court had a right to assume that appellee knew of, or at least had a right to anticipate, the use of the yard by the boys, as the proof showed that it had been so used, without objection from any one, for the past two years. He further contends that the placing and leaving of the wires and transformer for more than two years, as heretofore described, was, of itself, actionable negligence on the part of appellee, and that if appellee had given them the attention required by ordinary care it would or must have known of the passway into the yard, and that the children were using the yard for play. For these reasons he claims he was entitled to an instruction au-

thorizing the jury to find for him, if appellee knew of or had reasons to anticipate that the boys were in the habit of using the churchyard. This is the real question in the case, and it is one not easy of solution.

As stated, there is not the slightest testimony showing that appellee had any knowledge or information that the boys were in the habit of entering the churchyard from the adjacent lot when playing there; nor had it any reasons to anticipate their going into the yard, except that boys of their age might be expected to go into any inclosure they could enter.

[1] The rule of law governing such cases has not been extended as far as claimed by appellant's counsel. The "turntable doctrine" was established upon the idea that something dangerous to children had been constructed at a place where children were in the habit of passing or congregating, or at a place easy of access and inviting to children, and that these facts were known to the owner of the dangerous structure. In the case of *Bransom's Adm'r v. Labrot*, etc., 81 Ky. 638, 50 Am. Rep. 198, the administrator was allowed to recover for the death of a child, which was caused by the overturning of a lumber pile, and the court quoted with approval, in that case, from *Hargreaves v. Deacon*, 25 Mich. 1, the following: "The owner of private grounds is under no obligation to keep them in a safe condition for the benefit of trespassers, idlers, bare licensees, or others who may come upon them, not by invitation express or implied, but for pleasure or to gratify their curiosity however innocent or laudable their purpose may be." That opinion proceeded, however, by saying that the rule quoted did not apply to that case, as the lumber pile had been situated on the lot for many years, and, by license of the owner, the lot was used by the public as a passway and by the children as a playground, meaning, of course, if the lot where the lumber was piled had not been so used with the knowledge of the owner of the lumber, the rule quoted would have applied. The cases announcing this doctrine do it upon the idea that the dangerous instrument is attractive and inviting to children, and that the owner thereof, for these reasons, might have reasons to anticipate that children would congregate at the place the thing is located and receive injuries. That rule cannot be applied in the case at bar, as there was nothing attractive about the place where the boy was injured. He went there for the purpose only of securing his ball. The inclosure was simply a yard by the side of the church building and was inclosed, as heretofore described, without any doors, gates, or other opening to permit ingress. It was not shown that appellee, or any person in charge of the church and yard, had any knowledge or information of the stone or rock being piled up against the fence and brick wall, or that

there was a plank placed on the inside of the inclosure, so that the boy could go from the top of the wall to the ground inside the yard.

The case of *Graves v. Washington Water Power Co.*, 44 Wash. 675, 87 Pac. 956, 11 L. R. A. (N. S.) 452, is very similar to the one at bar. In that case a boy, 15 years of age, climbed up a pier of a bridge, a distance of about 30 feet, where he was injured by coming in contact with a wire charged with electricity. The claim was made that the braces on the pier formed a kind of a lattice work, which served as a ladder and made the structure an attractive one to the boy, who, it is asserted, went up to a point where pigeons nested and received his injury as stated. In that case the court refused to allow the boy to recover, and said: "The things which constituted the attraction which, it is claimed, drew him to this place were features connected with the river, the bridge, and the pigeons, and were matters for the existence of which appellant was not responsible." In the case at bar the boy's only attraction to the place where he was injured was the recovery of his ball.

The case of *Mayfield Water & Light Co. v. Webb's Adm'r*, 129 Ky. 395, 111 S. W. 712, 33 Ky. Law Rep. 909, 18 L. R. A. (N. S.) 179, 130 Am. St. Rep. 469, is also very much like the case under consideration. In that case a little boy was killed by coming in contact with an electric wire strung on poles 18 feet above the ground. He reached the wire by going up the guy wires and the pole. This court said the owner need not anticipate that children will reach such wires by climbing poles or walking up guy wires. In that case the wire, at the point where the boy was injured, was defective, and this makes the case peculiarly applicable to the case at bar.

[2] It follows that the lower court did not err in giving the peremptory instruction, as appellee's transformer and wires were located inside the yard, which was inclosed by a solid brick wall 7 feet 8 inches high; and it had neither actual nor constructive notice of any use of the premises by any one.

Judgment affirmed.

COOMES BROS. v. GRIGSBY & CO. et al.
(Court of Appeals of Kentucky. Dec. 20, 1912.)

1. FRAUDULENT CONVEYANCES (§ 295*)—SUFFICIENCY OF EVIDENCE.

Evidence held not to sustain a finding that certain mules and hogs were ever the property of defendants, or were transferred by them to their mother to defraud their creditors.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. §§ 867-875; Dec. Dig. § 295.*]

2. APPEAL AND ERROR (§ 1009*)—FINDINGS—CONCLUSIVENESS—EQUITY CASE.

While the Court of Appeals gives considerable weight to a chancellor's fact findings, and it will not reverse where the evidence conflicts on a mere question of credibility, still, when on the face of the record his judgment is not supported by the weight of the evidence, it will be reversed.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3970-3978; Dec. Dig. § 1009.*]

3. APPEAL AND ERROR (§ 1009*)—FINDINGS—CONCLUSIVENESS.

While a verdict will not be disturbed unless palpably against the evidence, a chancellor's findings have not the same weight, as he does not hear and see the witnesses.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3970-3978; Dec. Dig. § 1009.*]

Appeal from Circuit Court, Nelson County.

Action by Grigsby & Company and others against Coomes Brothers. From a judgment for plaintiffs, defendants appeal. Reversed and remanded for a judgment dismissing petition.

Nat W. Halstead, E. E. McKay, and S. W. Eskew, all of Bardstown, for appellants. C. T. Atkinson and J. Smith Barlow, both of Bardstown, for appellees.

HOBSON, C. J. The firm of Coomes Bros. made an assignment on November 10, 1910, to W. T. Spalding for the benefit of their creditors. The firm was composed of three brothers, Bowman, William, and Floyd Coomes; the latter being an infant. At the time of the assignment, the firm owed Grigsby & Co. a debt of about \$500 which was unsecured. Grigsby & Co. brought this action against the Coomes brothers, their mother, Annie E. Coomes, and the assignee, W. T. Spalding, charging in their petition that the firm owned two mules worth \$325 and ten hogs worth \$94.95, which they had not included in their schedule or turned over to the assignee, and had fraudulently turned over to their mother, Annie E. Coomes. Answers were filed controverting the allegations of the petition, and on final hearing the circuit court adjudged the plaintiff the relief sought in their petition, directing the assignee to take charge of the property and hold it for the benefit of the creditors of Coomes Bros. From this judgment the mother, Annie E. Coomes, and Coomes Bros., appeal.

Jeff D. Coomes, the father of the Coomes brothers, and the husband of Annie E. Coomes, died in the spring of the year 1910, largely indebted. After his death the exemptions allowed to the widow and the infant children under the statute were set apart. There were six boys and two girls, and, as we understand the evidence, only two of the boys were of age. Bowman, William, and Floyd were cultivating a farm which they had rented and on which they lived not far from their father's, and were also doing business

as Coomes Bros. in baling hay and the like. The father had bought his farm, but he had not paid for it, and the widow and the infant children remained on this. The proof for the defendants by Mrs. Coomes and her sons is, in effect, that she desired to put in a considerable crop of wheat on the farm, and, not having teams enough to put the crop in, desired to buy two mules to be used in putting in the wheat crop; that she had her two sons to buy the two mules for her, they and she executing the note for the purchase money. The mules were brought to her place, and used in putting in the wheat crop by the younger boys, and were kept on her place. They were never used by Coomes Bros., and were in her possession at the time of the assignment. C. R. Barnes, from whom they bought the mules, states practically the same facts as they do as to what the trade was, testifying that they told him their mother was purchasing the mules and that they asked permission to take the mules to her place so that she might see them before the trade was concluded.

The proof as to the hogs by the defendants is that Mrs. Coomes, at the suggestion of her sons, concluded in August that she ought to get some hogs to make her meat for another year; that Coomes Bros. owed her about \$40, and at her suggestion one of them bought the ten hogs from a neighbor, paying thereon \$44, and agreeing to pay the balance, \$50. Her son testifies that he told the person from whom he bought the hogs that they were for his mother. He testifies that nothing of the sort was said. The remainder of the price of the hogs was not paid or secured until after the assignment, when Mrs. Coomes and W. T. Spalding, as her surety, gave her note for it. The hogs, like the mules, were taken to Mrs. Coomes' place and were there in her possession from the time of her purchase until this controversy arose.

On the other hand, the plaintiff proved by two witnesses that, on the day of the assignment, the elder Grigsby asked C. R. Barnes if the Coomes brothers owed him anything, and Barnes said they owed him a note for \$325 for a pair of mules; that he was safe, as he had their mother on the note as security. Barnes says that he said: "I sold them a pair of mules out there a few weeks ago, but look to Mrs. Coomes for that; Mr. Grigsby asked me if she was on the note, and I said 'Yes.'" He also testifies that a day or two after this, when Grigsby called his attention to the mules not being in the schedule, he said, "Well, I suppose not because they said they bought them for their mother, and wouldn't suppose they would list them as a part of their assets." Frank Coomes testified that he had a talk with the Coomes brothers about the pair of mules, and asked them what they gave for them, and they said \$325, and he asked them why they were not working them, and they

said they did not care to butcher them; they were young mules. P. B. Crume, the man from whom the hogs were bought, also testified that, at or about the time of the assignment, some of the Coomes brothers had a conversation with him in which they said, if he said nothing about them buying the hogs from him, that nobody would know they had bought them, and they would turn the hogs over to their mother, or give them to their mother; that they said the hogs would not have to go into the assignment. He also testified that when he went over to see about the hogs after the assignment they claimed that the hogs were bought for their mother, and that she said that they had not fulfilled their contract by giving him the note, and whatever the boys did about the hogs would be all right with her. He was then proposing to take back part of the hogs inasmuch as he had not been paid all the purchase money. He also testified that, in speaking about the mules, Mrs. Coomes said she thought they would be thrown into the assignment. She referred to them in that way, while she seemed to think the mules ought to belong to her. "She said, 'I expect the mules will have to go into the assignment,' and that the mules were bought for her, and 'why they would have to go in I don't know.'" R. W. Havelan testified that he had a conversation with William or Bowman Coomes on the day of the administrator's sale of his father's property, and that he said if there was a crowd enough there he was going to sell his mules, and that after the sale he told him there were no mule buyers there, and he did not sell any mules.

[1] This is, in substance, the evidence heard on the trial. We think it is totally insufficient to show that the mules or hogs were the property of Coomes Bros. or were fraudulently transferred to their mother by them. The testimony as to what Barnes said about the mules is only competent to contradict his testimony, and his testimony is confirmed by the testimony of Mrs. Coomes and her two sons and a number of circumstances. That Mrs. Coomes in fact used the mules, and that she claimed them as her mules long before there was any idea of an assignment, is proved by a witness who lived on the place. The statements of Coomes Bros. shown by the plaintiffs are at best very uncertain evidence, and, when all the facts and circumstances are considered, the great weight of the evidence is in favor of Mrs. Coomes. It is undoubtedly true that both Mrs. Coomes and her sons, not knowing the law applicable or their rights under the law, were in doubt where they stood after the assignment was made, and that their ignorance and apprehension led them to say the things that were proved by the plaintiffs. But these utterances are not sufficient to overcome the undoubted fact that both the hogs and the mules were taken to Mrs. Coomes' place when they were bought.

and put in her possession and kept in her possession and control; that she needed them, and, so far as the evidence shows, the boys did not need them. It was not unnatural that the mother so lately widowed should have her boys do the trading for her, and it was not unnatural that they should speak of the property as the mules and the hogs they had bought. The evidence as to the hogs is not as clear as that as to the mules; but, summing it all up, we are satisfied the transaction was in good faith and was not made with any view of defrauding or affecting in any way the creditors of Coomes Bros. At that time they were doing considerable business, and no thought of an assignment was in their minds.

[2] It is true that in an equity case we give considerable weight to the finding of the chancellor on a question of fact, and that we will not reverse his judgment on a mere question of the credibility of the witnesses where the evidence is conflicting. But as we have held in many cases, we read the record for ourselves, and, when on the face of the record the chancellor's judgment is not supported by the weight of the evidence, it will not be affirmed. *Deatley v. Tolle*, 96 S. W. 920, 29 Ky. Law Rep. 1111; *Howell v. Union Grocery Co.*, 113 S. W. 912; *Northrup v. Summers*, 132 Ky. 156, 116 S. W. 699; *Sommer v. Ross*, 116 S. W. 1181; *Quigley v. Beam*, 137 Ky. 325, 125 S. W. 727; *Prewitt v. Glasscock*, 137 Ky. 779, 127 S. W. 145; *Fairbanks, Morse & Co. v. Madisonville Savings Bank*, 141 Ky. 374, 132 S. W. 540.

[3] The verdict of a properly instructed jury will not be disturbed unless it is palpably against the evidence. The judgment of the chancellor is given considerable weight, but it is not treated as the verdict of a properly instructed jury, for the reason that he does not see and hear the witnesses and must simply determine the case from the record, and when his judgment is not in accord with the weight of the evidence it will be reversed.

Judgment reversed, and cause remanded for a judgment dismissing the petition.

CROSTHWAITE v. CROSTHWAITE et al.
(Court of Appeals of Kentucky. Dec. 20, 1912.)

1. WILLS (§ 55*)—PROBATE—HEARING—EVIDENCE—COMPETENCY OF TESTATOR.

Evidence held sufficient to show that testator was not competent to make a will.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 137-161; Dec. Dig. § 55.*]

2. APPEAL AND ERROR (§ 1043*)—HARMLESS ERROR—REFUSAL OF CONTINUANCE.

Where a hearing in a will contest was on November 14th set for November 20th, and the contestee moved for a continuance on the ground that she was in a nervous condition, incapable of advising her counsel or appearing as a witness, and on the ground of the absence

of a material witness, and the court refused a general continuance, but postponed the trial four days, at which time both sides announced ready, and all of the witnesses desired by contestee were present and testified in her behalf, and she was able to testify and advise her counsel, the refusal to grant a general continuance was not error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4115-4121; Dec. Dig. § 1043.*]

3. JURY (§ 142*)—ESTOPPEL TO OBJECT—CHALLENGE OF JUROR FOR CAUSE.

A juror summoned in a will contest, where the mental capacity of the testator was in issue, was challenged for cause, and stated that he knew testator well and had read of the contest on the ground of his mental incapacity, and that whether he had an opinion as to such incapacity would depend on when the will was made, the date of which he did not then know, and counsel for appellant did not then inform him as to the date of the will, so that he might question him as to his capacity at that date. Held that, after an adverse verdict, the appellant was estopped from complaining of the error, if any, in overruling the challenge for cause.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 500, 630; Dec. Dig. § 142.*]

4. EVIDENCE (§ 501*)—OPINIONS—EXAMINATION OF WITNESS.

Where witnesses in a will contest were examined in detail as to their qualifications to have an opinion on the mental capacity of testator, and were permitted to state that he knew the objects of his bounty and the value of his estate and had a disposing mind, the refusal to permit them to say whether testator was of sound or unsound mind was not error, since the question had been fully answered.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2292-2305; Dec. Dig. § 501.*]

Appeal from Circuit Court, Fayette County.

Will contest between Matt Crosthwaite and others and Lula D. Crosthwaite. Judgment for contestants, and Lula D. Crosthwaite, contestee, appeals. Affirmed.

A. F. Byrd and J. F. Wallace, both of Lexington, for appellant. T. T. Forman, Forman & Forman, W. C. G. Hobbs, and Nat Hobbs, all of Lexington, for appellees.

CARROLL, J. This is a contest over the will of Perry Crosthwaite, who died in Lexington in April, 1911, leaving an estate worth between \$23,000 and \$25,000. In March, 1910, at the time he made the will in controversy, he was 86 years old. In his will, after directing the payment of his debts and funeral expenses, and nominating his executor, he gave to his daughter, Lula D. Crosthwaite, the appellant here, \$10,000. To his daughter Jennie R. Hobbs he gave \$1,000. To his wife, Mary, he gave the sum of \$100. The balance of his estate he devised equally to his six children, Matt, Lula D., Sam H., Harry M., and William Crosthwaite, and Jennie R. Hobbs, share and share alike. He also gave to his daughter Lula D. Crosthwaite all of his household and kitchen furniture that she might desire to have. In the will he assigned as a reason

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes 151 S.W.—60

for giving to his daughter Lula D. \$10,000, in addition to her share of the residuary estate, "her years of tender affection in nursing and caring for me, and for her great sacrifice in caring for me during my years of sickness and health." As a reason for only giving his wife \$100 he said in his will: "I have been a kind and loving husband to her, and during our married life have deeded to her real estate and personal property. I have advanced her money and kept up her property in repair and given her all the money she desired during our married life, and she has an abundance of property in her own name to keep her comfortable the rest of her days." The will, when offered for probate in the county court, was rejected, and from the order rejecting the will Lula D. Crosthwaite prosecuted an appeal to the circuit court. Upon a trial in the circuit court before a jury a verdict was returned, finding that the paper offered was not the will of Perry Crosthwaite, and from the judgment on this verdict Lula D. Crosthwaite prosecutes this appeal.

Four grounds are relied on for reversal: (1) Because the verdict of the jury was flagrantly against the evidence, and a new trial should have been granted by the lower court; (2) because the court erred in refusing a continuance of the case on request of appellant; (3) because the court failed to sustain the challenge of the appellant to one of the jurors for cause; (4) because the court erred in failing to permit Burgin, Miller, and other witnesses in behalf of appellant to testify as to the soundness of mind of the testator.

[1] Taking up these assigned errors in the order in which they have been stated, the first one makes it necessary that we should state briefly the evidence introduced by the parties to the contest. The testator, as before stated, made the will in contest about a year before he died, and when he was 86 years of age. He had been married twice, and his six surviving children were the issue of his first wife, who died some 30 years before he did. He was married to his second wife, who survived him, 20 years or more before his death; but no children were born of this marriage.

The appellant is a maiden lady, and was about 55 years old when the will was written. For many years she had suffered severely from a nervous ailment, and is shown by the evidence to have rather an excitable, nervous disposition, and little or no capacity for earning her own living. She had always made her home with her father, who made comfortable provision for her support, furnishing her not only with the necessities but with some of the luxuries of life, and if the testator had been of disposing mind the provision made for her could not be considered either unnatural or unreasonable.

All the witnesses agree that the last wife

of the testator, who has a comfortable estate in her own right, is a most estimable lady, and was at all times kind and attentive to her husband, and especially faithful in the performance of her wifely duties in the latter years of his life. It is also conceded that the testator, until about four years before the will was executed, was an active, capable business man; but that about 1907 he commenced failing mentally as well as physically, and continued to decline until his death.

The paper in controversy was the only will the testator ever made, and several witnesses testified that he often said that the law made as good a will as he wanted, although there is evidence that he expressed his intention on more than one occasion, before the paper in issue was executed, of making suitable provision for the appellant, and it is also shown that after the execution of this paper he said he had made provision for her. It is, however, quite evident that the testator never seriously contemplated making a will, and this theory is abundantly supported by the uncontroverted fact that he never attempted to make one until he was 86 years of age. It appears from the evidence that the appellant, in December, 1909, drafted, as she testifies, at his request, a paper intended to be a will, in which he made the same provision for her that was made in the paper offered as his will. This paper, written by appellant, was some time afterward taken to her attorney, J. Franklin Wallace, and he, after consulting with the testator, wrote the paper in issue and gave it to appellant, who retained it until it was signed by the testator, in March, 1910. On the day the paper was signed by the testator, his wife was absent from home, as appellant knew, and she testified she selected this date because she was absent.

One of the attesting witnesses, Dr. F. O. Young, had been for 25 years the family physician of the testator, and was intimately acquainted with him, both personally and in a professional capacity. He states that he was telephoned by the appellant to come to the house of the testator, and that when he arrived there he saw for the first time the will, which was in the possession of appellant. Asked to relate what transpired and to describe the condition of the testator, he said: "I do not know that I can tell everything about it. I read the will over to him. At first Miss Lula said there wasn't any use to read it to him; just let him sign it, and I said, 'No, I will read it to him.' and I read it to him, and he sat there in a dazed kind of condition. After I got through, I don't remember who asked him to sign it. Anyhow, it was pushed over to him, and a bottle of ink passed to him, and he, in a very trembling condition, signed it." He

further testified that the testator at the time was suffering from senile dementia and was in a very feeble condition, both mentally and physically; that he did not make any comment whatever when he signed the paper and did not request any person to witness it, and did not recognize him at first when he went into the room. He also testified that, in his opinion, the testator did not have sufficient mind to know the meaning of the paper, and that he knew when he attested the will as a witness that the testator was not capable of making a will; that after it was written and signed he took possession of the paper at the request of appellant, the testator not giving any direction about it. Asked why he signed the paper believing at the time that the testator did not have sufficient mental capacity to execute a will, he said: "I don't know why I did. I wished often I had not." He further said that he did not know the importance of his signature, or that it would be necessary to prove that the testator was of sound mind before the paper could be probated as his last will.

The other attesting witness, Thresa Horine, testifies in substance that she was a servant in the house of the testator and was called on, in connection with Dr. Young, to witness the will; that at the time she had been employed in the family for nearly a year. She said that she had never had any business conversation or transaction with the testator, and that on more than one occasion she noticed he failed to recognize members of his family, and particularly his son, Sam Crosthwaite, who lived in the house with him. This witness further said that at the time the will was signed the testator was quite feeble, but was sitting up in a chair by the bed, and that during the time she was there it was his habit to get up about 9 o'clock in the morning and then go to bed at 11 and get up again about 2 in the afternoon and again retire between 4 and 5.

A number of other witnesses, business and professional men, who were intimately acquainted with the testator, gave convincing evidence as to his mental and physical failing for three or four years before his death. Some of them testified that he would get lost on the streets of Lexington where he had lived for many years, and others said that he often failed to recognize his nearest and best friends, and yet others that he did not know what estate he owned.

On the other hand, several witnesses of intelligence and character, who were well acquainted with the testator, testified that he was competent to make a will; but we think the evidence shows that he was not, and so we cannot direct a new trial on the ground that the verdict is not sustained by the evidence.

[2] The next assigned error is the failure

of the trial court to grant a continuance of the case. It appears from the record that on the 14th of November, 1911, the case was set down for trial on November 20th. On this date the appellant moved for a continuance, and, in support of this motion, filed her own affidavit and the affidavit of her counsel and her physician. One of the grounds for continuance was that appellant was in a nervous, delicate condition and incapable of giving to her counsel the advice and assistance they needed in the trial of the case, and unfit, on account of her temporary mental and physical condition, to appear as a witness. Another ground was the absence of material witnesses. Upon considering this motion the court refused a general continuance of the case, but postponed the trial four days. When it was again called for trial, both sides announced ready; all of the witnesses appellant desired were present in person and testified in her behalf, except one, whose deposition was read, and the appellant was present in court, and judging from her evidence, which we have carefully read, was fully competent and qualified, not only to make a good witness in her own behalf, but to give to her counsel such advice and assistance as an intelligent client could. The court did not commit any error in overruling the motion for a general continuance.

[3] The next alleged error is the failure of the trial judge to sustain a challenge for cause to Charles Gaitskill, who was summoned as a juror. It appears from the record that this juror was challenged for cause, but the court overruled the motion to excuse him for cause, and, when a panel of 18 qualified jurors was offered to counsel on both sides, this juror was not stricken from the panel by either side, although each side, peremptorily and as a matter of right, excused three of the jurors. What occurred, when this juror was examined and challenged for cause, appears in the bill of exceptions signed by the trial judge, and also in a bystanders' bill, made up at the instance of counsel for appellant. In the bill of exceptions signed by the judge it is recited that: "In selecting and impaneling a jury for the trial of this case, Charles Gaitskill, one of the jurors who tried this case, stated under oath when being examined by the attorneys and by the court, touching his qualifications as a juror to try the case, that he was acquainted with Perry Crosthwaite during his lifetime, and knew him well, and that he had read in the papers published in Lexington an account of the making of the will in contest and that there was a contest over his will as to his mental capacity. When asked by counsel for appellant as to whether he had an opinion as to the mental capacity of said Perry Crosthwaite to make a will and dispose of his property, he answered that it would depend upon when the will was made. Now, the juror was not in-

formed as to the date of the making of the will, and made no further answer as to whether he at the time had an opinion as to that subject. When asked by the court as to whether he had any opinion that would interfere with an unbiased verdict, after he had heard the evidence and the instructions of the court, he replied that he had not, and the court thereupon overruled the challenge for cause." In the bystanders' bill it is set out that this juror said he had formed an opinion as to the merits of the case from what he had heard and read of it, and also from his personal acquaintance with the testator, but did not know whether he had ever expressed the opinion. The bystanders' bill also recites that this juror, when asked by counsel for appellant as to whether he had an opinion as to the capacity of the testator to make a will, answered that it would depend on when the will was made, but that he was not informed as to the date of the making of the will.

It would seem from this that counsel for appellant were not at the time very desirous of removing this juror from the panel, because they could easily have informed him as to the date of the will, and the juror could then have readily said whether he had an opinion as to the capacity of the testator to make a will at that date. If this information had been given to the juror by counsel for appellant and he had said that, in his opinion, the testator was not competent to make a will in March, 1910, we have no doubt that the trial judge would, on his own motion, have excused the juror, and certainly he would have done so upon the request of counsel for appellant.

It is, of course, of the highest importance to parties to litigation, as well as to the correct administration of justice, that jurors selected to try a case should be without bias or prejudice for or against either of the parties, and be entirely free from any fixed opinion that might lean their judgment to one side or the other. But counsel for the unsuccessful party will not be heard to complain, after they have lost the case, that a juror was disqualified for service, when they accepted him with knowledge of his disqualification or failed to show his disqualification by asking such questions as they at the time knew would develop it.

If a party knows that a juror is disqualified, or knows, from answers made by a juror when examined touching his qualifications, that he can be disqualified by giving him information as to some material fact that the juror is at the time ignorant of, but that will certainly be developed on the trial, and he fails to challenge the juror or refrains from asking him questions that he knows will disqualify him, he will be estopped, after an adverse verdict, to obtain a new trial on the ground that the juror was disqualified to sit in the case. When a party

knowingly and freely takes the risk of accepting as favorable to him a juror that he could have removed, he must take the consequences, and, if it develops that the juror had some bias or leaning, he cannot complain. If this were not true, it is manifest that the party who saw proper to take his chances on getting a verdict with the juror that he might have removed would be given an unfair advantage over his opponent. The record does not show appellant entitled to complain of the error, if there was one, in overruling the motion to challenge this juror for cause.

[4] Another ground urged for reversal is that the trial court refused to permit several witnesses offered by appellant to answer the question whether in the opinion of the witness the testator was of sound or unsound mind. All of the witnesses who were asked this question were examined in detail as to their qualifications to have an opinion touching the mental capacity of the testator, and they were permitted to say that in their opinion he had mind and memory sufficient to know the objects of his bounty, the value and character of his estate, and to dispose of it according to a fixed purpose of his own. After being permitted to answer every pertinent question that could throw light on the knowledge of the witness as to the competency of the testator, and allowed to express an opinion favorable to his ability to make a will, it was not error to refuse to permit witnesses to say whether the testator was of sound or unsound mind, as this question was fully answered in the other answers given by them.

Upon the whole case we do not find any error that would justify us in disturbing the judgment of the lower court, and it is affirmed.

TURNER et al. v. J. M. BROOKS & SONS et al.

(Court of Appeals of Kentucky. Dec. 20, 1912.)

JUDGMENT (§ 606*) — OBSTRUCTIONS — RIGHTS OF ACTION — PERMANENT INJURIES.

Where the builders of a railroad wrongfully blasted rock into a river so as to divert its channel and in case of high water cause a riparian owner's land to be overflowed, separate actions may be recovered for each of the recurring injuries, and a recovery by the landowner will not bar his grantees.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1120; Dec. Dig. § 606.*]

Appeal from Circuit Court, Harlan County.

Action by John L. Turner and another against J. M. Brooks & Sons and others. From a judgment for defendants, plaintiffs appeal. Reversed and remanded.

W. F. Hall, of Harlan, for appellants. Acree & Stewart, of Harlan, for appellees.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

CLAY, O. In the year 1910 and 1911 the Washtoto & Black Mountain Railroad Company, a corporation organized under the laws of the state of Kentucky, was engaged in constructing a railroad along the Poor fork of the Cumberland river. The contract for doing the work of grading, excavating, etc., was let to the Callahan Construction Company, which in turn contracted with J. M. Brooks & Sons to do the work. John L. Turner and Kenton Cornett owned a small tract of land on the opposite side of the river from where the grading, blasting, and excavation were being done. Upon this property are situated an ordinary storehouse, a barn, and a gristmill and suitable millrace. Charging that the railroad company, the contractor, Callahan Construction Company, and the subcontractor, J. M. Brooks & Sons, blasted rock out into the river and so diverted the flow of the stream as to cause it to run over their land and injure their mill and other property, plaintiffs, John L. Turner and Kenton Cornett, brought this action to recover damages. At the conclusion of the plaintiffs' evidence, the court directed a verdict in favor of the defendants. Judgment was entered accordingly, and plaintiffs appeal.

It appears that the property in question was purchased by plaintiffs from J. J. Huff by deed dated January 23, 1911. Prior to that time the construction of the railroad at a point just opposite the property had been begun. At this point there was a cliff of solid stone formation. To reduce the cliff to the required grade it was necessary to do considerable blasting. In doing this large quantities of stone were thrown into the river just opposite the mill property. The stone fell out into the river for a considerable distance. The defendants made no effort to remove it. The result was that the natural flow and current of the river was changed, and the water so diverted that it ran over the land of plaintiffs and injured both the land and the mill. Whether or not any blasting was done after plaintiffs purchased the property in question does not satisfactorily appear. It does appear, however, that nearly all of the blasting had been done prior to that time. After that time there was a high tide in the river, and considerable damage was done to the mill property.

After Huff sold to the plaintiffs, and on May 3, 1911, he himself brought suit against J. M. Brooks & Sons and the Callahan Construction Company to recover for damages to the property. He compromised the suit for the sum of \$55. The receipt which he gave recited that the sum given him was in full settlement and compromise of all damages done to his property by J. M. Brooks & Sons or the Callahan Construction Company on account of J. M. Brooks & Sons' blasting and building the Washtoto & Black Mountain

Railroad through his premises, and in full settlement of the damage suit brought by him against J. M. Brooks & Sons and the Callahan Construction Company in the Harlan circuit court on May 3, 1911.

Defendants insist that as the blasting was all done, and the property permanently injured, prior to the time of its purchase by plaintiffs, the right of action for such injury was in Huff alone, and that, as plaintiffs purchased the property in its depreciated condition, they are not entitled to recover. If this were a case of a permanent structure, lawfully and properly built, the contention of the defendants would be sound, for in that event there could be only one recovery for all damages, past, present, and future, and the vendor, Huff, alone would be entitled to recover. *L. & N. R. R. Co. v. Lambert*, 110 S. W. 305, 33 Ky. Law Rep. 199; *L. & N. R. R. Co. v. Orr*, 91 Ky. 109, 15 S. W. 8, 12 Ky. Law Rep. 756; *Hay v. City of Lexington*, 114 Ky. 669, 71 S. W. 867, 24 Ky. Law Rep. 1495; *Richmond v. Gentry*, 136 Ky. 319, 124 S. W. 337, 136 Am. St. Rep. 255; *Stickley v. C. & O. Ry. Co.*, 93 Ky. 323, 20 S. W. 261, 14 Ky. Law Rep. 417. But even in the case of a permanent structure, if the structure be unlawfully or negligently built, and by reason thereof injury is inflicted from time to time, there may be recurring recoveries. *City of Louisville v. Coleburne*, 108 Ky. 420, 56 S. W. 681, 22 Ky. Law Rep. 64; *Klosterman v. C. & O. R. Co.*, 56 S. W. 820, 22 Ky. Law Rep. 192; *Finley v. Williamsburg*, 71 S. W. 502, 24 Ky. Law Rep. 1338; *Madisonville, Hartford & Eastern R. Co. et al. v. Graham*, 147 Ky. 604, 144 S. W. 737. This is not a case of a structure. The act of the defendants in blasting the stone into the river, and permitting it to remain there to the injury of others, was not based on any semblance of right. Being unlawful and wrongful from the very outset, we see no way in which it may become right as to the owners of the land, so long as any recurring injury occurs, unless by release or grant, or the payment of a sum covering all damages, past, present, and future. Until this be done, or the nuisance be abated, recoveries may be had for each recurring injury. As recoveries may be had for each recurring injury, it follows that the right of action for each recurring injury is in the owner of the premises at the time the injury results, and a payment to a former owner after he has parted with title for injuries resulting to the property while owned by him is no defense to an action by a subsequent owner for injuries to the premises occurring after his purchase. As there was evidence tending to show an injury to the property after its purchase by the plaintiffs, and that this injury resulted from an unlawful act of the defendants in blasting the stones into the river and diverting its flow,

it follows that the trial court erred in giving a peremptory in favor of defendants.

Judgment reversed, and cause remanded for new trial consistent with this opinion.

CHICAGO, ST. L. & N. O. R. CO. et al. v.
ROWELL.

(Court of Appeals of Kentucky. Dec. 20, 1912.)

1. CARRIERS (§ 315*)—INJURIES TO PASSENGERS—PLEADING.

In an action by a passenger injured by the sudden stopping of the car on which she was riding, the fact that it was not derailed will not warrant a peremptory instruction because of variance, though her petition alleged that her injuries were caused by the carelessness of defendants in the construction and operation of the tracks and trains, and that the coach in which plaintiff was riding was wrecked, derailed, and thrown off the track; the negligence counted on not being the derailment.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1270, 1281, 1282; Dec. Dig. § 315.*]

2. CARRIERS (§ 320*)—INJURIES TO PASSENGERS—QUESTION FOR JURY.

In an action by a passenger injured by the sudden stopping of a train, part of the cars of which were derailed by the opening of a switch, evidence on that issue of negligence held sufficient to go to the jury.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1118, 1126, 1149, 1153, 1160, 1167, 1179, 1190, 1217, 1233, 1244, 1248, 1315-1325; Dec. Dig. § 320.*]

3. CARRIERS (§ 306*)—INJURIES TO PASSENGERS—LIABILITY FOR ACTS OF SERVANTS.

Where the trains of one railroad company were run over tracks leased from a second, which were jointly used by it and a third, all three companies are liable as principals to passengers injured by the act of a switchman of the third company who opened a switch, under a train of the first.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1249-1251; Dec. Dig. § 306.*]

4. CARRIERS (§ 317*)—INJURIES TO PASSENGERS—EVIDENCE.

In an action against a railroad company for injuries caused by jolting resulting from a quick, sudden stop, where it appeared that plaintiff did not tell the railroad company's servants that she was injured, evidence that they did not assist her from the coach was improperly admitted.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1295-1306; Dec. Dig. § 317.*]

5. EVIDENCE (§ 548*)—EXPERT TESTIMONY—PHYSICIANS.

Where a physician examines one to qualify himself as a witness, he cannot state what the party detailed as the history of her case, although the rule is otherwise where the physician is called to administer treatment.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2365; Dec. Dig. § 548.*]

6. EVIDENCE (§ 501*)—EXPERT EVIDENCE—OPINION EVIDENCE.

One, not a medical expert, cannot testify that prior to the alleged injuries plaintiff was a well woman, but should be required to state the facts and the difference in appearance of plaintiff before and after the accident.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2292-2305; Dec. Dig. § 501.*]

7. CARRIERS (§ 317*)—INJURIES TO PASSENGERS—EVIDENCE.

In an action against a railroad company for injuries caused plaintiff by the sudden jolt or jar of a train in stopping, evidence by other passengers that there was no such jolt or jar as would throw a person about in a seat is admissible.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1295-1306; Dec. Dig. § 317.*]

8. DAMAGES (§ 132*)—PERSONAL INJURIES—EXCESSIVE DAMAGES.

In an action by a female plaintiff to recover damages for injuries claimed to have been caused by the sudden stopping of the railroad train on which she was a passenger, an award of \$7,500 is excessive, where it appeared that her present condition might well be the result of previous trouble with her genitive organs, and the medical testimony tended to show that her claim of injuries from jolt or jar causing hemorrhages from the bowels was unfounded.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 372-385, 396; Dec. Dig. § 132.*]

9. CARRIERS (§ 319*)—INJURIES TO PASSENGERS—PUNITIVE DAMAGES.

Where the servant of a railroad company turned a switch under a passenger train which was in motion, causing a derailment, punitive damages are properly allowed; the conduct of the servant showing a wanton and reckless disregard for human life.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1338-1345; Dec. Dig. § 319.*]

10. TRIAL (§ 125*)—ARGUMENT OF COUNSEL—SCOPE OF ARGUMENT.

In their arguments to the jury, counsel should confine themselves to the law and the evidence, and it is highly improper for them to go without the record for the purpose of appealing to the passion and prejudice of the jurors.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 303-307; Dec. Dig. § 125.*]

Appeal from Circuit Court, Grayson County.

Action by Loula Rowell against the Chicago, St. Louis & New Orleans Railroad Company and others. From a judgment for plaintiff, defendants appeal. Reversed and remanded.

Louis A. Faurest, of Elizabethtown, M. A. Arnold, of Leitchfield, C. L. Sivley, of Chicago, Ill., Trabue, Doolan & Cox, Benjamin D. Warfield, and Chas. H. Moorman, all of Louisville, for appellants. John C. Graham and John Campbell, both of Leitchfield, and Chapeze & Crawford, of Louisville, for appellee.

CLAY, C. Plaintiff Loula Rowell, brought this action against the Chicago, St. Louis & New Orleans Railroad Company, the Illinois Central Railroad Company, and the Louisville & Nashville Railroad Company to recover damages for personal injuries alleged to have been caused by the joint and concurrent negligence of defendants. The jury returned a verdict in favor of plaintiff for \$7,500. Judgment was entered accordingly, and the railroad companies appeal.

On the afternoon of December 23, 1910, plaintiff, after purchasing a ticket from

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Leitchfield to Louisville, boarded one of the Illinois Central Railroad trains at Leitchfield. She was accompanied by her young son. She first got into the coach next to the rear coach, which was a chair car. Later on she took a seat in the chair car, near the front on the right-hand side. When it reached a point near Fourteenth and Magnolia streets in Louisville, the train, which, according to her evidence, was running rapidly, suddenly lunged forward and then backward. She was sitting in a chair putting on her cloak, and had her arms up. The jerk of the train caused her right side, near the waistline, and her arm to strike the chair or the window—she did not know which. The blow made her sick and dizzy, and gave her a pain in her head, back, and side. She remained in the coach until every one had left except an old man. Upon leaving the coach, she walked to Twelfth street, where she took a car for her sister's home at Eighteenth and Dumesnil streets. She reached her sister's home about 8:20. She drank a little coffee, sat up for about 20 minutes, and then retired for the night. She slept badly during the night, and next morning suffered from a hemorrhage of the bowels. After that she had continuous hemorrhages from the bowels up until about a month before the trial. On Saturday, the day after the alleged accident, she was still weak and nervous, and suffered pain from her back and side. She had four or five hemorrhages that day. On Sunday her condition was about the same. She had several hemorrhages that day. On Sunday afternoon she and her sister walked up to see Mrs. Talkington, who lived a few squares away. On Monday they spent the day with Mrs. Talkington. While there, she had a hemorrhage from the bowels. On Tuesday she returned to her home at Leitchfield because she was not feeling well. She did not call a physician until December 30th, when Dr. Clark was sent for. She went back to Louisville on January 23, 1911, to be treated by Dr. Woody, and remained there until February 12th. In May she again returned to Louisville, and went from there to Frankfort to see her mother. In November, 1910, she weighed 160 pounds, had a good appetite and good health. She was able to perform all her household duties, work in her yard and garden, and ride horseback. Since the accident she had suffered severe pain, and was unable to work. At the time of the trial, she weighed about 128 pounds. Plaintiff admitted that she suffered greatly from suppressed menstruation, but claimed that she never stayed in bed over two or three hours at a time. She admitted that the physicians had to give her something to relieve her condition.

Charlie Taylor, who formerly had been a freight brakeman in the employ of the Illinois Central Railroad Company, testified that on the day of the alleged accident he was on the east side of the Illinois Cen-

tral Railroad track at Fourteenth street, up near what is called Magnolia street, when the train came into Louisville, and only a short distance from the place of derailment. A switchman, or Louisville & Nashville man of some kind, ran up to the switch, and was fooling with it. The switch was thrown between the baggage car and the first day coach. One car went on the main track, and one went down the siding where the Louisville & Nashville crew was. There was a smash-up, like a mess. The passenger train stopped on the other side of the crossing about 20 or 30 feet. The train was running about 15 or 18 miles an hour. The first day coach went down the siding and knocked some bars off of a Louisville & Nashville engine, and damaged the engine some—side-swiped it. It was a severe crash. The air hose came apart. The stop was sudden and unusual. On cross-examination he stated that, from the Southern crossing to the switch that was thrown, the distance was about 40 feet. He did not examine the hose to see if it had been broken, but thinks it must have been. The switch was a Louisville & Nashville switch, and the track was a Louisville & Nashville track on which the switch engine was standing. Did not know who the man that threw the switch was. He was there with the Louisville & Nashville crew. The first coach and the baggage car left the track, but the two rear coaches never left the track.

Jacob Ricketts stated that he was a car inspector of the Louisville & Nashville Railroad Company. He inspected the cars on Fourteenth street near the Southern crossing about one hour after the accident. The front trucks of the baggage car were on the main track, and the rear trucks were on the siding. An equalizer bar on the baggage car was broken, and 10 siding boards on the baggage car were raked. The air hose was not broken. He examined the hose. The two rear coaches never left the rails. The rear coach was still on the main track. The inside rail under the combination car had turned over, leaving it sitting on the ground.

Dr. A. D. Willmoth, a Louisville physician who had been practicing for 16 years, and who made a specialty of surgery and diseases of women, testified that he examined plaintiff on about April 1, 1911. She was suffering from a hemorrhage from her womb, which was turned back slightly. The tubes and ovaries on either side were congested. The womb itself was movable, with the exception of a slight fixation, and the appendages were slightly congested. She was very tender over the right kidney, and was nervous and very weak. The womb was larger than it ought to be, and must have been painful while plaintiff was standing on her feet, as it had a tendency to produce a lagging sensation. The condition of the kid-

ney was probably due to contusion. Plaintiff's pulse would go up when he touched there, and it gave her pain, showing that she really suffered pain in that region. In his opinion, her condition was permanent unless she was operated on. On cross-examination he stated that hemorrhages from the bowels might be caused by many things, such as severe dysentery or irritation. Any blow sufficiently hard to produce a hemorrhage of the bowels would most probably produce a rupture. Such an injury is either fatal very quickly, or the patient recovers in a short time. When he saw the plaintiff there was no evidence of injury of this kind. He found evidence of injury to the uterus only. It was doubtful if the blow received on the back in December would produce a tenderness in the kidney in the April following without displacing the kidney. Never knew of a case where a person sitting in a chair received an injury that resulted in displacement of the womb. This was usually caused by falling on the buttocks or feet. Didn't think the stopping of a passenger train twice as hard as usual would have produced the condition in which he found plaintiff.

Plaintiff's sister, Mrs. Houtchens, testified that plaintiff reached her house about 8 o'clock. Plaintiff seemed awful tired, worn out, and nervous. Did not eat much supper. Remained up about 20 minutes after arriving. She had a hemorrhage of the bowels Saturday morning. Went to Mrs. Talkington's on Sunday. Could then walk naturally. From her facial expression, she seemed to suffer pain. When she woke up, she appeared restless and nervous. Plaintiff returned to her home in January and remained about three weeks. She was then poorly, lying down most of the time, nervous, and having hemorrhages of the bowels. Plaintiff had lost flesh and was not able to get around much. When she returned in May, her condition was about the same as in January.

Dr. F. L. Wilhoit testified that he examined plaintiff and found her suffering from traumatic neurasthenia. She had a number of symptoms of that condition, such as irritability, headache, backache, inability to concentrate her thoughts and to read, straining of the eyes, and vasomotor disturbances. Her heart beating was very rapid; in the neighborhood of 98, when 72 was normal. Her respiration was fast and shallow. She had a tenderness over her right kidney and spine, and a good deal of congestion of the uterus, ovaries, and tubes, entailing a good deal of trouble at the menstrual periods, and lasting longer than it should last. She had lost some weight since he examined her in April. When examination was made she suffered pain, and was easily excited. She got out of breath from the least exertion. Was not able to take walks for any distance. Pain would necessarily accompany conditions

which were found. Her condition on her last examination was worse than when he examined her nine months prior thereto. In his opinion, her condition was permanent. He testified also that plaintiff gave him a history of some hemorrhages at the time following the accident, and of the fact that she had suffered pain at various times, and had lost weight. On cross-examination he testified that he examined plaintiff for the purpose of qualifying himself as a witness. Anything that would deplete the system would render person subject to neurasthenia. He made no examination of the bowels, and found no evidence of hemorrhage of the bowels.

Five or six of plaintiff's neighbors testified that she was stouter before the injury, and was able to do all of her work then, but since the injury had not been able to do so. Two or three of them admitted on cross-examination that plaintiff, prior to the alleged injury, had an occasional sick spell which would confine her to the house, but not over a day at a time.

Dr. F. C. Woody testified that he examined plaintiff on January 25, 1911, in Louisville. He found her a tall, well-developed, healthy-looking young woman, apparently weighing in the neighborhood of 150 pounds. She looked worn and anxious, and was nervous. Her hands and arms trembled, which condition she said had come on her since the railroad accident. Her bladder was disturbed, and she was unable to hold her urine. She had cramps of the bowels between actions, and hemorrhages of the bowels at every action. Her appetite was bad, her tongue coated, and her digestion impaired. Looked worn from loss of sleep because she had had a headache that kept her awake. There was tenderness down the side of the neck, and especially in the back of the head. Her heart was normal, and there was nothing the matter with her left lung. Her respiration was a little shallow and catchy, which he found due to a tenderness in her right lung. Her right side was quite tender from the collar bone down. Her liver and abdomen were also tender, and the tenderness extended around to the back. On listening, he found a dullness and a sound of congestion in her lungs, showing that she had some pneumonia. Her ribs were very tender to the touch. Could not determine whether there was a fracture or not. She complained of great pain all up and down her spine, and pain in the lower part of the abdomen. She was menstruating at the time so you could not examine her to see what injury was there. During the early part of May he, Dr. Koontz, and Dr. McMurtry made an examination. Found the womb turned backward, showing some injury or infection. She was still having pain in her bowels and occasional hemorrhages, which he thought might be due to the position of the womb. What

caused it, he did not know. Had thought that she would improve, but was disappointed at finding her looking so thin and worn. Her spine was very tender to the touch, and her condition never improved. Thought that her health would be permanently impaired. On cross-examination stated that the congested condition of the lungs had disappeared.

Dr. W. S. Clark stated that he had known plaintiff for three or four years, had been her family physician. Prior to her alleged injuries, she was a stout, healthy woman. When he was first called to treat her on December 30, 1910, she was suffering with a pain in her back and in her side. Her temperature was 102. Found her sixth or seventh rib on the right side broken near the spine. She was very tender along the spine, and very nervous. Saw her various times thereafter. Examined her during the month of April, 1911. She was still tender along the spine near the broken rib, but had no fever. Made a vaginal examination, but was unable to discover anything wrong there. She claimed to have had hemorrhages from the bowels, but he knew nothing as to this except what she said. When he first examined her, he thought she would recover, but she had not done so. She had lost a good deal of flesh, her appetite was bad, and she frequently had to take a narcotic before she could sleep. On cross-examination he stated that there was nothing wrong with her womb or female organs when the examination was made in April. He visited her frequently before the alleged injury. She had painful menstruation. Frequently he had to give her something to relax her. As soon as the period was established, she would be up. This condition rarely ever lasted over 12 or 14 hours. When he first saw her, in December, 1910, she probably had a slight attack of pneumonia. He gave her medicine ordinarily given to relieve a severe cold, and the congestion of the lungs cleared up in eight or nine days.

H. C. Houtchens, plaintiff's brother-in-law, testified that she came to his house about 9 o'clock. She looked tired and worn out. She retired in about an hour. On Sunday she seemed worse, and got worse all the time she was there. Then she came back to his home in about six months. Did not recall any visit in January, 1911.

The evidence for the defendants is as follows: Miss Sallie Heiner and Miss Ada May Meredith, who were seated just across the aisle from the plaintiff, testified that the train was going slowly at the time it stopped, and that there was no unusual jerk or jar of the train. Neither of these witnesses knew that the train was derailed until some one came into the train and informed them of this fact. They both say that the plaintiff was not thrown or jerked in any way.

Miss Bertha Morgan, a school-teacher, T.

E. Sanders, a concrete contractor, W. C. Hager, a journalist, Harry Jack, a journalist, and his wife, W. C. Lee, who travels for the Courier-Journal Company, C. M. Brame, who travels for the Bowling Green Nursery Company, and W. P. Vanderveer, a farmer residing at Hodgenville, all testified that they were on the train in question, and that the train was moving slowly and stopped in the ordinary way, without any unusual jar or jerk.

Mrs. Talkington testified that plaintiff visited her on Sunday afternoon and Monday following the derailment. Plaintiff told her of the derailment, but made no complaint of having been injured in any way, or of being unwell. Plaintiff had no hemorrhages at her house.

Dr. Lewis S. McMurtry, a specialist in the diseases of women and abdominal surgery, testified that he examined plaintiff under order of court on April 12, 1911. When he made the examination, Drs. Clark, Wood, and Willmoth were present. He found nothing the matter with her lungs, spine, bowels, or womb. There was no evidence of any injury to the bowels. He had never known, in a practice of 30 years, an instance of hemorrhage of the bowels from a blow on the surface of the body. Could not understand how a blow on the surface of the abdomen could produce a hemorrhage from the alimentary canal. If it were possible to give a blow causing such injury, it would be in the abdomen, and the plaintiff could not sit up or walk. Found plaintiff's uterus in its natural condition, and her ovaries and tubes normal and free from diseases and adhesions. Found no trouble with the kidneys. Never heard of such a thing as falling of the womb being caused by a blow to the womb while sitting down. Plaintiff, however, was not well. Her nutrition was not good. Her general nervous tone was below par. This may be due to a variety of causes, and is not an organic disease. Great pains during the menstrual period are often associated with neurasthenia. The duration of pneumonia from traumatism is from 12 to 14 days.

Dr. L. Koontz testified that he was a surgeon and examined plaintiff in connection with Dr. McMurtry on April 12, 1911. The examination was thorough. Found no evidence of any injury to the spine. Never knew of a hemorrhage of the bowels being caused by a blow on the outside of the body. We do find hemorrhages of the bowels from other causes. Plaintiff's uterus and tubes were in normal condition. There was no trouble with the lungs, spine, or kidneys. The reflexes were normal. Plaintiff had neurasthenia, and this was not caused by any organic trouble. The painful conditions during menstruation are evidence of neurasthenia.

[1] The defendants were not entitled to a peremptory instruction because the petition

charged that the coach in which plaintiff was riding was derailed, while the proof showed that, as a matter of fact, it was not derailed, but remained on the track. The negligence specified in the petition is "the carelessness of the defendants and each of them in the construction, maintenance, and operation of the tracks, roadbeds, switches, and turn-outs and the operation of said trains and defects in said locomotives and cars" by which plaintiff's said injuries were produced and inflicted. It is true that the petition does allege that, by the joint and concurrent negligence and culpable carelessness of defendants, and each of them, the coach in which plaintiff was riding was wrecked, derailed, and thrown off the track, thereby seriously, permanently, and painfully injuring the plaintiff, etc. The derailment of the coach is not the ground of negligence relied on, but merely the result. The fact that the plaintiff alleged too much will not defeat a recovery.

[2, 3] There was evidence tending to show that the switch was turned under the train while in motion by a Louisville & Nashville switchman, and that the train itself was wrecked. If the train was wrecked by the negligence of the defendants, and plaintiff was thereby injured, she is entitled to recover, even though the coach in which she was riding was not derailed.

The railroads did not introduce any evidence to the effect that it was not a Louisville & Nashville switchman that threw the switch, or that the accident did not happen upon the Louisville & Nashville track. In the absence of such evidence, we think the testimony of Charlie Taylor was sufficient to take the case to the jury on that question. If it be true that the accident happened on an Illinois Central train, and that the switch was turned by a Louisville & Nashville switchman, and the tracks were leased by the Chicago, St. Louis & New Orleans Railroad Company to the Illinois Central Railroad Company, and jointly used by the Illinois Central Railroad Company and the Louisville & Nashville Railroad Company, a fact which seems to be admitted by the pleadings, then we conclude that, for the negligence of the switchman, all three of the railroad companies are liable. *McCabe's Adm'r v. Maysville & B. S. R. Co.*, 112 Ky. 861, 66 S. W. 1054, 23 Ky. Law Rep. 2328; *I. C. R. Co. v. Sheegog's Adm'r*, 126 Ky. 254, 108 S. W. 323, 31 Ky. Law Rep. 691; *L. H. & St. L. R. Co. v. Kesssee*, 108 S. W. 261, 31 Ky. Law Rep. 617.

[4] The court improperly permitted the plaintiff to testify that no one of the employes on the train on which she was riding assisted her off the train. She states that she did not inform any one that she was injured. Unless they knew that she was injured, there was no necessity for offering her any assistance.

[5] The court erred in permitting Dr. Wil-

hoit to detail in part the history of her case as given by plaintiff. Where a physician examines a witness for the purpose of treatment, he may testify to what the patient said. Where, however, he examines a patient for the purpose of qualifying himself as a witness, he will not be permitted to do so. Dr. Wilhoit admits that he examined plaintiff for the purpose of testifying. That being true, what the plaintiff said to him was not admissible as evidence. *C. & O. R. Co. v. Wiley*, 134 Ky. 461, 121 S. W. 402.

[6] It was likewise improper to permit Mrs. Harrison Roberts, over defendants' objection, to pronounce the plaintiff "a well woman prior to the alleged injuries." She was not an expert, and should not have been permitted to give an opinion on such matters. She had a right to describe the appearance of plaintiff, before and after the accident, and to tell any facts she knew in connection with the plaintiff's ability or lack of ability to move about and perform her usual household duties, thus leaving to the jury to determine the conditions from the facts so testified to. *Illinois Life Insurance Co. v. De Lang*, 124 Ky. 569, 99 S. W. 616, 30 Ky. Law Rep. 753.

[7] When counsel for defendants asked Miss Bertha Morgan if there was any such jolt or jar as would throw a person about in the seat, the court should have permitted the witness to answer. The same ruling should have been made when the witness T. E. Sanders was asked, "Did that stop of the train jerk you or anybody there in your view, Mr. Sanders?"

[8] The weight of the evidence is to the effect that no unusual jar or jerk attended the stopping of the train on which plaintiff was riding, and that plaintiff was not jerked or thrown at the time the train stopped. Conceding, however, that she was, the evidence is by no means satisfactory that the injuries which she claims to have suffered were caused by any jar or jerk which she received on the occasion in question. Prior to the time of the alleged injury, plaintiff suffered greatly from suppressed menstruation; so much so that her own witness and physician testified that it was frequently necessary to give her medicine to relieve this condition. This of itself was sufficient to account for the congested condition of the uterus, and it is altogether improbable that this condition was in any wise contributed to by any shock that she received on the train. Nor is there any definite testimony tending to show that the hemorrhages of the bowels from which she claims to have suffered were probably produced by a blow. Old and prominent physicians testified that, in a number of years of practice, they never knew of such a thing. To have caused this condition, the blow must have been a very severe one, and it is hardly probable that the plaintiff, had she received such a blow.

would have failed to call the attention of some one on the train to the fact, or would have failed to mention it to her friend, Mrs. Talkington, with whom she spent the day. If it be true that she suffered greatly from suppressed menstruation, as she herself admits, and as Dr. Hall testifies, and if it be true, as Dr. Woody says, that she was subject to great flooding when her periods came, it is much more probable that the neurasthenia from which she is suffering is due to this condition rather than to any blow that she received on the occasion of the wreck. The congested condition of her lungs has passed away. Her rib, if it was fractured, has grown together. Her kidney is not shown to have been permanently injured. We therefore conclude that a verdict of \$7,500, under these circumstances, is excessive.

Instruction No. 1 is not subject to the criticism that it assumes that the switchman operating the switch was the agent of the three railroad companies. The court told the jury that he was the agent or employé of the three defendants only in the event that the jury believed from the evidence that he was the employé of the Louisville & Nashville Railroad Company. On another trial the court, in submitting the questions set forth in instruction No. 2, will also submit the question whether or not plaintiff was thereby injured.

[8] It was not error to give an instruction authorizing the recovery of punitive damages against the Louisville & Nashville Railroad

Company. If, as a matter of fact, the person turning the switch was the employé of that company and turned the switch under the moving train, his conduct showed such a wanton and reckless disregard for human life as to authorize the infliction of exemplary damages. *Louisville & Nashville R. R. Co. v. Smith*, 135 Ky. 462, 122 S. W. 806.

[10] Our attention has been called to several instances where counsel for plaintiff went outside of the record in arguing the case to the jury. We have uniformly held that counsel, in making their arguments to the jury, should confine themselves to the law and the evidence, and should not go outside of the record for the purpose of bringing to the attention of the jury matters which have no bearing whatever on the questions at issue, and which are conveyed to the jury for the sole purpose of inflaming their passions and exciting their prejudice. *L. & N. R. Co. v. Crow*, 107 S. W. 808, 32 Ky. Law Rep. 1145; *Ky. Wagon Mfg. Co. v. Duganics*, 113 S. W. 129; *I. C. Ry. Co. v. Proctor*, 122 Ky. 92, 89 S. W. 714, 28 Ky. Law Rep. 598; *L. & N. R. Co. v. Payne*, 138 Ky. 274, 127 S. W. 993, Ann. Cas. 1912A, 1291. We deem it unnecessary to take up and consider the alleged instances of misconduct, but will content ourselves with calling the attention of counsel for the necessity of confining their arguments within the limits indicated.

Judgment reversed, and cause remanded for new trial consistent with this opinion.

DOLPHIN v. KLANN.

(Supreme Court of Missouri, Division No. 2.
Nov. 13, 1912. Rehearing Denied
Dec. 10, 1912.)

1. APPEAL AND ERROR (§ 1010*)—FINDINGS—CONCLUSIVENESS.

A finding by the court, rendered without the giving of any declarations of law, will not be disturbed where there is any evidence to support it.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3979-3982, 4024; Dec. Dig. § 1010.*]

2. BOUNDARIES (§ 33*)—PRESUMPTIONS—PLATS.

Under Rev. St. 1909, § 10290, requiring one laying out an addition to cause to be made an accurate plat particularly describing lots by numbers and their precise length and width, the law presumes that an accurate survey and marking on the ground formed the basis for a plat, so that the lots may be identified.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. §§ 146-152; Dec. Dig. § 33.*]

3. BOUNDARIES (§ 33*)—PLATS—SURVEYS.

A plat of an addition comprising land bordering on a railroad right of way showed that the course of the railroad was not straight. The lengths of the lines running east and west as boundaries of the lots were marked on the plat. The lots bordering on the railroad were irregular in shape, and the lengths of their boundaries were marked accordingly. An old fence was placed in accordance with courses and distances called for. Held to justify a finding that a survey was actually made before the making of the plat, and a surveyor seeking to establish different lines must show good grounds therefor.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. §§ 146-152; Dec. Dig. § 33.*]

4. BOUNDARIES (§ 8*)—MONUMENTS—CALLS FOR DISTANCES.

An unmarked line is not a natural or artificial monument, and does not, when called for in a deed, overcome a call for distance; but the latter will prevail.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. §§ 8-41; Dec. Dig. § 3.*]

5. BOUNDARIES (§ 8*)—SURVEYS—CALLS FOR DISTANCES.

Where a surveyor was not the county surveyor when he made a resurvey of a platted addition, and he did not give any data from which he made the survey, such as his starting points, the survey did not overcome the calls for distances in the plat.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. §§ 8-41; Dec. Dig. § 3.*]

6. BOUNDARIES (§ 55*)—ILLEGAL SURVEYS.

A survey which violates the act of Congress requiring that, in subdividing fractional sections on the west side of a township, the surplus over 40 chains in width shall go to the west side of the section, is illegal.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. §§ 278, 279; Dec. Dig. § 55.*]

7. EJECTMENT (§ 86*)—POSSESSION OF DEFENDANT—TITLE OF PLAINTIFF.

Where, in ejectment, defendant was in possession claiming under a plat of an addition as actually laid out on the ground, plaintiff could not recover except by affirmatively showing a better right.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 238-245; Dec. Dig. § 86.*]

8. BOUNDARIES (§ 53*)—PRESUMPTIONS—SURVEYS.

Where a survey is illegal in a matter which the court knows about, it will not presume that it is correct in those particulars as to which it is not informed.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. §§ 264-267; Dec. Dig. § 53.*]

9. BOUNDARIES (§ 10*)—ADDITIONS—PLATS.

A plat of an addition must be taken as a whole, and a corner will not be so changed as to cause a shifting of the position of all the lots in the addition.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. §§ 90, 91; Dec. Dig. § 10.*]

Blair, C., dissenting.

Appeal from Circuit Court, Greene County; Jas. T. Neville, Judge.

Action by John Dolphin against Bertha Klann. From a judgment for plaintiff, defendant appeals. Reversed and remanded for new trial.

This is an ejectment suit to recover possession of a strip 12½ feet wide, which the plaintiff alleges is the east part of lot 20 in block 2 of Chamberlain's addition to Springfield. The defendant claims that the strip constitutes the west part of lot 21 in said block. It is agreed that plaintiff owns lots 19 and 20 and that the defendant owns lots 21 and 22, and the dispute is as to the boundary line. The case was tried without a jury. On the written request of defendant, the court made a special finding of the facts and found for plaintiff. The defendant has appealed.

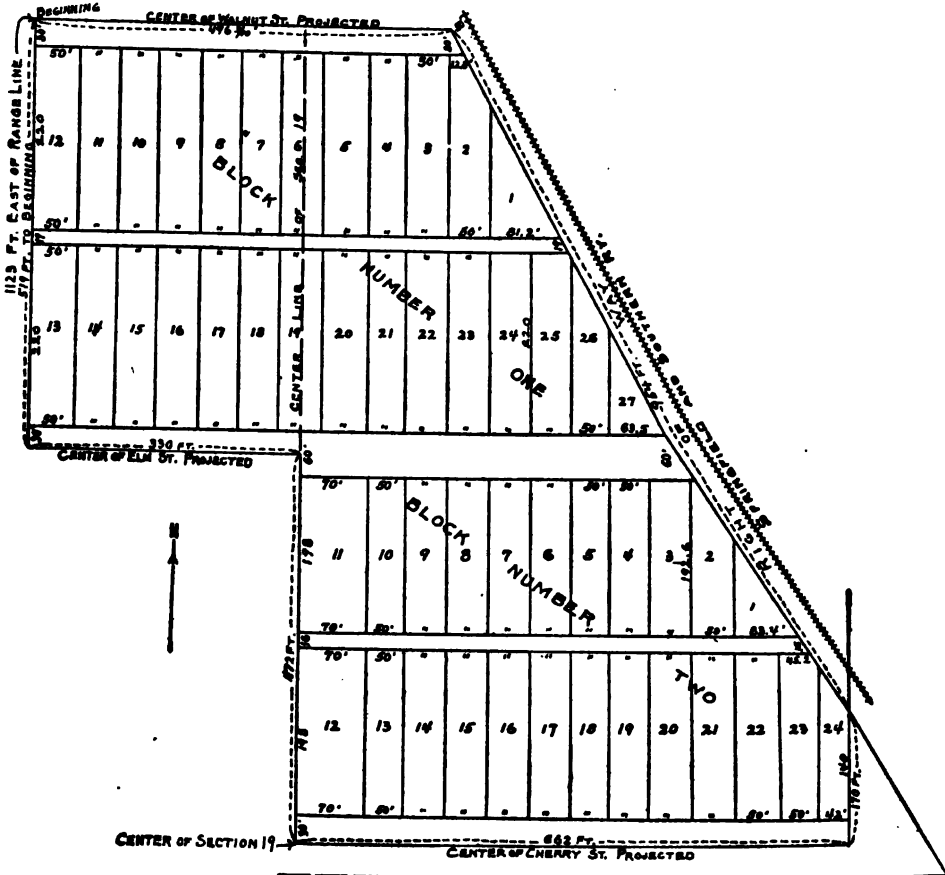
On March 21, 1887, one McCann conveyed to Chamberlain a tract of land described as follows: "Beginning in the center of Walnut street as laid down in Robberson's addition to the city of Springfield, Mo., eleven hundred and twenty-three (1,123) feet east of the range line dividing range twenty-one (21) and twenty-two (22); thence east along center of Walnut street projected four hundred ninety-six and three-tenths (496.3) feet to the west line of the right of way of the Springfield & Southern Railway; thence south and east on and along said west line of the right of way nine hundred fifty-four (954) feet to a point on the east line of the west half of the southwest quarter of the northeast quarter of section nineteen (19), township twenty-nine (29) north, range twenty-one west of the fifth (5th) P. M.; thence south on said line one hundred and seventy (170) feet to the center of Cherry street projected; thence west on and along said center of Cherry street projected six hundred and sixty-two (662) feet to the center of said section nineteen (19); thence north and along the line dividing the east and west halves of section nineteen (19) four hundred and seventy-two (472) feet to the center of Elm street projected; thence west on and along the center of said Elm street projected three hundred and thirty (330) feet; thence north five hundred and

nineteen feet to the center of Walnut street projected; the place of beginning. Reserving for the ordinary purposes of roads and highways a strip of thirty (30) feet off the north and south side and sixty feet through the center portion running from the point where Elm street projected joins this tract of land to the right of way of the Springfield & Southern Railway."

On April 5, 1887, Chamberlain filed a duly executed and acknowledged plat of said addition in the office of the recorder of deeds, in which the land included was described just as in the deed to him. The plat is as follows:

where defendant claims that it is, and that on a part of that line as claimed by the defendant there was, shortly before the trial, an old fence which had inclosed defendant's garden.

The plaintiff claims that the east boundary of the W. ½ of the S. W. ¼ of the N. E. ¼ of the section is 18 feet further east than is called for by the distance of 954 feet along the right of way, and that the description in the plat should be so construed as to hold that such line is the east boundary of the addition. Plaintiff also claims that the center of the section is 12½ feet further east than is called for by such measurements.



It is conceded by the evidence on both sides that the starting point and the distance along the north boundary of the addition are correct, and that by following the right of way of the railroad southeastwardly the distance of just 954 feet called for, and running thence south 170 feet just reaches the center of Cherry street, and that running thence west with Cherry street 662 feet just reaches an old post and wire fence, which runs a short distance north and is thence continued by a hedge fence; and such evidence of both sides shows that, with the boundaries of the addition thus run, the line between the plaintiff and defendant is

Mr Culler, who had been county surveyor for 3½ years, made a survey by which he located the line between the parties at the place contended for by the defendant.

Mr. Phillips, who had been county surveyor and city engineer and surveyor under the government, testified as follows: "Q. Now I will ask you, in accordance with that, where the west line of Mr. Dolphin's lot No. 19 would be, according to Mr. Culler's survey there? Where would it be in reference to the poles of the street railroad company in the street there? A. It would be in the neighborhood of 12 feet west. Q. In the street? A. Yes, sir. Q. Now it would come

clear outside of the poles of the street railway there? A. I think so. Q. What lot was taken for that street? A. Eighteen. Q. Now Mr. Schmook asked you about the west line, is it? A. For a short distance it is an old post and wire fence running north, and then— Q. Well, next to Cherry street, what sort of a fence is it? A. At the southwest corner of the addition? Q. Yes. A. It is an old wire fence, and then runs into a hedge fence. Q. Where is that fence in reference to the center line of the addition there, the line mentioned in the description in the plat here? A. It is 12 feet further west. Q. I will ask you if you know whether on the east of that addition if there is a tract of land, according to Mr. Culler's survey if he is correct, if there is any land not claimed by anybody in the addition there? Is there a strip over there on the east? A. There would be; yes, sir. Q. Of how much? A. It would leave 18 feet over there. Q. Now take this fence on the west which you say—the hedge fence which you say is 12 feet west of the center line; how does that correspond with the line of the tract south of that, with the west line of Pickwick place? A. It would correspond very closely. Q. That fence or that line as you claim it does that correspond with the west line of Pickwick place? A. Yes, sir; it is on the line with those old trees, an old fence before the old fence was taken down. Q. The line through the center of the section as you found it there corresponds with the west line of Pickwick place? A. Yes, sir; it corresponds with the line of trees. Q. Have you surveyed that section 19 pretty generally? A. Yes, sir. Q. You know where the section lines are? A. Yes, sir."

He also testified: "Q. Now did you and Mr. Culler make that survey in the center of Walnut street along the railroad right of way 954 feet? A. We did. Q. Now when you came to the 954 feet were you to the center of Cherry street? A. Not quite. It don't quite reach the intersection of Cherry street. Q. Now when you got 954 feet you got to the section line, or the half section line, which is it? A. It is a quarter quarter line. But it don't reach it. Q. How many feet east or west of that quarter quarter line is it? A. About 18 feet. Q. Which way? A. This 954 feet stops short of it. Q. Now what section is that in? A. Nineteen. Q. That is in section 19. Is section 19 a section that contains lots? A. Yes, sir. Q. On the west? A. Yes, sir; fractional section. Q. The consequence is that they measured what would be to the section line if the forties were exact forties? A. Yes, except two feet. Q. Are the lots there full? A. They are more than full. They are 8 feet full. They have allowed 2 feet. Q. So this 954 feet call lacks about 18 feet, is it 18 feet west? A. The 954 feet strikes a point 18 feet west of this quarter quarter

line. Then, if we run straight south, we would run parallel with this line 18 feet from it. Q. So that is 18 feet west of this quarter quarter line? A. Yes, sir. But if we stop at the 954 feet and proceeded from there, as we did, there is where we located the iron pin. Q. If you go on to where you strike the quarter quarter line before you turn south—well now the way you did, going the 954 feet, then the next call south is 170 feet? A. Yes, sir." Also: "Q. Then running southeast along the west line of the right of way 954 feet, and from there south to the center line on Cherry street, and from there west to the old fence, allows for all of the lots in this addition according to the plat fronting on the north side of Cherry street? A. Yes, sir. Q. And it was based upon that that you and Mr. Culler agreed and set this iron pin? A. We supposed that was the way it was surveyed. The Court: Q. If you go to the range line on Walnut street and then survey east 1,123 feet to the beginning point, and then make all the calls in this plat to the southwest corner of the addition, you will be in the center of Cherry street on the line of that old fence? A. Yes, sir. Q. You don't know whether it is west of the center of the section 12 feet or not? A. That is according to the distances given in the calls. Q. If you go the distances given in the calls, you will wind up on Cherry street on that line? A. Yes, sir. Q. But you will never strike the east line as called for as one of the calls? A. Possibly, not quite. Q. Did you survey that to see that the center of the section would be 12½ feet east of the old hedge fence? A. Yes, sir. Yes, I run both section lines through there." There is no evidence showing that there was ever at any time any monument or object marking the location of the center line of the section or of the east line of the W. ½ of the S. W. ¼ of the N. E. ¼ of the section at the places where the plaintiff claims that such lines are; and there is no evidence that such lines were ever so located by a survey except the evidence of Surveyor Phillips as above set out.

Plaintiff's evidence showed that the 18-foot strip on the east is not claimed by any one adversely to the owner of the adjacent lot, and there is no evidence that the 12½-foot strip on the west of the addition is so claimed. Prior to the filing of the plat, Cherry street was laid out and opened along the south line of the addition at the place called for by the plat.

John Schmook, of Springfield, for appellant J. T. White, of Springfield, for respondent.

ROY, C. (after stating the facts as above). [1] The verdict and finding having been for the plaintiff, and there being no declarations

of law, the verdict should not be disturbed if there is evidence to support the finding. We hold there is no such evidence for the following reasons:

[2] I. Section 6569, R. S. 1879, now section 10,290, R. S., required that any one laying out an addition should "cause to be made out an accurate map or plat thereof particularly setting forth and describing; * * * all lots for sale, by numbers, and their precise length and width." There are two strong reasons for finding that the lots and streets and their location were accurately surveyed and marked out on the ground as a basis for the plat. The first reason is that the law presumes that such survey and marking were made. We have no case in this state expressly so holding; but in *Burke v. McCowen*, 115 Cal., loc. cit. 485, 47 Pac. 368, it is said: "The making and filing of the plat or map of the Ukiah North addition implies that said addition had been surveyed, and that the map or plat thereof filed September 18, 1889, was based on said survey, and that said survey was marked upon the ground so that the streets, blocks, and lots could be identified." That court then cites on the point *McDaniel v. Mace*, 47 Iowa, 510; *Banker v. Caldwell*, 8 Minn. 103 (Gil. 46); *Jackson v. Freer*, 17 Johns. (N. Y.) 29, 31; *Jackson v. Cole*, 16 Johns. (N. Y.) 261. Those cases are not all directly in point, but they support the general proposition.

[3] II. The plat bears on its face facts which, taken in connection with the conceded extrinsic facts, show that the plat was based on a survey not only of the boundaries of the addition but of the interior lot lines. The plat shows that the course of the railroad is not straight, but that it curves to the eastward as it goes southward. The lengths of the lines running east and west as boundaries of the lots are marked on the plat. The lots bordering on the right of way of the railroad are irregular in shape, and the lengths of their boundaries are marked accordingly. It would have been difficult, if not impossible, to correctly indicate such distances without such survey. We have a right to take notice of the historical fact that on the invention of wire fencing hedges were no longer planted in this state, and that the hedge fence at or near the southwest corner of the addition was there when the addition was platted. We have a right to draw the inference that such fence was adopted by the maker of the plat as the west boundary; in other words, as the center line of the section. It was right on the line called for by the courses and distances. The old fence inclosing a part of defendant's premises shows that it was placed there in accordance with such courses and distances disregarding the two lines as now claimed by plaintiff for the east and west boundaries of the addition. In *Whitwell v. Spiker*, 238 Mo., loc. cit. 638,

142 S. W. 251, it was said by Brown, J., speaking of government monuments and surveys: "These in thickly settled communities, and especially in cities, become obliterated, and their places are supplied by houses, fences, and other visible things that have been planted or adopted for that purpose. When this has been done, they may be used as landmarks for all, and their removal does not, of course, remove the land which has been bought and sold with reference to them." Any surveyor who undertakes to establish a different line should be required to show "good grounds for the faith that is in him."

[4] III. Even if it were true, as contended for by the plaintiff, that the east boundary of the addition running south from the railroad is 18 feet further east than called for by the distance given along the right of way, that boundary would not, in such case, be the east boundary of the addition. That line was never marked by any monument or object of any kind. Such an unmarked line does not constitute either a "natural monument" or "artificial mark," and does not, when called for in a deed, overcome the call for distance. It was so held by *Valliant, J.*, in *Guitar v. St. Clair*, 238 Mo., loc. cit. 627, 142 S. W. 291, and in *Koch v. Gordon*, 231 Mo., loc. cit. 652, 133 S. W. 609. The same rule holds good as to plaintiff's claim that the center of the section is 12½ feet east of the fence. We hold that the call for 954 feet from the center of Walnut street along the right of way prevails over the call for an unmarked subdivisional line of the section, and that the courses and distances around to the southwest corner of the addition prevail over the unmarked line which plaintiff claims to be the center line of the section, and that would be the case even though it were the true line.

[5] IV. We hold that there is no evidence sustaining plaintiff's claim as to the location of the boundaries of the addition. The witness Phillips, on whose sole testimony the contention of plaintiff is based, was not the county surveyor for 3½ years at least before the trial. There is no evidence that he ever, while such county surveyor, located those lines. It was said by *Gantt, J.*, in *Granby Mining Co. v. Davis*, 156 Mo. 422, 57 S. W. 126, that, where the interior corners of sections have been fixed by county surveyors, such corners as thus fixed will be binding in the absence of proof that such surveyor has violated the law in his methods. The survey or surveys alleged to have been made by Phillips are not shown to have been made by him while such surveyor. He does not give any data from which he made such surveys, such as his starting points, etc. In *Jones v. Lee*, 77 Mich. 42, 43, 43 N. W. 855, it was held that the testimony of surveyors as to their surveys where the data from which the sur-

veys were run were not given has no force or effect, and that plats so made and in evidence did not give the data necessary to measure the rights of the parties.

[8-8] V. The surveyor Phillips did not explain how, in finding the center of the section, he allowed $7\frac{1}{2}$ feet surplus in the width of the west half of the S. W. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of the section. That makes a surplus of 30 feet in the width of the E. $\frac{1}{2}$ of the section. That is a violation of the act of Congress which requires that, in subdividing fractional sections on the west side of the township, the surplus over 40 chains in width shall all go to the west side of the section. *Vaughn v. Tate*, 64 Mo. 491; *Knight v. Elliott*, 57 Mo. 317. It thus appears affirmatively that the Phillips surveys were not legal. If it be said that the plat gives a surplus of two feet in the south boundary of the W. $\frac{1}{2}$ of the S. W. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$, which is equal to 8 feet surplus in the width of the E. $\frac{1}{2}$ of the section, we answer that such fact does not help the plaintiff. The defendant is in possession claiming under the plat as actually laid out on the ground, and the plaintiff cannot displace her except by affirmatively showing a better right. We have not overlooked the fact that, if the Phillips surveys were otherwise correct, the allowance of a surplus by Phillips was favorable to the defendant and threw the center of the section further west than it would otherwise have been. It should, however, suffice to say, that those surveys being illegal in the matters which we know about them, we will not presume that they were correct in those particulars as to which we are not informed.

[9] VI. Finally, moving the southwest corner of the addition $12\frac{1}{2}$ feet east of that fence will change the direction of the west boundaries of every lot in block 2. It will shift the position of every one of those lots to the eastward. It will change the width and contour of the fractional lots. It was said by *Valliant, J.*, in *Guitar v. St. Clair*, supra: "The plat is not to be taken to pieces, it is to be taken as a whole, and the rights of the city and of individuals, in so far as they are derived from the plat, date from its filing." We hold that the plat cannot be warped to the right or left. To do so in this case would be to destroy the addition as laid out, and substitute another and a different one therefor.

The judgment is reversed.

BLAIR, C., dissents.

PER CURIAM. The foregoing is adopted as the opinion of the court.

NOTE.—On motion for rehearing, cause is remanded for new trial.

STROTHER et al. v. BARROW.

(Supreme Court of Missouri, Division No. 1.
Nov. 30, 1912.)

1. APPEAL AND ERROR (§ 843*)—QUESTIONS REVIEWABLE — RULING ON DEMURRER TO EVIDENCE.

An assignment complaining of the overruling of a demurrer to the evidence raising questions specified in other assignments of error fills no separate function on appeal, and will not be considered.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3331-3341; Dec. Dig. § 843.*]

2. COMMON LAW (§ 7*)—CHARITIES (§ 10*)—ENGLISH STATUTES—ADOPTION.

The statute of charitable uses (St. 43 Eliz. c. 4) is a part of the common law of the state, but its enumeration of charities is not exclusive, and there are other objects deemed charitable in a legal sense.

[Ed. Note.—For other cases, see *Common Law*, Cent. Dig. § 7; Dec. Dig. § 7;* *Charities*, Cent. Dig. § 34; Dec. Dig. § 10.*]

3. ADVERSE POSSESSION (§ 4*) — AGAINST WHOM CLAIMED—CHARITIES—"CHARITABLE USE."

A grant to trustees of a church to hold the premises in trust for the use of the congregation of the church, and in trust to control the use and occupancy of a building in process of erection on the land described for a place of worship, is a grant for a charitable use within Rev. St. 1909, § 1883, providing that limitations shall not extend to lands granted to any pious or charitable use.

[Ed. Note.—For other cases, see *Adverse Possession*, Cent. Dig. §§ 7-10, 12-57; Dec. Dig. § 4.*]

For other definitions, see *Words and Phrases*, vol. 2, p. 1074.]

4. CHARITIES (§ 30*) — ABANDONMENT — EVIDENCE.

The evidence to establish abandonment of a charitable use created by deed must be clear and conclusive.

[Ed. Note.—For other cases, see *Charities*, Cent. Dig. § 61; Dec. Dig. § 30.*]

5. CHARITIES (§ 30*) — ABANDONMENT OF CHARITABLE USE—ELEMENTS.

Abandonment of a charitable use involves the elements of intent to abandon permanently and the physical fact of nonuser for the charitable purpose, and the two must conjoin and operate at the same time.

[Ed. Note.—For other cases, see *Charities*, Cent. Dig. § 61; Dec. Dig. § 30.*]

6. CHARITIES (§ 30*) — ABANDONMENT OF CHARITABLE USE—EVIDENCE—SUFFICIENCY.

Evidence held to support a finding that a charitable use created by a deed conveying land in trust for religious purposes was not abandoned, and limitations did not run against the land conveyed.

[Ed. Note.—For other cases, see *Charities*, Cent. Dig. § 61; Dec. Dig. § 30.*]

7. APPEAL AND ERROR (§ 1010*)—FINDINGS—CONCLUSIVENESS.

A finding sustained by testimony is conclusive on appeal.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3979-3982, 4024; Dec. Dig. § 1010.*]

8. CHARITIES (§§ 10, 36*)—CONVEYANCES FOR RELIGIOUS PURPOSES — CONSTRUCTION — "CHARITY."

A trust created by a deed conveying land to trustees of a Presbyterian church in trust

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

for the use of the congregation of the church as a place of worship is not violated by a transfer to a Universalist church; any gift not inconsistent with law and promotive of the amelioration of the condition of mankind, or the diffusion of useful knowledge, being a "charity."

[Ed. Note.—For other cases, see Charities, Cent. Dig. § 34; Dec. Dig. §§ 10, 36.*]

For other definitions, see Words and Phrases, vol. 2, pp. 1074-1088; vol. 8, p. 7600.]

9. EJECTMENT (§ 95*)—TITLE OF PLAINTIFF—EVIDENCE—SUFFICIENCY.

In ejectment by a senior grantee against a junior grantee of the same grantor for a strip of land claimed by defendant, evidence held to justify a finding that the strip passed to the senior grantee.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 280-295; Dec. Dig. § 95.*]

10. APPEAL AND ERROR (§ 695*)—QUESTIONS REVIEWABLE—SUFFICIENCY OF EVIDENCE—RECORD.

Where the testimony of a surveyor who made a survey is meaningless without a plat to which he referred, and the plat is not in the record, the sufficiency of his testimony to support the finding will not be considered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2911-2914; Dec. Dig. § 695.*]

11. CHARITIES (§ 36*)—CONVEYANCES—VALIDITY—PRESUMPTIONS.

Where land conveyed to the trustees of a Presbyterian church in trust for the use of the congregation for religious purposes was conveyed to "the Universalist general convention, a corporation existing under the laws of the state of New York," and the deed was silent as to the business character of the corporation, the presumption was that the conveyance was for a religious use, so that it and one claiming title under it acquired title.

[Ed. Note.—For other cases, see Charities, Cent. Dig. § 65; Dec. Dig. § 36.*]

12. ACKNOWLEDGMENT (§ 38*)—CORPORATIONS (§ 444*)—EXECUTION—ACKNOWLEDGMENT—SUFFICIENCY.

Under Rev. St. 1909, §§ 2790, 2799, 3001, authorizing a corporation to convey real estate by deed, sealed with its seal, and signed by the president, and authorizing the use of a form of certificate of acknowledgment prescribed, etc., a deed executed by a corporation reciting in the testimonium clause that in witness thereof the chairman of the board of trustees of the corporation and the secretary thereof have set their hands and seal of the corporation, followed by their signatures and the corporate seal, and acknowledged before a notary certifying that the officers were known to him, and that they acknowledged that they signed the deed on behalf of the corporation as officers for the purposes therein mentioned, was sufficiently executed and acknowledged.

[Ed. Note.—For other cases, see Acknowledgment, Cent. Dig. §§ 217-220; Dec. Dig. § 38; Corporations, Cent. Dig. §§ 1779-1781; Dec. Dig. § 444.*]

Appeal from Circuit Court, Pike County; D. H. Eby, Judge.

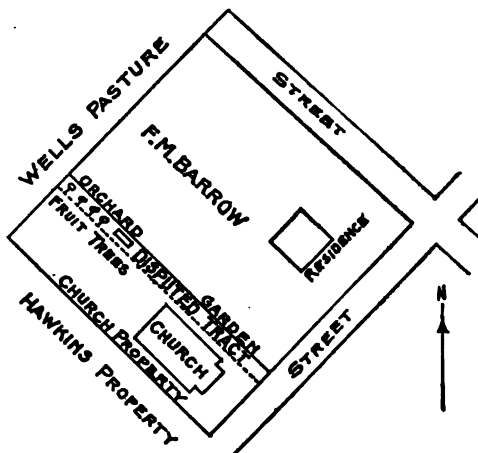
Action by Louis A. Strother and others against Franklin M. Barrow. From a judgment for plaintiffs, defendant appeals. Affirmed.

Hostetter & Haley, of Bowling Green, and J. O. Barrow, of Vandalla, for appellant. T. B. McGinnis, of Bowling Green, I. C. Dempsey, of El Paso, Tex., and Tapley & Fitzgerald, of Bowling Green, for respondents.

LAMM, J. Ejectment. Defendant appeals from a judgment in favor of plaintiffs for an undivided two-sixths interest in a tract, situate in the hamlet of Ashley, Pike county.

Ashley was not laid out true to the cardinal points of the compass. Its subdivisions run from the northeast to the southwest. Among them is a square acre once belonging to Boyd, the common source of title. Boyd deeded 70 feet in rectangular shape off the southwest end of his acre to the Old School Presbyterian Church, putting the title in named trustees. The residue he deeded to his daughter, Mrs. Dorsey, and she conveyed to defendant. The church 70 feet passed by mesne conveyances (so plaintiffs claimed) to plaintiffs as trustees of the Ashley Church of the Methodist Episcopal Church South. It will be observed that plaintiffs, who sued for all, were awarded possession of an undivided two-sixths interest only, and abided the judgment. One phase of the dispute is over the boundary line between the church's 70 feet and Barrow's residue. Another is adverse possession. The parcel in controversy is a strip 11 feet wide at one end, 6 feet 10 inches at the other, and 3.16 chains long.

A map furnished by appellant is, so far as it goes, accurate enough to aid in grasping the situation, viz.:



The petition was conventional. The answer was a general denial coupled with two affirmative pleas (one the 10-year and the other the 30-year statute of limitations). The reply was conventional. At the close of plaintiffs' case and again at the close of the whole case, defendant interposed a demurrer to plaintiffs' evidence, which was overruled.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes 151 S.W.—61

and he saved the point. No other instructions were asked on either side. The trial was to the court without the aid of a jury, and, at defendant's request, the court made a finding of facts. Facts essential to the determination of questions raised will appear in connection with rulings thereon.

The assignments of error are: "(1) The court erred in refusing defendant's instructions in the nature of a demurrer to the evidence offered at the close of plaintiffs' testimony and at the close of all the testimony. (2) The court erred in refusing to give effect to defendant's adverse possession, which he affirmatively found to have continued from 1890 down to the date of the institution of the suit. (3) The court erred in finding that the strip of ground in controversy was not conveyed by the deed from Cary A. Boyd to Elizabeth Dorsey and by the deed from Elizabeth Dorsey to the defendant Barrow. (4) The court erred in interpreting the deed from the alleged officers of the Old School Presbyterian Church to the Universalist General Convention, a New York corporation. (5) The deed purporting to be from the Universalist General Convention, a corporation, to the trustees of the Methodist Episcopal Church South, dated October 25, 1905, was ineffective to convey any title and the acknowledgment thereto was fatally defective." Of these in their order.

[1] 1. Of the demurrers.

In effect, the demurrers search, under guise of a general form, errors specified in assignments 2, 3, 4, and 5. Hence a disposition of those specifications will be tantamount to an appellate ruling on the demurrers. Accordingly we pass by that assignment *eo nomine*, as filling no separate function on appeal.

[2, 3] 2. Of adverse possession.

The court found that defendant had been in possession under claim of title uninterrupted and adversely since the year 1890 up to the date of the suit, 1908. To break the force of that finding, it also found that the statute of limitations could not be invoked as a bar to plaintiffs' claim or to create title in defendant. *Contra*, that section 1886, R. S. 1909, applied to the facts—that section reading: "Nothing contained in any statute of limitation shall extend to any lands given, granted, sequestered or appropriated to any public, pious or charitable use, or to any lands belonging to this state." To break the force of that ruling, defendant contends that, assuming the original grant to the trustees of the Old School Presbyterian Church to be for a "pious and charitable use," yet on the facts here that use was abandoned; whereat (on such abandonment) the statute began to run and continued to run, although a pious use of the property was subsequently resumed. In outline such is the controversy under this head.

We are of opinion the ruling nisi was correct. This, because:

(a) For present purposes it will be assumed that the strip in dispute passed by the deeds in plaintiffs' chain of title, and not by the deeds in defendant's. Whether that assumption be correct will be looked to presently. On that assumption, out of abundant caution, we reserve the question whether a stranger to conveyances creating a pious or charitable use can, in aid of his claim of adverse possession by limitation, raise the point of its abandonment. Whether the grantor who conveyed to the use or his descendants under the notion of a reverter may make the point, or whether some proper party suing in equity to regulate the use may assert rights under a nonuser or abandonment, we need in no wise consider. In this discussion we take the point as we find it, and shall assume, without deciding, that defendant can make it.

(b) From ancient times a pious use has been considered a charitable use. The quoted statute speaks of both, but in a broad sense the one includes the other. The principles of law governing one govern the other. Under the old English act, known as the "Statute of Charitable Uses (St. 43 Eliz. c. 4)" money and lands granted for the repair of churches created a charitable use. That act is part of our common law, but it has been held that its enumeration of charities is not preclusive. There are other objects deemed charitable in a legal sense (*Buchanan v. Kennard*, 234 Mo. 117, 136 S. W. 415, 37 L. R. A. [N. S.] 993), and a grant for the building of a church has always been considered as raising a charitable use; religion being but part and parcel of charity for purposes of jurisprudence. Indeed, defendant's counsel concede impliedly that the original grant from Boyd was to a pious use within the meaning of section 1886, *supra*. The deed from the common source of title, Boyd, passed the title in 1870 to named trustees, elders of the Old School Presbyterian Church in the town of Ashlley, in consideration of \$1, and the further consideration of grantor's "love, regard, reverence, attachment and affection for said Old School Presbyterian Church." The grant ran to said elders and their legal successors in office. In ordinary warranty form its habendum clause reads: "To have and to hold the premises aforesaid with all and singular the rights, privileges, immunities and appurtenances thereto belonging or in any wise appertaining unto the said parties of the second part and unto their legal successors to be elected as aforesaid forever, in trust, for the use of the congregation of said Old School Presbyterian Church, and in trust, that the said parties of the second part and their successors to be elected, as aforesaid, shall have the control and direction of the use and occupancy of the building now being erected on said described lot,

when erected, for the worship of God and the transaction of any business that has for its object the promotion of the Redeemed Kingdom."

Now, it is hornbook doctrine that grants for a pious or charitable use (as this evidently was) are favored by the law. The legal maxim is: The law favorem charity. Wing. 144. Another is: The church is to be more favored than a person. "*Ecclesiae magis favendum est quam personae.*" So, too, the idea of perpetuity is of the very essence of such grant. "If the court considered that it was for the public benefit that the property in question should be devoted forever to fulfilling the purpose named, it held that purpose good. Thus it held good all trusts for promoting the established religion, also all trusts for keeping up schools and hospitals, and many other trusts. These trusts, for purposes which the law considers it for the public benefit to perpetuate forever, are called charitable trusts. This is the only general definition which can be given of the word charity." Tyssen on Charitable Bequests, p. 5.

[4] In judicially approaching, then, the question of abandonment, the right doctrine needs must be that the law looks with disfavor on the abandonment of a pious or charitable use. Therefore on a priori principles the evidence required to establish abandonment should be of a stringent and conclusive character, leaving no reasonable loophole for escape from the conclusion.

[5, 6] Abandonment of a pious use involves two elements, to wit: (1) The intent to abandon permanently; and (2) the physical fact of nonuser for religious purposes. These two elements must conjoin, and both be operative at the same time, or there can be, in the very nature of things, no abandonment. After a careful study of the record, we are of opinion the evidence did not satisfactorily show the presence of either element. The most that can be said for that evidence was that religious services at times languished, at spells was discontinued, and was then resumed. The fact of resumption itself suffocates the idea of an intent to abandon. There was some testimony that defendant used the back yard of the church premises to garden for a season or so, and one season stored potatoes in the church. He was janitor while the Universalists were in control, had the key, and what he did on his own initiative in making a wareroom of the edifice may tend to show desecration by him, but does not show abandonment of the pious use by owners. Shortly before the Universalists sold to the Methodists, they moved the Bible, organ, pulpit, bell, and most of the benches to a church they controlled in a neighboring village. On the heels of that denuding act, they conveyed to the Methodists by a deed couched in terms not only precluding the idea of abandonment, but re-consecrated the church to religious services.

Witness the following clause: "In trust that said premises shall be used, kept and maintained and disposed of as a place for divine worship," etc. The trial court found against defendant on the question of abandonment. There was testimony sustaining that finding.

[7] With a law case in that fix, we are bound by his finding on the fact. *Donaldson Bond & Stock Co. v. Houck*, 213 Mo. loc. cit. 426, 427, 112 S. W. 242. With abandonment eliminated, there can be no question but what section 1886, supra, avoids the application of any statute of limitations. The trial court rightly so ruled.

[8] (c) It is faintly argued (or suggested) that the Boyd deed to the Presbyterians should be construed to mean that the property must always be used by that particular congregation of the Old School Presbyterian Church, and that any use of the premises by some other congregation would be a violation of the trust imposed by the deed. But is not that an exceedingly narrow and sour view? No authority is cited to sustain it, and, if there had been, we would hesitate long before following it. In what just sense would it be an abandonment of a pious use to have one religious denomination take over by purchase the church edifice of another? Are not all Christian churches, whatever their peculiar tenets of mere creed, at bottom devoted to the same pious use—the cure of souls? Mr. Binney's definition of a charitable use which courts are fond of using, used by him in his argument in *Vidal v. Philadelphia*, 2 How. (U. S.) 127, 11 L. Ed. 205, is: "And whatever is given for the love of God or for the love of a neighbor in the Catholic and universal sense, given from those motives and to these ends, free from the stain and taint of every condition that is personal, private or selfish, is a gift for charitable uses." There are cases in which that definition has been held too restrictive, but we know of none holding that a grant coming within that definition would not raise a charitable use. This court has given a broader definition (*Missouri Historical Society v. Academy of Science*, 94 Mo. loc. cit. 466, 8 S. W. 348), viz.: "Any gift not inconsistent with existing laws, which is promotive of science, or tends to the education, enlightenment, benefit, or amelioration of the condition of mankind, or the diffusion of useful knowledge or is a public convenience, is a charity." In the light of the scope and intentment of such definitions, how could it be justly ruled that the mere transfer of title and the custody of a church of one Christian denomination to another is an abandonment of a pious use? Any Christian church is but a hospital for souls. A curate is but a physician to souls (à cure). So far as this court can see, all churches have that end in view as their *raison d'être*.

Finally, we recur to the question whether this defendant can make the point at all. Mark, those who made the grant do not

complain. Those who received it are standing on it, and rest content. Vide *St. Louis Public Schools v. Risley*, 28 Mo. loc. cit. 419, 75 Am. Dec. 131, *arguendo*. This is not a proceeding in equity to regulate the misuse of a charity; and by what right does a stranger to the grant suggest its invalidity? Is that question not *res inter alios acta* as to him? So, under the proof, as a member of the Universalist Church he enjoyed the charitable benefits of the grant, and it comes with ill grace from him to now impugn it. None of these suggested questions are argued in briefs, and consequently they are reserved.

[9] 3. Did the court err in finding that the strip in dispute was not conveyed by, nor was it within the calls of, the deeds in defendant's chain of title?

We think not. In the first place, the conveyances under which defendant holds are junior conveyances to the original grant to the Presbyterians. Defendant purchased what remained of the Boyd acre after the 70 feet were conveyed off of the southwest end, and the conveyances in his chain refer to the Presbyterian deed, and, in terms, excepted the church tract therefrom. In the next place, the chief (if not the whole) force of defendant's claim rests on the statute of limitations and not on a grant by deed. Moreover, on defendant's theory the side of the church building is on the division line between the 70 feet and the residue of the acre. On plaintiffs' theory the little strip in dispute lies between the church building and defendant's grant. In this condition of things the surveyor of Pike county, Beauchamp, made a survey. The deeds in both chains of title call for corner stones, courses, distances, etc. He testified he found those stones and ran his lines in accordance with the calls of the deeds. He testified his survey was correct and based on plats, conveyances, cornerstones of former surveys, etc. He found, and so testified, that the disputed strip lies within the description in plaintiffs' chain of title, and not within that of defendant's. He was examined in connection with a plat which is not reproduced in this record. His testimony relates to a lettering on that plat indicating the distances, courses, cornerstones, beginnings, endings, etc., mentioned by him. It is now insisted that his cross-examination established the inaccuracy of his survey.

[10] The laboring oar was on defendant to impugn the official survey. *Carter v. Spracklin*, 151 S. W. 451, just handed down. But, absent the plat concerning which he testified and the lettering to which he referred, it is impossible to say that defendant's contention is correct, for much of the testimony is meaningless without the plat and letters. As the impossible excuses persons, so it excuses judges. Some of the precepts of the law (of its very bones and framework) are: No one is bound to do what is impossible.

2 Bou. 116. Impossibility is an excuse in law. "*Impotentia excusat legem*." Coke, *Litt.* 29a. We have enough to do, to do what we can, not what we can't. The point is ruled against defendant.

[11] 4. Of error in interpreting the deed from the Presbyterians to the Universalists.

As developed in appellant's brief and argument, error in this assignment hinges on the proposition that under that deed there was a break in the pious use. The idea seems to be that the grant in the Presbyterian deed was to "The Universalist General Convention, a corporation existing under the laws of the state of New York." The deed being silent on the business character of that corporation, and there being no reference in it whereby it can be seen on its face that the grant was for a pious use, we are asked to hold as a matter of law that it was a grant to a use not pious. The inference being that with such a break in the use, the title itself fails, and plaintiffs must be cast in a strictly legal action of ejectment. But we shall not so hold. When the Universalist General Convention subsequently conveyed title to the Methodists, it, at the first chance it had to speak on the point, described itself as a religious corporation. We take its word for it, absent countervailing proof. So the proof is that the Universalists when they acquired title actually used the edifice for church purposes, and that defendant had charge of it on behalf of that denomination of Christians. Do not acts interpret words? Not only so, but, absent proof to the contrary, as here, we would not be willing to hold (against the indications in the name of the corporation) that it was not an instrumentality of the Universalist Church, and was seised of the property to the use of that denomination. The presumption would be in the first instance that the Presbyterians would not intend to break the pious use by their conveyance. Surely defendant does not want us to rule (as a matter of law and without any proof) that the faith of that branch of the Christian Church is not a Christian or pious faith, or that their churches are not dedicated to a pious use. Learned counsel, taking us into their confidence, assure us that the Universalist faith "is a beautiful faith." If necessary, we would be willing to rule that it was a comfortable faith, and, if we were permitted to express a judicial hope, it would be the hope that it may turn out to be a true one in the great day of final accounts; for does not a very good book say we are all miserable sinners?

We pause to ask: May a mere earthly court (the which we admit we are) go out of its way to repudiate the sunny theological dogma, much doubted by some stout polemics, viz., that every man will be finally saved and dwell forever with the felicitous? No! Emphatically, no! Angels and ministers of grace, defend us! So the melancholy Dane

exclaimed (when startled by a well-known apparition) and so say we. We say it in the form of a pious exclamation, because sometimes an exclamation is as good as a discourse, and let it go at that. Why should we decide the point when we have no jurisdiction of the subject-matter? Says Coke soberly (Coke, Litt. 232b): "There be three kind of unhappy men. He that hath knowledge, and teacheth not. He that teacheth, and liveth not thereafter. He that knoweth not, and doth not inquire to know." But that pronouncement is too broad as a rule regulating judicial discourse. Indeed, getting unanimity of opinion in questions of religious faith in the decision of cases has not been so easy as to invite a wide play of unnecessary exposition in ghostly matters. Agreeable thereto the inquisitive scholar may find abundant grounds in *Boyles v. Roberts*, 222 Mo. 613, 121 S. W. 805, and *State v. Railway Co.*, 239 Mo. 196, 143 S. W. 785 (q. v.)

[12] 5. Of the deed from the Universalists to the Methodists.

The substance of the objection made to that deed (split into specifications in appellant's brief) is that its acknowledgment is bad, reading: "State of Minnesota, County of Hennepin—ss.: On this 25th day of October, 1905, personally came before me a notary public in and for the county and state aforesaid the above named Henry W. Rugg and G. L. Demarest, personally known to me to be respectively the chairman of the board of trustees of the Universalist General Convention, and the secretary thereof, and the officers they represent themselves to be and acknowledge to me that they signed the foregoing instrument in behalf of the Universalist General Convention and as chairman of the board of trustees and secretary for the uses and purposes therein mentioned. In witness whereof I have hereunto set my hand and seal, this day and year written." The testimonium clause of the deed and the signatures thereto run thus: "In witness whereof the chairman of the board of trustees of the said Universalist General Convention and the secretary thereof, have hereunto set their hands and seal of said corporation, the 25th day of October, 1905. Henry W. Rugg, Chairman of Board of Trustees. G. L. Demarest, Secretary. [Corporate Seal.]"

To that deed the corporation seal was affixed, as indicated. A mere glance shows that the certificate of acknowledgment does not conform to the form the statutes say "may be used" in acknowledging corporate deeds. R. S. 1909, § 2799. But he has read that statute to little purpose who concludes that the statutory form is necessary to a good acknowledgment. The language of the section in that particular is not mandatory, but permissive. It does not say the form must or shall be used, but that it "may be

used." In the exposition of that statute it has been held that the acknowledgment to a corporate deed, if good before the statute was passed, would be good after it was passed. *Huse v. Ames*, 104 Mo. loc. cit. 102, 103, 15 S. W. 965. We look, then, to all related statutes, and to the exposition given them by appellate courts. There are cognate sections prescribing how a corporation may hold and can convey real estate, and what the certificate of acknowledgment must show. Comparing the mandatory requirements of section 2799 with sections 2790 and 3001—all strictly in *pari materia*—it will be seen that the certificate of acknowledgment complies substantially with the requirements of those sections. In *St. Louis Public Schools v. Risley*, 28 Mo. loc. cit. 419, 75 Am. Dec. 131, it was ruled that, when the common seal of a corporation appears to be affixed to an instrument and the signatures of the proper officers are proved, courts are to presume that the officers did not exceed their authority, and that when an act is within the powers of a corporation, and its existence is witnessed by an instrument clothed with the formalities requisite to bind it, there is no hardship in the rule which imposes on one objecting to its validity the necessity of showing that it was without the assent necessary to its existence. The logic of that holding precludes the necessity of showing corporate assent, or the order of a board of directors, in the first instance. In *Perry v. Price*, 1 Mo. loc. cit. 649, it is ruled that, a corporation being an invisible body, it cannot manifest its intention in its deed by any personal act or oral discourse, and speaks only by its common seal. The logic of that ruling stresses the use of the corporate seal. Though private seals are abolished, yet the use of a corporate seal on a corporate deed remains an essential. R. S. 1909, § 2773. In *City of Kansas v. Railroad*, 77 Mo. loc. cit. 185, a doctrine of the *Risley Case*, *supra*, was reaffirmed to the effect that in aid of a certificate of acknowledgment reference may be had to the instrument itself or any part of it; and that it was the policy of the law to uphold certificates when substance is found and not to suffer conveyances, or the proof of them, to be defeated by technical or unsubstantial objections. In *Eppright v. Nickerson*, 78 Mo. loc. cit. 485 et seq., will be found an acknowledgment of a corporate deed, less substantial than the one in this case, which was held good. In *Railroad v. City of St. Louis*, 66 Mo. loc. cit. 247, may be found an apposite pronouncement, viz.: "As the one company had the right to sell, and the other to purchase, it follows that the deed, under the seal of the corporation and signed by the proper officers of the company, is *prima facie* evidence that the officers did not exceed their authority, and, if the assent of the stockholders to such conveyance was not had,

it devolved upon the defendants to show that fact." The logic of that ruling is to simply invoke the cardinal maxim that things are presumed to be rightly done. *Hartwell v. Parks*, 240 Mo. loc. cit. 546, 144 S. W. 793. So *Thompson, J.*, in *Missouri Fire Clay Works v. Ellison*, 30 Mo. App. loc. cit. 72, lays down this proposition: " * * * Authority on the part of the president and secretary to execute a deed for the corporation need not be affirmatively shown by a party claiming under the deed, but, in the absence of evidence to the contrary, such authority is presumed." See *Musser v. Johnson*, 42 Mo. 74, 97 Am. Dec. 316, and *Shewalter v. Pirner*, 55 Mo. 218, *arguendo*. The signatures of the officers are sufficiently attested by the certificate in question. The assent of the directors will be assumed under the doctrine of the cases cited, and a corporate seal attached to the deed is of substance in determining the sufficiency of the acknowledgment as to corporate intent. We have not undertaken to state the specifications of the objections to this acknowledgment *seriatim*. It is sufficient to say that all of them are disposed of against appellant in the foregoing discussion. The point is ruled against defendant.

With this ruling, the cause is determined in favor of plaintiffs. Let the judgment be affirmed. All concur; GRAVES, P. J., in result.

JEWELL v. STURGES et al.

(Supreme Court of Missouri, Division No. 1. Nov. 14, 1912. On Rehearing Nov. 28 and 30, 1912.)

1. MASTER AND SERVANT (§ 88*)—INJURIES TO SERVANT—INDEPENDENT CONTRACTOR—DEFECTIVE PLACE TO WORK.

Plaintiff, an iron roller, was injured while working in defendant's plant by being caught in the loop of a hot bar of iron, due to the absence of an iron post intended to be set in the floor to prevent such an injury. Defendant company furnished all the instrumentalities for the manufacturing operations. Held, that defendant was liable for plaintiff's injuries, whether plaintiff was an employé of defendant or of the head roller who, under a contract dictated by a labor union, did all the actual work of manufacture in the mill according to a certain piece work schedule, and employed, discharged, and paid plaintiff and the other workmen under him.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 144-152; Dec. Dig. § 88.*]

2. MASTER AND SERVANT (§ 88*)—NATURE OF RELATION—SERVANT OF INDEPENDENT CONTRACTOR—INJURIES—LIABILITY OF OWNER.

Where an owner undertakes to furnish the place and the appliances with which an independent contractor is to perform his contract and retains possession and control over the place and appliances, the owner will be liable for injuries to the servants of a contractor by reason of the unsafe character of the place; the contractor and his employés under such circumstances having the same right

that an ordinary employé has to demand of the owner a reasonably safe place to work.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 144-152; Dec. Dig. § 88.*]

Graves, P. J., and Lamm and Ferrias, JJ., dissenting.

In Banc. Appeal from Circuit Court, Jackson County; Jos. E. Guthrie, Judge.

Action by Jesse Jewell against Benjamin Sturges and the Kansas City Bolt & Nut Company. Judgment for plaintiff against the Kansas City Bolt & Nut Company, and it appeals. Affirmed.

Because of a dissent in division, the case was transferred to the court in banc, and after a rehearing the latter adopted the divisional opinion of WOODSON, J., as the opinion of the court in banc, which is as follows:

"This case was here on a former appeal, and the opinion affirming an order of the circuit court, granting the plaintiff a new trial, is reported in 231 Mo. 176, 132 S. W. 703, 140 Am. St. Rep. 515. The facts of the case were fully stated in detail by the court in the opinion before mentioned, and for that reason they will be but briefly stated here; reference is made to that case for a statement of the facts as they appear by the record in this appeal.

"Briefly stated, the defendant was a large manufacturing concern which manufactured various products made of iron and steel, and among other things it made rods, bolts, and nuts. A part of the work necessary to produce those articles was to heat and roll large bodies of iron through the rolling mill, which constituted one of the departments of the defendant company's plant. That was accomplished in the following manner: 'Scrap iron was bundled up, bound together, and heated to a white heat in a furnace. It was then run through a set of rolls by other employés, called "roughers," and thus formed into billets some three feet in length and three inches thick; it was then passed to another set of employés, called "strainers and catchers," of which plaintiff was one, who passed it through other sets of rollers several times, reducing it each time in thickness and increasing its length until it reached the desired dimensions. The rolls at which plaintiff was engaged stood in an east and west direction, containing several sets of rolls about 15 feet in length. The plaintiff occupied the north side of the string of rolls. Those working with him were on the south side of the string of rolls. Those on the south side would take a billet from the roughers and place the end of it in the rolls; the rotary motion of which would convey it to the north side, where the plaintiff would catch it with a pair of iron tongs, and place the end of it in another set of rolls beneath the ones from which it had just passed, and it would be carried back to the south side

by the same means and reduced in thickness and extended in length, as previously stated. This method was continued until the bar was some 30 or 40 feet in length, when the process of "repeating" was begun; that is, the plaintiff would catch the end of the bar with a pair of tongs as it came through at the east end of the rolls and carry it around north in a semicircle and place the front end in the rolls at the west end of the string which so ran as to carry the bar back to the south side. By this process the bar would be coming through at the east end of the string of rolls to the north side, and at the same time it would be going through the rolls to the south side at the west end of the rolls.' The foregoing quotation is taken from the statement of the case in the former opinion.

"The evidence showed that some 8 or 10 feet back from the set of rollers there was a hole made in the floor of the mill in which an iron post was designed to be inserted, when the 'repeating' process, before mentioned, was being carried on. This was intended to prevent the catcher from being caught in the loop of the bar and drawn up to and crushed by it against the rollers in case the rear end thereof should for any reason hang in the roller. That, at the time of the plaintiff's injury, said post was not in position, but in lieu thereof an iron spindle and some other materials were placed on the floor near said hole. That while the plaintiff was engaged in the performance of his duties as a catcher, the rear end of a rod caught in the roller, and the loop thereof surrounded and knocked said iron spindle and other materials aside and caught the plaintiff just above the ankle of the foot and drew it up against a tub of water, which was setting between him and the rollers, and so burned, bruised, and mangled his leg that, after suffering excruciating pain and mental anguish for a year or more, it became necessary for his limb to be amputated just above the ankle. The second trial resulted in a verdict for the plaintiff for \$18,000, of which he remitted \$3,000, leaving \$15,000, for which judgment was entered, and in due time the defendant appealed.

"All of the questions except one presented by the record on the former appeal were carefully and fully considered and disposed of by this court in the opinion before mentioned. Counsel for the defendant at the second trial, retried in the circuit court all the questions passed on by this court on the former appeal, and have rethrashed them out here on this appeal, and request us to reconsider them at this time. After a careful re-examination of the questions of fact and law presented by this record, we are satisfied that the conclusions reached, when the case was here before, were correct, and no good would be accomplished by restating or passing upon them again.

"We will content ourselves at this time by first restating the question not passed upon in the former opinion, and, second, the substance of the evidence bearing upon it, all of which was not introduced at the former trial, namely, that the plaintiff was not working for the defendant at the time he was injured, but was employed by and was working for the Blue Valley Lodge No. 2 of the National Amalgamated Association of Iron, Steel & Tin Workers, and that in consequence thereof defendant company was not liable to the plaintiff for the injuries received by him.

"The evidence in this case covers more than 400 pages of printed matter, and a large portion of it relates to this question, and we will therefore only be able to set out the substance of part of it and the effect of other portions, which is as follows: A contract between the defendant company and said Association of Workers, which is as follows: The portions of said document introduced in evidence being in the words and figures following:

"Page No. 3. Ex. 1—A. E. P.

"Sheffield, Mo.

"Western Scale.

"Memorandum of Agreement.

"We, Kansas City Bolt & Nut Co., of the first part, and Blue Valley Lodge No. 2, State of Missouri, National Amalgamated Association of Iron, Steel & Tin Workers, of the second part, do hereby agree that the following scales of prices, based upon the actual sales and shipments of iron or steel, as arranged for in conferences, shall govern the wages of the several departments as herein stated, commencing July 1, 1902, and ending June 30, 1903.

"It is further agreed that no scale shall go below the base price named on the rate selected.

"It is understood: First. That iron mills (except sheet mills) working steel shall pay price and one-half price for steel, but this shall not apply to mild steel, that is, working that steel of which the output of the mill shall be as great as when working iron of the same sizes; but when the output of steel is but three-fourths ($\frac{3}{4}$) of the output of iron, the rule price and one-half shall apply.

"Second. On all mills working iron or steel weighing one hundred and thirty (130) pounds, or over, extra help shall be furnished to the heater, the same to be paid by the company.

"Third. The time in scrapping and bushing, also finishing departments, shall in no case exceed nine hours and fifteen minutes from the regular time the mill begins to roll until the first furnace commences to charge the last heat. This shall not apply to mills working shorter charging hours; this not to apply to boiling departments (except scrap-

ping and busheling); also other departments working under the three-turn system. The time for meals on following-up mills shall not be counted in.

"Page No. 4. Ex. 1—B. E. P.

"Fourth. Wherever deviations from the Western Iron Scale, signed for by any manufacturer and the Amalgamated Association, are made and evidence is produced to prove it, the Amalgamated Association and manufacturers agree to make every effort to correct the same, provided the trains and furnaces are similar, but if the deviations continue to be tolerated by the Amalgamated Association, all other mills shall receive the same. All manufacturers and workmen governed by this scale hereby agree not to make any deviation from the scale agreed to.

"Fifth. Finishing mills will be allowed to work three turns when practicable. On finishing mills working or desiring to work three turns, eight hours shall constitute a day's work. Rolling shall not start earlier than 5 a. m. Monday morning, and first furnace shall cease charging at 11:30 a. m. on Saturday. The last furnace shall not charge later than one (1) hour after the first furnace, and close the week's work. On all mills working three turns a third roller shall be employed.

"Sixth. All ten-inch guide and hook mills with one furnace averaging \$35.00 per turn or more, or with two furnaces \$65.00, per turn or more on a 9¼ hour system, based on a 1-cent card rate, the eight-hour system shall be adopted. On bar and twelve-inch mills averaging 60,000 pounds on one (1) furnace, and 85,000 pounds on two (2) furnaces per turn on the 9¼-hour system, the eight-hour system shall be adopted."

"(Signatures omitted.)

"It was agreed that the base price at a one (1) cent card rate, based on actual sales of bar iron, as per conference agreement, with extras, shall be the straight one dollar and twenty-one cents (\$1.21) per ton for rolling, sixty-one and seven-tenths ($61\frac{7}{10}$) cents for heating, thirty-two and three-fourths ($32\frac{3}{4}$) cents per ton each for roughing, and catching on guide, 10-inch, hoop and cotton tie mills with two (2) per cent additional for each one-tenth ($\frac{1}{10}$) advance or decline on said card from one (1) to two (2) cent card rate.

"The rollers, heaters, roughers and catchers shall each be paid by the company. It is understood, however, that this arrangement shall in no way detract from the authority of the roller in controlling all hands on mill, including hiring and discharging, and, as heretofore, the roller shall be held responsible for the work done. Bar mill heating price to govern base sizes alone.

"Arthur Palmer, the night boss roller, testified that: 'Q. Now this book speaks of the

authority of the roller in controlling all hands in the mill. Now what is it you call the mill? A. That is the train of rolls, and all the furnace men, and so forth. Q. That means the working part of it that is done from this furnace? A. Yes, sir. There were two furnaces on the mill, and the roller has charge of the heaters and all hands on the mill. Q. All hands engaged in rolling iron? A. Yes, sir. Q. When Jesse Jewell, the plaintiff, was injured there? A. Yes sir. Q. In what capacity? A. As roller—foreman, rather. Q. Who employed you? A. Mr. Sturges. Q.—Mr. Benjamin Sturges, the defendant here? A. Yes, sir. Q. By "roller" you mean a subroller under Mr. Sturges? A. Yes, sir. Q. How long had you been working under Mr. Sturges? A. Well, about, possibly, eight years. Q. At this same plant? A. Yes, sir. Q. Were you a member of Blue Valley Lodge No. 2, National Amalgamated Association of Iron, Steel & Tin Workers? A. Yes, sir. Q. Was Mr. Sturges also a member? A. Yes, sir. Q. And were you the roller on the shift on which Mr. Jewell was engaged at the time he was injured? A. Yes, sir. Q. Who paid Mr. Jewell? A. Mr. Sturges. Q. State whether or not there was an inspector employed by the company to inspect this iron? A. Yes, sir. Q. Where did he work? Where did he inspect it? Where was the inspection made? A. Well, it was after it got cold—after it got sheared and cold—it was taken to the scales and unloaded, and as it was unloaded it was inspected. I presume that is the way they inspected it. Q. Now, do you know whether this rolling work was done under this kind of an agreement, from year to year, from 1896—1895 and '96—on down to the time Jewell was hurt? A. Yes, sir. I believe the agreement has always been there, the same—about the same. Q. And they were made before the expiration of the year; the one for the succeeding year would be made before the expiration of the one for the present year? A. Yes, sir. Q. So they were continuously working under the scale? A. Yes, sir."

"John P. McLaughlin testified: 'Q. What position, if you know, did defendant Benjamin Sturges on December 9, 1902, and for a number of months previous thereto, hold in the rolling mill of defendant? A. He was the man that had the whole charge of the mill. Q. Whose duty, if you know, was it to inspect the machinery, appliances, tools, and safeguards, if any, furnished the employes? A. Now, in regard to that question, I would like to make a little explanation. Q. Answer it in whatever way you believe to be true. A. It is customary, when a roller gets a position as a roller on a mill, he has full charge of that mill; the mill is under his care; everything is under his care; and, as a rule, whatever appliances he recom-

mends, whatever appliances he needs, will be given to him.'

"Benjamin Sturges, one of the defendants, who had been employed in this mill for two years prior to the date of the injury, testified: 'Q. Some of the men, I believe the evidence showed, were paid by the company direct? A. Yes, the heaters and roughers. Q. Who would employ them—hire them? A. I did. Q. Did you have the right of discharging too? A. Yes, sir. Q. Superintendent of them, while they were doing their work? A. That is, these rollers and— Q. Which? The heaters and roughers, and men that were paid by the company, did you direct them in their work too? A. Oh, yes; yes, sir. Q. Now you received so much a ton for the finished product of iron rolled in that mill? A. Yes, sir. Q. Whether it was rolled by your shift or any other shift? A. Any other. Q. Did you have three shifts when you first started in? A. No, sir. Q. And then you paid the strainers, scrapers, finishers—these men were paid by the scale—and then you employed some laborers who were not paid by any scale? A. Yes. There was some of them not in a scale at that time. Q. You employed several men of that kind? A. Yes. Q. You went and came as you thought the business demanded? A. Yes. Q. Did you leave any record in the office of the time you spent there? A. Well, I think they have a record. They used to have a man at the gate. Q. You didn't make any record? A. No, sir. Q. And didn't pass in at the gate and check in? A. I passed through the gate. Q. You did not check in? A. No, sir. Q. When you came in or when you went out? A. No, sir; none of the mill men did. Q. None of the men you paid? A. None of the rolling mill men. Q. Mr. Sturges, I believe you stated this; I want to be perfectly sure about it. You collected the money from the company for the entire output of the three shifts, based on the ton? A. Yes, sir. Q. And you paid out to the men their money for the three shifts, whether you worked on the shift or not? A. Except the heaters and roughers. Q. What men were under your pay—you paid that way? A. Yes, sir.'

"S. Y. High testified: 'Q. Now, Mr. Sturges got a profit off of the work of all three shifts, did he not, of the rolls? A. I don't know what Mr. Sturges made on his rolls. Q. Well, you paid Mr. Sturges a certain amount? A. He was paid a certain amount, per ton; yes. Q. And then he paid for having the work done out of that? A. Part of it; yes. Q. And what he had left, after paying that, he kept? A. Why, sure. Q. Do you know how much was paid to Mr. Sturges in any one year for the amount of work that he did? Do you know? A. No, sir; I do not. Q. Who paid him? A. He was paid from the office. Q. Did you know anything about how much his compensation was? A. I did not. Q. Did you ever inquire into

how much he was getting for that work? A. No, sir. Q. And how much his profits were over and above what he paid his rollers and strainers and finishers, and all those people he had to pay? A. I could answer in this way that they tried to find out how much he did make, and nobody could find out. That's all I know about it.'

"Jacob Knapp testified: 'Q. Yes, you were employed by the company as a weigher for the company? A. Yes. Q. To receive this iron from the rollers, and weigh it? A. Yes, sir. Q. And there were two of you worked there—two shifts of weighers? A. Yes, one for day and one for night. Q. And there were three shifts of rollers, catchers, and strainers and so forth? A. Yes. Q. And then this iron was brought up to you, and you kept the weighing of each one of these shifts separate? A. Yes, sir. Q. Did you keep each heat separate? A. Yes. Q. And then you marked that up on a board, as required by the rules of the union? A. Yes, sir.'

"The uncontradicted evidence also showed appellant, the Kansas City Bolt & Nut Company, owned the entire plant and everything connected therewith where respondent was working at the time of his injury. They owned the plant and furnished their own machinist to keep the same in repair, and furnished all the material that went into the output. The company also furnished everything in the way of tools and implements in use, and kept them in repair; also furnished the engineer, fireman, and all others who were necessary to furnish power with which to run the entire plant; also the appliances with which all the employes worked, and made all repairs in all departments, when called upon to do so. Sturges, the codefendant, occupied the position of head roller, who employed respondent to work in the mill after consultation with Superintendent High. The mill at the time in question was being operated under a contract made between the Kansas City Bolt & Nut Company and the 'Blue Valley Lodge,' a labor organization of men employed or engaged in working in the rolling mills. There is no evidence in the case that Jewell belonged to Blue Valley Lodge. He states that he did not remember whether he had deposited his card in the Blue Valley Lodge after he came from Chicago where he had worked, but that he was a member of the Amalgamated Association, and Blue Valley Lodge was a branch of that association."

Rees Turpin and A. P. Woodson, both of Kansas City, for appellant. Ralph S. Latshaw, Reed & Harvey, and Yates & Mastin, all of Kansas City, for respondent.

WOODSON, J. (after stating the facts as above). Upon the evidence before stated, counsel for appellant insisted below and requested the court to declare, as a matter

of law, that the relation of master and servant did not exist between it and the respondent at the time of his injury, and for that reason, among others, he was not entitled to a recovery in this case. In other words, the appellant insists that the Blue Valley Lodge No. 2 of the National Amalgamated Association of Iron, Steel & Tin Workers, and Benjamin Sturges, the head roller, were, at the time of the injury, independent contractors, and that the respondent was an employé of it, and not of appellant, and consequently the relation of master and servant at said time did not exist between the appellant and the respondent, and for that reason the former was not liable to the latter for the injuries sustained by him. The court refused that instruction, and submitted that question, by proper instructions, to the jury, who found it in favor of the respondent.

When the case was here before, it was decided that the question of the relationship existing between the appellant and the respondent was one of fact which should be submitted to the jury under proper instructions from the court, provided the evidence upon that question was conflicting, which at that time we were unable to decide, for the reason that the contract under which Sturges, the head roller, was working in the rolling mill was not before the court. The same question is urged upon our attention again, and, if we correctly understand counsel for appellant, they do not challenge the correctness of the instructions submitting that question to the jury, except for the reason assigned that there is no evidence upon which to base it. At the second trial the contract between said association and the appellant was introduced in evidence and is preserved in the record which may be found set out in the statement of this case.

[1] Conceding without deciding the question that the contract means what counsel for appellant contends, namely, that the Blue Valley No. 2 Lodge of the National Amalgamated Association of Iron, Steel & Tin Workers, was an independent contractor for the production of the rods, bolts, and nuts mentioned in said contract, and that respondent was employed by and was working for the latter, and not for the former, at the time of his injury, nevertheless the trial court, under the evidence, properly refused said instruction for the reason that the uncontradicted evidence shows that the appellant company owned the entire plant, including the roller mill in question, furnished the place where the respondent worked, that it furnished the machinists to make the repairs, and that it was its duty to keep the place and the instrumentalities with which he worked in repair, and that it furnished the engineers, firemen, and all others who were necessary to generate the heat and power for the entire plant, the mill included. The uncontra-

dicted evidence showed that the direct cause of the respondent's injury was the negligent failure of the appellant to furnish the stanchion post mentioned in the evidence, and not from any negligence of Sturges or any one whom he represented.

[2] In discussing this question in the former appeal in the case (231 Mo. loc. cit. 195, 132 S. W. 707, 140 Am. St. Rep. 515), the court said: "In the case at bar, what was the proximate cause of the injury? Clearly it was the failure of the company to maintain the iron post described in the petition. If it had been there it would have been a physical impossibility for respondent to have sustained the injuries of which he complains. That being true, then the question presents itself: Was the company negligent in failing to maintain the post at the place and in the manner stated in the petition? In order to properly determine this question, we must consult the evidence bearing upon that question. It is undisputed that the appellant company owned the entire plant in question and had exclusive control over every department thereof, including the rolling mills; that is (whatever may have been the relation that existed between the appellant company and Sturges, whether that of contractor or vice principal), the company had possession of and control over the building in which the mill was located, as well as the mill itself, including the engines, boilers, and machinery connected therewith. The company also operated the entire plant, including the mill, and made all necessary repairs throughout all of the departments of the plant. Sturges and his assistants had nothing to do with those matters, except to manufacture the iron bars mentioned in the evidence in the building and on the mill which was thus owned, controlled, and operated by the company; but, as previously stated, this record does not disclose whether Sturges was an independent contractor in doing that work or whether he was an employé and foreman of the company in charge of that work. Under this view of the case, the company undertaking to furnish and furnishing the place where, and the instrumentalities with which, the work was to be performed, the law imposed upon it the duty to exercise ordinary care in seeing that the place where Sturges and his assistants were to work, and that the instrumentalities with which they were to labor, were reasonably safe for that purpose, even though it be conceded that Sturges was an independent contractor. This is true for the reason that, if the owner undertakes to furnish the place and the appliances with which an independent contractor is to perform his contract, and retains possession and control over said place and appliances, then the contractor and his employés have the same right that an ordinary employé has to demand of the owner that they be reasonably safe for the

purpose for which they were furnished. *Geismann v. Missouri Edison El. Co.*, 173 Mo. 654, 73 S. W. 654; *Ryan v. Railroad*, 190 Mo. 621, 89 S. W. 865, 2 L. R. A. (N. S.) 777; *Clark v. St. Louis & Suburban Ry. Co.*, 234 Mo. 396, 137 S. W. 583; *Clark v. Union Iron & Foundry Co.*, 234 Mo. 436, 137 S. W. 577. The last two cases are just handed down by this division of the court, and are now pending in court in banc. The precise question now under consideration was fully considered in the *Clark Case*, and for that reason it is useless to further extend this discussion along that line. The only reason why the owner is not liable in damages for injuries sustained by an employé of an independent character is because the owner has no control over the actions of the contractor, whether they be negligent or not. But in the case at bar, as before stated, *Sturges* had no control over the place in which, or the instrumentalities with which, he was manufacturing the bars. And, since it is practically undisputed that respondent was injured in consequence of the absence of the post, we may drop the question of independent contractor and proceed to the consideration of the question, Was it negligence on the part of the company to have failed to furnish and maintain the post in question? The petition alleged, and the evidence of respondent tended to prove, that the ordinary, usual, and safe way to operate rolling mills of this class while the process of 'repeating' was going on was to have an iron post firmly set and maintained in the floor of the building in which the mill is located some 10 or 12 feet from the string of rolls, around which the bar was to pass in a semicircle, of sufficient strength to stop the movement of the bar whenever the end thereof should for any cause become caught in the rolls, and thereby prevent the loop of the bar from catching the employés by the feet or legs and drawing them up against the framework of the rollers."

By reading the contract before set out in the statement of the case, it will be seen that it does not materially change the nature of the case from what it was when previously here, for the evidence at the first trial showed, as it does here, that the appellant retained absolute possession and control of the entire plant, the rolling mill included; that it furnished the place for and the instrumentalities with which *Sturges* and his employés performed their duties; and that the appellant made all necessary repairs of every kind and description about the entire plant, the mill included, and also furnished the heat and power which was necessary to produce the manufactured articles mentioned in said contract. *Sturges* and those whom he represented, if any one, had nothing to do with, nor was he under any obligation to furnish the place where,

or the instrumentalities with which, his employés did their work; nor was he or they under any legal obligation to keep those matters in repair. The evidence conclusively shows that those duties were reserved to the appellant and were not imposed by contract or otherwise upon *Sturges*, except when he might be guilty of misfeasance; but in this case the jury found he was not guilty of misfeasance, but, had he been, that fact would not have relieved the appellant of liability if its negligence had contributed with that of *Sturges* in producing the injury, much less can it escape liability where its negligence as the evidence shows, was the sole cause of the injury.

The second trial of the case was conducted in harmony with the views of this court expressed in the former opinion.

Finding no error in the record, the judgment of the circuit court is affirmed. All concur, except *GRAVES, P. J.*, and *FERRISS and LAMM, JJ.*, dissenting.

On Rehearing.

PER CURIAM. Now at this day the court, having seen and fully understood the appellant's motion for a rehearing herein, doth order that said motion be, and the same is hereby, overruled on condition that plaintiff within 10 days remit \$5,000 of his judgment as of the date of the verdict, otherwise the motion will be sustained.

WOODSON and KENNISH, JJ., dissent.

November 30, 1912.

PER CURIAM. Pursuant to the order of this court made on the 26th day of November, 1912, conditionally overruling the appellant's motion for a rehearing herein, comes the said respondent this day, by attorney, and enters a remittitur herein in the sum of \$5,000 as of the date of the original verdict, part and parcel of a judgment heretofore entered in this cause in the circuit court of Jackson county. Now, therefore, the court doth order that the appellant's motion for a rehearing herein be, and the same is hereby, overruled.

STATE v. STAPP.

(Supreme Court of Missouri, Division No. 2.
Dec. 10, 1912.)

1. CRIMINAL LAW (§ 494*)—EVIDENCE—EXPERTS—WEIGHT AND SUFFICIENCY.

The jury had a right to find that an abortion four weeks after the use of instruments on the womb of prosecutrix was caused thereby, notwithstanding uncontradicted expert testimony that it could not have been so caused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1081; Dec. Dig. § 494.*]

2. ABORTION (§ 11*)—EVIDENCE—"ADMINISTER."

Evidence that accused delivered pills to a pregnant woman with instructions to take them

the following day, without any evidence that she ever swallowed any of them, was insufficient to support a conviction for administering a drug with intent to produce an abortion, since to "administer" a poison or other thing is to cause it to be taken by compelling a person by violence to swallow it, or by delivering it to one receiving it voluntarily into her system.

[Ed. Note.—For other cases, see Abortion, Cent. Dig. § 22; Dec. Dig. § 11.*]

For other definitions, see Words and Phrases, vol. 1, pp. 195-197.]

3. ABORTION (§ 13*)—TRIAL—INSTRUCTIONS—"ADMINISTER"—"GIVE."

Where the evidence showed that a person accused of administering a drug with intent to produce an abortion gave pills to the prosecutrix with directions to take them the next day, an instruction that to "administer" drugs to a person meant to "give" them to such person was erroneous, since while to "give" drugs to a person may in some cases include the idea that the drugs are taken into the stomach, it could not have that meaning in view of the evidence.

[Ed. Note.—For other cases, see Abortion, Cent. Dig. § 23; Dec. Dig. § 13.*]

For other definitions, see Words and Phrases, vol. 4, pp. 3094-3098.]

4. CRIMINAL LAW (§ 1172*)—APPEAL—PREJUDICIAL ERROR.

Where accused was charged with using instruments and administering drugs to produce an abortion, and expert testimony that the abortion could not have been caused by the use of the instruments was uncontradicted, the erroneous submission of the issue relative to the administration of drugs was prejudicial, since the jury probably convicted on that ground.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3128, 3154-3157, 3159-3163, 3169; Dec. Dig. § 1172.*]

5. CRIMINAL LAW (§ 785*)—INSTRUCTIONS—CREDIBILITY OF WITNESSES.

Even if an instruction, on a trial for abortion, that the fact that the prosecutrix was implicated, may be taken into consideration in determining her credibility is proper, its refusal is not error, since it contains no legal proposition, but is purely a comment on the evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1774, 1776-1781, 1889-1894; Dec. Dig. § 785.*]

6. INDICTMENT AND INFORMATION (§ 60*)—PARTICULARS OF OFFENSE.

An indictment charging accused with administering drugs to a pregnant woman and using instruments on her body to produce an abortion, but not alleging whether or not either the woman or a quick child died, is insufficient, since it does not show whether the offense is abortion or manslaughter.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 182, 266, 267; Dec. Dig. § 60.*]

7. INDICTMENT AND INFORMATION (§ 125*)—ELEMENTS OF OFFENSES.

The administration of drugs and the use of instruments to produce an abortion are separate offenses, and hence should not be charged in one count of an indictment.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 334-400; Dec. Dig. § 125.*]

Appeal from Circuit Court, Ray County; F. H. Trimble, Judge.

Joseph Stapp was convicted of crime, and he appeals. Reversed and remanded.

Appellant is a physician and was convicted under an indictment charging him in one count with having administered drugs to a pregnant woman, and also with having used instruments upon her body, all with the intent to produce an abortion. There is no allegation in the indictment as to whether the death of the woman or of a quick child was caused by the abortion. Elizabeth Bales testified that she, being about four months pregnant, went, in company with Reed Taylor, the author of her trouble, to the office of the defendant about 10 o'clock at night on June 26, 1910; that Taylor first had a talk with the defendant out of hearing of the witness; that the witness then entered defendant's office, and defendant told her that he had learned from Taylor that they (witness and Taylor) were in trouble and that he had told Taylor that he (defendant) had helped others and would help them; that defendant used instruments in her womb, and gave her some pills with instructions to take them the next day. There was no evidence that she ever took (swallowed) the pills. No inquiry was made of her at the trial as to whether she ever took the pills into her stomach. The abortion occurred on July 24, 1910. She was not confined to her bed until the day on which the abortion occurred, but stated in her testimony that she could "hardly go." Several physicians testified as experts that an abortion would not occur from the use of instruments so long after such use, and there was no medical evidence to the contrary. Reed Taylor corroborated the evidence of Miss Bales as to the visit to defendant's office and the purpose of such visit. The defendant testified and denied the charge in toto. The court refused a demurrer to the evidence asked by the defendant, and also refused the following instruction asked by him: "The jury are instructed that the prosecuting witness is a competent witness, but the fact that she was implicated in the alleged transaction may be taken into consideration by the jury in determining the credibility to be given to her testimony." The jury were instructed to find the defendant guilty if they found that he, under the circumstances and with the intent mentioned in the instructions, administered to her any drugs or used upon her any instruments by inserting them in her womb. By instruction 3 the jury were told that the word "administered" meant the giving to her any drugs for the purpose of producing an abortion.

Lavelock & Kirkpatrick, of Richmond, for appellant. Elliott W. Major, Atty. Gen., and John M. Dawson, Asst. Atty. Gen., for the State.

ROY, C. (after stating the facts as above).
[1] I. We are confronted with the fact that

the abortion did not occur until four weeks after the alleged use of the instruments. The expert testimony was all to the effect that such result would not follow after so long a time. The jury were not necessarily bound by the expert evidence, and had the right to find that the abortion was caused by the use of the instruments notwithstanding such expert evidence. But on this record we cannot say that they did so find. They may have found that the abortion was caused by the drugs. Yet there is no evidence that she took the drugs into her stomach.

[2] Instruction No. 2 authorized them to find the defendant guilty if he administered the drugs with such an intent. There was no evidence on which to base it.

[3] Instruction No. 3 told the jury that to "administer" drugs to a person meant to "give" them to such person. To "give" drugs to a person under some circumstances may possibly include the idea that such drugs are taken into the stomach. It could not have any such meaning in this case, because the evidence was that defendant gave her the pills with directions to take them the next day. The jury may have failed to find that any instruments were used; and, under those instructions, may have found the defendant guilty because he had delivered to her the pills regardless of whether she ever swallowed them. We cannot presume that she swallowed any of the pills. She was on the stand, and counsel for the state did not ask her whether she swallowed them, and she made no statement on the subject. Bishop on Statutory Crimes, § 747, says: "To administer the poison or other thing is to cause it to be taken. It may be by forcing it down the woman's throat, or by violence compelling her to swallow it. Or it may be by delivering it to one who receives it into her system voluntarily, having, or not, asked for it." We hold that there was no evidence on which the defendant could be convicted of administering drugs to the prosecuting witness.

[4] From the circumstances of the case, we think it more than probable that the jury convicted the defendant on that ground. The error was directly prejudicial to the right of the accused.

[5] II. As to whether instruction F asked by defendant should have been given, Bishop says: "The woman is admissible as a witness within principles explained in another connection. We have seen that, generally, in our states, she is not technically an accomplice, whose evidence, therefore, is within the special rule requiring confirmation. But it is by some deemed that, 'inasmuch as she was in a moral point of view implicated in the transaction, it would be proper for the jury to consider that circumstance in its bearing upon her credibility,' rendering a caution from the court, to this

effect, judicious and proper, and evidence confirmatory particularly appropriate. And some tribunals appear to regard her, as to confirmation, substantially the same as a technical accomplice. Yet, in reason, the difference is wide; for an accomplice swears under the temptation of earning thereby his own immunity, while she does not. She discloses her own disgrace; and, where no evil motive appears for it, this fact may, in reason, strengthen her credibility. Yet plainly the special temptations of the particular case should be taken into the account, and the attention of the jury may well be directed to them." It will be noticed that the writer says that the attention of the jury "may well be directed to them." He does not state that such instruction must be given. None of the cases cited by that writer require that such an instruction should be given. We consider such an instruction useless. It contains no legal proposition and is purely a comment on the evidence.

[6] III. The indictment does not charge the commission of any offense. Manslaughter, under the terms of section 4458, occurs only in case of the death of the woman or of the quick child. The offense of abortion is committed only when such death does not occur. There is no allegation that such death did or did not occur.

[7] It is well to call attention to the fact that administering drugs with such intent is an offense, and that the use of instruments with such an intent is also an offense, and that the indictment attempts to charge both such offenses in the same count.

The judgment is reversed, and the cause remanded.

BLAIR, C., concurs.

PER CURIAM. The foregoing opinion is adopted as the opinion of the court. All concur.

McCOLLIN v. JAMES BLACK MASONRY & CONSTRUCTION CO.

(Supreme Court of Missouri, Division No. 1.
Nov. 30, 1912. Rehearing Denied
Dec. 24, 1912.)

MASTER AND SERVANT (§ 149*)—INJURY TO SERVANT—NEGLIGENCE—"RIGGING."

The foreman in charge of the construction of a building directed employes who had just raised a column from the first floor to the second to bring to the first floor all the rigging, consisting of ropes and blocks and chains. The rigging hung above a rope supporting a scaffold in use. The employes not only removed the rigging, but untied the rope, causing the scaffold to fall, injuring an employe working thereon. *Held*, that the foreman was not guilty of actionable negligence in giving the order, since the word "rigging," when applied to the handling of heavy loads of timber, metal, or stone, means the tackle, lines, and fastenings with which the work is accomplished, and the order

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

did not refer to the rope supporting the scaffold.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 291-295; Dec. Dig. § 149.*]

Appeal from St. Louis Circuit Court; C. C. Allen, Judge.

Action by John E. McCollin against the James Black Masonry & Construction Company. From a judgment for defendant, plaintiff appeals. Affirmed.

Henry A. Baker and Campbell Allison, both of St. Louis, for appellant. Jones, Jones, Hocker & Davis, of St. Louis, for respondent.

BROWN, C. The petition states that the defendant is a Missouri corporation engaged in the general contracting business, and one Anton Pape was its foreman; that the plaintiff is a bridge and structural iron worker, and was on December 19, 1905, employed by defendant in that capacity in erecting a building in St. Louis under the direction of said Pape as foreman. The petition then proceeds as follows: "That while plaintiff was at work as aforesaid, on said day, he, in obedience to the order of said foreman, was on a plank scaffold, suspended below the second floor of said building, one end of which plank scaffold was resting on and supported by an X brace, and the other end was resting on and suspended by a rope, which rope was passed through a girder above the said plank scaffold and was wound three times around a floor beam or girder of the second floor, and then securely tied by two "half-hitches" to a wire cable just above the said second floor; that while plaintiff was thus on said plank scaffold and at work as aforesaid, without any knowledge, fault, or negligence on plaintiff's part, said foreman, Anton Pape, although he well knew, or by the exercise of ordinary care might have known, that plaintiff was at work on said scaffold, as aforesaid, carelessly and negligently ordered and directed two of the employees of the defendant then at work on the said building under the direction of the said Pape, to take up the rigging (which rigging included the said rope supporting the plank scaffold on which the plaintiff sat as aforesaid), thereby ordering and directing the said workmen to take up and remove the said rope supporting the plank scaffold on which the plaintiff sat, as aforesaid, and that the said workmen, in obedience to the said order and direction, and in execution thereof, untied the said rope tied to the wire cable as aforesaid, and uncoiled the same, or permitted it to uncoil, from around the said girder, whereby the end of said scaffold which was being supported by said rope, as aforesaid, suddenly and without warning of any kind to plaintiff, was permitted and caused to drop, in consequence of which said negligence, plaintiff fell

to the floor below." He then proceeds to describe his injuries, and asks \$10,000 for damages. The answer contains a general denial.

The plaintiff proved that at the time of the accident he was engaged with others under the direction of Mr. Pape, in the work of reconstructing a building in St. Louis by substituting a heavy steel girder, three feet in depth, to support the second floor, in place of a wooden floor beam in use for that purpose, so that all supports might be removed and the entire room left in the clear. The supports had already been removed from beneath the wooden beam, and it was supported at the end near the place where the accident occurred by a wire cable wrapped around it, extending up through the second floor and fastened at the next floor. The steel girder consisted of two members placed side by side separated by pieces of metal between them, called "separators." These had already been placed in position, supported in some manner not clearly described, underneath and parallel to the wooden beam, and were ready to have the separators inserted, and be bolted together. This was to be done by the plaintiff and Mr. Connelly, members of the force at work on the building under the direction of Mr. Pape, who told them to construct a scaffold from which to do the work. Mr. McCollin got a yellow pine plank about 2 inches thick, 10 inches wide, and 16 to 18 feet long, and laid on the floor directly under and parallel to the girder, while Connelly went up to the second floor with a rope, which he passed through the space between the members of the girder. Mr. McCollin then took it and tied it securely to the north end of his plank, placed the south end in an X brace about three feet below the bottom of the girder, and then swung up the other end by the rope so as to level it. Mr. Connelly then wrapped his end of the rope three times around the wooden beam at a point near the wire cable that supported it from the floor above, and then made two half-hitches around the cable, fastening it securely. Mr. McCollin then sat upon the scaffold, the bottom of the girder just clearing his head, to put in and tighten the bolts in the lower half of the girder, while Mr. Connelly did the same work on the other half from above. They completed the scaffold and got to work at about 3 o'clock in the afternoon, stopping for the evening about half past 4. They went to work the next morning at 8 o'clock, and about a quarter before 10, while Mr. McCollin was pulling the wrench to tighten a bolt, the scaffold went from under him and he fell; his foot going through a hole in the floor, and fracturing his leg badly above the ankle. His first look was at the scaffold. The scaffold knot still held around the plank and the knot consisting of half-hitches around the wire cable was untied, the turns

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Index

taken off the beam, and the weight of the rope over the steel girder held it suspended about a foot from the floor. The evidence tended strongly to show that the rope was well fastened and would not have become untied without manual interference; that two men named Jones and McVey were working on the second floor; that between 9 and 10 o'clock the morning of the accident they raised a column from the first to the second floor and put it in place. Mr. Pape then ordered them "to take down all the rigging that was up there and go down on the first floor." The rigging consisted of ropes and blocks and chains. There were several pieces of colls, and one rope was rigged up in a set of falls and tackle blocks directly over the place where the rope which supported the scaffold was tied. There were also some lashings or short pieces of rope used to tie on to anything to hook the falls into, and other pieces of rope that were used as hand lines. Mr. Jones, who testified, saw the rope that was tied to the cable that supported the wooden girder with two half-hitches. The plaintiff asked questions calculated to elicit testimony that the rope supporting the scaffold was "rigging" within the meaning of this order, which was excluded by the court and exceptions taken by the plaintiff. When the order was given, Mr. Pape, Mr. Jones, and Mr. McVey were all standing on the second floor; both Mr. McVey and Mr. Jones being near the rope that supported the scaffold. This was five or ten minutes before the accident. Mr. Jones, upon his cross-examination, testified that he did not untie this rope. He was not asked, either on direct or cross examination, whether he saw Mr. McVey untie it, and Mr. McVey was not introduced by either party.

At the close of plaintiff's evidence, the court, at the request of defendant, instructed the jury to find for the defendant, and the correctness of this ruling constitutes the only question here for review. It will be observed that the only negligence charged in the petition is that of Mr. Pape, the foreman, in giving the order "to take up the rigging." One thing is therefore evident: That, unless the order given by Mr. Pape constituted negligence, the court was right in holding that there could be no recovery. The order as proved was in the following words: "Bring down all the rigging that there is up here and come down on the first floor."

Like most language, this expression is to be construed with respect to the circumstances in which it was used. The man to whom it was addressed had just been raising a column from the first floor to the second. The fall, or movable pulley of the tackle, with its hook, hung above the same knot that became untied. This tackle, with the lashings by which it was fastened to its support or took hold upon its load, and the hand

lines with which the column had been steadied and swayed to its place when the time came to set it down, were all there, and constituted the rigging used by the men who did the work. Having accomplished their task, nothing is more natural than that they should have been directed to remove it to some other place for use or storage. The word "rigging" is a common English one, and when applied to the handling of heavy loads, whether of timber, metal, or stone, or other similar material, means the tackle, lines, and fastenings with which the task is accomplished, without regard to the material, whether metal or vegetable, from which they are fabricated. In this case it would be an absurdity to hold that it referred to the ropes in use to support the building or structures in use at the time. Had the men to whom the order was given proceeded to unfasten the wire rope which supported the wooden floor beam so as to let the second floor down into the room below, it would not have shown a more fundamental misconception of a plain order than did the unfastening of the rope which was tied to it and supported the scaffold in use below.

Although in our opinion the evidence tends strongly to show that the rope supporting the scaffold was untied and cast off by the workmen on the second floor of the building, there is no evidence of negligence of the foreman in giving the order in evidence. It follows that the judgment of the trial court must be affirmed, and it is so ordered.

PER CURIAM. The foregoing opinion of BROWN, C., is adopted as the opinion of the court. All concur.

STATE v. DONNINGTON.

(Supreme Court of Missouri, Division No. 2.
Dec. 10, 1912.)

1. CRIMINAL LAW (§ 406*)—EVIDENCE—ADMISSIONS.

Where a person accused of defiling a female child confided to his care testified that he was impotent, the testimony of a witness that accused told him that he visited the house of a woman of ill repute was competent as an admission on the issue of impotency, even if it was not competent for purpose of impeachment because a proper foundation was not laid.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 785, 894-927; Dec. Dig. § 406.*]

2. WITNESSES (§ 277*)—CROSS-EXAMINATION OF ACCUSED IN CRIMINAL PROSECUTIONS.

Cross-examination of a person accused of defiling a female child concerning a visit by him to the house of a woman of ill repute was proper as tending to discredit his testimony that he was impotent.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 925, 979-984; Dec. Dig. § 277.*]

3. CRIMINAL LAW (§ 480*)—OPINION EVIDENCE—COMPETENCY OF EXPERTS.

The sustaining of an objection, unless the witness further qualified himself, to a question

asked a doctor as to whether in his opinion accused could have had sexual intercourse with the prosecutrix, was proper where the witness had stated that he had paid but little attention to the girl and was hardly qualified to answer.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1069; Dec. Dig. § 480.*]

4. CRIMINAL LAW (§ 1159*) — APPEAL — REVIEW—QUESTIONS OF FACT.

While it is the province of the jury to weigh the testimony and determine the facts, when the question of the sufficiency of the evidence is properly presented, an appellate court must determine it.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3074-3083; Dec. Dig. § 1159.*]

5. RAPE (§ 52*)—WEIGHT AND SUFFICIENCY OF EVIDENCE.

Accused was charged with rape on a female under 14 years of age, and with defiling a female under 18 years of age confided to his care. He was convicted on the second charge. The only evidence on the issue of rape tended to show a ravishment by force, and on this theory evidence was admitted that the prosecutrix made complaint promptly after the commission of the crime. *Held* that, although the conviction was not for rape, the sufficiency of the evidence to support it should be tested by the rules applicable in cases of rape.

[Ed. Note.—For other cases, see Rape, Cent. Dig. §§ 78-82; Dec. Dig. § 52.*]

6. RAPE (§ 54*) — EVIDENCE — WEIGHT AND SUFFICIENCY.

A conviction for rape may be had on the uncorroborated testimony of the prosecutrix; but if her testimony is contradictory, or not convincing, or leaves the mind clouded with doubts, it must be corroborated.

[Ed. Note.—For other cases, see Rape, Cent. Dig. §§ 83, 84; Dec. Dig. § 54.*]

7. RAPE (§ 52*) — EVIDENCE — WEIGHT AND SUFFICIENCY.

Where the testimony of the prosecutrix was not corroborated and was contradictory and improbable, her reputation for truth, veracity, and morality was seriously impeached, and no testimony was offered to sustain it, the evidence did not support a conviction for defiling a female child.

[Ed. Note.—For other cases, see Rape, Cent. Dig. §§ 71-74, 76; Dec. Dig. § 52.*]

Appeal from Circuit Court, Bates County; C. A. Calvird, Judge.

F. H. Donnington was convicted of crime, and he appeals. Reversed and remanded.

W. O. Jackson, of Butler, and Silvers & Silvers, of Kansas City, for appellant. Elliott W. Major, Atty. Gen., and John M. Atkinson, Asst. Atty. Gen., for the State.

KENNISH, J. The defendant was tried in the circuit court of Bates county, at the February term, 1911, under an indictment containing two counts. The first count charged him with carnally knowing Esther Cronkhite, a female child under the age of 14 years, and the second charged him with defiling Esther Cronkhite, a female under 18 years of age, who had been confided to his care. The jury returned a verdict of not guilty on the first count and a verdict of guilty on the second. Defendant was sen-

tenced to four years in the penitentiary and appealed to this court.

The evidence for the state tended to show the following facts: At the time of the alleged offense the defendant was 37 or 38 years of age and weighed over 200 pounds. He was a hard working man, had been married three times, and had a daughter 18 years of age. His second wife died in March, 1907 and in May of that year he married her sister, who had been making her home at his house prior to the death of his second wife. In August, 1909, defendant and his wife went to Kansas City and procured, through the mediation of the Detention Home, three children of one R. T. Cronkhite, a laborer, whose wife was dead. The children were Esther, the prosecutrix, who was 12 years of age on January 2, 1909, Forest, a boy aged 10, and Alice aged 2. The arrangement made with the father of the children was that defendant and his wife were to take them and care for them as their own. The children were taken to defendant's home on a farm in Bates county and all three remained there until Christmas, 1909, when the father went to visit them and insisted on taking the youngest back home with him. A few days later he did take the baby to his home in Kansas City, and did not see Esther or Forest again until after the indictment herein was returned.

The testimony of the prosecutrix was to the following effect: The defendant "took advantage" of her five times during February and March, 1910; once during the first week in February, three times in the latter part of that month, and once on the 1st day of March. On each of these occasions her brother Forest, the defendant's wife, and Mahan, a farm hand employed by defendant, were all away from defendant's home, leaving defendant and her alone in the house. The first three times defendant's wife had gone to town, and the last two times she was visiting a neighbor. When the second offense was committed, which was in the latter part of February, Mahan was in the field plowing corn. The first time defendant "took advantage" of her he called her upstairs, in the daytime, caught her by the hands, laid her on the bed, and attempted to ravish her. She screamed, fought, and resisted in every way she could, and he did not accomplish his purpose. When, about three weeks later, he did succeed in defiling her, and also on three subsequent occasions when he forced her to yield to him, the circumstances were precisely the same as at the time of the first assault; defendant either called or sent her upstairs to the same room, in the daytime, caught her by the hands, laid her on the bed, and forcibly ravished her, while she resisted in just the same manner as at the time of the first attempt. In the first attempt there was no

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

penetration whatever, but she bled a few drops. The second time there was penetration, from which she suffered pain; but she did not bleed. Defendant warned her if she told what he had done it would mean sudden death, and she never informed any person of what had happened or complained to any person of the treatment she had received, except her brother Forest. She told him of each offense on the road to school. In each instance that was the first opportunity she had to tell him, although three of the offenses were committed on Saturdays when there was no school and would be none until the following Monday. She remained at defendant's home until she and Forest were taken away by the sheriff on June 13, 1910, which was the day before the grand jury returned the indictment against the defendant, and between March 1st and June 13th defendant made no attempt to violate her person. After the commission of the third offense and before the commission of the last one, defendant's wife went to the town of Adrian and remained from Friday until Sunday, and during that time defendant did not molest her.

On cross-examination she testified that, after defendant defiled her, he whipped her and her brother for stealing money from the hired man and lying about it and for playing truant from school. She denied that she stole the money, but testified that Forest confessed it, and then defendant whipped both of them for stealing and lying and for truancy. In a deposition taken eight months before the trial, she denied that defendant whipped her. She admitted that both she and Forest wanted to get away from defendant's home because of "the mistreatment." In her deposition she testified that both she and the boy wanted to leave defendant's place because his wife beat them, and in that connection the following questions and answers appear in her deposition: "Q. Did you and your brother Forest talk about trying to get away from Mrs. Donnington? A. Yes. Q. Did you both agree that if you could tell about Mr. Donnington this would help you get away? A. Forest told. Q. Did he tell this so you could get away? A. I don't know." She admitted that while living in Kansas City she shot at a man, but her testimony does not disclose the circumstances of the shooting. In the course of her cross-examination, the following occurred: "Now, do you remember an old Swede named Swanson? A. Yes, sir. Q. You used to visit him occasionally? A. I visited his wife. Q. His wife? Why, he was a widower. A. I did his washing for him. My oldest brother always took the clothes to him." She admitted that in a conversation with defendant's mother soon after he was arrested she was asked why she did not tell the mother about defendant's misconduct when the mother visited his home, and that she answered by saying: "Oh, I forgot it. I didn't think about it."

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In her deposition, taken two months after defendant was arrested, she stated that when the first assault took place the defendant told her to lie down upon the bed, and she refused to do so; that he threatened to whip her unless she did as he told her, and she then lay down upon the bed. At the trial her testimony was that on that occasion he placed her upon the bed by force. In the deposition she said that when the first assault was made she did not know that there was any blood upon her garments until she went to bed that night. At the trial she testified that the defendant noticed the blood on her garments and made her go downstairs and wash them immediately after the assault took place. Asked to explain this discrepancy in her testimony, she said: "I just got it wrong the other time." In the deposition she testified that she did not know in what month defendant first assaulted her; that he "took advantage" of her five times, but she could not tell when either assault occurred. At the trial, eight months later, she fixed the time of each offense positively; one during the first week of February, three in the latter part of that month, and the last one on the 1st day of March. After prosecutrix left the witness stand, she was recalled by the state and explained that, when she said Mahan was plowing corn in February, she meant he was plowing up cornstalks. Being cross-examined, she admitted that the prosecuting attorney had asked her in the meantime if it was not cornstalks instead of corn that the man was plowing in February. She was then asked on what part of the farm he was plowing, and answered, "The south end." Asked if she did not know there were no cornstalks on the south end of the farm at that time, she answered, "He was in the west end."

No evidence whatever was introduced by the state tending to corroborate the prosecuting witness. It does not appear that she became pregnant, or that a medical examination was ever made to ascertain whether or not she had been deflowered. It was not shown by any other witness that she suffered any pain or shock as a result of the alleged repeated outrages, or that she made complaint to any person, although she was attending school during the month of February, 1910. Her brother Forest, to whom she testified she made prompt complaint each time the offense was committed, and who was eleven years old at the time of the trial, was not called as a witness.

The defense was a denial by defendant, and testimony contradicting prosecutrix as to many circumstances in connection with her version of the commission of the different offenses; that prosecutrix was a slender, undeveloped girl—had not reached the age of puberty; that it would have been impossible for defendant to have defiled her without so injuring her as to cause intense pain and suffering; that defendant had been

completely impotent since the month of April, 1908; also, that the reputation of prosecutrix for truth and veracity and for morality was bad.

Defendant's wife and Mahan, the hired man, testified that Mrs. Donnington was away from home but twice in February, 1910, and but once in March. One of the times to which they testified she was away from home was in the latter part of February, when she went to Adrian on Friday and remained until Sunday. Prosecutrix testified that defendant was guilty of no improper conduct while his wife was away on that trip. Defendant's wife corroborated him as to his impotency subsequent to April, 1908. He was also corroborated in this respect by Dr. Hall of Adrian and by Dr. Dawson of Kansas City, both of whom testified that an injury of the scrotum received by defendant several years before, and an operation that was performed therefor, would tend to render him partially or completely impotent. Mahan testified that neither he nor any other person did any plowing on defendant's farm during the month of February, 1910. He further testified that, after defendant whipped prosecutrix and the boy for lying and stealing, prosecutrix said to the witness that she would "get even with defendant for whipping her." Three witnesses from Kansas City, who had known prosecutrix when she lived there with her father, testified to her bad reputation for truth and veracity and morality. Two of them, Mrs. Miller and Mrs. Burch, were engaged in city mission work for the Dunkard Church in Kansas City, and prosecutrix came under their observation in their mission work. They based their testimony on what they heard from people living in the vicinity of her father's home. The other witness, Mrs. Hagen, lived in the immediate vicinity of the Cronkhite home in Kansas City. The defendant called a number of witnesses who testified to his good reputation, and the state, in rebuttal, produced several who testified to the contrary on that issue. Other material facts will be stated in connection with the points decided.

[1] I. The defendant was asked on cross-examination if, returning from Butler to his home in 1910, he did not state to Paul Jenkins that he had visited the house of Clara Hussy, a woman of ill repute, and that he was going to "get some from her." He denied making the statement, and in rebuttal Paul Jenkins was asked by the prosecuting attorney if the defendant made the foregoing statement to him, under the circumstances mentioned. The witness answered affirmatively, but fixed the date in 1909. The defendant moved that the testimony of Jenkins be stricken out for the reason that the time fixed by the impeaching witness was a different date from that named in laying

the foundation for impeachment. The court overruled the motion, and error is assigned upon such ruling. The testimony sought to be stricken out was competent as an admission against the defendant upon the issue of impotency, even though not for the purpose of impeachment, and we think the court properly overruled the defendant's motion.

[2] Neither was it error to prove by cross-examination of defendant that he had visited the house of Clara Hussy. He had testified that he was impotent, and relative to that question it was the right of the state to prove his behavior in that respect by cross-examination. That he visited such a place, in connection with his admission to Jenkins as to his intentions, was proper cross-examination, as a circumstance tending to discredit his testimony as to his impotency at the time of the alleged offense.

[3] II. Dr. Hall, as a witness for the defendant, was asked to state whether in his opinion the defendant could have had sexual intercourse with the prosecuting witness. An objection to this question was sustained by the court, and defendant complains of such ruling as error. The court gave as a reason for the ruling that the Doctor had stated that he had paid but little attention to the girl, and was hardly qualified to answer the question, adding, "Unless he further qualifies himself, the objection will be sustained." The witness did not further qualify, as suggested by the court, and we think the court correctly sustained the objection.

[4] III. One ground of the motion for a new trial is that the verdict is against the weight of the evidence and is not supported by the evidence. This assignment calls for a consideration of the testimony upon which the verdict of guilty rests. In the discharge of this duty we are not unmindful of the settled rule of appellate procedure that it is the province of the jury to weigh the testimony and to determine the facts. Nevertheless, when the question of the sufficiency of the testimony is properly presented, an appellate court cannot escape responsibility by shifting it to the jury. The heinousness of the crime charged herein and the strong feeling against one accused of such crime, under the surrounding facts of this case, independent of the question of guilt or innocence, have such an influence against the person on trial that courts, in a spirit of caution born of experience, closely examine and scrutinize the testimony upon which a conviction has been secured.

[5] The defendant was charged with and put upon his trial for two offenses, namely, rape, and defiling a female under his care and protection. While the former, on account of the age of the prosecutrix, did not require proof of force, yet the only testimony for the state upon that issue tended to show a ravishment by force, and therefore

any testimony competent in corroboration of the prosecutrix in forcible rape was competent in this case. Upon this theory alone the state was permitted to introduce evidence tending to prove that the prosecutrix made complaint promptly after the commission of the crime. And although the conviction was not upon the count charging rape, both offenses were submitted to the jury upon the testimony, and we think its sufficiency to sustain the verdict should be judged by the rules applicable in rape cases.

[6] In the recent case of *State v. Tevis*, 234 Mo., loc. cit. 284, 136 S. W. 341, this court, speaking through Brown, J., announced the law upon the question of corroboration of the prosecutrix in such cases, as follows: "A conviction in cases of either incest or rape may be had upon the uncorroborated evidence of the prosecutrix, but when the evidence of such prosecutrix is of a contradictory nature, or, when applied to the admitted facts in the case, her testimony is not convincing, but leaves the mind of the court clouded with doubts, she must be corroborated, or the judgment cannot be sustained. *State v. Goodale*, 210 Mo. 275, loc. cit. 290 [109 S. W. 9]; *State v. Brown*, 209 Mo. 413 [107 S. W. 1068]."

The same subject is discussed, and the rules by which courts should be guided are set forth, in *Kelley's Crim. Law & Prac.* § 541, in the language following: "The credibility of the witness, and whether her statements be true or not, must be left with the jury. If her reputation for chastity and morality be good, and she made complaint at her first opportunity, or shortly after the fact, and the accused fled, any such facts would go to strengthen her testimony. On the other hand, if her reputation for truth, morality, or chastity be bad; if she concealed the injury for any considerable time; if she might have been heard, and yet made no outcry—these facts would tend to show that her testimony is false or feigned. So, if she voluntarily continue friendly intercourse with the accused after the fact without complaining against him, this would tend to render her story improbable. The state may not only show any marks of violence seen upon her person to corroborate her story, but may prove that she made complaint recently after the alleged offense."

[7] There is such an utter absence of testimony corroborative of the prosecuting witness, in the record before us; so many contradictory statements in her testimony given at the trial, as compared with that given in her deposition; such improbability in her version of the crime; and her reputation for truth and veracity and for morality was so seriously impeached by women who well knew her and her reputation in Kansas City, while no testimony was offered to sustain it—that we are not willing to let a verdict

stand for so grave a crime, upon such unsatisfactory evidence. We shall not dwell upon the weakness of the case against the defendant by going over the testimony in detail. We think it sufficient to say at this time that the decision of the case has been withheld because of the thorough and most careful examination and re-examination we have made of the testimony. We are not disposed to end the case by reversing the judgment and discharging the defendant, for the reason that upon a retrial the state may be able to introduce testimony in corroboration of the prosecutrix; but we do not hesitate to say that, unless a stronger case is made against the defendant upon a second trial, an instruction directing a verdict should be given.

Other errors are assigned, which we have examined and found to be without merit; but, in view of the disposition made of the case, we do not deem it necessary to discuss them.

The judgment is reversed, and the cause remanded.

BROWN, P. J., and FERRISS, J., concur.

FARRIS v. ST. LOUIS & S. F. R. CO.

(Springfield Court of Appeals. Missouri. Dec. 23, 1912. Rehearing Denied Dec. 23, 1912.)

1. RAILROADS (§ 327*)—CROSSING ACCIDENTS —DUTY TO LOOK AND LISTEN.

The duty to look and listen for approaching trains, including the obligation to see and hear, before attempting to cross a highway crossing, is absolute; failure to do so, if there be opportunity, being negligence.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1043-1056; Dec. Dig. § 327.*]

2. RAILROADS (§ 327*)—CROSSING ACCIDENTS —DUTY TO LOOK AND LISTEN.

The duty to look and listen before crossing a highway crossing, and to see and hear approaching trains, is particularly applicable to pedestrians; the danger zone being smaller in their case.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1043-1056; Dec. Dig. § 327.*]

3. RAILROADS (§ 328*)—CROSSING ACCIDENTS —DUTY TO LOOK.

The fact that the view was obstructed in approaching a railroad crossing on a highway made it more obligatory upon a pedestrian to look for approaching trains before attempting to cross.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1057-1070; Dec. Dig. § 328.*]

4. RAILROADS (§ 335*)—CROSSING ACCIDENTS —NEGLIGENCE.

One injured at a railroad crossing, by showing that he went upon the track without seeing the train, when he could have done so by looking, destroys his prima facie case, made by showing failure to give the signals and the resulting collision.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1028, 1084, 1086-1088; Dec. Dig. § 335.*]

5. RAILROADS (§ 334*)—CROSSING ACCIDENTS—CONTRIBUTORY NEGLIGENCE.

A traveler, who without his own fault is placed in a position of imminent peril at a railroad crossing, will not be guilty of contributory negligence, though he did not select the wisest course in extricating himself, especially where placed therein by the company's negligence.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. § 1027; Dec. Dig. § 334.*]

6. RAILROADS (§ 327*)—CROSSING ACCIDENTS—CONTRIBUTORY NEGLIGENCE.

Though a pedestrian knows that a certain train is due to stop at a nearby station at a certain time, and sees a train approaching at that time, he cannot assume that it is the local train, which will stop, so as to excuse himself from ascertaining whether it is the expected train.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1043-1056; Dec. Dig. § 327.*]

Appeal from Circuit Court, Crawford County; L. B. Woodside, Judge.

Action by Frank H. Farris, administrator of the estate of J. H. Calvin, against the St. Louis & San Francisco Railroad Company. From a judgment for plaintiff, defendant appeals. Reversed.

W. F. Evans, of St. Louis, and Mann, Todd & Mann, of Springfield, for appellant. Frank H. Farris and C. C. Bland, both of Rolla, for respondent.

GRAY, J. This is an action by the plaintiff, administrator of the estate of J. H. Calvin, deceased, to recover damages for his death alleged to have been caused by defendant's negligence. The answer denied negligence on defendant's part, and alleged that Calvin's death was due to, and was the direct result of, his own negligence. The issues were submitted to a jury, and a verdict for \$2,000 returned.

It is conceded that Calvin was killed by being struck by a passenger train of defendant at a crossing in the village of Moselle, this state, on the 29th day of March, 1911. Moselle has a population of about 250. Defendant's track runs from the southwest to the northeast through the village. The depot is situated on the north side of the track. At a point about 120 feet east of the depot is a public crossing. The railroad track divides the village, and residences and business houses are situated on either side of the track, and there is, at a point about 50 feet east of the depot, a crossing for footmen, which had been used as such for a long time prior to the death of the deceased. At a point a few feet northeast of this crossing, a sidetrack left the main line and extended parallel therewith by the station to the southwest, and at a point where the footpath crossed the track the south rail of the main track was about 6 feet from the north rail of the side track. At a point southeast of the depot and just south of the side track there was a granary, and on the side track opposite the granary and just to the southwest of the

footpath, were two box cars. The east end of the east car was a few feet northeast of the east end of the granary and about 20 feet southwest of the foot path at the point where the same crossed the tracks. The defendant had two east-bound morning passenger trains, each of which had a fixed schedule of time. Train No. 6 was a fast train, due at 6 o'clock a. m., and did not stop at Moselle. Train No. 14 was due to arrive at 7:39 a. m., and was a local train, always stopping at Moselle. No. 6 was late, and arrived at Moselle on the time of No. 14.

The evidence discloses that the deceased, who had been in and about the village for several months, started to cross from a saloon on the south side of the village to the north side, by way of the footpath, and, as he was passing over the main track, was struck by the fast east-bound No. 6, and killed. The evidence further discloses that several people were at the station, waiting to become passengers on No. 14, when No. 6 passed through without stopping, and at a rate of about 60 miles an hour. There is a sharp conflict in the record as to whether the signals were given for the station and the crossing. The plaintiff's witnesses testified that signals were not given, and the defendant's witnesses that they were. The verdict of the jury settled this question in favor of plaintiff.

The petition alleged that the distance between the side track and the main track was 8 feet, and all the witnesses practically agreed that at the northeast corner of the east box car the distance was 7 feet and 8 inches, and at the path about 6 feet. The witnesses also agreed that, when the deceased had reached a point where his view was no longer obstructed by the east end of the box car, he could have seen, had he looked, the approaching train for some distance down the track. This distance had been measured by one witness for the plaintiff and two for the defendant, and they agreed that it was from 1,400 to 1,500 feet. Other witnesses testified that it was about a quarter of a mile. One witness for the plaintiff, however, testified he had never measured it, but he thought the track was straight for about 600 feet, and that a train could have been seen coming that distance at least. There was other testimony that the train could have been seen beyond the point where the curve commenced in the track. It can hardly be said there is any conflict on this point, as the witness who testified the track was straight for 600 feet said he was only approximating it, and it might have been straight for a greater distance, and did not undertake to say a train could not have been seen at a greater distance than 600 feet.

The evidence showed that the side of the box car extended 2 feet north of the south rail of the side track, and this distance, de-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

ducted from the distance between the rails, left a space of 5 feet and 8 inches between the northeast corner of the box car and the south rail of the main track. In determining the distance the deceased was from the main track when he could have seen the approaching train, the distance the side track was from the main track at the point where the path crossed the same is immaterial. The issue would be the same if the side track had not extended east of the box cars at all. The deceased could have seen the approaching train when his vision was no longer obstructed by the box car, and, as heretofore stated, the witnesses agreed that this was when he was at least 5 feet and 8 inches from the main track, and that the train would have remained in full view from the time when it first could have been seen until it had crossed the path. It is upon this proof that the appellant claims the court should have given its demurrer to the evidence.

[1, 2] The duty to look and listen for an approaching train before attempting to cross a railroad track is absolute, and the failure to do so when there is opportunity therefor is want of ordinary care as a matter of law. *Burge v. Railroad* (Sup.) 148 S. W. 925; *Green v. Railway*, 192 Mo. 131, 90 S. W. 805. This duty to look and listen before attempting to cross the track includes the obligation to see and hear a train, and where the undisputed evidence shows that the deceased, by looking, had an opportunity to see the approaching train before the time of the accident, and that his opportunity was such that he could not have failed to have seen or heard the train in time to avoid the injury, if he had used ordinary care in looking, then under the law he will be deemed to have seen and heard the train, although there was no testimony that he did see it. Under such circumstances, the traveler is deemed to have seen what was plainly to be seen. This doctrine is applied in cases where it was daylight, and the engine or train in plain view, and could unquestionably have been seen if the traveler had looked in the direction from whence it came. This rule is particularly applicable to persons traveling on foot, "since the danger zone in such a case is so narrow, and it may be avoided with so little effort."

[3] Granting that, on account of the obstructions, the deceased could not have seen the approaching train from the time he left the saloon until he had reached the northeast corner of the box car, it does not help the plaintiff's case. On the contrary, the very fact that the view was obstructed until he reached this point made it all the more necessary for him, when he had reached that point, to look for the approaching train before attempting to pass over the track. *Philadelphia, B. & W. R. Co. v. Buchanan* (Del.) 78 Atl. 776; *L. & N. R. Co. v. Gardner's Adm'r*, 140 Ky. 772, 131 S. W. 787; *Coleman*

v. Atlantic Coast L. R. Co., 153 N. C. 322, 69 S. E. 251; *Elliott v. Railroad*, 84 Conn. 444, 80 Atl. 283; *Beech v. Railway*, 85 Kan. 90, 116 Pac. 213; *Wise v. Railroad*, 81 N. J. Law, 397, 80 Atl. 459.

[4] The respondent claims that he made a prima facie case when he showed that the deceased was killed at a public crossing by a train colliding with him, and that the statutory signals were not given, and the burden of proving nonliability was then shifted to the defendant. This is the general rule; but, when the plaintiff's own testimony shows that the injured person was guilty of negligence that directly contributed to the result, there is nothing left for the defendant to prove. *Green v. Railroad*, 192 Mo. 131, 90 S. W. 805. In other words, the rule is that where the plaintiff, in making out his case, shows that he went upon the track without seeing the train, when he could have seen it by looking, he thereby overcomes and destroys his own prima facie case, made by the showing of the failure to give the signals and the collision.

[5] It is next claimed by the respondent that the deceased could not see the approaching train until he had reached the danger point, and that he passed to the danger point because the defendant failed to give any signal of the approaching train, and, had the signal been given, the deceased would have stopped before he got so close to the track as to be in a place of danger, and that he was killed while attempting to escape. When a traveler upon a highway, without fault on his part, is placed in a position of imminent peril at a railroad crossing, the law will not hold him guilty of negligence, though he did not select the very safest course; and this rule is especially applicable where the person was placed in such perilous position by the railroad company's negligence, as in failing to give proper signals. *Dickinson v. Railroad Co.*, 81 N. J. Law, 464, 81 Atl. 104, 87 L. R. A. (N. S.) 150.

Do the facts justify the respondent in invoking this rule? We think not. The east end of the box car was west of the path, and therefore there was nothing for at least 30 feet south of the main track, and all the deceased had to do, when he arrived within 6 feet of the main track, was to look to the southwest, and he would have seen the approaching train, and could have stepped back until it had passed.

[6] It is next claimed that the fast train came through on the time of the local train, and that the deceased was justified in believing it was the local train, and would stop at the station, and therefore he would have plenty time to pass over the track ahead of it. In the first place, there is no evidence that the deceased believed the approaching train was the local or slow train, or that he did not know the fast train had not passed. In fact, it is not even alleged in the petition

that he relied on any such facts. But, waiving all pleading and proof, the point must be decided against the respondent as a matter of law. In *Boyd v. Railway Co.*, 105 Mo. 371, 16 S. W. 909, the deceased, husband of plaintiff, was a hotel keeper in the town of Renick. His hotel was situated about 100 feet from the depot, and the tracks of the defendant were between the hotel and the depot. The deceased, in the prosecution of his business, was in the habit of going to the depot upon the incoming of all passengers stopping at the station. One of the defendant's regular trains was due at 12:30 p. m. On the day plaintiff's husband was killed, an excursion train approached the station on the time of the other train, and was running about 40 or 45 miles an hour. When the deceased heard the train, he immediately came out of the hotel and started to the depot, and entered upon the track immediately in front of the approaching engine, and was killed. In passing on the case, the Supreme Court said: "The train was in plain view. That he both heard the train and saw it, in a general way, there is no question; but he did not stop a moment in his course to observe its movement, to ascertain whether it was the regular train he was expecting, and which would stop at the depot, and whose speed, as it slowed up for that purpose, he could accurately gauge from his long and frequent experience, or, as it proved to be, a special going at a high rate of speed and showing no evidence of an intention to stop. Dominated, perhaps, by the first impression, received in the house when he heard the whistle, that this was the regular mail, he hastened towards the depot and onto the track without stopping for a moment to test by sense of sight or sound the correctness of his first impression, and as the result of his heedlessness lost his life."

This decision is controlling on us, and undoubtedly holds that the pedestrian, even though he knows that a certain train is due to stop at a station at a certain time, and he sees a train coming at such time, he cannot assume that it is the regular train and will stop, but must watch its movements and ascertain for himself whether it is the expected train. In *Moody v. Railroad*, 68 Mo. 470, the plaintiff's husband was postmaster at Webster, and was in the habit of delivering the mail to a certain passenger train. His post office was on the opposite side of the railroad to that where the depot was, and from which the mail bags had to be delivered to the train. On the night of the accident he heard a train about the time the mail train was expected and usually passed, and he picked up his mail bags, saw the approaching train, but, supposing it would stop, attempted to cross over in front of the locomotive and was killed. There was much testimony that the statutory signals were not given. In passing on the case

Judge Napton said: "As to ringing the bell or sounding the whistle, it was clearly of no importance, so far as Moody was concerned, since it is conceded that he heard and saw the train, and was simply misled by supposing it was the mail train; and the only question is, who is to be responsible for the mistake and his recklessness in determining to cross over in front of the cars, which he could see were going at a rapid rate? Our opinion is that the instruction asked by the defendant, applicable as it was to the facts in evidence, should have been given." It makes no difference, in the *Moody* and *Boyd* Cases, that the deceased actually saw the train coming, and that there is no evidence in the present case that Calvin did see the train, as all the evidence shows that Calvin could have seen the train, had he looked, and therefore the law says he did see it.

The case is very similar to *Giardina v. Railroad*, 185 Mo. 330, 84 S. W. 928. In that case the defendant had a double-track street railroad in the city of St. Louis. An east-bound car had stopped at a street crossing to receive passengers. While the car was thus standing, the plaintiff came running to deliver a key to a person on the car. The car was on the south track, and the plaintiff came to the rear end of the car and delivered the key, then turned to go back across the north track, and, as he did so, he was struck by a west-bound car on that track and received his injuries. The plaintiff testified that he knew it was the custom of the company to have the motorman of a car, which was approaching a car that had stopped, sound his gong and go slowly, and, knowing this custom, he, before attempting to cross the north track, paused behind the east-bound car and listened, but, hearing no gong, concluded there was no car coming. The evidence showed that, with the east-bound car out of the way, the plaintiff could have seen the car on the north track for 1,000 feet. In passing on the case, Judge Vaillant said: "It may be conceded that the defendant was negligent in running its car at a high rate of speed and without sounding the gong past a standing car, from the rear of which the motorman ought to have known that people were liable to pass. It is not likely that the peremptory instruction was given on the theory that no negligence of the defendant was shown, but rather that the plaintiff failed to observe that degree of care that was to be expected of a man of ordinary prudence. * * * From where he stood the body of the east-bound car shut off his view to the east; but one who was as familiar with the movements of the cars as he said he was, in fact, any man of common experience in the plaintiff's place, should have known that in a moment the east-bound car would have gone, and the obstruction to his vision would have been re-

moved. But, even if he had not had that moment to spare, he could have leaned forward beyond the line of the standing car in perfect safety, and have seen the west-bound car coming. The measured distance between the tracks was 6 feet 10 inches. * * * His act in stepping on or near the north track without looking for the west-bound car was negligence, and it contributed to cause the accident."

If we adopt the theory that the deceased knew the time of the trains, and saw the approaching train, but believed it was the local or slow train, and relied on its stopping, and tried to pass in front of it, then we have nothing to do but to follow the *Boyd* and *Moody* Cases, and hold that the defendant is not liable for his mistake; and, on the other hand, if we proceed on the theory that he had no such knowledge, then he passed from a point of safety to danger without looking to see an approaching train, that he could have seen, had he looked, and our judgment is controlled by a long line of decisions of the Supreme Court, holding in such case defendant is not liable.

The judgment is reversed. All concur.

SILBERBERG v. GITENSTEIN.

(St. Louis Court of Appeals. Missouri. Dec. 3, 1912.)

1. APPEAL AND ERROR (§ 532*)—BILL OF EXCEPTIONS—NECESSITY—MOTIONS.

The ruling on a motion to affirm the judgment of a justice of the peace for failure to give notice of the appeal cannot be reviewed, unless the motion and an exception to the ruling thereon is preserved by a bill of exceptions.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 2399-2401; Dec. Dig. § 532.*]

2. APPEAL AND ERROR (§ 297*)—REVIEW—MOTION FOR NEW TRIAL.

An adverse ruling on a motion to affirm the justice's judgment cannot be reviewed, unless a motion for new trial or a rehearing appears in the bill of exceptions.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 1722, 1723; Dec. Dig. § 297.*]

3. APPEAL AND ERROR (§ 305*)—EXCEPTION BELOW—NECESSITY.

Even where there has been a motion for new trial or rehearing, the denial thereof is not open to review, unless there has been an exception to the ruling.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 1759-1764; Dec. Dig. § 305.*]

Appeal from St. Louis Circuit Court; James E. Withrow, Judge.

Action by M. Silberberg against Israel Gitenstein. Judgment for plaintiff, and defendant appeals. Affirmed.

Felix Cornitus, of St. Louis, for appellant. Henry H. Furth, of St. Louis, for respondent.

NORTON, J. This cause originated before a justice of the peace, and defendant prosecuted an appeal from the judgment there rendered against him to the circuit court. Two terms of court having elapsed after appeal was perfected, plaintiff moved an affirmance of the judgment of the justice for want of notice of the appeal, as it is said no such notice was given. On hearing the court sustained this motion, and gave judgment for the plaintiff affirming the judgment of the justice. It is from this judgment of the circuit court on plaintiff's motion for an affirmance because of the failure to give notice of the appeal from the justice that the present appeal is prosecuted.

[1] The record here is in such condition as precludes our right of review. Though a bill of exceptions was made and filed in due time and appears to be allowed and signed by the judge, there is no exception whatever to be found therein. The question which it is sought to have reviewed here arises wholly on the motion to affirm the judgment of the justice, and there appears to have been no exception saved to the ruling of the court on that motion. Mere motions filed in a cause are not part of the record proper, but are matters of exception which themselves, together with an exception to the ruling of the court thereon, must be preserved in the bill of exceptions in order to have the ruling on such motions reviewed on appeal. See *Stark v. Zehnder*, 204 Mo. 442, 102 S. W. 992. It is true the motion itself is incorporated in the bill of exceptions here. However this may be, no exception to the action of the court thereon appears.

[2] Furthermore, we are precluded from reviewing the ruling of the trial court on this motion, and in affirming the judgment of the justice for the reason that no motion for a rehearing or new trial of that question appears in the bill of exceptions. Matters of exception which occur in the trial court must be brought to the attention of the trial court by a motion for a new trial or rehearing, and that tribunal afforded an opportunity to review the ruling thereon or else no review of the same question may be had here. It may be that had this question been presented to the trial court by a motion for a new trial or rehearing this appeal would have been unnecessary, for, perchance, the trial court would have corrected the ruling complained of if it is, in fact, an erroneous one. At any rate, it is well settled that rulings on motions interposed before final judgment and exceptions thereon will not be reviewed in the appellate court in the absence of a motion for a new trial or rehearing first inviting the attention of the trial court thereto. When there is no motion for a new trial in the bill of exceptions, the matter of exception is not open for review on appeal. See *Coy v. Landers*, 146 Mo. App. 413, 125 S. W. 789; *Sim-*

coe Realty Co. v. Wm. J. Lemp Brewing Co., 152 S. W. 31.

[3] Moreover, even where there is a motion for a new trial or rehearing and such motion has been overruled, matters of exception will not be reviewed here unless there appears, too, an exception to the action of the trial court in overruling the motion for a new trial. See *Wilbrandt v. Laclede Gas-light Co.*, 135 Mo. App. 220, 115 S. W. 497.

For the reasons given, the judgment should be affirmed. It is so ordered.

REYNOLDS, P. J., and CAULFIELD, J., concur.

MARTIN v. BUNKER-CULLER LUMBER CO.

(Springfield Court of Appeals. Missouri. Dec. 2, 1912. Rehearing Denied Dec. 19, 1912.)

1. SALES (§ 418*)—BREACH OF CONTRACT—DAMAGES.

The damages for breach of defendant's contract to sell plaintiff timber for wagon hubs are not limited to the difference between the contract price and the market value, but include loss of profits, it being understood plaintiff was buying the timber to manufacture into hubs to sell, and plaintiff being unable elsewhere to obtain such timber.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. §§ 1174-1201; Dec. Dig. § 418.*]

2. EVIDENCE (§ 113*)—LOSS OF PROFITS—MARKET VALUE.

As regards damages from loss of profits through defendant's breach of contract to furnish timber for plaintiff to manufacture into hubs to sell, the price at which another had contracted to buy the hubs of plaintiff is some evidence of their market value.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 259-296; Dec. Dig. § 113.*]

3. SALES (§§ 411, 418*)—BREACH OF CONTRACT—PETITION.

The petition showing the agreement that plaintiff should erect a mill on defendant's land for manufacture of hubs, and that defendant should furnish plaintiff timber to manufacture into hubs, that plaintiff erected the mill at a certain cost, and defendant failed and refused to furnish the timber, authorizes recovery of nominal damages; and so states a cause of action.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. §§ 1161-1164, 1174-1201; Dec. Dig. §§ 411, 418.*]

Appeal from Circuit Court, Shannon County; W. N. Evans, Judge.

Action by George R. Martin against the Bunker-Culler Lumber Company. Judgment for plaintiff. Defendant appeals. Affirmed.

A. W. Lincoln, of Springfield, Wm. P. Elmer, of Salem, and Orchard & Cunningham, of Eminence, for appellant. Munger & Lindsay, of Piedmont, and Lin Shuck, of Eminence, for respondent.

GRAY, J. This appeal presents the vexed and difficult problem as to when the profits lost by the party defeated of his contract by the wrongful act of the other contracting

party can be recovered in a suit for damages based on a breach of the contract.

The defendant in March, 1909, owned a sawmill at Bunker, Mo., and also a large body of timber in that vicinity. On the 9th of March the plaintiff and defendant entered into a contract in writing, by the terms of which the defendant was to furnish plaintiff, free of rent for five years, a suitable sight at Bunker for a hub manufacturing plant; also agreed to sell and deliver to the plaintiff on cars at the hub yard during the said term of five years sufficient oak timber to make 600,000 wagon hubs, and to deliver one-fifth, or 120,000, of said hubs during each year of the contract. The delivery was to be made at the rate of 10,000 per month, with a proviso that the number might be exceeded during the months of September, October, November, and December of each year, during which four months a total delivery of 80,000 hubs was authorized. The contract contained the further provision that in case the 80,000 hubs were delivered in said four months the delivery during the months of April, May, June, and July following might be reduced accordingly, and that, if an average of 20,000 hubs had been delivered during said fall months, the delivery during the other months should not exceed 5,000 per month. The plaintiff agreed to erect at his own cost upon the ground so furnished by the defendant, a hub manufacturing plant, with all necessary warehouse buildings, and have the same ready for operation not later than November 1, 1909, and to pay the defendant 10 cents per hub for all timber delivered to him under the contract. The contract also provided that all timber to be delivered was subject to inspection by the plaintiff before loaded on the cars, and that the defendant was to be released of his obligation to furnish the hubs in case it became impossible to make delivery of them owing to defendant's inability to obtain said hub timber along with its regular logging operations.

The evidence on the part of the plaintiff tended to prove that, after the execution of the contract, the plaintiff went to Chicago, and there made a contract for the sale of all of his hubs, and that he purchased in Ohio all the machinery for his plant, and caused the same to be shipped and erected on the land of the defendant, and was ready to receive hub timber on November 1, 1909, and so notified the defendant; that the defendant did not furnish him any hubs until the latter part of January, 1910, and then only about 2,500, and to August 1, 1910, only furnished timber for about 10,000 hubs; that the plaintiff repeatedly made demands on defendant for the hub timber, and kept expert millmen ready to operate the hub mill until the 1st of August, 1910, at which time he let them go. The plaintiff offered further

testimony tending to prove that he had inspected hub timber for about 140,000 hubs, and that defendant shipped such timber to its sawmill, and did not deliver the same to plaintiff's hubmill. The defendant admitted it furnished no hub timber until in January, and that to the 1st of August, 1910, it had delivered less than 10,000 hubs; that during said time it was cutting, in its regular logging operations, but little timber that met the requirements for hubs, and that much of it that really did meet the requirements was rejected by the plaintiff's inspector; that, if plaintiff had not abandoned his contract, defendant would have been able in the future to have supplied him with the amount of hub timber called for in the contract. The case was tried before a jury in Shannon county, where it had been taken on change of venue from Dent county, resulting in a verdict in favor of the plaintiff for \$1,317.27, which amount was reduced by a set-off claim of the defendant of \$67.27, leaving a balance of \$1,250, for which a judgment was rendered against the defendant. In due time the defendant perfected its appeal to this court. The defendant has seen fit to limit the issues in this court to three, and we will limit our investigation accordingly.

[1] It is appellant's first contention that the proper measure of damages is the difference between the market value of the hub timber at the place of delivery and the contract price. The recognized leading case is that of *Hadley v. Baxendale*, 9 Exch. 354, and it has been approved by most of the American courts and by the Supreme Court of this state in *Mark v. Cooperage Co.*, 204 Mo. loc. cit. 265, 103 S. W. 20. The rule as stated in that case is that where two parties have made a contract, which one of them has broken, the damages which the other party ought to receive in respect of such breach should be such as may fairly and reasonably be considered either arising naturally—i. e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it—and that if the special circumstances under which the contract was actually made were communicated, and thus known to both parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated, but, on the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he at the most could only be supposed to have had in contemplation the amount of injury which would

arise generally, and in the great multitude of cases not affected by any special circumstances from such a breach of contract. In *Hammond v. Beeson*, 112 Mo. 190, 20 S. W. 474, Judge MacFarlane said: "It is impossible to lay down any rule of damages for breach of contract that can be justly applied to all cases of any particular class. Each case must in a great measure be determined upon equitable principles upon the particular facts by which it is attended, the controlling principle being that the one suffering from the breach should be fully compensated for all losses sustained. Other rules are merely aids to that end."

The evidence discloses that there was no other hub timber that plaintiff could have purchased to keep his mill running, and therefore he was at the mercy of the defendant for such timber. He had erected on the land of the defendant a hubmill for the purpose of manufacturing into hubs, timber then growing on defendant's land, to be sold on the market. It must have been the contemplation of both parties that plaintiff intended to manufacture and sell the hubs at a profit, and thereby reimburse him for his expenditures and his equipment and the cost of manufacturing the hubs. That it was a special contract with the defendant is evidenced by the fact that the hubmill was to be erected on defendant's premises, and the defendant was to furnish water necessary for the operation of the same. Under these circumstances, it cannot be said that plaintiff's damages are the difference between what he paid for the hub timber and the market value of such hub timber. In *Hammond v. Beeson*, supra, the plaintiff sued for special damages for breach of a contract to grade five miles of railroad for the defendant. In discussing the plaintiff's damages the court said: "It is a clear proposition, and one well settled by the authorities, that, where there is an express contract, the contract itself should furnish the basis for estimating the damages, if they can be ascertained thereunder with sufficient certainty. The contract price, in a contract of this character, would not be the reasonable measure of the damage, but the benefits plaintiff could have obtained, had he been permitted to perform the work at the contract price. The profits plaintiff expected to realize out of the contract were the real consideration that induced him to make it. These became a part and parcel of the contract itself, and to these he ought to be entitled. If the contract was terminated or performance prevented by the defendants, whether through inability or design, the purposes of plaintiff were defeated, and the loss of profits sustained. The profit was the full measure of his possible gain, if he had been permitted to complete this contract, without unreasonable delay or interference. If he performed no part of it and incurred

no expense, all the damages he could justly demand would be the loss of the profits he could have realized. * * * This rule is equitable and just, and furnishes full and adequate compensation for all injury sustained." The evidence shows that plaintiff was compelled to rely on defendant for his hub timber, and could not have secured the same at any other place. If defendant's theory is correct, then notwithstanding the parties entered into the contract by which the plaintiff was to, and did, expend about \$6,000 equipping his hubmill on the land of the defendant, in order to manufacture the timber furnished by defendant, and although the defendant had not furnished a single piece of timber for a hub, yet, if the value of the hub timber was no greater than plaintiff had agreed to pay defendant for it, the plaintiff could not be allowed any damages. In *Jordan v. Patterson*, 67 Conn. 473, 35 Atl. 521, the Supreme Court of Connecticut, in a similar suit, said: "In the present case the plaintiffs claimed that at the time of delivery there was no market in which they could procure such goods as the defendants were to deliver to them. This was a fact which might be proved by the testimony of any person who had knowledge on the subject. * * * The defendants had knowledge that the plaintiffs contracted for these garments in order to resell them to others. They were chargeable with knowledge that the plaintiffs would make such profits as the market price of such goods would give them. * * * In respect to this item of damage the rule above stated furnished the proper test. In restoring an injured party to the same position he would have been in if the contract had not been broken, it is necessary to take into the account losses suffered, as much as profits prevented. And whenever the loss suffered, or the gain prevented results directly from a circumstance which may reasonably be considered to have been in the contemplation of the parties when entering into the contract, the plaintiff should be allowed to prove such loss."

The rule allowing plaintiff to recover damages for loss of profits, where the defendant has agreed to sell him an article, which, in turn, the plaintiff is to manufacture into another article, and to make his profit on resale of the manufactured article is generally recognized by the authorities, when the evidence shows that the parties contemplated the manufacture and resale of the article at the time the contract was made. *Jordan v. Patterson*, supra; *Ford Hardwood Lumber Co. v. Clement*, 97 Ark. 522, 135 S. W. 343; *Liggett Spring & Axle Co. v. Michigan Buggy Co.*, 106 Mich. 445, 64 N. W. 466; *Trego v. Arave*, 20 Idaho, 38, 116 Pac. 119, 35 L. R. A. (N. S.) 1021; *Wakeman v. Wheeler & W. Mfg. Co.*, 101 N. Y. 205, 4 N. E. 264, 54 Am. Rep. 676; *Cloe v. Rogers*, 31 Okl. 255, 121 Pac. 201, 38 L. R. A.

(N. S.) 366. The case of *Wilson & Son v. Russler et al.*, 91 Mo. App. 275, is not in conflict with the rule we have just announced. In that case there was a sale of a sawmill and 200,000 feet of saw logs then cut and lying on the banks of the Osage river, within a short distance of the sawmill. The seller did not deliver the logs, and in an action on the contract the court told the jury that, in estimating the damages by reason of the failure to deliver the logs, the jury should take into consideration the net profit which defendants could have made had said logs been delivered and sawed into lumber. The Kansas City Court of Appeals reversed the case, and held that such damages were not recoverable under the issues. After citing the authorities, the court said: "It is thus seen that the foregoing authorities make it plain that the defendants' instructions now in question go too far. They authorized the jury to find for defendants the kind of damages which the law forbids *when the general allegation of the answer in respect to the counterclaim is like that in this case*. When anything beyond the difference between the agreed and the market price of the thing sold is sought to be recovered, some special circumstance under which the contract was made must be alleged and shown. 'Now, if the special circumstances under which the contract was actually made were communicated and were *thus known to both parties*, the damages resulting from the breach of such a contract which they would reasonably contemplate would be the amount of the injury which would ordinarily follow from such breach of the contract under the circumstances so shown and communicated.'" Instead of being in conflict with our position, this case sustains it. There were no special circumstances shown in that case, but the question was submitted solely on a contract of sale. Not so here, however, as the petition in this case alleges the special circumstances under which the contract was entered into, and clearly showing that both parties contemplated that the whole purpose and object of plaintiff in entering into the contract was to secure the hub timber and manufacture the same into hubs and to sell the same at a profit.

[2] It is next claimed that the plaintiff's testimony was insufficient to authorize the recovery of loss of profits. The plaintiff testified that it cost him 30 cents to make a set of hubs, and the timber cost him 40 cents, and that he sold the hubs for \$1.10 to \$1.75 a set; that he had a contract for the sale of the hubs at Chicago, by which he received 90 cents for 8-inch hubs, \$1.10 for 9-inch hubs, \$1.55 for 9½-inch, and \$1.75 for 10½-inch, per set of four hubs; that these prices were f. o. b. Bunker. It was not alleged in the petition, or shown by the evidence, that the defendant was notified before the contract was entered into or any

time thereafter that plaintiff had a special contract for the sale of his hubs, and therefore it may well be said that plaintiff was not entitled to recover for the difference between what it cost to manufacture his hubs, and the contract price for which he had sold them. The court, however, did not submit that issue to the jury, and therefore the question needs no further consideration. The testimony was admissible, however, for the purpose of showing the contract price, as the rule seems to be that the contract price is competent evidence tending to prove the value. *Abbit v. St. Louis Transit Co.*, 104 Mo. App. 534, 79 S. W. 496; *State ex rel. v. Steele & Co.*, 108 Mo. App. 363, 83 S. W. 1023; *Jordan v. Patterson*, supra. In *Jordan v. Patterson*, supra, the plaintiff offered testimony of the prices he was to obtain on a resale, and the court said: "If proof of the terms of these last-mentioned subsales was offered for the purpose of showing what the market price of such goods was at the time they were to be delivered, then the evidence should have been received. The market value of any goods may be shown by actual sales in the way of ordinary business." The plaintiff's testimony stood absolutely uncontradicted, and therefore we must hold that it was some evidence of the market value of the manufactured product, and authorized the court to submit that issue to the jury. The court did not submit to the jury any loss that the plaintiff sustained by reason of his mill standing idle; thus causing expense for hired help, etc. And to this extent the instruction was really more favorable to the defendant than it was entitled to be. *Morrow v. Railroad*, 140 Mo. App. 200, 123 S. W. 1034.

[3] The last point is that the petition does not state facts sufficient to constitute a cause of action. This contention cannot be sustained. Separate and apart from that portion of the petition regarding the profits, the petition states a cause of action for damages directly suffered and sustained by the plaintiff, growing out of the fact that under his contract with the defendant he expended over \$5,000 in building his mill on the land of the defendant for the purpose of carrying out his contract, and that the defendant failed and refused to carry out his part of the agreement. These allegations undoubtedly authorized the recovery of nominal damages, and therefore the petition states a cause of action.

During the trial, the defendant made several objections to the introduction of testimony, which were overruled. We are not holding that these objections were without merit, but appellant has not asked us to reverse the judgment on account of any errors in the introduction of testimony.

The judgment will be affirmed. All concur.

STONE v. JOHNSTON.

(Kansas City Court of Appeals. Missouri.
Dec. 9, 1912.)

1. ARBITRATION AND AWARD (§ 27*)—ARBITRATORS—DISQUALIFICATION—INTEREST.

Where one acting as an arbitrator of the amount due under a contract for services to be rendered by plaintiff on defendant's farm, unknown to plaintiff, owned an adjoining farm and was interested in a drainage ditch on which plaintiff did a portion of his work, he was disqualified as an arbitrator, and the plaintiff could treat the whole proceeding as void.

[Ed. Note.—For other cases, see *Arbitration and Award*, Cent. Dig. §§ 137-140; Dec. Dig. § 27.*]

2. ARBITRATION AND AWARD (§ 67*)—FRAUD—RATIFICATION.

Evidence held to show that plaintiff had knowledge of defendant's fraud practiced in an arbitration proceeding when he treated a new contract arising therefrom valid, thus ratifying the award.

[Ed. Note.—For other cases, see *Arbitration and Award*, Cent. Dig. §§ 341, 342; Dec. Dig. § 67.*]

Appeal from Circuit Court, Charlton County; S. T. Jones, Special Judge.

Action by Willis Stone against V. W. Johnston. Judgment for plaintiff, and defendant appeals. Reversed.

Bresnehen & West, of Brookfield, for appellant. J. A. Collet, of Salisbury, and John D. Taylor, of Keytesville, for respondent.

JOHNSON, J. This is an action to recover damages resulting from the alleged breach by defendant of a contract of employment. Defendant, a banker in Champaign, Ill., owned a farm of 900 acres in Charlton county, Mo., most of which lay in the Charlton river valley. Under date of February 8, 1910, he entered into a contract in writing with plaintiff, who was living in Illinois, by the terms of which he employed plaintiff for a term ending March 1, 1911, to move with his family to the farm, and to do work upon it as defendant, from time to time, should direct. Some of the land had been cultivated, much of the bottom land had not been broken for cultivation, and a drainage system of some magnitude was being constructed for the benefit of this and adjoining farms in the valley. The contract contemplated that the services of plaintiff would be employed in planting and cultivating crops, in plowing unbroken land, and in working on the drainage ditch, and fixed the compensation plaintiff was to receive for these different kinds of work. For example, he was to be paid \$1.75 per acre for plowing unbroken land, \$1.25 per acre for plowing land that had been cultivated, 20 cents per acre for planting crops, 50 cents per acre for cultivating crops, and 35 cents per hour for each man and team "working on the levee." It was provided that plaintiff should move his family to the farm and should take with him a full set of farming implements and "at

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

least nine head of good horses and mules." He was to have the use free of charge of the house, barn, outbuildings, and "a truck patch," and was "to pay the usual price for the pasture land used by him, and also pay the usual rental for all land farmed by him on the shares." Further the contract provided that defendant would "instruct second party (plaintiff) as to how he desires said land farmed and crop tended," and that, "when not practicable to work on the crops, second party is to be furnished levee work, ditching, bridge building, and other farm work which is to be paid for at the usual and customary rate; it being understood that first party (defendant) is to advise second party from time to time as to the work he desires done and method of doing same."

In plaintiff's family were two sons almost grown who had been working for their father as farm hands, and we think the contract as a whole expressed the mutual intention that plaintiff should take with him sufficient equipment for the proper employment of himself and his sons, and that defendant should keep this force reasonably employed during the term of the contract at the rates of compensation therein stated. Plaintiff and his family moved to the farm, and he brought with him 10 head of horses and mules and the equipment mentioned in the contract. He was ready to begin work March 15, 1910, but was compelled to remain idle a week because of defendant's failure to give working orders. Defendant visited the farm March 22d and gave directions concerning the work to be done, and then returned to Champaign. Some of the work laid out by defendant could not be done on account of unfavorable weather, and the remainder was not sufficient to keep the force busy. The evidence of plaintiff tends to show that the disagreement which ensued between the parties very shortly after their relation began was caused by the neglect of defendant to give adequate working orders, while the evidence of defendant is to the effect that such orders were given and plaintiff failed to obey them. This disagreement which related to the question of the amount due plaintiff under the contract became so acute that plaintiff went to Champaign early in May to effect a settlement, if possible. A conference there between the parties resulted in an oral agreement to submit the matters in dispute to arbitration, and three arbitrators were chosen. One of them was an associate of defendant in the banking business in Champaign, and another (F. H. Jones) owned a farm adjoining that of defendant in Chariton county and was interested in the drainage project by which the farms in that neighborhood were to be benefited. The evidence of plaintiff shows he had knowledge of the business connection between the first-mentioned arbitrator and defendant, but had no knowledge that Mr. Jones was directly interested in the subject-matter of the arbi-

tration. On May 11, 1910, the arbitrators made the following award in writing: "We, the undersigned, have agreed, as arbitrators of the contract of February 8, 1910, between V. W. Johnston and Willis Stone, it shall be null and void and of no effect. It is further agreed that Willis Stone shall be allowed eighteen dollars (\$18.00) for work done May 2, 3, 4, 5, and 6, 1910, forty dollars (\$40.00) for work done on Elm creek cut-off, and the sum of sixty-seven and 65/100 dollars (\$67.65), a total of one hundred twenty-five and 65/100 dollars (\$125.65), being the amount due up to date. Further said Stone shall be allowed \$1.25 per acre for all plowing up to this date, in addition to the above, less \$50, which has been paid said Stone. It is further agreed that said Stone shall be paid the sum of two hundred seventy-five dollars (\$275.00) per month for the service of himself, two boys, ten horses, and his implements for the first five months from this date. Further said Stone shall receive fifty-nine dollars (\$59) per month for the remaining time to the first of March, 1911, for himself, ten horses and implements. The pasture 15 or 20 acres near barn, there shall be no charge for." This award was submitted to both parties, was accepted by them, and they gave formal expression to their acceptance by signing the award. Plaintiff returned to the farm and worked one month under the new agreement. The arbitration did not result in restoring harmony between the parties. During that month the correspondence conducted by them became somewhat acrimonious. In a letter written by plaintiff May 25, 1910, he said, "The way you wrote your last letter does not sound good to any one. I am not worried about your holding my money as I am here with everything that I agreed to bring and can collect for my time. It is hard labor, and I think a man ought to pay for it. Mr. Johnston, I think you had better investigate that arbitration contract and see if it will hold good with two parties interested as Jones and Goodman were to you."

Before the end of the first month plaintiff employed a lawyer who telegraphed defendant that a settlement must be made at the end of the month. Defendant came to Chariton county in response to the telegram and refused plaintiff's demand for \$275, a full month's pay under the new contract. The parties then entered into a written contract for a second arbitration in which they agreed that the new contract of May 11, 1910, should be taken as a basis, and that the award of the arbitrators, in addition to assessing the amount due plaintiff for his services from May 11th to June 11th, should allow him the damages, if any, that would be sustained by him in consequence of an immediate termination of the contract of employment. The closing sentence of the agreement provided that "the arbitrators are to decide all controversies up to March

1, 1911." Pursuant to this agreement an award was made June 13, 1910, which allowed plaintiff \$75 for services during the month in question, and \$200 damages on account of the termination of the contract of employment. Both parties accepted the award, and defendant gave a check to plaintiff in a sum including the amount of the award plus \$53.80 due on the old settlement and less \$25 paid to plaintiff's attorney in settlement of his fee. Afterward defendant stopped payment on the check before plaintiff could collect it, but later sent the money out to a banker in Charlton county with instructions to pay it to plaintiff on his removal from the farm. Plaintiff refused to accept the money on these terms, and remained on the farm until March, 1911. He did no more work for defendant under the old contracts, and in June, 1911, brought this suit to enforce a claim for damages based on the alleged breach by defendant of the original contract of February 8, 1910.

[1] The contention of plaintiff is that the two agreements for arbitration and the respective awards made under them are void for the reason that one of the arbitrators selected under the first agreement (F. H. Jones) was interested in the subject-matter of the controversy. In the first award plaintiff was allowed \$40 "for work done on Elm creek cut-off." This cut-off was a part of the drainage system, and plaintiff introduced evidence tending to show that Mr. Jones, who, as stated, owned a farm adjoining the farm of defendant, was one of the landowners at whose expense this work was being done, and therefore was bound to contribute to the payment of the work performed by plaintiff. Mr. Jones denies this statement and says he had nothing to do with the cut-off in question. We think the evidence of plaintiff relating to this subject, though weak, is strong enough to raise an issue of fact, and therefore, in our consideration of the demurrer to the evidence, we shall assume that Mr. Jones had a pecuniary interest in one of the items submitted to him as an arbitrator. Such interest disqualified him from serving as an arbitrator and tainted the award with fraud and corruption. Being an interested party to the controversy, he had no right to act as judge of his own cause, and, as plaintiff was ignorant of the fraud at the time of its perpetration, he was not bound by his acceptance of the award. *Shawhan v. Baker*, 150 S. W. 1096, decided at this term, and cases cited. "An award may undoubtedly be impeached and avoided by proof of fraud, provided it be fraud practiced upon or by the referees." *Strong v. Strong*, 9 Cush. (Mass.) 560. And had plaintiff not ratified the award after his discovery of the fraud, there can be no question that he would have been entitled to treat the whole arbitration proceeding as void and to stand on the original contract.

[2] But we find he did ratify and adopt the award after he discovered the fraud, and with full knowledge of its infirmity used it as a basis for the contract of June 13th providing for a second arbitration. In his letter of May 25th he warned defendant that the first award was subject to attack "with two parties interested as Jones and Goodman were to you." His counsel offer as an explanation of that statement that plaintiff knew Goodman was associated with defendant in the banking business and supposed that Jones sustained a similar relation towards defendant. The evidence is uncontradicted that Jones and defendant had no such business association, and, if plaintiff meant what his counsel say he meant, he was making a charge against Jones that had no substantial foundation and therefore was recklessly made. We find the testimony of plaintiff gives no color to this proffered explanation, but on the contrary discloses that the thought in his mind when he included Jones in the charge of fraud was that Jones had a pecuniary interest in the subject-matter of the arbitration. We quote from his testimony: "Q. At that time you say you had no information whatever that Jones had any interest in the work that was done on the Elm creek cut-off? A. No, I didn't know that he had any interest in it at all, whatever. Q. And you had no information of that sort on the 13th day of June, 1910, when the second arbitration was had? A. No, sir. Q. Absolutely none? A. Only by hearsay. Q. By hearsay, did you have some information to that effect at that time? A. Not anybody that knowed positively. Q. You didn't have any information from Mr. Jones to that effect? A. No, not till later. Q. You didn't have any information from Mr. Johnston to that effect? A. No, sir. Q. And, as a matter of fact, you have had no such information from Mr. Jones or Mr. Johnston up to this time? A. No, sir; not from either of them."

We do not give much weight to this lay classification as "hearsay" of the sources of plaintiff's information, especially in view of the fact that he used the information as the foundation of a direct and specific charge of fraud. His own testimony, viewed in the light of all the circumstances of the case, convinces us and leaves no room for a reasonable difference of opinion that he knew as much about the alleged interest of Jones in the subject of the arbitration when he entered into the contract of June 13th as he did when later he repudiated that contract. Notwithstanding the first award may have been tainted with fraud of which he was the victim, plaintiff, after the discovery of such fraud, could ratify the award and treat the new contract resulting from it as valid, and therefore as superseding the original contract. It was optional with him to adopt or repudiate the results of his adversary's

duplicitly, but, after making his choice with open eyes and acting on it, he will not be suffered to change positions. In the contract of June 13th plaintiff voluntarily stood on the ground that the original contract had been superseded by the new contract of May 10th and agreed that the latter contract should be terminated on terms allowing him to recover the damages such premature ending would cause him. He is bound by that contract and the award made under it and cannot maintain an action founded on the original contract.

The learned trial judge permitted plaintiff to recover on the theory that the question of whether he had knowledge of the fraud in the first arbitration at the time he entered into the contract for the second involved issues of fact for the jury to determine. This, as we have shown, was an erroneous view of the evidence.

The judgment is reversed. All concur.

WRIGHT et al. v. STATE.

(Supreme Court of Arkansas. Dec. 9, 1912.)

1. MALICIOUS MISCHIEF (§ 9*)—EVIDENCE—SUFFICIENCY.

Evidence held to support a conviction for malicious mischief, committed by the killing of hogs.

[Ed. Note.—For other cases, see Malicious Mischief, Cent. Dig. § 15; Dec. Dig. § 9.*]

2. MALICIOUS MISCHIEF (§ 1*)—EVIDENCE—SUFFICIENCY.

Evidence that a sister concealed the death of hogs killed by her brother is insufficient to convict her of malicious mischief, committed by the killing of the hogs.

[Ed. Note.—For other cases, see Malicious Mischief, Cent. Dig. §§ 1-5; Dec. Dig. § 1.*]

Appeal from Circuit Court, Carroll County; J. S. Maples, Judge.

A. B. Wright and Ruth Wright were convicted of malicious mischief, and they appeal. Affirmed as to A. B. Wright, and reversed as to Ruth Wright.

Charles D. James, of Eureka Springs, for appellants. Hal L. Norwood, Atty. Gen., and Wm. H. Rector, Asst. Atty. Gen., for the State.

KIRBY, J. Appellants were jointly charged in the justice's court with the offense of malicious mischief, alleged to have been committed by killing a sow and pigs of the value of \$20, the property of C. C. Matthews. From a conviction there, they appealed to the circuit court, where they were again convicted and fined \$20 each, and the value of the animal slain was fixed by the jury at \$20, and the court rendered judgment against them for the fine and cost and triple damages in the sum of \$60. From this judgment they appealed.

[1] The testimony is altogether circumstantial. The owner of the hogs stated that he had seen the sow, heavy with pig, a few

days before he finally missed her, near the Wright field, where he found a hog had gone through their fence, and the tracks looked like those of his sow, which had a defective foot and made a peculiar track. On Sunday he discovered these tracks in the Wright field, and, while he was standing at the fence looking at them, saw A. B. Wright about 200 yards away, carrying a double-barrel shotgun in his hand, and coming towards him. Not having spoken to Wright for some time, he did not wait until he came up, but left. After searching for two or three days and not finding the sow, and finding a young pig about four or five days old, almost starved, near where the hog tracks went into Wright's field, he swore out a search warrant and went to Wright's place with an officer, and in the search through the field, to which appellants objected, they discovered a hog's bed about 125 yards from where witness had seen the tracks of his sow going into the field, and near it some dried blood and gun wads. From the bed a trail led off, showing the prints of something having been dragged on the ground, which was followed about 40 yards down into a little draw, and ended at a place where some rocks and stones were piled, and the place had been recently dug up. Upon removing the earth and stones, the body of the sow was found, and identified as the property of the complaining witness. She weighed about 200 pounds, and witnesses were not able to ascertain how she had been killed. A little further up the draw five or six dead pigs were found, covered with stones.

There was some incompetent testimony introduced, relating to the conduct of appellants in the treatment of the stock of other individuals at different times before, which was not objected to. We are not able to say that the reasonable inferences arising from the facts developed—the death of the hogs in appellant's field near where he was seen a day or two before with a shotgun, with the concealment of the bodies of the dead hogs, as stated, upon the farm of appellant A. B. Wright—are not sufficient to support the jury's verdict as against him, notwithstanding he denied having killed the hogs and any knowledge of their burial upon his farm. The evidence is not very satisfactory, but we are not able to say it is insufficient; and the judgment is affirmed as to him.

[2] There is no testimony whatever to connect appellant Ruth Wright with the commission of the offense, further than that some of the witnesses stated they did not believe that A. B. Wright alone could have dragged the dead animal from the place it appeared to have been killed to the place where it was found buried, and that she objected to the search of the farm by some of the people accompanying the officer with the warrant, explaining her objections by saying

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

they were their enemies. This is not sufficient to raise more than a suspicion, if it does that, so far as she is concerned, and her action, not crediting her explanation, which is most reasonable, could be accounted for in a desire to shield her brother, if she knew of his having committed an offense; and even in felony cases a person standing in the relation of sister to the accused cannot be an accessory after the fact. The concealment of the death of the hogs did not constitute the offense of malicious mischief, and is not more than a circumstance tending to show they had been wrongfully killed in violation of the statute. As to her the judgment is reversed, and the cause dismissed.

FELLHEIMER v. HIGGINS et al.

(Supreme Court of Arkansas. Dec. 9, 1912.)

MECHANICS' LIENS (§ 281*)—ENFORCEMENT—SUFFICIENCY OF EVIDENCE—INDEBTEDNESS OF DEFENDANT.

In a suit by subcontractors against an owner to enforce mechanics' liens, with a cross-complaint by the contractor to recover the balance of the contract price after satisfying such liens, defended on the ground that on account of the contractor's negligence one of the walls of the building fell, subjecting the owner to damages in excess of the unpaid remainder of the contract price, *held*, that the evidence supported a finding that such damages resulted from defects in the architect's plans, and not from negligence of the contractor.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. §§ 565-572; Dec. Dig. § 281.*]

Appeal from Garland Chancery Court; Alphonso Curl, Special Chancellor.

Suit by one Donnelly and others against Henry Fellheimer and Henry Higgins to enforce mechanics' liens, with cross-complaint by Higgins against Fellheimer. Decree for plaintiffs against Fellheimer, and for Higgins on his cross-complaint, and Fellheimer appeals. *Affirmed*.

J. B. Wood, of Hot Springs, for appellant. W. H. Martin, of Hot Springs, for appellees.

MCCULLOCH, C. J. Appellant, Henry Fellheimer, entered into a written contract with Henry Higgins, one of the appellees, whereby the latter agreed to furnish material and construct for appellant a fourth story to the latter's brick building in the city of Hot Springs, for an agreed price. The contract provided that the work should be done according to the plans and under the direction of an architect named in the contract. After the completion of the building, certain of the subcontractors, who furnished material and performed labor in the erection of the improvement, instituted this action in the chancery court of Garland county to enforce their respective liens for the unpaid portion of the price of material and labor, alleging that more than enough of the contract price to

cover the amount of their liens remained unpaid. Appellant and Higgins were both made defendants, and Higgins filed a cross-complaint against appellant to recover the balance of contract price alleged to be due, after satisfying the asserted liens of the subcontractors who sued. Appellant defended on the ground that the improvement had not been made in accordance with the specifications of the contract and the directions of the architect, and that on account of such negligent construction, and also the negligence of servants of Higgins, one of the walls fell and inflicted injuries on certain individuals, thereby subjecting appellant to liability for damages largely in excess of the unpaid remainder of the contract price, which sum, it is alleged, appellant had to pay, after judgment had been rendered against him therefor in favor of the injured persons. On final hearing of the cause, the court found that the falling of the wall was not caused by negligence on the part of Higgins or his servants, but fell on account of the defective plans and specifications furnished by the architect, and that Higgins was not responsible for the damages which resulted. A decree was rendered against appellant in favor of the subcontractors who sued, and in favor of Higgins for the unpaid balance of the contract price, after satisfying the liens.

The contract between appellant and Higgins provided that the latter should be liable to the former for any damages sustained by reason of negligence in constructing the walls, and appellant contends that under this contract Higgins should be held liable for the damages paid to the injured parties, and also that the damages so paid should be treated as a reduction of the contract price, so as to exclude any liability on appellant's part for the amounts due the subcontractors. If the damages arose by reason of negligence of Higgins or his servants, it is clear that he would be liable therefor to appellant; but the question whether, as against the subcontractors, the amount of the damages should, under the contract, be applied in reduction of the contract price is another question, and one not entirely free from doubt. In *Cost v. Newport Builders' Supply & Hardware Co.*, 85 Ark. 407, 108 S. W. 509, 14 Ann. Cas. 142, we held that, in the absence of actual notice, a subcontractor is not chargeable with notice of special stipulation against allowance of liens in the contract between the owner and principal contractor. Whether that principle will apply in this case, so as to deny the right of the owner to have the contract price reduced by damages arising from negligent act, we need not decide; for the chancellor found, from conflicting testimony, that the damages arose from defects in the plans prepared by the architect, and not from negligence of Higgins in constructing the walls, or in carrying

on the work in and about the building. Our conclusion is that the findings of the chancellor are not against the preponderance of the evidence, and for that reason the findings should not be disturbed.

Appellant introduced three witnesses, who were laborers employed by Higgins, the contractor, and who testified that when the wall fell they were engaged in removing some scaffolding, and in doing so struck the wall with the end of a piece of timber, and it immediately fell. They were handling a plank 6 or 8 inches wide, 2 inches thick, and 16 feet long; two of the men having hold of it at the time, one at each end. One of them stumbled, causing the other end to go back toward the wall, and they testified that the end of the plank brushed or rubbed against the wall. None of them testified that it struck the wall a solid, direct blow. One of them testified that it was a light blow, not more than sufficient to brush off the protruding mortar, and not of sufficient force to knock down the wall. Higgins and the man who had charge of the brick work under him both testified that the plan of constructing the wall on top of the old one was faulty; that they followed the plan of the architect precisely, but called the latter's attention to the fact that the plan was not satisfactory. They testified that the wall was built according to the plans and specifications of the architect, and that the blow from the piece of timber was insufficient to cause the wall to fall. About 30 feet of the wall fell out. It seems improbable that the light blow described by the witnesses would be sufficient to knock down a properly constructed wall, and under the circumstances described in the testimony we cannot say that the chancellor erred in holding that the falling of the wall did not result from the blow. The testimony is sufficient to warrant the conclusion that the wall was not properly planned, but that it was constructed in accordance with the plan of the architect.

Appellant also makes the contention that the wall fell on account of not being properly braced, but there was no testimony to sustain that charge of negligence.

Decree affirmed.

KANSAS CITY SOUTHERN RY. CO. v. HARRIS.

(Supreme Court of Arkansas. Nov. 18, 1912.)

1. RAILROADS (§ 482*)—FIRES—ACTIONS—EVIDENCE.

In an action against a railroad company for negligently firing plaintiff's property, evidence held sufficient to support the judgment.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1730-1736; Dec. Dig. § 482.*]

2. RAILROADS (§ 459*)—FIRES—DEFENSES—CONTRIBUTORY NEGLIGENCE.

Under Act April 2, 1907 (Laws 1907, p. 336), making railroads liable for damages

caused by fire set out by their locomotives, contributory negligence by the owner, short of an act so grossly negligent as to amount to fraud, is no defense.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1677-1680, 1684; Dec. Dig. § 459.*]

Appeal from Circuit Court, Polk County; Daniel Hon, Special Judge.

Action by R. P. Harris against the Kansas City Southern Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Read & McDonough, of Ft. Smith, for appellant. W. M. Pipkin, of Mena, and Hill, Brizzolara & Fitzhugh, of Ft. Smith, for appellee.

WOOD, J. This suit was brought by appellee against appellant to recover damages for the alleged destruction of certain lumber and other property which appellee alleged in his complaint was destroyed by fire from one of appellant's engines while the same was being operated on appellant's railroad in Polk county, Ark., on April 19, 1910. The answer denied all the material allegations of the complaint. There was no specific plea of contributory negligence. Verdict and judgment were in favor of the appellee in the sum of \$1,102.80, from which this appeal has been duly prosecuted.

[1] The testimony, stated most strongly in favor of the appellee, is substantially as follows: Appellant's freight train passed Eagleton going north about 6 o'clock in the afternoon. At that point there was an upgrade to the track and it was a heavy train. Sparks and fire were emitted from the smokestack and were falling in an old tramway between 50 and 100 feet from the railroad track. A short time after the train passed fire was discovered in the tramway. There had been no other fire anywhere in the vicinity for several days. The planing mill had not been running. A witness attempted to extinguish the fire in the old tramway, but was unsuccessful. The fire was burning in trash and old rotten wood and other debris. About a half hour after the first attempt to put out the fire, the witness returned to the spot and found fire at the identical place where he first attempted to extinguish it, and by that time it had covered an area of 10 or 12 feet. In his second attempt to extinguish the fire he scattered the same, poured water on it, and thought that he had put it out. Witness testified that when fire gets started in trash and rotten wood it is difficult not only to put it out, but almost impossible to tell when it has been extinguished. In such debris as that described, fire will smoulder for hours at a time, and then kindle up and spread. At a later hour in the night, left uncertain in the testimony, probably between 12 and 2 o'clock, the alarm of

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Index.

fire was again given, and witnesses who had seen the fire earlier in the evening, and others, went to the scene. The old tramway was burning at this later time, and a large part of the same had been consumed. At that time large coals and sparks were being carried from the old tramway across the road into the lumber piles and a new tramway. The wind was blowing from the direction of the old tramway towards the lumber pile. The piles of lumber and other property that were consumed by these fires constituted the loss for which appellee sued and has obtained judgment.

The appellant contends that the above facts are not sufficient to sustain the verdict, and he cites many cases where, under the circumstances peculiar to those cases, it was held that the evidence was insufficient; but each case must necessarily depend upon its own facts, and we are of the opinion that the above evidence makes it a question for the jury as to whether the fire originated from appellant's engine or from some other cause. In *St. L., I. M. & S. Ry. Co. v. Dawson*, 77 Ark. 438, 92 S. W. 27, we said: "It is not required that the evidence should exclude all possibility of another origin, or that it be undisputed. It is sufficient if all the facts and circumstances in evidence fairly warrant the conclusion that the fire did not originate from some other cause." Applying this doctrine, we are of the opinion that the facts disclosed by the testimony in the record, giving it the strongest probative effect in favor of the appellee, would warrant the jury in finding that the fire could not have originated from any other cause than that alleged in the complaint.

The testimony makes it reasonably certain that the fires discovered at about 6:30 o'clock in the old tramway, and again at 7 o'clock, were caused by appellant's engine. The witness attempted to put out the first fire, thought he had done so, but after the fire broke out again he saw that he had failed in the first attempt. On the second attempt to put the fire out he again thought he had done so, and testified as a fact that he had done so. But the discovery of the fire later in the night, when considered in connection with the evidence tending to show the direction from which the wind was blowing and the manner in which the fire is shown to have consumed the trash and other combustible material between the old tramway and the new tramway and lumber pile, was sufficient to warrant the jury in finding that the witness was mistaken in saying that he had put out the fire, and sufficient to justify their conclusion that the last fire originated from and was but a continuation of the first.

▲ witness stated that he saw "fire and
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smoke and sparks going from the old tramway to the new tramway." Another witness said: "The fire had started on the edge of the tram where I had seen Mr. Williams first working at it on the north side." "The fire was spreading across towards the new tramway. It was across and burning in the edge of the tram and stacks of lumber. The ground was burnt from where I first saw the fire where Williams was putting it out across the road into the tram." Another witness said, speaking concerning the fire that he saw about 2 o'clock that night burning in the lumber: "Well, there was quite a bit of fire there, in the old tramway. It had burned out the trailway of the old tram."

We are of the opinion that these facts were sufficient to sustain the verdict. There is really no evidence to justify any other conclusion than that the fire was caused in the manner alleged in the complaint; but, even if it could be said that there might have been another origin of the fire, still it would be a question for the jury, because the above facts certainly tended to show that the last fire was caused from the same source as the first.

[2] The appellant contends that the court erred in refusing to instruct the jury that contributory negligence was a defense to this action. This court, in a well-considered opinion recently rendered, construing the act of April 2, 1907, held that under that act, making railroads liable for damages caused by fires set out by their locomotives, contributory negligence of the owner short of an act so grossly negligent as to amount to fraud is no defense. *Evins v. St. L., I. M. & S. Ry. Co.*, 147 S. W. 452, in addition to authorities there cited; 2 Thompson's Commentaries on Neg. §§ 2337 et seq., 2350. Under this statute, if the owner of property, or those duly authorized to represent him, should stand by and see a fire consume his property which it was within their power with reasonable efforts to prevent, of course, this would be an act of gross negligence, and would be tantamount to fraud that would prevent recovery under the statute. *Denver & R. Co. v. Morton*, 3 Colo. App. 155, 32 Pac. 345; *Union, etc., R. Co. v. Williams*, 3 Colo. App. 528, 34 Pac. 731. See, also, *Peter v. Chicago, etc., Ry. Co.*, 121 Mich. 324, 80 N. W. 295, 46 L. R. A. 224, 226, 228, 80 Am. St. Rep. 500, cited in 3 Elliott on R. R. § 1238, note 127. But we are of the opinion that the jury were warranted in finding that no such negligence or fraud was committed by the appellee or his servants.

Other objections were urged to rulings of the court, for a reversal of the judgment; but we do not find that there was error in any of the court's rulings.

The judgment is therefore affirmed.

STUBBLEFIELD v. STUBBLEFIELD.

(Supreme Court of Arkansas. Dec. 2, 1912.)

1. GUARDIAN AND WARD (§ 161*)—FINAL SETTLEMENT—EXCEPTIONS—TRIAL BY JURY.

The circuit court, on appeal from a decree of the probate court on exceptions to the final settlement of a guardian, should not submit to a jury the decision of the exceptions, but should state the account without a jury.

[Ed. Note.—For other cases, see *Guardian and Ward*, Cent. Dig. §§ 523-526; Dec. Dig. § 161.*]

2. GUARDIAN AND WARD (§ 163*) — FINAL SETTLEMENT—INTERMEDIATE SETTLEMENTS—CONCLUSIVENESS.

The court, on a final settlement of a guardian's account, must take as a basis for the settlement an intermediate settlement approved by the probate court, unless an affirmative showing is made that at the time of the approval there was property in the guardian's hands not included in the settlement.

[Ed. Note.—For other cases, see *Guardian and Ward*, Cent. Dig. §§ 474, 540-544; Dec. Dig. § 163.*]

3. GUARDIAN AND WARD (§ 159*)—SETTLEMENT OF ACCOUNTS—INTEREST.

Where the final settlement of a guardian did not show how much of the balance was money, or how much was represented by notes, and all the notes offered in evidence bore 10 per cent. interest per annum, interest must be charged at the rate of 10 per cent. per annum; and after charging interest at such rate the court must determine what part of the credits asked should be allowed and render judgment for the balance.

[Ed. Note.—For other cases, see *Guardian and Ward*, Cent. Dig. §§ 516-520; Dec. Dig. § 159.*]

4. GUARDIAN AND WARD (§ 148*)—SETTLEMENT OF ACCOUNTS—CREDITS.

Where, in proceedings for a final settlement of a guardianship, the parties treated notes as worth their face value in money, the court, on the notes being surrendered by the administratrix of the deceased guardian, must give credit for the balance due on the face of the notes.

[Ed. Note.—For other cases, see *Guardian and Ward*, Cent. Dig. § 497; Dec. Dig. § 148.*]

Appeal from Circuit Court, Randolph County; J. W. Meeks, Judge.

Proceedings by Sarah E. Stubblefield, administratrix of E. H. Stubblefield, deceased, for the final settlement of the guardianship of deceased, in which J. D. Stubblefield, appointed guardian, filed exceptions. From a judgment granting insufficient relief, petitioner appeals. Reversed and remanded.

Witt & Schoonover, of Pocahontas, for appellant. T. W. Campbell, of Pocahontas, for appellee.

SMITH, J. This action originated in the Randolph county probate court and involved the correctness of a final settlement made by the administratrix of a deceased guardian. E. H. Stubblefield, in his lifetime, was guardian of certain minors, who are referred to throughout the record of this case as the "Bryan heirs." The last settlement made by him was filed August 15, 1906, and

showed a balance due his wards of \$482.71. This settlement was duly approved by the probate court, although it does not appear of what this balance consisted, but in all probability it consisted to a large extent, if not entirely, of notes taken by him for various loans of money belonging to his wards. The said E. H. Stubblefield died July 17, 1909, without having made any further settlement of his guardianship, although he continued to act in that capacity, collecting old loans and making new ones, and otherwise managing the estate in his charge. Upon his death his wife filed what purported to be a final settlement of his guardianship, showing various debits and credits and a balance due of \$213.86.

After the death of E. H. Stubblefield, letters of guardianship on the estate of said minors were granted to one J. D. Stubblefield, and he filed exceptions to the settlement of the administratrix, alleging that at the death of E. H. Stubblefield he had in his hands certain promissory notes belonging to his wards with which he was not charged in his settlement, and that after all proper credits had been given there still remained a balance due of \$642.69. He also excepted to the allowance of the credits asked by the administratrix, which included certain sums of money alleged to have been paid the minors and himself, as their guardian, together with certain attorney's fees, taxes, and court costs and compensation in the sum of \$50. It was contended in the exceptions that the compensation asked was excessive, and it was prayed that only such of the other credits be allowed as were covered by vouchers that might be produced.

[1] The case reached the circuit court on appeal, where the present guardian demanded a trial of his exceptions before a jury, and this demand was granted, over the objections and exceptions of the administratrix, and much of the confusion of the record in this case flows from the acquiescence in this demand. While we do not reverse this case because of the trial court's action in awarding a jury, we do take this occasion to again disapprove the practice of submitting the decision of exceptions to settlements in the probate court to the verdict of a jury. Judge Eakin said, in the case of *Crow, Guardian, etc., v. Reed*, 38 Ark. 485: "A trial of exceptions by a jury in the probate court is not contemplated by law. The function of the county and probate courts in such matters is rather that of an auditor, clothed with judicial power, or that of a master stating an account. It is not usually such matters as juries can perform. Any circuit court has the power, under the Code Practice, to order any special issue or issues to be tried by a jury which before the Code might have been so tried. But that has no application to the probate courts. It would not do to have exceptions to ac-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

counts burdened with the cost of jury trials. The judges must take the responsibility of determining the facts as well as the law."

Upon the trial the jury made no finding as to the credits asked for, except that of compensation, which was allowed in the full amount claimed, and neither the briefs of counsel, nor the transcript itself, shows what became of the other credits; and we may only conjecture whether the jury treated them as unexcepted to, and therefore unnecessary to be considered by them, or whether, on the other hand, they regarded the credits as being without proofs to support them, and were for that reason not considered at all. There was both a general and a special verdict in the case, which apparently are in conflict, or, at least, their effect is not clear to us, and in the preparation of the judgment there may have been information or explanation before the court, and which we do not have; but the court entered up a judgment which appears to us to be an improper one.

At the trial proof was offered as to all the notes shown to have been in the hands of the guardian and his administratrix, notwithstanding two of the notes were shown to have been dated prior to the guardian's settlement; and there was evidence in regard to his possession of three other notes, the dates of the execution and payment of which are not shown. The good faith and fair dealing of this guardian is not questioned by the appellee, but, on the contrary, a compliment, no doubt well deserved, is paid his fidelity and diligence; but appellee says that his settlement did not include all the notes in his hands. This settlement appears to be a common account against all of his wards; but no point is made here of that fact, and these funds will, no doubt, be properly distributed when this guardianship is finally closed.

Proof offered by the appellee tended to show, and did in fact show, that, first and last, there were in the hands of E. H. Stubblefield, and afterwards in the hands of his administratrix, notes for a sum considerably in excess of the amount for which the guardian and his administratrix charged themselves in the settlement; but it is equally as certain that this resulted in part from relending the same money. And as to at least one of these notes the proof on the part of appellee showed that the money loaned belonged in part to the guardian individually and to his wards, and some of the notes which were taken to himself individually were evidently for money belonging to his wards. In other words, this appears to have been an estate administered by an honest man, who had only limited knowledge in keeping accounts.

[2] This case will be reversed and remanded, with directions to the court below to state this account without a jury, and in

doing so the court will take as a basis for settlement the sum shown to have been due in the guardian's settlement of August 15, 1906, unless an affirmative showing is made that at that time there was either money or notes, or other property, in his hands not included in that settlement.

[3] Interest must be charged at the rate of 10 per cent. per annum, because the settlement does not show how much of the balance is money, nor how much is represented by notes, and all the notes offered in evidence appear to have borne interest at the rate of 10 per cent. per annum. After charging interest at this rate, the court will determine what part of the credits asked should be allowed, and the balance will be the sum for which judgment will be rendered.

[4] It appears that under the directions of the court below the administratrix surrendered to the clerk of the county court the notes remaining in her hands, and during the progress of the litigation one of the notes matured, and was paid to the clerk. The parties treated the notes in question as being worth their face value in money, as approved personal indorsements appear to have been exacted in each instance, and the court will allow credit for the full balance due upon the face of the notes surrendered in obedience to its order, and the administratrix will have credit therefor.

MEDLOCK v. OWEN.

(Supreme Court of Arkansas. Dec. 9, 1912.)

1. EASEMENTS (§ 5*)—WAYS—ACQUISITION.

A private way over the land of another may be acquired by adverse user, provided the use has been for the statutory period of seven years under a claim of right, openly, continuously, and adversely; but a permissive use will not ripen into title.

[Ed. Note.—For other cases, see Easements, Cent. Dig. §§ 13, 20-22, 26; Dec. Dig. § 5.*]

2. APPEAL AND ERROR (§ 1009*)—FINDINGS—CONCLUSIVENESS.

A finding of the chancellor on conflicting evidence will not be disturbed on appeal, unless clearly against the weight of the evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3970-3978; Dec. Dig. § 1009.*]

Appeal from Clark Chancery Court; Jas. D. Shaver, Chancellor.

Suit by J. A. Medlock against W. P. Owen. From a decree for defendant, plaintiff appeals. Affirmed.

Callaway & Hule, of Arkadelphia, for appellant. McMillan & McMillan, of Arkadelphia, for appellee.

HART, J. J. A. Hardage died intestate owning the S. E. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ and the S. W. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of section 14, township 7 S., range 20 W., in Clark county, Ark. In the latter part of 1807 or 1808 J. A. Medlock entered into a contract with the ex-

ecutors of the estate of J. A. Hardage, deceased, to purchase the S. ½ of the first-mentioned 40-acre tract. He immediately went into possession of the land, and in two years thereafter finished paying for it. On the 29th day of February, 1904, the executors of said estate executed to him a deed to said 20 acres of land. In 1901 or 1902 W. P. Owen purchased the last-mentioned 40-acre tract of land from the estate of J. A. Hardage, deceased. It is adjoining and east of the 20 acres purchased from said estate by Medlock. Medlock owned 40 acres of land immediately south of that purchased by W. P. Owen, and on this tract his residence was situated. At the time Medlock purchased the 20 acres of land from the Hardage estate there was a tenant house on it. A dim roadway wide enough for a wagon to travel ran from his tenant house across the 40 acres of land purchased by Owen from the Hardage estate in a northerly direction to the public road from Arkadelphia to Mt. Ida. There was a well-defined road running northward from Medlock's residence across the land purchased by Owen from the Hardage estate to the Arkadelphia and Mt. Ida road. Owen cleared up his land, and attempted to fence up the private road running from Medlock's tenant house to the public road. He left open the road running from Medlock's residence to the public road, and also left a road on the south side of his land running from Medlock's residence to his tenant house. Medlock instituted this suit in the chancery court to enjoin Owen from fencing up the road from his tenant house to the public road.

The evidence introduced by him tended to show that he and his tenant had continuously used said private road as a passageway since he purchased the 20 acres of land from the Hardage estate and went into possession thereof, and that his use of the road was adverse and under a claim of right so open and notorious as to put Owen on notice thereof. The evidence introduced by Owen tended to show that he had resided near there since the purchase of the land by him in 1901 or 1902, and that the use of the private road in controversy was by his permission. The chancellor found that the use of said road by the plaintiff Medlock was a permissive one, and that the road in controversy was not necessary as a way to or from his land. The case is here on appeal.

[1] The law applicable to cases of this sort is settled by the case of *Clay v. Penzel*, 79 Ark. 5, 94 S. W. 705. There Mr. Justice Riddick, speaking for the court, said: "Whether these plaintiffs used this strip as a private passway or as a public alley is not very material, so far as this case is concerned; for a private way over the land of another may be acquired by adverse use in the same time that the public may acquire

the right to a public highway by adverse user. In either case the use must be under a claim of right, and not permission. The way in either case must be used openly, continuously, and adversely under a claim of right for the full period of the statute of limitations, which in this state is seven years"—citing authorities.

[2] As we have already stated, there was a direct conflict in the evidence, and the chancellor found in favor of the defendant. We do not deem it useful or necessary to make a detailed statement of the facts, or to go into a discussion of them. Under the settled rule of this court, the finding of facts made by a chancellor will not be disturbed on appeal, unless it is clearly against the weight of the evidence. A careful consideration of the testimony leads us to the conclusion that the finding of the chancellor is not against the preponderance of the testimony, and this view is strengthened when we consider that the plaintiff had an almost equally accessible way to the public road by going along the road left open at the south end of the defendant's tract of land to the road leading from plaintiff's residence to the public road.

Therefore the decree will be affirmed.

DONIPHAN LUMBER CO. v. FIX.

(Supreme Court of Arkansas. Nov. 11, 1912.)

APPEAL AND ERROR (§ 1002*)—REVIEW—CONCLUSIVENESS OF VERDICT—CONFLICTING EVIDENCE.

A verdict on conflicting evidence will not be disturbed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3935-3937; Dec. Dig. § 1002.*]

Appeal from Circuit Court, Cleburne County; Jas. H. Fraser, Special Judge.

Action by Jacob Fix against the Doniphan Lumber Company. Judgment for plaintiff, and defendant appeals. Affirmed.

S. Brundidge, of Searcy, for appellant. B. B. Hudgins, of Harrison, for appellee.

KIRBY, J. This is a suit for double damages, under section 6542 of Kirby's Digest for the conversion of timber. The case was here before on appeal, and is reported in 129 S. W. 287¹. The cause was reversed for the error of the lower court in virtually instructing a verdict; the court saying: "The testimony made it, at least, a question for the jury to say whether or not appellee had consented that appellant should appropriate the timber."

The testimony on the second trial does not differ materially from that upon the first.

¹ Reported in full in the *Southwestern Reporter*; reported as a memorandum decision without opinion in 98 Ark. 623.

and was sufficient to support a verdict of the jury either way.

The jury having found for appellee, the verdict will not be disturbed, and the judgment is affirmed.

GARDNER et al. v. McAULEY et al.

(Supreme Court of Arkansas. Dec. 2, 1912.)

1. PARTITION (§ 114*)—ATTORNEY'S FEES—ALLOWANCE.

Kirby's Dig. § 5793, relating to proceedings where lands are sold because not susceptible of division, and providing that the proceeds, after deducting the costs, shall be divided among the parties, furnishes no basis for the allowance of solicitor's fees to the plaintiff in partition where no sale was made.

[Ed. Note.—For other cases, see Partition, Cent. Dig. §§ 440-449; Dec. Dig. § 114.*]

2. PARTITION (§ 114*)—COSTS—SOLICITOR'S FEES.

Plaintiffs are not entitled, upon a decree for partition, to have their solicitor's fees taxed as part of the costs, where the proceeding is an adversary one or the defendants appear by attorneys who act in their behalf and plaintiffs' attorney does not perform all of the services in the case.

[Ed. Note.—For other cases, see Partition, Cent. Dig. §§ 440-449; Dec. Dig. § 114.*]

Appeal from Chancery Court, Jackson County; G. T. Humphries, Chancellor.

Action by Marcus O. McAuley and others against John F. Gardner and others. From a decree allowing plaintiffs a solicitor fee upon partition, defendants appeal. Decree reversed, and allowance stricken.

Phillips, Hillhouse & Boyce, of Newport, for appellants. Otis W. Scarborough, of Newport, for appellees.

MCCULLOCH, C. J. The parties to this action were the owners, as tenants in common, of a tract of land in Jackson county, Ark., and appellees, who owned an undivided one-sixth interest in the land, commenced this action in the chancery court against appellants, who were the owners of the other five-sixths, to have a partition according to their respective interests. Robert C. McAuley, one of the appellees, claimed an interest, as tenant by the curtesy, in the undivided one-sixth interest owned by his co-appellees, and he joined as party plaintiff in the suit. Appellants employed attorneys to represent them in the cause, and promptly made their appearance and filed an answer, in which they disputed the rights of Robert C. McAuley as a tenant by the curtesy, and also alleged that the lands could not be partitioned in kind, and asked that the same be sold for partition. On final hearing of the cause the court appointed commissioners to make partition, and on report of the commissioners the court rendered a decree for partition of the lands in accordance with the respective shares of the parties. Subsequently the court made an order allowing appellees the sum of \$300 as a fee for their

solicitor, and taxed the same as costs in the action. From this part of the decree an appeal has been prosecuted.

[1] Therefore the only question presented in the case is whether or not, in a suit for the partition of lands, it is proper to allow the solicitor of the plaintiff a fee for his services, and tax the same against all the parties to the action.

The only statute in this state bearing even remotely on the question at issue is a section of the Civil Code relating to proceedings where lands are sold because not susceptible of division, and provides that "the proceeds of every such sale, after deducting the costs and expenses of the proceedings, shall be divided among the parties whose rights and interests shall have been sold, in proportion to their respective rights in the premises." Kirby's Digest, § 5793.

The Supreme Court of Michigan held that a somewhat similar statute authorized the allowance of attorney's fees in a partition suit where no sale of the land was made. *Greusel v. Smith*, 85 Mich. 574, 48 N. W. 616. This does not seem to us, however, to be the proper construction of the statute, and in this view we are supported by decisions of other courts. *Swartzel v. Rogers*, 3 Kan. 380; *Lang v. Constance*, 46 S. W. 693, 20 Ky. Law Rep. 502.

This court, in *Cowling v. Nelson*, 76 Ark. 146, 88 S. W. 913, held that the chancery court was without jurisdiction to order a sale of lands in a partition suit to pay costs and expenses, including attorney's fees.

[2] So, if there be authority to tax attorney's fees against the parties in a partition suit, it must be found outside of the statutes of this state. That question has never before been here for decision. In *Cowling v. Nelson*, supra, we said: "The utmost that can be said of the attorney's fees are that they were part of the costs; and as to whether the court has, in amicable suits, any right to tax them as costs, is a question that the courts are divided upon, but all agree that in adversary proceedings they cannot be so taxed." Upon consideration of that question, it now appears to us that the weight of authority is against the taxation of attorney's fees, even in amicable partition suits, unless the partition resulted solely from the services of the solicitors for one of the parties and such services were accepted by the other parties. See 21 Am. & Eng. Enc. of Law (2d Ed.) pp. 1177, 1178; 30 Cyc. p. 298; *Jordan v. Farrow*, 130 Ala. 428, 30 South. 338; *Hutts v. Martin*, 134 Ind. 587, 33 N. E. 676; *Coles v. Coles*, 13 N. J. Eq. 365; *Butler v. Butler*, 73 S. C. 402, 53 S. E. 646; *Legg v. Legg*, 34 Wash. 132, 75 Pac. 130.

In adversary suits there is no ground for taxing the fees of the solicitor of one of the parties against the other parties, and the doctrine of allowance of attorney's fees

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

in amicable suits of this character should, we think, be limited to those cases where the services of the plaintiff's solicitor, not only result in benefit to the whole subject-matter of the litigation, but are accepted and acquiesced in by the other parties. The rule does not apply where all of the parties appear by their respective solicitors and the proceedings are conducted through their joint efforts. The true rule which should govern in these cases is, we think, stated by the New Jersey court as follows: "The order for the allowance is frequently based on the consent of parties or on the statement that the parties concur in the allowance. Where this is the case, or where the proceeding is in fact amicable and in behalf of all the parties interested, the propriety of the allowance is manifest. The aid of counsel is necessary to investigate title, to examine conflicting claims, and to conduct the cause. Where the defendant concurs in the proceeding, there is no reason why the complainant should be compelled to bear this part of the expense more than any other. In such case the complainant's counsel represents the interests and protects the rights of all the parties. All are presumed to be equally benefited by the proceedings. But the complainant's claim to partition may be resisted. The proceedings may be hostile, or, if not hostile, the defendants may employ their own counsel, and by answer seek to protect their interests. If the plaintiff's title is disputed, or the partition opposed upon any ground unsuccessfully, the defendants will be compelled to pay costs. And if no opposition is made to the partition, and the defendants choose to employ their own counsel, why should they be compelled to pay the counsel of the complainant? If the complainant is entitled to an allowance for counsel fees, why not the defendants also? As the proceeding in this case is not amicable, and as the claim for counsel fees is resisted by the defendants, it must be denied." *Coles v. Coles*, 13 N. J. Eq. 365.

Now, either of the rules above stated excludes the right of the appellees to have their solicitor's fee taxed as a part of the expense of the proceeding. Appellants promptly appeared in the action with their own solicitors to represent them, and thereafter took part in the proceedings; the same becoming to some extent adversary. Up to the time of the appearance in the case it cannot be said that the proceedings were amicable, for it could not be told, until the appearance day passed, whether the same would be amicable, or whether they would thereafter be adversary. As a matter of fact, in this case the proceedings did become to some extent adversary, for appellants denied the right of partition in kind, and asserted that the lands could not be equitably divided and should be sold for divi-

sion. Thereafter they were represented by their own counsel, and there is no reason why, in addition to this, they should be taxed with any portion of the fees of the solicitor of appellees. It cannot be said, under those circumstances, that they ever accepted the benefit of the services of appellees' solicitor, for they were represented by their own solicitors in every step of the proceedings.

We are not to be understood as holding that, where one or more tenants in common brings suit against the other tenants in common for partition, and there is no appearance or resistance, the proceedings resulting in an amicable partition of the property, the fees of the plaintiff's solicitors should not be taxed against all the parties. That question does not arise in this case under the facts as before related. But even in that sort of a case, if the fees are taxable, they can only amount to such sum as the solicitor can appropriately charge his own client, and not the fee he might have charged if employed by all of them. *Bradshaw v. Bank of Little Rock*, 76 Ark. 501, 89 S. W. 316. "The object of the allowance," said this court in the above-cited case, "is not to give the attorneys a larger fee than they might have recovered from their own clients, but to shift the burden of the charge from them and place it upon the creditors of the bank generally. The inquiry, then, is: What would have been a reasonable charge against their own clients for the services performed?"

Our conclusion, therefore, is that it was improper to tax any attorney's fees against appellants, and the decree of the court in that respect is reversed, and the allowance stricken out. It is so ordered.

WALES-RIGGS PLANTATIONS v. DYE.

(Supreme Court of Arkansas. Dec. 2, 1912.)

1. PRINCIPAL AND AGENT (§ 123*)—AGENCY—EVIDENCE.

Evidence, in an action to charge one with the price of goods bought by another, held insufficient to show apparent or ostensible authority to buy them on its account.

[Ed. Note.—For other cases, see *Principal and Agent*, Cent. Dig. §§ 420-429; Dec. Dig. § 123.*]

2. PRINCIPAL AND AGENT (§ 123*)—AGENCY—EVIDENCE.

Authority of an agent cannot be proved by the mere fact that the one claiming the power has exercised it, but the person to be charged as principal must be shown to have assented to the act.

[Ed. Note.—For other cases, see *Principal and Agent*, Cent. Dig. §§ 420-429; Dec. Dig. § 123.*]

Appeal from Circuit Court, Cross County; S. R. Simpson, Special Judge.

Action by the Wales-Riggs Plantations against I. R. Dye. From a judgment for

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

defendant on a set-off, plaintiff appeals. Reversed and rendered.

Chas. E. Robinson, of Wynne, for appellant.
S. M. Wassell, of Little Rock, for appellee.

HART, J. Appellant commenced this suit in the justice court against appellee to recover upon two promissory notes. The appellee admitted liability on the notes, but filed a set-off, in which he claimed that appellant was due him an amount over and above that due by him upon the notes for goods and merchandise sold by him to Mrs. G. K. Cross for appellant. Appellee recovered judgment against appellant in the justice court on his set-off, and the case was appealed to the circuit court. There appellee again recovered judgment, and the case is here on appeal.

The facts are as follows:

C. W. Riggs testified: "I am president of the appellant corporation, and have been since its organization. The amount due appellant by appellee on the first note sued on was \$5.25 on August 5, 1909, and on the second note \$50 was due on July 1, 1910. Both of these sums are due and unpaid. On November 18, 1909, appellant entered into a written agreement with Mrs. G. K. Cross by which she became its agent in Cross county for certain specified purposes, which were set out in the contract. She had no power to make a contract for us, but could only talk over contemplated contracts and present them to us for our approval. She never had any authority to make any contract for us, and I never gave her any authority whatever to use our credit, and never agreed with her or any one else to pay her debts, except in one instance, when she was taken sick on the Love place, which she had rented from us. On that occasion we received a letter that she was sick and needed assistance. We wired back that we would pay any one for taking care of her during her sickness. We never knew that she bought goods from the appellee and had same charged to our account, and never gave her any authority to buy goods from appellee and charge them to us. Mrs. Cross never had any authority to collect money for our company, except one time she was given authority to collect \$10 on a horse sold. At another time she collected \$25 and gave the company's receipt therefor. This was done without authority, but, owing to the distress she was in at the time, we ratified her action."

I. R. Dye, appellee, testified: "The plaintiff company owes me \$149.17 for supplies furnished to Mrs. G. K. Cross bought from February to June, 1909, from me at my store in Parkin. I charged the goods to C. W. Riggs by Mrs. G. K. Cross. The plaintiff company never told me to furnish her goods, nor promised to pay for any she got; but Mrs. Cross came there and took an oversight over the affairs of the company, making con-

tracts, buying feed, selling stock, and selling land, and I just supposed she had the right to charge things to them." Cross-examination: "When Capt. Riggs was in my town, Parkin, 1907 or 1908, this Mrs. Cross was with him and appeared to be treated as one of the family. He ran an account at my store which he finally paid by receipting one of this same series of notes, one of which is sued on. While he was there at that time, Mrs. Cross came to the store to get goods several times; sometimes with an order; sometimes without. The goods were furnished her just as they would be to the member of any other man's household, and they were charged to him. This is the reason, when she came there again and wished to buy goods, I sold them to her and charged them to C. W. Riggs by her. At the time Capt. Riggs was in Parkin, when he ran a bill at my store he was in the show business, and was in Parkin in winter quarters with his show. This account that I have filed as a counterclaim has never been paid and is past due. It amounts to \$149.17. I never did send the company or Capt. Riggs a statement of the account to let them know that the goods were being charged to him. After she had run quite a bill, she came and insisted on my taking her personal note for the goods bought, and I reluctantly took it. Later she gave me another note when she had bought more goods. I have these notes now at home. They have never been paid. I said to her that I was owing the company and that we could settle it that way. I did not take the notes as a settlement releasing the Wales-Riggs Plantations Company from the debt due me. One of the series of notes to which the notes sued on belongs fell due after I had furnished these goods to Mrs. Cross and charged them to Capt. Riggs, and when the bank notified me the note was due I paid it. I did not then mention to the company the fact that I had anything against it, but paid the note in money."

J. H. Hammett testified: "I was levee tax collector in 1908, and Mrs. Cross paid the levee taxes that year for Wales-Riggs Plantations. The next I knew of her was in the fall of 1909, after I had moved from Wynne to Earle. She had desk room in my office. I had a letter from Capt. Riggs saying she was general agent of the plaintiff, and she acted like it in every way, making contracts, drawing them and signing them, renting land, selling stock, and so on."

On rebuttal Mrs. G. K. Cross testified: "In the spring of 1909 I was agent for appellant company to show its lands and stock and submit to the company any propositions or offer of rentals that might come up. I had no authority whatever to close up contracts. The goods I bought from Mr. Dye were to be charged to me and were not for the appellant company. I was not the agent of the company at that time. I was farming land which

I had rented from appellant. I executed my notes to appellee for the goods I bought from him."

[1, 2] It is not claimed that there was any express authority on the part of Mrs. Cross to bind appellant, and we think that the testimony falls short of showing that she had any apparent or ostensible authority to do so. The contract of agency between appellant and Mrs. Cross made in the fall of 1909 has no probative force in this case. In proving authority of an agent for the purpose of binding the principal by the former's transaction there must be evidence of the agency at that time. The goods were purchased by Mrs. Cross from appellee in the spring of 1909 between February and June. The contract of agency between appellant and Mrs. Cross was not made until November, 1909. In the spring of 1909 Mrs. Cross was the tenant of appellant. The fact that Mrs. Cross collected money for appellant at one time by its permission, and that it ratified her act in collecting money at another time without its permission, coupled with the fact that she also paid the levee taxes for it for one year, are not sufficient to show that she was the general agent of appellant and as such had a right to buy goods and have the same charged to it.

The authority of an agent is never proved by the mere fact that the person claiming the power has exercised it. It must also be proved that the person to be charged as principal assented to such act. *St. L. I. M. & S. Ry. Co. v. Bennett*, 53 Ark. 208, 13 S. W. 742, 22 Am. St. Rep. 187.

Riggs, the president of the appellant company, and Mrs. Cross, both testified that she had no authority to buy goods and charge them to the account of appellant, and Mrs. Cross testified that she did not do so. Appellee testified that in 1907 Mrs. Cross lived with C. W. Riggs, the president of the appellant company, as a member of his family, and, like any other member of the family, came to his store for goods for him and had same charged to his account, and that Riggs paid for them.

It is contended by counsel for appellee that the agency of Mrs. Cross as established during the winter of 1907 was presumed to continue. But it will be noted that there was no testimony that Mrs. Cross was the agent for appellant in the spring of 1909. Any presumption of that fact was overcome by the positive and direct testimony of both Riggs and Mrs. Cross to the effect that she had no authority in the spring of 1909 to bind the appellant for goods sold to her by appellee. At that time she was only the tenant of appellant and was working its land just as other tenants were doing.

It follows that the judgment must be reversed, and, inasmuch as the case has been fully developed, judgment will be entered

here for appellant in the amount of the balance due on the two notes sued on.

SMITH, J., absent and not participating.

BOBO v. STATE.

(Supreme Court of Arkansas. Dec. 2, 1912.)
INTOXICATING LIQUORS (§ 146*) — ILLEGAL SALES—PRINCIPALS.

Defendant was asked by M. if he could get him some whisky, and was given money to get it. He got it of B., who had told him he could get it of him any time, and gave it to M., who did not know B. was engaged in selling it. *Held*, that he was a necessary factor in making the sale, and that he acted for B. as well as M., and so was a principal in the illegal sale.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. §§ 159, 160, 163; Dec. Dig. § 146.*]

Appeal from Circuit Court, Lafayette County; Jacob M. Carter, Judge.

Henry Bobo appeals from a conviction. *Affirmed*.

Searcy & Parks, of Lewisville, for appellant. Hal L. Norwood, Atty. Gen., and Wm. H. Rector, Asst. Atty. Gen., for the State.

HART, J. Henry Bobo was indicted and convicted of the offense of selling whisky without license. The facts are as follows: E. E. Mulkey went into a restaurant in Lafayette county, Ark. where the defendant, Henry Bobo, was employed. He told Bobo that he wanted a drink, and asked him if he knew where he could get any whisky. He told Bobo that if he could get it he would pay for it. He gave Bobo \$1.50 with which to get the whisky, and Bobo left the restaurant and soon afterwards returned with a quart of whisky, which he delivered to Mulkey. Bobo said that he got the whisky down at the power house from a man by the name of George Russell, and gave him the \$1.50 for it; that he brought the whisky back to the restaurant and delivered it to Mulkey; and that Mulkey gave him a drink out of the bottle. On cross-examination Bobo stated that two or three days before this Russell had come around to the restaurant and told him if he wanted any whisky at any time that he had some for sale. Russell did not ask Bobo who the whisky was for, and Bobo did not tell Mulkey from whom he got it. At the conclusion of the evidence the court directed a verdict of guilty, and the action of the court in so doing is assigned as error.

Counsel for the defendant rely upon the case of *Whitmore v. State*, 72 Ark. 14, 77 S. W. 598. In that case the state introduced evidence tending to prove the defendant sold whisky without license. On the other hand, there was evidence which tended to show that the defendant did not sell the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

whisky, but that he only made out an order for whisky to persons in St. Louis dealing in liquors for the person to whom he was charged with selling the whisky. The persons in St. Louis were licensed liquor dealers. The court held that if the defendant in that case did nothing more than order liquor for another person from this firm that he was not guilty. This was because the persons in St. Louis were authorized to sell liquors, and the law did not prohibit any one from buying from them. This was but an application of the well-known rule of agency; that is to say, that which a man may legally do himself he may also do by an agent. The facts in this case are essentially different, and we think the present case is controlled by the principles of law announced in the case of *Foster v. State*, 45 Ark. 361. In that case Foster was indicted for selling liquor to a minor. The proof was that Foster took the money of the minor and purchased the liquor for him at a saloon in which he was not interested, and delivered the liquor to the minor. The court said that Foster was not the actor in making the sale to the minor, and to this extent was not within the language of the statute, which prohibited the sale of whisky to minors. The court held, however, that following the rule of the common law all persons concerned in the commission of a crime less than a felony, if guilty at all, are principals, and that Foster was guilty because he aided and abetted the liquor seller, which was the offense prohibited by the statute. The court said: "However men combine, each one is criminally responsible for what he personally does, * * * for the whole of what he assists others in doing, and for all that the others do through his procurement. Bish. St. Cr. § 1024. The appellant had the evil design of procuring a sale of liquor to a minor, and his act directly and immediately led to the commission of the offense. This made him a principal in the offense."

In the application of this rule in the case of *Dale v. State*, 90 Ark. 579, 120 S. W. 389, the court said: "It has often been ruled that one who aids another in the sale of whisky contrary to law is guilty as a principal offender, no matter what subterfuge is resorted to, or what means are employed to accomplish the sale."

Again the court said: "One might be interested in the sale and aiding the seller, and yet have no interest in the whisky being sold. One might be employed by another to assist him in making a sale, and act as his agent in making the sale of a commodity, and yet have no interest whatever in the thing being sold. He might be interested in the proceeds of the sale, or interested in making the sale because of some pecuniary or other benefit that he expected to reap from

it, and yet not have any interest in the thing that was being sold. The distinction is clear, and it is vital."

Under the facts of the present case, the defendant, Bobo, aided Russell in making the sale of the whisky to Mulkey, and thereby became a principal in the offense. Mulkey did not know that Russell was engaged in the illegal sale of whisky. He came into the restaurant where Bobo was working and asked him if he could get him any whisky, and gave him money to pay for it with. Bobo went out and got the whisky from Russell, and came back and delivered it to Mulkey.

On cross-examination he was asked, "How come you to know where to get that whisky?" To which he answered: "The man that was selling it had been around there, and told me that if I wanted any he had some for sale, and told me where to find him at." We quote further from his cross-examination, as follows: "Q. How come this man coming around up there telling you he had whisky to sell, and you could get some any time you wanted to? A. Well, I guess he knew that I was in a public place— Q. In fact, he asked you to turn everything you could his way? A. No, sir. I bought it for myself before— Q. Well, he told you that if anybody come around there that wanted whisky you could get it, didn't he? A. No, sir. He just told me I could get some if I wanted it."

While Bobo says he procured the liquor from Russell at the request of Mulkey, with money furnished by him for the purpose, still he admits that Russell was not known to the buyer, and had told him that he had liquor for him whenever he wanted it. This shows that Bobo was a necessary factor in making the sale, and that he acted for the seller as well as the buyer, and as such intermediary, he was interested in the sale of the liquor, within the rule announced in the case of *Dale v. State*, supra, and became thereby a principal offender.

The judgment will be affirmed.

McCULLOCH, C. J., concurring.

LAY v. BROWN et al.

(Supreme Court of Arkansas. Dec. 2, 1912.)

1. CONTRACTS (§ 130*) — VALIDITY — RESTRAINT OF BIDDING AT EXECUTION SALE.

An agreement by the holder of a judgment against a decedent's estate that as to certain land the judgment should be enforced only as to a one-half interest, whereas a two-thirds interest might have been subjected in consideration that the other party, an assignee of decedent's widow's interest, would not bid at a sale under such judgment, was not invalid as being against public policy; no other attempt to restrict competition at the sale being shown.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 654-658; Dec. Dig. § 130*]

2. CONTRACTS (§ 71*)—CONSIDERATION—SUFFICIENCY.

The judgment creditor's relinquishment of right to subject the full two-thirds interest in the land to her judgment, and the other party's forbearance to bid at the sale, constituted sufficient consideration to support the contract.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 295, 296, 298, 316-324, 327; Dec. Dig. § 71.*]

3. CONTRACTS (§ 71*)—CONSIDERATION—SUFFICIENCY.

A consideration such as will support a contract need not be a thing of pecuniary value or even reducible to money value; waiver of a legal right at the request of another party being sufficient consideration for a promise.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 295, 296, 298, 316-324, 327; Dec. Dig. § 71.*]

Appeal from Benton Chancery Court; T. H. Humphreys, Chancellor.

Action by Clara Lay against Isabell Brown and others. Decree for defendants, and plaintiff appeals. Affirmed.

W. E. Lynn, a resident of Missouri, died without children, leaving a widow, and, at the time of his death, owned certain real estate in Benton county, Ark. Clara Lay recovered judgment against his estate for \$830 and costs. The estate was administered in Missouri and only a portion of the claim paid. Suit was filed on the judgment in Benton county and a decree rendered for the balance due and ordering the sale of decedent's undivided interest in the land. Proceeding under the decree, only an undivided one-half interest in the land was sold by the appellant; it being assumed that the widow was entitled to one-half of the lands of her deceased husband, there being no children, and the statute providing that she shall be endowed with one-third of the real estate only, as against creditors, being overlooked.

S. A. Robinson, one of the appellees, acquired the interest of Sarah Lynn, the widow, in the lands from her heirs and devisee, and claimed to be the owner of an undivided half of the land at the time of the sale. On the day of the sale, under the decree it was claimed that appellant was entitled to subject a two-thirds interest in the land to the payment of her debt, and prior to the sale Clara Lay agreed with the representatives of the owner of the other interest that she would make no further claim against appellee for the one-sixth interest, which she was entitled under the law to have subjected to the payment of her debt if said Robinson, who was present for the purpose of bidding, would not bid at the sale of the land for the payment of her judgment. Appellee Robinson did not bid at the sale, in accordance with the agreement, and the one-half interest sold was purchased by appellant for \$300. Later appellant brought this suit to subject the one-sixth interest in the lands to sale. The whole property was sold, and \$169, the

value of that interest, brought into court and kept subject to appellant's right to recover. The court held that the agreement as made by the parties should be enforced, and that the appellant could not thereafter, in violation of her agreement, recover the money representing the one-sixth interest of said estate. From the decree denying the relief, this appeal comes.

Rice & Dickson, of Bentonville, for appellant. W. D. Mauck, of Bentonville, for appellees.

KIRBY, J. (after stating the facts as above). [1] It is contended for appellant that no such agreement was made as claimed by appellee, and that, if made, it was invalid, being against public policy and without consideration, and not binding against her. The testimony was sufficient to warrant the finding of the chancellor that appellant agreed to refrain from any further proceeding against the estate of W. E. Lynn and Sarah Lynn, so far as this land was concerned, in consideration that appellee Robinson would refrain from bidding at the sale of the interest in the lands ordered sold for the satisfaction of her judgment against the estate, at which sale Robinson did not bid, and said half interest was purchased by appellant. There is no testimony tending to show that there was any conspiracy to prevent competition at the public sale of the lands, or to stifle bidding, further than as the agreement on the part of Robinson not to bid would have such effect. Without doubt he had the right to bid, and having succeeded to the rights of the heirs or devisees of the widow, Sarah Lynn, in the lands ordered to be sold, which interest, he understood at the time of his purchase, amounted to an undivided half, was at the sale, as he said, for the purpose of protecting his interest by bidding. He did not bid, and the half interest in the lands sold was purchased by appellant at the sale. He refrained from bidding on the express promise of appellant, as the chancellor found, that there would be no further proceeding against the estate of Lynn to subject any greater interest in the lands to the payment of the debt than they already sold. Appellant was aware at the time of making such agreement that another one-sixth interest in the land could be subjected to the payment of her claim.

In *Hopkins v. Ensign*, 122 N. Y. 144, 25 N. E. 306, 9 L. R. A. 731, the court, reviewing many of the older cases in which a stricter doctrine was announced, said: "The court will now look to the intention of the parties, and if they be fair and honest and the primary purpose be not to suppress competition but to protect their own rights, and there be no fraudulent purpose to defraud others interested in the result of the sale,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

the agreement may be upheld. The question is one of fact to be determined by the trial court upon the evidence before it." The primary purpose of this agreement was not to prevent competition at the sale nor to stifle the bidding, but to protect the rights of the parties, so far as the evidence shows, and it was not an agreement against public policy and void on that account.

[2, 3] If the land sold brought less than its reasonable market value, it does not appear from the evidence, and, if the agreement of appellee not to bid had resulted in such effect, those interested, on that account, had their remedy in an application to set the sale aside. Neither can it be said that the agreement of appellant was without consideration; the agreement of appellee not being in contravention of public policy. A consideration need not be a thing of pecuniary value, or even reducible to a money value. A waiver of a legal right at the request of another party is sufficient consideration for a promise. Certainly Robinson had the right to bid at the sale, and he thought it was necessary in order to protect the interest in the lands which he had purchased, and intended to do so. Appellant procured him to refrain from exercising his right, agreeing, in consideration therefor, to relinquish her right to proceed against the lands in controversy for a further interest than that ordered to be sold. There was a consideration, certainly, of forbearance on the part of Robinson, and without doubt upon the part of appellant, to relinquish a thing of value by such agreement. 9 Cyc. 311-315; Sykes v. Lafferry, 27 Ark. 409; Heitsch v. Cole, 47 Minn. 321, 50 N. W. 235; Hopkins v. Ensign, supra.

Finding no error in the record, the decree is affirmed.

C. C. EMERSON & CO. v. STEVENS GROCER CO.

(Supreme Court of Arkansas. Nov. 25, 1912.)

1. TRIAL (§ 260*) — REQUEST FOR INSTRUCTIONS—INSTRUCTIONS ALREADY GIVEN.

In an action for breach of a contract to sell and deliver a car load of potatoes, a requested instruction that the burden of proof was upon the buyer to show by a preponderance of the evidence that the seller accepted his counter proposition was properly refused, where the court had already instructed that the jury must find that the seller accepted the buyer's offer, and agreed to deliver at a different place at the same price that it had previously quoted for delivery.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651-659; Dec. Dig. § 260.*]

2. SALES (§ 181*)—ACCEPTANCE—ADMISSIBILITY OF EVIDENCE—RETENTION OF CHECK.

The fact that the seller retained the buyer's check for an unreasonable time without notifying the buyer that he only retained it pending negotiations as to the terms of the contract of sale, or that he failed to return it within a rea-

sonable time, was admissible upon the issue of acceptance.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 473-491; Dec. Dig. § 181.*]

3. SALES (§ 182*)—EXECUTION OF CONTRACT—QUESTION FOR JURY.

Where the seller upon receipt of an order for goods required a cash payment, and the payment of an additional rate for delivery at a different place from that for which it had quoted prices, and the buyer sent a check asking a reduction in rate, and the seller cashed the check and retained the proceeds without immediate notice to the buyer, the question whether the seller accepted the check understanding that it had been sent on the condition that, if accepted, it would be an acceptance of the buyer's counter offer, was for the jury.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 492-495; Dec. Dig. § 182.*]

4. SALES (§ 23*)—REQUISITES OF CONTRACT—OFFER TO BUY AND ACCEPTANCE.

Where an offer to buy goods is made and the time of acceptance is not limited, the offer is open until accepted or rejected, provided that be done within a reasonable time.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 44-48; Dec. Dig. § 23.*]

5. TRIAL (§ 279*) — INSTRUCTIONS — SPECIFIC OBJECTION.

Where an instruction is not satisfactory to a party because confusing or misleading, he should specifically point out such objection, so that the court might have opportunity to correct it.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 690; Dec. Dig. § 279.*]

6. SALES (§ 421*)—ACTION FOR BREACH—INSTRUCTIONS.

In an action for breach of a contract to sell and deliver goods, where the seller contended that the buyer unconditionally retained his check for such an unreasonable time, so that the jury might consider or infer an acceptance, and the buyer contended that he retained the check pending further construction of the buyer's counter proposition, and that the buyer knew that he so retained it, instructions that the jury must find that the buyer's counter proposition was accepted by the seller, and that the fact that the seller received and deposited the check was only evidence of acceptance, that if accepted with the intention of assenting to the counter offer, or if retained an unreasonable time without notice, there should be a finding for the buyer; fairly submitted the respective theories of the parties, and were not reversible error.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1203; Dec. Dig. § 421.*]

Appeal from Circuit Court, Jackson County; R. E. Jeffery, Judge.

Action by the Stevens Grocer Company against C. C. Emerson & Co. From a judgment for plaintiff, defendant appeals. Affirmed.

Jno. W. & Jos. M. Stayton, of Newport, for appellant. Jones & Campbell, of Newport, for appellee.

HART, J. This is the second appeal in this case. The first appeal is reported in 95 Ark. 421, 130 S. W. 541, under the style of Emerson v. Stevens Grocer Co. The issues and facts are fully stated in that decision, and, as counsel for appellants con-

cede that the facts on the retrial of the case are the same, they need not be restated here. Appellee brought this suit against appellants to recover damages for failure to deliver a car of potatoes which the former alleges the latter had sold it. There was a verdict and judgment for the appellee, and the case is here on appeal.

[1] It is first contended by counsel for appellants that the court erred in refusing to give instruction numbered 6 asked by them. The instruction is as follows: "The burden of proof is upon the plaintiff to show by a preponderance of the evidence that the defendant accepted plaintiff's counter proposition." There was no error in this. In instruction numbered 1, given by the court, is in part as follows: "The first contract between the parties has been abandoned by the plaintiff, and the only thing left in the case and the only question for you to decide is whether or not the defendants accepted the said counter proposition, and agreed to deliver the potatoes at Marianna at the same prices it had quoted for their delivery at Newport, and, before you can find for the plaintiff, you must find from a preponderance of the evidence in this case that the defendants did accept the offer thus made by plaintiff, and did agree to deliver said potatoes at Marianna at the same prices that it had previously quoted for a delivery of them at Newport." It will be observed that the concluding part of this instruction is practically the same as instruction numbered 6 requested by appellants and refused by the court.

The court instructed the jury as follows:

No. 3: "You are instructed that the request of the plaintiff contained in its letter of January 6th was a counter proposition to buy a car of potatoes for delivery at Marianna at the same price as quoted by the defendants for delivery of a car of potatoes at Newport, and that you must find that this counter proposition was accepted by the defendant before you can find for the plaintiff in this case, and that the receiving and depositing of said check for \$100 contained in said letter of January 6th was not an acceptance of said counter proposition in itself, but merely evidence of such acceptance, and that it is the intent with which such check was received and deposited that is to guide you in determining the weight to be given such acts as showing an acceptance. Now if you find that the defendants received and deposited said check upon the terms and with the intention of assenting to the terms of said counter offer, or retained said check an unreasonable time without notice, then you will find for the plaintiff; but if you find that it was received and deposited and merely held by the defendants for a reasonable time, pending negotiations between plaintiff and defendants for the purchase of the Marianna car, such holding would not be an acceptance of the counter

offer, and you will find for the defendants."

No. 4: "If you find that, upon the plaintiff ordering a car of potatoes on Newport quotations delivered at Marianna, defendants notified plaintiff that delivery at Marianna would require a deposit of \$100 for future delivery, and that plaintiff remitted the amount, but asked a modification to the Newport rate, and if you further find that the defendants accepted the check upon the terms and in assent to the offer set out in plaintiff's letter of January 6th, or that, under the circumstances of this case, the defendants retained such check for an unreasonable time, then you may find for the plaintiff the amount sued for."

It is now insisted by counsel for appellants that the court erred in giving instruction numbered 4. They contend that the two instructions are contradictory and confusing, and say that the jury must have understood instruction numbered 4 to mean that appellants were liable if they retained the check for an unreasonable length of time, no matter what they did or said to indicate their refusal to accept appellee's offer; that the simple retention of the check outweighed everything else.

[2] In the former opinion the court said: "The mere retention of the check was only evidence of such acceptance, and not conclusive proof thereof. If the appellants retained the check for an unreasonable time without notifying appellee that they only retained it for the purpose of waiting negotiations looking to the agreement of the parties to the terms of the contract, or failed to return it within a reasonable time, then the jury might infer from such action and conduct on the part of appellants that they actually did accept the terms of the offer contained in the letter of January 6th for the purchase of the potatoes. We think that, under the testimony, it was a question of fact for the jury to determine whether or not the appellant accepted the check upon the terms and in assent to the offer set out in appellee's letter of January 6th, or whether they only held it awaiting negotiations, and that it was also a question of fact for the jury to determine whether under the circumstances of this case they retained it for an unreasonable time." By the letter of January 6th appellee made a counter proposition to appellants that it would take the car of potatoes if it was delivered at Marianna at the same price as made in the original proposition of appellants for delivery at Newport. The disputed question of fact in the case is as to whether appellants accepted the counter proposition of appellee. In our former opinion we held that the fact of appellants retaining the check sent with the counter proposition was evidence of acceptance, but was not conclusive thereof. We reversed the case because the court in effect told the jury that the retention and collec-

tion of the check by appellants constituted as a matter of law an acceptance of the counter proposition made by appellee.

[3, 4] In the case of *Kempner v. Cohn*, 47 Ark. 519, 1 S. W. 869, 58 Am. Rep. 775, which was cited in our decision on the former appeal, it was held that, where an offer is made and the time of acceptance is not limited, the proposition is open until it is accepted or rejected, provided an answer is given in a reasonable time. In the decision on the former appeal, we held that under the facts and circumstances of this case it was a question of fact for the jury whether appellants retained the check for an unreasonable time, and also held that, if appellants did retain the check for an unreasonable time without notifying appellee that they only retained it for the purpose of further negotiations in regard to the counter proposition made to them by appellee, the jury might infer an acceptance. It is the contention of appellee that appellants unconditionally retained the check for an unreasonable time, and that from this the jury might infer an acceptance. On the other hand, appellants claim that they retained the check pending further negotiations in regard to the counter proposition made to them by appellee on January 6th, and that the facts and circumstances adduced in evidence were such that the jury should find appellee had notice that they so held it.

[5, 6] Instructions numbered 3 and 4 immediately followed each other, and it is evident that in them the court endeavored to submit to the jury the respective theories of the parties to the suit. If instruction numbered 4 was not satisfactory to appellants for the reason that they thought it might be confusing and misleading to the jury, in fairness to the court, they should have specifically pointed out their objections to it, to the end that the court might correct it. If they had done so, doubtless the court would have changed the verbiage of the instruction so as to meet their objection. Having failed to make a specific objection to the instruction, we do not think that the judgment should be reversed for giving it.

We think that the respective theories of the parties in regard to the disputed question of fact were fairly submitted to the jury, and the judgment will be affirmed.

FULLERTON v. HENRY WRAPE CO.

(Supreme Court of Arkansas. Dec. 2, 1912.)

1. MASTER AND SERVANT (§ 217*)—"ASSUMPTION OF RISK"—KNOWLEDGE.

The rule that an employé is presumed to have assumed the ordinary risks incident to his employment is subject to the limitation that he must have knowledge not only of the existence of defects, but must also be charged with knowledge that the defects exposed him to danger; but, if a danger is so obvious as to be

apparent to one of ordinary intelligence, an employé is chargeable with knowledge thereof.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 574-600; Dec. Dig. § 217.*

For other definitions, see *Words and Phrases*, vol. 1, pp. 589-591; vol. 8, pp. 7584, 7585.]

2. MASTER AND SERVANT (§ 217*)—INJURY TO EMPLOYÉ—ASSUMPTION OF RISK.

An experienced operator of a circular saw in a lumber mill assumed the risk of being fatally injured by a piece of lumber being thrown back by the saw, due to want of a guard and to the fact that a device designed to prevent "pinching" of pieces being sawed was insufficient, especially where he is shown to have realized the danger through having made complaint about the defective condition before the accident occurred.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 574-600; Dec. Dig. § 217.*]

Appeal from Circuit Court, Green County; W. J. Driver, Judge.

Action by Mary E. Fullerton, administratrix, against the Henry Wrape Company. Judgment for defendant, and plaintiff appeals. Affirmed.

Appellant brought this suit against appellee to recover damages for injuries sustained by her husband which resulted in his death and which were received while he was in the employment of appellee. The facts are as follows: Appellee was a corporation engaged in manufacturing white oak heading in its factory at Paragould, Ark. As a part of its machinery therefor appellee maintained and operated a circular rip saw attached to a revolving shaft set in boxing made fast to a stationary frame. The saw was 18 inches in diameter, and about one-third of it extended upwards between two flat boards which constituted a table on top of the framework. The saw revolved very rapidly and was used to rip white oak heading, which is a piece of white oak 22 inches long, three-quarters of an inch thick, and from 6 to 12 inches wide. There was a knife or spreader made of iron or steel set right back of the saw to keep the boards from pinching the saw. Appellee operated a number of rip saws, and it was its custom to shut down four times a day for each man to look at his saw and to change the saws when they became dull or out of set. It was the sawyer's duty to change the saws when they are dull or out of set. On the 18th day of August, 1911, Andy E. Fullerton was operating said rip saw. He stood in front of the saw in the usual way and placed the piece of white oak heading against the saw, and after it had been cut for a distance of 16½ inches the back part of the saw became pinched in the piece of heading. This had the effect to draw the piece of heading to the top of the saw. It then flew back and struck Fullerton in the abdomen and caused the injuries from which he died about two days later. The saw in question was unguarded. The purpose of a guard on a saw

of this kind is to prevent the piece of heading from flying back when the saw becomes pinched.

Appellant adduced evidence tending to show that the saw became pinched when it was dull or out of set. The evidence for the appellant also showed that the spreader on the saw-rig in question was thinner than the saw and that on this account the saw might become pinched; that the purpose of the spreader was to keep that part of the heading which had been cut from coming together and pinching the saw. The saw-rig in question had been shut down 1 hour and 15 minutes before the accident occurred, but the testimony does not disclose whether the saw was changed by Fullerton at that time or not. The man who operated the saw just after Fullerton was struck by the piece of heading testified that the saw appeared to be dull, but that he could not tell whether it was out of set or not. The decedent had worked in the factory of appellee for six or seven years, according to the testimony of one witness. His son testified that he had worked there for about eleven years. For the last two years of his service he operated the saw in question, and from June 3d to August 18th, the time of the accident, he operated it continuously. Appellee had other saw-rigs where the operator stood at the side of the machinery to operate them. They were so constructed in order to lessen the danger to the operator from the pieces of heading flying back when the saw became pinched. On the day of the accident Fullerton complained to the manager of the mill about the defective condition of the rip saw and saw-rig. The manager told him to go ahead and run it and he would have it fixed. The accident occurred two or three hours after this conversation. The jury returned a verdict for appellee, and the case is here on appeal.

Johnson & Burr, of Paragould, for appellant. Block & Kirsch, of Paragould, for appellee.

HART, J. (after stating the facts as above). [1] It is true, as contended by counsel for appellant, that the rule that an employé is presumed to have assumed the ordinary risks incident to the employment in which he is engaged is subject to the limitation that he must have knowledge not only of the existence of defects, but must also be charged with knowledge that the defects exposed him to danger. It is equally well settled, however, that if the danger arising from the defects is so obvious as to be apparent to a person of ordinary intelligence, the law will charge the servant with the knowledge of the danger. *Davis v. Railway*, 53 Ark. 117, 13 S. W. 801, 7 L. R. A. 283; *Clark Lumber Co. v. Northcutt*, 95 Ark. 291, 129 S. W. 88; *Asher v. Byrnes*, 141 S. W. 1176; *Railway v. Owens*, 145 S. W. 879.

[2] The trial judge recognized the principle that the servant's knowledge of a defect is a bar to his action only when it was apparent that he understood the risks created by that defect, but considered that the danger arising from using the machinery in its alleged defective condition was unmistakably obvious to the decedent. For this reason the instructions given by the court limited appellant's right to recover to the sole issue of decedent's complaint about the defective condition of the machinery and the master's promise to repair. Upon this action of the court counsel for appellant assign error.

All of the witnesses testified that the saw revolved very rapidly, and that when it became pinched for any reason the piece of heading which was being sawed would be forced to the top of the saw and would then fly back with considerable force. The purpose of the spreader was to keep the piece of heading from pinching the saw, and the purpose of a guard was to keep the piece of heading from flying back and striking the operator when the saw became pinched. The decedent had worked at appellee's mill for a period of time variously estimated from seven to eleven years, and had worked at the saw in question at intervals for two years just preceding the accident. He commenced regularly to operate the saw on the 3d of July preceding the accident, and worked there up to the time of the accident, which occurred on the 18th of August. It was the sawyer's duty to remove the saw when it became dull or out of set. The decedent was a sawyer of experience, and the fact that the saw was unguarded and that the spreader was thinner than the saw, and on this account was likely to cause the saw to become pinched, are facts that were obvious to the decedent. This is conceded by counsel for appellant, but they contend that the decedent did not realize or appreciate the danger from using the saw in its defective condition. But it seems to us that the danger arising from the defective conditions as they are alleged to have existed were equally obvious to the decedent. As we have already seen, the testimony shows that they were known to all the other servants of the company who had no more experience in the use of the saws than had the decedent. If the danger was obvious and patent to them, it was equally so to the decedent when his age and experience in the use of machinery is taken into consideration.

Moreover, the testimony of the appellant shows that the decedent made complaint about the defective condition of the machinery on the very day of the accident, and the master promised to repair it. The fact that he made the complaint is inconsistent with the idea that he did not realize the danger from using it in its alleged defective condition, and shows that he appreciated the danger which might result from a continued use of the machinery before the alleged defects had been remedied.

No other assignments of error are urged for a reversal of the judgment, and the judgment will be affirmed.

HEARIN et al. v. UNION SAWMILL CO.
et al.

(Supreme Court of Arkansas. Dec. 9, 1912.)

1. LOGS AND LOGGING (§ 3*)—CONVEYANCES—CONSTRUCTION—"OLD-FIELD PINE."

A timber deed, which conveyed all the pine timber 10 inches and up, includes every kind of pine on the land, regardless whether it is worth sawing, and so includes old-field pine, which is pine that grows on land that has been once farmed.

[Ed. Note.—For other cases, see Logs and Logging, Cent. Dig. §§ 6-12; Dec. Dig. § 3.*]

2. EVIDENCE (§ 461*) — DOCUMENTARY EVIDENCE—PAROL EVIDENCE RULE.

Where a timber deed conveyed all the pine timber 10 inches and up, thus including old-field pine, parol evidence was inadmissible to show that it was not intended by the parties to include such timber.

[Ed. Note.—For other cases, see Evidence Cent. Dig. §§ 2129-2133; Dec. Dig. § 461.*]

3. REFORMATION OF INSTRUMENTS (§ 23*)—RIGHT TO CORRECTION—MISTAKE.

Where a timber deed included all the pine timber 10 inches and up, and had been read by the grantors, who upon a subsequent correction of the deed made no objection to that description, they are not entitled to have it reformed at a later time on the ground that the description was inserted by the grantee's fraud or through mistake.

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. § 82; Dec. Dig. § 23.*]

4. EVIDENCE (§ 130*)—RELEVANCY.

In an action by the grantors to reform their timber deed, evidence that the purchaser's grantee who was made a party solely for that reason, had urged, in an action between other parties, a contention similar to that of the grantors, is irrelevant.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 403; Dec. Dig. § 130.*]

Appeal from Union Chancery Court; J. M. Barker, Chancellor.

Action by J. F. Hearin and another against the Union Sawmill Company and another. From a decree for defendants, plaintiffs appeal. Affirmed.

J. B. Moore, of El Dorado, and Warren & Smith, of Camden, for appellants. Gaughan & Sifford and Powell & Taylor, all of Camden, for appellees.

HART, J. J. F. and J. C. Hearin were in 1905 the owners of a tract of land in Union county, Ark., on which grew oak and pine timber. On the 27th day of March, 1905, they conveyed to the Summitt Lumber Company, a corporation, "all the pine and oak timber ten inches and up" on said land. Eight years was given in the deed to remove the timber. Subsequently it was discovered by the parties that a mistake had been made in the description of the land, and a new

deed was executed on the 19th day of June, 1906, and the timber was again described as "all the pine and oak timber ten inches and up." The tract of land in question contained both virgin and old-field pine. "Old-field pine" is pine that grows on land that has been once farmed. In 1909 the Summitt Lumber Company conveyed the timber so purchased by it to the Union Sawmill Company, another corporation. All the deeds referred to were filed for record. The Summitt Lumber Company began to cut and remove the old-field pine, as well as the virgin pine. The Hearins claimed that the old-field pine was not embraced in the timber deed given by them to the Summitt Lumber Company, and in 1909 they conveyed "an undivided half interest in and to all the old-field pine timber ten inches and upwards at the stump" standing and growing on said land to T. W. Ramsey, J. W. Warren, and C. W. Smith, upon consideration that their grantees should bear the expenses of litigation in a suit against the Summitt Lumber Company to recover the old-field pine. This suit was instituted in the chancery court by J. F. Hearin, J. C. Hearin, T. W. Ramsey, J. W. Warren, and C. W. Smith against the Union Sawmill Company and Summitt Lumber Company. The plaintiffs alleged in their complaint that the old-field pine was not embraced in the grant of timber to the Summitt Lumber Company, and also alleged that the language used in the deed was inserted by fraud or mistake, and that it was not intended by the parties that the old-field pine should be conveyed. The prayer of the complaint is that the timber deeds be canceled as a cloud upon plaintiffs' title, and that they be reformed to conform to the intention of the parties and for damages. The defendants deny the allegations of fraud and mistake and aver that the old-field pine was conveyed under the timber deeds. Evidence was introduced by both parties to sustain their respective contentions. The chancellor found in favor of the defendants, and plaintiffs have appealed.

C. W. Curphey was the agent of the Summitt Lumber Company in purchasing the lands from J. F. and J. C. Hearin. It appears that Mrs. J. C. Hearin owned a part of the land, and her husband, J. F. Hearin, owned a part. Both testified it was understood between them and Curphey, at the time the purchase of the timber was made and the deed to the same was executed, that the old-field pine was not to be included. They said that at that time old-field pine had no market value and that Curphey refused to purchase it; that there was no market value for old-field pine in that part of the country until in 1906 and 1907. Other evidence introduced by them tended to show that the mill operators did not begin to purchase old-field pine and saw it into

lumber until the latter part of 1905. They said that the old-field pine had more knots in it than the virgin pine, and for that reason could not be profitably sawed into lumber at the time the timber in question was conveyed to the Summitt Lumber Company in the spring of 1905. Afterwards they said that the price of lumber began to rise, and it was not until then that the sawmill operators began to purchase old-field pine. The Hearins also testified that one of the agents of the Summitt Lumber Company began to estimate the old-field pine in question in 1907, and that they told him that the old-field pine was not embraced in the deed made by them to the Summitt Lumber Company. The agent who made the estimate denied that they made any objection at the time, and denied that they contended that the old-field pine was not included in the deed during the time he was making the estimate.

The evidence on the part of the defendants tended to show that, at the time the Summitt Lumber Company purchased the timber from the Hearins, it and other sawmill operators were purchasing old-field pine and sawing it into lumber. Some of the witnesses said they began to purchase old-field pine and saw it into lumber as early as 1903, and some place the date in 1904.

[1, 2] It is first contended by counsel for the plaintiffs that old-field pine is not included in the description "all the pine and oak timber ten inches and up." We think they are not correct in this contention. These general words aptly include every kind of pine on the lands. The language used is broad enough to cover the old-field pine. It does not make any difference whether or not it was profitable at that time to saw old-field pine, for, as we have already seen, the language of the deed is not merchantable timber, but is "all the pine and oak timber ten inches and up." Since the language of a deed is broad and comprehensive enough to cover all the pine timber that may be found on the land of a certain description, it is not material to the effect of the deed that the parties in fact contemplated at the time that a particular kind of pine timber found on the land should not be included under the terms of the deed. This is so because the natural and ordinary meaning of the language used in the deed is broad and comprehensive enough to include the old-field, as well as the virgin, pine. To allow the plaintiffs to show by parol proof that it was not so intended would be to contradict or vary the written instrument, which is contrary to the settled rule in this state. *Cherokee Const. Co. v. Prairie Creek Coal Mining Co.*, 144 S. W. 927; *Boston Store v. Schleuter*, 88 Ark. 213, 114 S. W. 242; *Cox v. Smith*, 99 Ark. 218, 138 S. W. 978; *Delaney v. Jackson*, 95 Ark. 131, 128 S. W. 859; *Bradley Gin Co. v. J. L. Means Machinery Co.*, 94 Ark. 130, 126 S. W. 81.

[3] It is next contended by counsel for the plaintiffs that the language "all the pine and oak timber ten inches and up" was placed in the deed through fraud or mistake on the part of C. W. Culphey, the agent of the defendant Summitt Lumber Company, in purchasing the land. Culphey was not introduced as a witness, and it appears that he resided in another state at the time the depositions were taken. It also appears that Mrs. Hearin knew where he resided and that the defendants did not. She refused on cross-examination to disclose his address, but subsequently through her attorneys gave it to the defendants. Mrs. Hearin testified that she and her husband acted together in selling the timber and that both were present when the sale was made. She admits that she read over the deed they executed to the Summitt Lumber Company and, also, read it to her husband. Again, a year later, it was ascertained that a mistake had been made in the deed in the description of the land, and a new deed was executed to correct this mistake. This deed also described the timber as "all the pine and oak timber ten inches and up."

The deed was the final embodiment in writing of the agreement between the parties. The plaintiffs signed it of their own volition after having read it. They will not now be heard to say they did not know what it contained, or that they did not understand the plain and ordinary meaning of the words used. *Stewart v. Fleming*, 150 S. W. 128, and cases cited. In disclosing a similar principle, in that case, the court said: "There was no misrepresentation as to any matter of inducement to the making of the lease, which, from the relative position of the parties and their means of information, the one could be presumed to contract upon the faith and trust which he reposed in the representation of the agent of the other on account of his superior information and knowledge with respect to the subject of the contract, nor were there any fraudulent representations holding out inducements calculated to mislead the lessee and induce him to execute the lease on the faith and confidence of such representations, and, having signed it after opportunity to examine it, he will not be heard to say when he signed it that he did not know what it contained"—citing authorities.

[4] Testimony was introduced by the plaintiffs tending to show that the Union Sawmill Company, one of the defendants in this case, made a contention similar to the one they are making now in a contest with another corporation as to similar language used in a deed. It is only necessary to say, in regard to this, that such action could in no event affect the rights of the Summitt Lumber Company, which was not a party to that contention. Whatever rights the plaintiffs had resulted from a construction of

their deed to the Summitt Lumber Company. The Union Sawmill Company was only made a party defendant because it had purchased the timber from the Summitt Lumber Company. Hence the testimony referred to could have no probative force whatever as affecting the rights of the Summitt Lumber Company. The decree will be affirmed.

STRICKLIN et al. v. MOORE.*

(Supreme Court of Arkansas. Dec. 9, 1912.)

1. ADVERSE POSSESSION (§ 85*)—COLOR OF TITLE—EVIDENCE—WEIGHT.

In an action of ejectment between the heirs of a wife and a purchaser under an execution against the husband, evidence held insufficient to show any such change of possession under a colorable deed from the husband to the wife as gave her title by adverse possession prior to the execution sale.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 498-503, 656, 660, 668; Dec. Dig. § 85.*]

2. EVIDENCE (§ 471*)—FACTS OR CONCLUSIONS.

The testimony of a witness that he guessed his mother was in the possession of land was not a statement of a substantive fact, but a mere conclusion of the witness.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2149-2185; Dec. Dig. § 471.*]

3. ADVERSE POSSESSION (§ 62*)—CHARACTER OF POSSESSION.

Where a wife never had actual possession of land, the possession of the husband after her death was in his own right, and not as tenant by curtesy, and hence created title by adverse possession in himself, and not in the heirs of the wife as against an outstanding title.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 323-332; Dec. Dig. § 62.*]

Appeal from Circuit Court, Lafayette County; Jacob M. Carter, Judge.

Ejectment by Bryant L. Stricklin and others against Henry Moore. Judgment for defendant, and plaintiffs appeal. Affirmed.

R. M. Mann, of Texarkana, for appellant. Moore & Moore, of Texarkana, for appellee.

HART, J. This is an action of ejectment by Bryant L. Stricklin, W. W. Stricklin, and Fuller Stricklin against Henry Moore for 160 acres of land. On the former appeal the judgment was reversed because the circuit court erred in sustaining a demurrer to the complaint. Reference is made to the opinion on the former appeal for an extended statement of the issues. See *Stricklin v. Moore*, 98 Ark. 30, 135 S. W. 360. Upon the remand of the case, the defendant filed an answer in which he denied both the title and the right of possession of plaintiffs, and also pleaded an investiture of title in himself by adverse possession for more than seven years. At the conclusion of the testimony the court directed a verdict for the defendant, and the plaintiffs have appealed. The facts are as follows:

Wm. N. Stricklin became the owner of the

lands in controversy, together with other lands referred to in the testimony, some time about 1834. The lands in controversy were mortgaged by Wm. N. Stricklin to the Real Estate Bank of Arkansas and upon the foreclosure of this mortgage the property became the property of the state, but the state issued to Wm. N. Stricklin its certificate dated July 14, 1877, showing that he had a right to purchase the land. On February 24, 1879, W. N. Stricklin executed a deed to the land in question together with other lands to Mary D. Stricklin, his wife. On the 23d day of March, 1880, Wm. N. Stricklin and Mary D. Stricklin conveyed said lands to Sam B. Le May, a nephew of the said Wm. N. Stricklin, and on the same day Wm. N. Stricklin assigned to said Sam B. Le May the certificate which he had received from the state of Arkansas. On April 1, 1880, the state issued to Le May its patent to the land. Le May then on the same day executed to Mary D. Stricklin a bond for title to said lands, and took her notes for the purchase money. On the 17th day of August, 1881, the said Mary D. Stricklin died intestate, leaving the plaintiffs as her sole heirs at law. On October 4, 1880, the administrator of the estate of Wiley P. Cryer, deceased, recovered judgment against Wm. N. Stricklin for the sum of \$2,320.11. A suit was then instituted to set aside the deed to Le May as a fraud upon the creditors of Wm. N. Stricklin. On December 16, 1885, the deposition of Wm. N. Stricklin was taken in said cause. Wm. N. Stricklin died in 1908, and his deposition was read at the trial of the present case. He testified that he had been in possession of the lands in controversy from 1834 up to the present time (1885), and that the lands during all that time had never been out of his possession; that the lands were deeded to Sam B. Le May to assist him in defrauding his creditors, and that Le May had never asserted any title to the land, and did not expect his wife to pay for the land when he executed the bond for title to her; that Le May knew his wife had no property of her own, and never expected to pay for the lands. The suit by the administrator of Wiley P. Cryer, deceased, was never prosecuted to judgment, but was finally dismissed for want of prosecution. Some effort was made by the administrator of the estate of Sam B. Le May to collect the notes given him by Mary D. Stricklin, but it does not appear that they were ever collected or that any suit looking to that end was ever prosecuted to judgment. The defendant, Henry Moore, recovered judgment against Wm. N. Stricklin and Bryant L. Stricklin, and levied on about 700 or 800 acres of land, including the lands in controversy, to satisfy said judgment. Moore became the purchaser of all of said lands at the execution sale, and on May 2, 1895, after the expiration of the year

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes 151 S.W.—64 † For opinion on petition for rehearing, see 151 S. W. 1183.

for redemption had expired, received a deed to said lands. Moore then conveyed all of the lands so purchased by him at the execution sale, except the land in controversy, to the plaintiffs in the present suit. Moore testified that at the time he made the conveyance to them it was understood between him and the plaintiffs that he was to retain the title to the lands in controversy. The plaintiffs admitted the purchase of the other lands from him, but denied that they agreed that the defendant should retain the 160 acres in controversy for himself. The defendant after his purchase at execution sale went into possession of the 160 acres involved in this suit, and has held possession ever since, making improvement upon the lands, and renting them to some of the plaintiffs and to other persons.

In the opinion on the former appeal, which is the law of the case, the court, in discussing the deed from Wm. N. Stricklin to his wife, said that an equitable title is not sufficient to maintain ejectment unless there is a legal right to possession, but counsel for plaintiffs say that they rely on a title by adverse possession in the said Mary D. Stricklin to recover. On the former appeal the court said: "The allegations of the complaint are that Mary D. Stricklin held the land adversely from the date of her deed in 1879 up to her death in August, 1880, and that her husband, W. N. Stricklin, held adversely as tenant by the curtesy from then until defendant became the purchaser of his title at the execution sale in 1895. The adverse possession of W. N. Stricklin as such tenant by the curtesy, coupled with the adverse possession of his wife, constituted an investiture of title in the heirs of Mary D. Stricklin, subject to the life tenancy of W. N. Stricklin."

[1] It will be noted, however, that the question before the court then was whether the demurrer to the complaint should have been sustained, and the allegations of the complaint were considered as proved. Upon the proof, as shown by the record on the present appeal, it is not established that Mary D. Stricklin was ever in possession of the land. On the contrary, the undisputed proof shows that Wm. N. Stricklin entered into the possession of the lands in 1834, and remained in possession of them until the date of the execution sale to the defendant Moore in 1895. During this long period he was in open, notorious possession, taking the rents and exercising every act of ownership. The conveyance by him to his wife was merely colorable. It will be remembered that the conveyance was made in 1879, and that his wife died in August, 1881. At the date of the conveyance to her, she did not reside on the lands, but resided on their homestead in the town of Lewisville. She continued to reside there until her death. It does not appear that she ever exercised any act of owner-

ship whatever over the lands. In March, 1880, W. N. Stricklin and Mary D. Stricklin, his wife, executed a deed to Sam B. Le May to said lands, and W. N. Stricklin also transferred to him the certificate of the state, and on April 1, 1880, the state issued its patent to Le May. So Le May became invested with both the legal and equitable title, and the adverse possession of Stricklin was in hostility to his title.

[2] Plaintiffs claim that the testimony of B. L. Stricklin shows that Mrs. Stricklin was in possession of the land after the deed was made to her. The witness was asked who was in possession of the land after this deed was made, and answered: "The part of it that was deeded to mother. I guess she was in possession of it." This was merely a conclusion of the witness, and was not a statement of any substantive fact. Bryant L. Stricklin also testified that his father claimed to him the land was his wife's. He said that this was during his mother's lifetime, and after her death his father also spoke of it as belonging to his mother. On cross-examination he stated that his father was in the possession of the land at the time he made the deed to his wife, and that his mother at that time was living on the homestead at Lewisville, and continued to live there until her death. He further stated that his father controlled the land and continued in the possession of it.

W. W. Stricklin, another one of the plaintiffs, testified that his father was in possession of the land when the deed was made to his wife, and that he continued to hold possession of it until the defendant Moore took possession.

[3] We are of the opinion that the undisputed testimony shows that there was never any visible change in the possession of the land, and that there is no substantive testimony from which it can be inferred that Mrs. Stricklin ever entered into possession of the land at any time. This being true, the continued possession of the land after her death by Wm. N. Stricklin would not constitute adverse possession by him as tenant by curtesy, but such adverse possession by him being continued for the statutory period created an investiture of title in himself; that is to say, we are of the opinion that the undisputed testimony shows that Mrs. Stricklin never asserted any claim whatever to the land, and never took possession of it. On the other hand, Wm. N. Stricklin remained in possession of the land after the deed was made just as he had before and continued to control and exercise the exclusive ownership over it until it was sold to the defendant Moore at the execution sale in 1895. This gave him a title by adverse possession against Le May, to whom the legal title was conveyed in 1880.

It follows that the judgment must be affirmed.

WILLIAMS v. STATE.

(Supreme Court of Arkansas. Dec. 9, 1912.)

1. HOMICIDE (§ 255*)—TRIAL—EVIDENCE—SUFFICIENCY.

Evidence held sufficient to support a conviction of voluntary manslaughter.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 539-541; Dec. Dig. § 255.*]

2. CRIMINAL LAW (§ 596*)—TRIAL—CONTINUANCE.

In a prosecution for homicide, the refusal of a continuance on account of the absence of a witness who would have testified as to threats made by deceased was not improper, where there was other evidence to that effect.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1328-1330; Dec. Dig. § 596.*]

3. CRIMINAL LAW (§ 594*)—TRIAL—CONTINUANCE.

A continuance on the ground of absent witnesses is properly refused, where the trial court was warranted in finding that the attendance of such witnesses could not be procured.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1321, 1322, 1332; Dec. Dig. § 594.*]

Appeal from Circuit Court, Ashley County; H. W. Wells, Judge.

Jasper Williams was convicted of voluntary manslaughter, and he appeals. Affirmed.

George & Butler, of Hamburg, for appellant. Hal. L. Norwood, Atty. Gen., and Wm. H. Rector, Asst. Atty. Gen., for the State.

MCCULLOCH, C. J. The defendant, Jasper Williams, was indicted by the grand jury of Ashley county for the crime of murder, alleged to have been committed by killing one Louis Shelton in that county in the month of October, 1911. The jury convicted him of voluntary manslaughter, and fixed his punishment at a term of two years in the state penitentiary, and he has prosecuted an appeal to this court.

[1] The principal contention is that the evidence is not sufficient to sustain the verdict. Defendant and deceased were both colored men, who had resided in the same community as acquaintances and neighbors for a number of years. They had a falling out a short time before the killing, and bad blood arose between them. A difficulty between them had occurred only a few days before the killing. On the occasion of the killing they met during the day on a little bridge at or near the village of Thebes. When the defendant came up, the deceased, Shelton, and one Bethune, who testified as a witness in the case, were standing on the bridge together conversing, and after greetings had passed between the three, Shelton, according to the testimony of this witness, addressed defendant, saying: "What you said to me the other day I don't like. Jasper, you have got that to take back." Defendant replied, "If I take it back, you must make me take it back." Whereupon Shelton drew his knife

and stepped forward in the direction of defendant, when the latter drew his pistol and commenced firing. He fired three shots in quick succession, the last of which took effect in Shelton's body and caused immediate death. This witness states that Shelton stepped forward with the knife in his hand, but stopped as soon as defendant drew his pistol, and did not advance any further nor make any further effort to attack defendant. It does not appear from the testimony of the state's witness that he was close enough to defendant to strike him with the knife. Another witness testified that he was a short distance away, saw the men standing together, and when attracted by the first shot looked at them, and that Shelton made no forward movement after the first shot was fired. It was proved that threats were made by Shelton against the defendant, which were communicated to the latter before the killing occurred. Defendant's version of the affair, as related by him on the witness stand, is that, after the words were spoken between him and Shelton on the bridge, substantially as related by witness Bethune, Shelton advanced towards him, saying: "You just as well shoot. I am going to kill you"—and made a "grab" at him, or, to use his exact language, "grabbed at the waist of my pants, and said he was going to kill me with that knife." He stated further that deceased continued to advance, and that he (defendant) was going backward. We must, of course, treat the verdict of the jury as settling this conflict against the contention of defendant. We are of the opinion that the testimony was sufficient to sustain the verdict of voluntary manslaughter. The undisputed evidence is to the effect that Shelton brought on the killing and was the aggressor; but the jury might well have found, and doubtless did conclude, that the danger to defendant was not imminent enough to justify him in slaying his assailant, and that the killing was not necessary as an act of self-defense. The preponderance of the evidence, we think, is that the killing was perpetrated by the defendant while in fear of his own safety; but there was not sufficient foundation for it to warrant him in slaying his antagonist. It appears from the evidence that the defendant had been living in that community for 25 or 30 years, and bore an exceptionally good reputation for morality as well as for peace. The jury doubtless took this into consideration in fixing the minimum punishment. Considering the evidence, taken as a whole, we are of the opinion that the verdict of the jury was about right in finding defendant guilty of manslaughter, and we do not feel disposed to disturb it.

[2] The only other ground for reversal urged is that the court erred in refusing to grant a continuance. The prayer for continuance was based upon the absence of a

witness who it is alleged would have testified as to threats made by deceased which were subsequently communicated to the defendant. There was other testimony along the same lines, and it is manifest that defendant was not prejudiced by the absence of the witness.

[3] In addition to that, the court was warranted in finding that the attendance of the witness could not be procured. There was no error in overruling the motion.

Judgment affirmed.

McCARROLL v. RED DIAMOND CLOTHING CO.

(Supreme Court of Arkansas. Dec. 2, 1912.)

GUARANTY (§§ 7, 34, 67*)—SPECIAL GUARANTY—LIABILITY.

Where a traveling salesman on commission on orders taken and accepted took an order from the buyer which the seller refused to accept because of the buyer's financial condition, and so notified the salesman, who, by letter, replied that he knew that the buyer had been slow in paying his bills, and stated, "if my indorsement is worth anything, you can ship on it," and the seller, on receipt of the letter, shipped the goods relying on the guaranty, the salesman was absolutely bound to pay, and notice of the seller's acceptance of the guaranty and of the failure of the buyer to pay was not necessary to bind him.

[Ed. Note.—For other cases, see Guaranty, Cent. Dig. §§ 9, 77; Dec. Dig. §§ 7, 34, 67.*]

Appeal from Circuit Court, Yell County; Hugh Basham, Judge.

Action by the Red Diamond Clothing Company against John McCarroll. From a judgment for plaintiff, defendant appeals. Affirmed.

Appellant, who was at the time a traveling salesman for appellee, receiving commissions on orders taken and accepted, took an order from the Centerville Mercantile Company in September, 1908, for a bill of goods amounting to \$118.05. Appellee, upon receipt of the order, notified its salesman that it would not be filled because of the financial condition of said company, whereupon he wrote to them, stating he knew the company had been slow in the payment of its bills, and setting out the good financial condition of some of its officers and stockholders and its own worth, and, concluding: "If my indorsement is worth anything, you can ship on it. That is the way I feel about them. I am vice president of the McCarroll Brothers Company." The bill of goods was then shipped to the Centerville Mercantile Company under said direction and indorsement on September 30th, 1908. Said company continued in bad financial condition and failed to pay for the goods when the bill became due, and their check for the price being protested for non-payment and the account placed in the hands of an attorney for collection on December 7, 1908, and said company was later adjudged

insolvent, placed in the hands of a receiver, and its creditors realized nothing. Appellant was absent from the state during the spring and summer of 1909, and demand for payment was made on him when he returned in the fall, and, upon his refusal to pay, this suit was brought against said Mercantile Company and him before a justice of the peace, and appealed to the circuit court. On the hearing there the court directed a verdict for appellee, from which this appeal comes.

John McCarroll, pro se. Priddy & Chambers, of Danville, for appellee.

KIRBY, J. (after stating the facts as above). Appellant contends that he had no notice of the acceptance of his indorsement by the appellee company and the shipment of goods upon it, and on that account did not become liable thereon, and that appellee was negligent in proceeding to collect the debt from the insolvent company. If appellee's letter be construed as but an offer of indorsement or a conditional guaranty, it would have been necessary to notify him of its acceptance, or the conditions must have been performed by appellee company in order to fix his liability thereon, but such is not the case. Upon being advised of the refusal to ship the bill of goods ordered, because of the bad financial condition of the company ordering them, he wrote, expressing the utmost confidence in their ability to pay, giving his reasons therefor and concluded by saying: "If my indorsement is worth anything, you can ship on that. * * * I am vice president of the McCarroll Brothers Company." The appellee, upon the receipt of the letter, shipped the goods, upon said indorsement, charging them upon its books to the said company and John F. McCarroll, and relying absolutely upon the faith and credit of such indorsement, as the undisputed testimony shows. This was not a continuing guaranty nor a conditional one, but a special guaranty or indorsement, directing the shipment of the goods on the credit of the guarantor, if it was regarded good for the payment, and, being acted upon and the goods shipped in accordance therewith, appellant became absolutely bound with the principal on the contract of sale under which the liability of the failed company accrued. 20 Cyc. 1398, 1399; Stewart v. Sharp County Bank, 71 Ark. 588, 76 S. W. 1064; Friend v. Smith Gin Co., 59 Ark. 91, 26 S. W. 374.

It is insisted that appellant should have been notified of the acceptance of his contract of guaranty or indorsement at the time of the shipment of the goods, and the failure of the company to pay for them, in order to bind him thereon. If his letter had been but an offer to guarantee the payment of the account, this would be true, but it was a direction to ship the goods upon his in-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Index

dorsement, if his credit was regarded good for the amount, and needed only to be acted upon by the appellee, and the goods shipped in accordance therewith to bind him.

Appellee made no proposition to its salesman that it would ship the goods upon his guaranty of the account, but he sent the direction and indorsement which was acted upon by them, and thereupon became binding upon him. He does not claim that he did not have notice that the goods were shipped, but only that he was not advised at the time that the company would look to him for the payment in accordance with his proposition. He did know that appellee had refused to ship the bill of goods, because of the financial condition of the firm ordering them, and also that he had directed their shipment after being notified of such refusal upon his own indorsement, if it was regarded good, and that thereafter the goods were shipped. Nothing further was necessary to bind him to the payment therefor.

As these facts appeared from the undisputed testimony, the court did not err in directing the verdict.

The judgment is affirmed.

CLAY COUNTY v. BANK OF KNOBEL

(Supreme Court of Arkansas. Dec. 9, 1912.)

1. TAXATION (§ 453*)—ASSESSMENT—OVERVALUATION—REMEDY.

Acts 1911, p. 230, amending Kirby's Dig. § 7003, authorizing the board of equalization to correct errors in assessments, and providing for appeals from the order of the board of equalization to the county court, and appeals from the county court to the circuit court, furnishes a complete remedy in case of overvaluation of property for taxation by first applying to the board of equalization, and where relief is not granted by appeal to the county court, and then to the circuit court, and a taxpayer must pursue the statutory remedy, and, where he fails to do so, he cannot obtain relief in the circuit court.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 809; Dec. Dig. § 453.*]

2. TAXATION (§ 453*)—ASSESSMENT—OVERVALUATION—REMEDY.

Under Kirby's Dig. § 6992, providing for the meeting in September of each year of the board of equalization, and section 1361 and Acts 1895, p. 38, providing that the county court of Clay county shall be held at Piggott in April, July, and October of each year, and Acts 1911, p. 161, providing for separate county courts for the western district of Clay county, and for the meeting of such courts in March, June, September, and December of each year, and providing that the county court for levying taxes shall be held at Piggott as now provided by law, the provisions for the meeting of the equalization board and the session of the county court for Clay county apply to the western district, and a taxpayer in the western district may pursue the remedy prescribed by Acts 1911, p. 230, in case of overvaluation of his property by applying to the board of equalization, and, where relief is not granted, thereby appeal to the county court at the regular Octo-

ber term, and then by appeal to the circuit court.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 809; Dec. Dig. § 453.*]

Appeal from Circuit Court, Clay County; W. J. Driver, Judge.

Petition by the Bank of Knobel against Clay County for the reduction of the valuation of its property for assessment. From a judgment of the Circuit Court reducing the assessment as prayed for, the county appeals. Reversed and dismissed.

At the March term, 1912, of the Clay county court, appellee presented its petition alleging that its property in 1911, including its entire assets, personal and real, was assessed at the sum of \$9,342.43, whereas it should have been assessed at one-half that sum. It prayed that the assessment be reduced. The petition was overruled. Appellee took an appeal to the circuit court. In the circuit court appellant filed an answer admitting that appellee's property had been assessed at the sum alleged, but denied that the property was doubly assessed, and set up that the court was without jurisdiction or power to grant the relief prayed for, and alleged that, if the petitioner was entitled to any relief, it had lost that right by failure to apply to the proper court within the time required by law. A trial was had and evidence was adduced tending to show that appellee's property was assessed at its true value—the amount alleged in the complaint—and there was evidence to the effect that the board of equalization of Clay county had a rule to assess property at 50 cents on the dollar of its true value; that the board, in that respect, approved the rule of the State Tax Commission to assess property at its real value and then cut it half in two and put the valuation at one-half the real value. But this was not done as to the property of appellee. The circuit court rendered judgment reducing the assessment to \$4,696.25, as prayed in the petition. Appellant duly prosecutes this appeal.

G. B. Oliver, of Corning, for appellant. J. S. Jordan, of Corning, for appellee.

WOOD, J. (after stating the facts as above).

[1] Act 249 of the Acts of 1911, p. 230, which amends section 7003 of Kirby's Digest, provides that the board of equalization, when in session, "shall have power to examine witnesses with respect to any matter under investigation, to hear complaints with respect to the undervaluation or overvaluation of property, and to equalize the assessments of the county by adding to or taking from the valuation of any real or personal property, moneys and credits within the county, and to assess the property of any person omitted from the rolls by the assessor, and to correct the obvious errors that may have been made in the assessment of

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

property by the assessor." The second section specifies when the board of equalization shall meet, and then provides: "The board shall have power to exercise its functions in the equalization of property until the fourth Wednesday of October." The fourth section provides that "all appeals taken from the order of the board of equalization shall be taken to the October term of the county court, and such appeals, even if taken after the regular October term of the county court has convened, shall be heard and passed upon by said court before the fourth Wednesday in October." And the fifth section, among other things, provides that "all appeals from the county court to the circuit court herein provided must be taken within thirty days of the day upon which the order from which the appeal is taken was made." It will thus be seen that the statute furnishes a complete remedy, in case of overvaluation of property by the assessor, to have the same reduced by first applying to the board of equalization, and, if relief is not granted there, then by appeal to the county court, and then to the circuit court. The appellee did not pursue the remedy provided by statute.

We held in *Clay County v. Brown Lumber Co.*, 90 Ark. 417, 119 S. W. 251, that in all cases of excessive valuation, where the assessor or the board acts within its jurisdiction, the taxpayer must pursue the remedy provided for his relief or abide by the finding of the board. And in *Bank of Jonesboro v. Hampton*, 92 Ark. 492, 123 S. W. 753, we said: "The taxpayer may apply to the county board of equalization for redress against the action of the county assessor; and, if the county board does not grant him the relief, he may appeal to the county court, and, if dissatisfied with its action, may in turn appeal from its decision." In *State v. Little*, 94 Ark. 217, 126 S. W. 713, 29 L. R. A. (N. S.) 721, we said: "The courts, either of common law or equity, are powerless to give relief against the erroneous judgments of assessing bodies, except as they be especially empowered by law to do so." It thus appears that appellee, not having pursued the remedy provided by law, was not entitled to the relief which the circuit court granted.

[2] The appellee contends that under the act of May 4, 1911, *supra*, it was without a remedy because there was no October term of the county court of the Western district of Clay county to which it could appeal according to the provisions of that act. Act 204, p. 161, of the Acts of 1911, provides, among other things, for separate county courts for the Western district of Clay county and the time for the meeting of such courts, to wit, on the third Monday in December and on the fourth Mondays in March, June, and September of each year. After fixing the time for holding these courts, the act pro-

vides that "the county court for levying the taxes and making appropriations shall be held at Piggott, the county site, as now provided by law." At the time this act was passed the county court of Clay county was held at Piggott on the first Monday in April, July, and October of each year (Kirby's Digest, § 1361; Acts 1895, p. 36), and the board of equalization met in September of each year (Kirby's Digest, § 6992).

Counsel for appellee states that there was only one board of equalization in Clay county, and there is no evidence in the record showing that there was any board for the Western district separate from that for the Eastern district. Since there is no specific provision in the act for the meeting of the equalization board and session of the county court in the Western district of Clay county for the purpose of correcting improper assessment of taxes, we must assume that the above general provision for the meeting of the equalization board and the session of the county court for Clay county applied to the Western district as well as to the Eastern district thereof. When the county court met for the levying of taxes, it was necessarily in session for the purpose of correcting any errors that may have been made in the assessment of taxes, as the assessment of taxes necessarily preceded any proper levying thereof.

Therefore, if appellee's property was improperly assessed by overvaluation, it had a complete remedy as provided by statute, *supra*, by first making application to the board of equalization, and, if relief was not there granted, then by appeal to the county court, and then to the circuit court. Not having pursued this remedy, the circuit court erred in granting the relief prayed in the petition.

The judgment is therefore reversed, and the cause is dismissed.

GALLOWAY v. DARBY et al.

(Supreme Court of Arkansas. Nov. 18, 1912.)

1. WILLS (§ 775*)—LEGACIES—LAPSED LEGACIES.

As a will is ambulatory, the death of a legatee during the lifetime of the testator will cause a lapse in the legacy, in the absence of a statute to the contrary, and Kirby's Dig. § 8022, saves from lapse only bequests and devises to surviving children or descendants of the testator.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1997-2000; Dec. Dig. § 775.*]

2. WILLS (§ 775*)—CONSTRUCTION—INTENTION OF TESTATOR—"HEIRS."

The question in explaining a will is not what the testator meant, but what is the meaning of his words, and, where technical phrases or terms of art are used, it is fair to presume that the testator understood them, and hence a general provision in a will that all the property devised and bequeathed, unless otherwise specifically stated, shall vest in the devisees, their heirs and assigns, in fee simple, must be construed as words of limitation fixing the es-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

tate of such devisees, and cannot be construed as equivalent to children, and as showing an intention to prevent lapse by prescribing a line of succession, for the word "heirs" in its technical sense is a word of limitation, and not of substitution.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. §§ 1997-2000; Dec. Dig. § 775.*]

For other definitions, see *Words and Phrases*, vol. 4, pp. 3241-3265; vol. 8, pp. 7677-7678.]

3. WILLS (§ 858*)—LAPSED LEGACIES—RESIDUARY CLAUSE.

The distinction between personalty and realty having been abolished, a general residuary clause will carry a lapsed devise of realty as well as a bequest of personalty.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. §§ 2173-2183; Dec. Dig. § 858.*]

4. COURTS (§ 92*)—RULES OF DECISION—DICTUM.

A decision on which the case could have turned cannot be regarded as obiter dictum merely because, owing to the disposal of that contention, it was necessary to consider another question.

[Ed. Note.—For other cases, see *Courts*, Cent. Dig. § 335; Dec. Dig. § 92.*]

5. WILLS (§ 858*)—LAPSED LEGACIES—RESIDUARY CLAUSE.

Where the introduction of a will expressed the testator's intention of disposing of all her property, a residuary clause reciting that she gave, devised, and bequeathed all the rest and residue of her estate not hereinbefore specifically devised and bequeathed, of which she should die possessed or to which she will be entitled, will carry lapsed devises notwithstanding the expression "not hereinbefore specifically devised," for a general residuary clause carries all the property of the testator not otherwise disposed of, unless the will shows an intention to exclude from its operation some part of the estate, and such clause should be liberally construed to prevent intestacy.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. §§ 2173-2183; Dec. Dig. § 858.*]

Appeal from Pulaski Chancery Court; John E. Martineau, Chancellor.

Action between D. F. S. Galloway against James Darby and others. From a judgment for defendants, plaintiff and defendant W. A. Galloway appeal. Reversed and remanded, with directions.

Rose, Hemingway, Cantrell & Loughborough, of Little Rock, for appellants. James A. Comer and John McClure, both of Little Rock, for appellees.

MCCULLOCH, C. J. The merits of this controversy involve the construction of the last will and testament of Elizabeth S. Shall, who died in the city of Little Rock on March 23, 1906, the owner of a large estate, consisting mostly of valuable lands, city and farm property. The will was executed January 17, 1898, and on April 14, 1905, she added a codicil. The preamble or introductory clause of the will reads as follows:

"I, Elizabeth S. Shall, of the city of Little Rock, county of Pulaski, State of Arkansas, being in good bodily health and of sound and disposing mind and memory, calling to mind the frailty and uncertainty of human

life, and being desirous of settling my worldly affairs and directing how the estate with which it has pleased God to bless me, shall be disposed after my decease, while I have strength and capacity so to do, do make and publish this, my last will and testament, hereby revoking and making null and void all other last wills and testaments, by me heretofore made; * * * as to my worldly estate and all the property, real, personal or mixed, of which I shall die seized and possessed, or to which I shall be entitled at the time of my decease, I devise, bequeath and dispose thereof in the manner following, to-wit:—"

In item 1 the testatrix gave to appellant, D. F. S. Galloway, who was her grandnephew, her home in the city of Little Rock, and all its contents, furniture, paintings, silver, etc., horses, carriages, and harness, and also certain other lots of real estate in said city, and a tract of land in Pulaski county containing 180 acres.

In item 2 she gave to her nephew W. A. Galloway two lots in Little Rock, and a certain tract of land in Pulaski county.

In item 3 she gave to her niece Elizabeth S. Darby a farm in Pulaski county known as the "Shall place," containing about 786 acres. The language of that devise is as follows: "I give, devise and bequeath to my niece, Elizabeth S. Darby, the place known as the 'Shall place,' consisting of about 786 acres of land in Pulaski County, State of Arkansas, to-wit:—"(Here follows description.)

In item 4 she gave two lots in the city of Little Rock, and a farm in Pulaski county known as the "Beasley place," to her niece Mary A. Eanes for life, with remainder over to D. F. S. Eanes, a grandnephew of the testatrix.

In item 5 she gave to her said grandnephew D. F. S. Eanes three lots in the city of Little Rock, the property being left in trust to D. F. S. Galloway as trustee for the benefit of said D. F. S. Eanes until the latter should come of age.

In items 6 and 7, respectively, she bequeathed sums of money to a friend and to a certain church in Little Rock.

Item 8 contained the following residuary devise and bequest: "I give, devise and bequeath to my grandnephew, David F. Shall Galloway, all the rest and residue of my estate not hereinbefore specifically devised and bequeathed, whether real, personal or mixed, of which I shall die seized and possessed, or to which I shall be entitled at the time of my decease."

After the residuary clause the will reads as follows:

"The property herein devised and bequeathed in items four and five to my grandnephew, David F. Shall Eanes, shall, in the event of his death without issue of his body him surviving, vest in fee-simple in his

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

mother, my niece, Mary A. Eanes, her heirs and assigns.

"All the property herein devised and bequeathed, unless otherwise and specifically stated, shall vest in the devisees, their heirs and assigns in fee simple, and the property devised and bequeathed to my nieces is to be their sole and separate property and free from the control and debts of their said husbands, together with the rents and profits of the same."

By her codicil the testatrix revoked the devise to appellant, D. F. S. Galloway, as to some of the said lots given to him in the will, and devised the same to Elizabeth S. Darby in fee simple. The codicil made certain other changes not material to this controversy. Elizabeth S. Darby died prior to the death of the testatrix, and the controversy in this suit is as to the devolution of the property devised to her in the will and codicil.

It is the contention of appellant that both of the devisees to Elizabeth S. Darby lapsed on account of her death prior to the death of the testatrix, and that that property fell within the residuary clause of the will. The chancellor decided that the devise to Mrs. Darby in the will did not lapse, but went to her children under the terms of the will, and that the devise to Mrs. Darby in the codicil lapsed, but did not fall within the residuary clause, and as to that the testatrix is deemed to have died intestate, and the property descended to her heirs at law. Appellant, D. F. S. Galloway, is not one of the heirs of the testatrix, so, under the decree, he gets none of the property in controversy, and he appealed to this court. W. A. Galloway, the father of D. F. S. Galloway, is one of the heirs, and is a party to this suit. He appealed from that part of the decree which holds that the property devised to Mrs. Darby in the will goes to her children.

[1, 2] The rule is established beyond controversy, except where changed by statute, that a legacy or devise lapses when the legatee or devisee dies before the testator. 17 Am. & Eng. Ency. of Law, p. 748, and authorities there cited. "The lability of a testamentary gift to failure or as it is generally termed lapse," says Mr. Jarman, "by reason of the decease of its object in the testator's lifetime, is a necessary consequence of the ambulatory nature of wills, which, not taking effect until the death of the testator, can communicate no benefit to persons who previously die." 1 Jarman on Wills (6th Ed.) p. 307. A statute of this state changes that rule as to a legacy or a devise to a child or other descendant of the testator, and provides that it shall not lapse, but that "the property so devised or bequeathed shall vest in the surviving child or other descendant as if such devisee or legatee had survived the testator and died intestate." Kirby's Digest, § 8022.

It is conceded that the devise to Mrs. Dar-

by in the codicil lapsed, as decided by the chancellor, by reason of her death before the death of the testatrix, and the property either falls within the residuary clause of the will, if that clause is broad enough to include it, or descends to the heirs at law of the testatrix, as undisposed of property. That question will be considered later.

It is contended on behalf of appellees that the devise of the Shall place did not lapse, and that it was the intention of the testatrix to substitute the children of Mrs. Darby as devisees in the event of the latter's death before the death of the testatrix. This contention is founded on the general provision in the will that "all the property herein devised and bequeathed, unless otherwise and specifically stated, shall vest in the devisees, their heirs and assigns in fee simple." The argument is that there is presumed an intention not to permit the devise to lapse, and that the word "heirs" should be construed to mean "children," so that a line of succession should be prescribed in order to prevent lapse. There might be more reason for adopting that construction of the provision if it applied only to the devise to Mrs. Darby, but it applies to all of the property devised in the will except when "otherwise and specifically stated," and the fact that the provision is a general one materially weakens the basis for construing the word "heirs" to mean "children." We do not, however, mean to say that such would be the proper construction even if the provision applied only to the devise to Mrs. Darby. On the contrary, we are of the opinion that the words, "their heirs and assigns," were used in a technical sense to denote the character of the estate or extent of the interest to be taken by the devisees—that they are words of limitation, not words of substitution. The aim in construing a will is to correctly arrive at the intention of the testator, but the meaning is to be gathered from the language used. "The question in expounding a will is not what the testator meant, but what is the meaning of his words. The use of the expression that the intention of the testator is to be the guide, unaccompanied with the constant explanation that it is to be sought in his words and a rigorous attention to them, is apt to lead the mind unconsciously to speculate upon what the testator may have been supposed to have intended to say, instead of strictly adhering to the true question, which is what that which he has written means. The will must be expressed in writing, and that writing only is to be considered. And in construing that writing the rule is to read it in the ordinary and grammatical sense of the words, unless some obvious absurdity or some repugnancy or inconsistency with the declared intention of the writer to be extracted from the whole instrument should follow from the reading of it." 2 Williams on Executors, p. 327.

Cases are to be found where the word "heirs" in a will or deed was construed to mean "children." The following are among those cases: Wyman v. Johnson, 68 Ark. 369, 59 S. W. 250; Shirey v. Clark, 72 Ark. 539, 81 S. W. 1057. Other examples are found in the many cases cited by counsel for appellees. But words used in a will must be construed according to the technical legal meaning, unless explanatory words in the context qualify them or give them another meaning, or unless the peculiar situation under which they are used indicate an intention to use them other than in a technical sense. In Moody v. Walker, 3 Ark. 147, this court said: "When technical phrases or terms of art are used, it is fair to presume that the testator understood their meaning, and that they expressed the intention of his will, according to their import and signification. When certain terms or words have by repeated adjudication received a precise, definite, and legal construction, if the testator in making his will use such terms or similar expressions, they shall be construed according to their legal effect; for, if this was not the case, titles to estates would be daily unsettled, to the ruin of thousands." In Johnson v. Knight of Honor, 53 Ark. 255, 13 S. W. 794, 8 L. R. A. 732, in construing the meaning of the word "heirs," the court said: "It is a technical word. When used in any legal instrument, and there is no context to explain it, as in this case, it should be understood in its legal and technical sense." To the same effect, see Myar v. Snow, 49 Ark. 129, 4 S. W. 381. "Though the intention of a testator, when ascertained," says Mr. Jarman, "is implicitly obeyed, however informal the language in which it has been conveyed, yet the courts in construing that language resort to certain established rules by which particular words and expressions, standing unexplained, have obtained a different meaning, which meaning it must be confessed does not always quadrate with their popular acceptance. This results from the enactment of law, which presumes every person to be acquainted with its rules of interpretation, and consequently to use expressions in their legal sense, i. e., in the sense which has been fixed by adjudication to the same expressions occurring under analogous circumstances, a presumption, though it may sometimes have disappointed the intention of a testator, is fraught with great general convenience, for without some acknowledged standard of interpretation it would have been impossible to rely with confidence on the operation of any will not technically expressed until it had received a judicial interpretation." 2 Jarman on Wills, p. 1651. "In seeking for the expressed intention of the testator, his words are to receive that construction and interpretation which a long series of decisions has attached to them, unless it is very certain that they were used in a different sense." 1 Redfield on Wills, 433.

Lord Denman, in Doe v. Gallinle, 5 Barnewall & Adolphus, 621, said: "Technical words, or words of known legal import, must have their legal effect, even though the testator uses inconsistent words, unless those inconsistent words are of such a nature as to make it perfectly clear that the testator did not mean to use the technical words in their proper sense." Mr. Washburn has this to say on that subject: "On the other hand, 'heirs' may have sometimes meant the same as 'child' or 'children.' That the testator intended to use it thus must be clear and something more than implication. Otherwise, it is a word of limitation." 2 Washburn on Real Property, p. 603. Judge Sharswood, speaking for the court in Doebl's Appeal, 64 Pa. 9, said: "While the intention of the testator, if consistent with law, is undoubtedly to be the polar star, yet we are bound to take as our guides those general rules or canons of interpretation which have been adopted and followed by those who have gone before us. It becomes no man and no court to be wise above that which is written. Security of titles requires that no mere arbitrary discretion should be exercised in conjecturing what words the testator would have used, or what form of disposition he would have adopted had he been truly advised as to the legal effect of the words actually employed. That would be to make a will for him, instead of construing that which he has made."

This rule of construction has been universally adopted by judges and law writers. The exceptions to it are, as above stated, found in cases where there are qualifying words in the context, which shows that a technical meaning was not intended, or the peculiar circumstances under which the words were used demonstrate clearly that they were meant otherwise than in the technical sense. In the present instance there is nothing to indicate that the term, "heirs and assigns," was used otherwise than in the technical sense as words of limitation. There are numerous authorities holding that the word "heirs" in a will is a word of limitation, and not of substitution, and that the use of it, following the name of the devisee, does not prevent a lapse in the event of the latter's death before that of the testator. Mr. Jarman has this to say on that subject: "The doctrine applies indiscriminately to gifts with and gifts without words of limitation. Thus if a devise be made to A. and his heirs, * * * or to A. and the heirs of his body, and A. died in the lifetime of the testator, the devise absolutely lapses." 1 Jarman on Wills, p. 307. "For the word 'heirs' in such cases," says Mr. Underhill, "gives the heirs no interest under the will, but it is merely a word of limitation, showing what interest the ancestor was to take in case he should survive the testator." 1 Underhill on Wills, p. 436. Mr. Redfield states the same rule as follows: "The general presumption being

that these terms of succession are used to mark the extent of the interest thus intended to be conveyed to the legatee or devisee, and are therefore words of limitation merely." 2 Redfield on Wills, 160.

The same rule is stated in numerous authorities in support cited in 18 Am. & Eng. Enc. of Law, p. 754. See, also, *Jackson v. Alsop*, 67 Conn. 249, 34 Atl. 1106; *Maxwell v. Featherston*, 83 Ind. 339; *Keniston v. Adams*, 80 Me. 290, 14 Atl. 203; *Kimball v. Story*, 108 Mass. 382; *Wood v. Seaver*, 158 Mass. 411, 33 N. E. 587; *Hand v. Marcy*, 28 N. J. Eq. 59; *Kimball v. Chappel* (Sup.) 18 N. Y. Supp. 30; In the matter of *Wells*, 113 N. Y. 396, 21 N. E. 137, 10 Am. St. Rep. 457; *Moss v. Helsley*, 60 Tex. 426. In the case of *Watson v. Wolff-Goldman Realty Co.*, 95 Ark. 18, 128 S. W. 581, Ann. Cas. 1912A, 540, it was urged that the use of the words "and assigns forever," enlarged the estate, which otherwise would have been restricted by the use of the words "bodily heirs." But this court held, following other decisions cited in the opinion, that the word "assigns" was to be construed in a technical sense, and that it only imported "that the estate may be transferred, and cannot operate to enlarge the grant or defeat its express limitations."

Our conclusion, therefore, is that the devise to Mrs. Darby in the will lapsed, and that the property, the same as that devised in the codicil, either fell within the residuary clause or descended to the heirs at law of the testatrix.

[3] The remaining question relates to the devolution of the property described in the lapsed devise to Mrs. Darby. Did it fall within the clause giving the residuum of the estate to appellant D. F. S. Galloway? The residuary clause is general in its terms, and covers all property of every kind not otherwise disposed of in the will. At common law there was a distinction made, with respect to the operation of the residuary clause of a will, between bequests of personalty and devises of real property, the English courts holding that lapsed legacies fell into the residuum, unless otherwise directed in the will itself; but that a devise of real estate did not go to the residuary devisee. This rule was based upon another distinction arbitrarily made by the English courts that as to personalty a will was deemed to speak from the date it took effect—i. e., from the date of the testator's death—and therefore included property acquired by the testator after the execution of the will, but that, as to real estate, the will was deemed to speak only from the date of its execution, and did not include after-acquired property. The rule of the common law has been changed in England by the Statute of Victoria (1837), and in most of the American states, so as to completely sweep away the old distinction between bequests of person-

ality and devises of real property, and make a will speak from the date of the testator's death and convey after-acquired real estate as well as personalty; and, where those statutes have been put into effect, the rulings have been that lapsed legacies and devises fall into the residuary clause, unless a contrary intention on the part of the testator is expressed in the will. The rule and its changes are very clearly stated in the following excerpt from the opinion of the Indiana Supreme Court: "It is said, however, that there exists an important distinction between a void or lapsed bequest of personal estate and a void or lapsed devise of real estate, which obtains both in England and America in this: That the former falls into the residue, and the latter goes to the heirs. The reason generally assigned for such distinction has been the different operations of a will upon personal and real estate. It is said that as to personal estate the will would operate upon all the personal estate held by the testator at the time of his death; while as to his real estate the testator could only devise such as he owned at the time of his will. It is certain, we think, that the reason thus given for the supposed distinction has long since ceased to exist, if it ever existed in this state. Here the testator's will of personal estate must be executed with precisely the same solemnity and formality as the will devising real estate; and there is no perceptible or practical difference in the operation of a will upon personal and upon real estate." *Holbrook v. McCleary*, 72 Ind. 167. And the Supreme Court of Massachusetts, speaking through Justice Dewey, gives the following explanation of the changes in the law on the subject: "With us all ground for any such distinction has long since been done away with. Our whole system since the enactment of the Revised Statutes (chapter 62, section 3) has been to carry out the principle that devises of real estate and legacies of personal estate were to be placed substantially upon the same footing as to the extent of the power to devise and the formalities required in the execution of the testamentary instrument." *Thayer v. Wellington*, 91 Mass. (9 Allen) 283, 85 Am. Dec. 753. For other cases announcing the same changes in the law, see *Molineaux v. Reynolds*, 55 N. J. Eq. 189, 36 Atl. 276; *Estate of Upham*, 127 Cal. 90, 59 Pac. 315; *Drew v. Wakefield*, 54 Me. 291; *Reeves v. Reeves*, 5 Lea (Tenn.) 653; *Youngs v. Youngs*, 45 N. Y. 254; *Jackson v. Alsop*, 67 Conn. 249, 34 Atl. 1106; *West v. West*, 59 Ind. 529. We have no statute on this subject specifically abolishing the rule of the common law as to the distinction in the operation of wills between personalty and real estate. But in the case of *Patty v. Goolsby*, 51 Ark. 61, 9 S. W. 846, it was decided that the course of legislation here has swept away all distinctions, and that a will is

deemed to speak from the date of the testator's death as to real estate as well as to personality and carries after-acquired property, both real and personal. In that case the court, speaking through Special Justice Sol. F. Clark, said: "We are not aware that the question has ever been directly before this court, nor has there been any legislation in this state in terms changing or abolishing the English law on the subject. But a course of legislation was adopted at an early date wholly inconsistent with it, and which has certainly swept away the principles or grounds upon which the rule has ever been understood to be predicated. * * * Considering the great changes in the policy as well as the formalities in alienating and assuring title to real estate as to what they were when the English rule on this subject originated and prevailed, we cannot see, notwithstanding the common law has never been changed by any positive statute, any reason why a will should not speak from the death of the testator as to real as well as personal estate, and we are therefore of the opinion, and so hold, that the testator being seised and possessed of said lands at the time of his death they were included in his will and were conveyed thereby." That decision established here a state of the law similar to that of other jurisdictions where changes in the common law on this subject have been brought about by express statutory enactments. It necessarily and logically follows from the application of the principles there announced that lapsed devises of real estate fall into the general residuary clause, unless a contrary intention of the testator is clearly expressed in the will.

[4] It is insisted with much earnestness that the rule announced in *Patty v. Goolsby*, supra, was mere dictum, and should not be binding on us now as a precedent. We cannot agree with counsel that the opinion on that point is obiter dictum. That particular question was elaborately argued in the brief on one side, and seems to have been carefully considered by the court. If the court had reached a different conclusion upon that question of law, it would have been decisive of the issue between the parties. In other words, the case could have turned entirely upon the decision of that question. Therefore, it cannot be regarded as dictum merely because it was found necessary to consider another question in consequence of the conclusion reached by the court on that question. Besides, the case was a carefully considered one, and has undoubtedly become a rule of property in this state. We decline to overrule it or to discredit it.

[5] Now, turning to the question of lapsed legacies at common law, which must now be considered as the established rule also as to devises of real estate, we find little, if any, conflict in the authorities. "A residuary gift of personal estate," says Mr. Jarman, "carries, not only everything not in terms

disposed of, but everything that in any event turns out not to be well disposed of. A presumption raises for the residuary legatee as against every one except the particular legatee, for the testator is supposed to give his personality away from the former only for the sake of the latter. It has been said that to take a bequest of the residue out of the general rule very special words are required, and accordingly a residuary bequest of property 'not specifically given' following various specific and general legacies will include lapsed specific legacies." 2 Jarman on Wills, p. 716. The rule sustained by a long list of adjudged cases is thus stated by the Cyclopedists of the Law: "The residuary clause passes all the property of the testator that is not otherwise disposed of by the will, unless the words used show an intention to exclude from the operation of the residuary clause some part of the estate; it being the rule that a residuary clause will be liberally construed to prevent intestacy. This includes property acquired after the will was made, if it appears that the testator intended his will to operate on after-acquired property, and legacies and devises that lapse or otherwise fail for any reason." 18 Am. & Eng. Ency. of Law, p. 724. In *Lovering v. Lovering*, 129 Mass. 97, the court said: "A general residuary gift carries all property which is not otherwise disposed of by the will, and includes lapsed legacies and all void legacies. In this case the residuary gift was 'all the rest, residue and remainder of my estate, real and personal, of every nature and description.' The fact that he specifies certain remainders and reversions as included in the general description does not limit or narrow it." In the Matter of *L'Hommedieu*, 32 Hun (N. Y.) 10, the following statement of the rule is given: "It is a settled rule of construction that a residuary clause carries all which is not legally disposed of by the will, unless a contrary intention is manifest by the will itself. Such an intention cannot be deduced from the mere absence of words or that the testator failed to provide for the contingency upon which the lapse was occasioned. A testator is supposed to have given away from the residuary legatee only for the sake of the particular legatee." Authorities need not be multiplied on this point.

It is argued that the language of the will prevents the operation of the residuary clause as a general one, and evinces a specific intention on the part of the testatrix not to include lapsed legacies. Counsel invoke a strict construction of the language of the residuary clause on the ground that a presumption should not be indulged of an intention on the part of the testator to cut the heirs off from the lapsed devises, unless the intention is made clear by the language of the will. While it is sometimes said that an intention to disinherit lawful heirs is not to be presumed, in the absence of clear

and explicit language to that effect, yet there are other presumptions not to be overlooked. In the construction of wills there is always a presumption against partial intestacy, unless such an intention clearly appears from the language used in the instrument. *Booe v. Vinson*, 149 S. W. 524; 2 *Redfield on Wills*, 116. The presumption against intended intestacy leads to a liberal, rather than to a restrictive, construction of the residuary clause in the will, in order to prevent partial intestacy. "Where the language of the residuary clause is ambiguous," says the New York court, "the leaning of the courts is in favor of a broad rather than a restricted construction. It prevents intestacy, which it is reasonable to suppose testators do not contemplate, and, if the mind is left in doubt upon the whole will as to the actual testamentary intention, a broad rather than a strict construction seems more likely to meet the testamentary purpose, because such a clause is usually inserted to provide for contingencies or lapses, and to cover whatever is left, after satisfying specific and special purposes of the testator manifested in the other clauses of the will." *Lamb v. Lamb*, 131 N. Y. 234, 30 N. E. 134. This presumption is greatly strengthened by the language of the will and of its provisions, taken as a whole. The emphatic language used evinces a clear intention to cover all of the testator's property. The preamble reads thus: "As to my worldly estate and all the property, real, personal or mixed, of which I shall die seized and possessed, or to which I shall be entitled at the time of my decease, I devise, bequeath and dispose thereof in the manner following, to wit:" In 1 *Underhill on Wills*, § 464, this pertinent statement of the law on the subject is found: "The rule is that the testator's intention is to be ascertained from the whole will. If, therefore, the testator in the introduction expresses an intention of disposing of all of his estate as when he says 'I give and devise all of my worldly goods,' it should be considered. The presumption arises that, having the disposition of his whole estate in view, he did not intend to die intestate as to any part of it. If his subsequent language may be construed in either of two ways, by one of which a complete disposition will be made of his whole estate, and by the other only a partial disposition will be made, resulting in a partial intestacy, the introductory statement pointing to a complete disposition ought to be considered, and that sense adopted which will result in a disposition of the whole estate. Hence it follows that language which in a general or residuary clause may not alone be sufficiently conclusive to dispose of all the property of the testator may have its meaning enlarged to correspond with an intention shown in the introductory clause."

Mr. Redfield states the same conclusion as follows: "The courts have for a long time

inclined very decidedly against adopting any construction of wills which would result in partial intestacy unless absolutely forced upon them. This has been done partly as a rule of policy perhaps, but mainly as one calculated to carry into effect the presumed intention of the testator, for the fact of making the will raises a very strong presumption against any expectation or desire on the part of the testator of leaving any portion of his estate beyond the operation of the will. Hence, where a general residuary bequest was accompanied with expressions affording a more limited construction, and pointed only to a particular surplus beyond the properties specifically mentioned, it was nevertheless held to pass the residuum of his property at the time of his decease as well that which he held at the date of his will as that afterwards acquired. Lord Eldon here said that it was the general rule in regard to residuary bequests to avoid partial intestacy, and that it required very special words to confine a residuary bequest to the property belonging to the testator at the date of his will." 2 *Redfield on Wills*, p. 116. The words of the residuary clause, "not hereinbefore specifically devised," do not overcome the presumed intention to include lapsed devises. That phrase must be construed with reference to the time that the will speaks, and, when so considered, it refers to valid devises or those which finally take effect under the will, but does not exclude from the residuum lapsed devises or those which are void when the will takes effect. "In all these cases of lapsed or void legacies," says the Massachusetts court, "or a legacy that fails for want of using proper language to create the same, or to designate the legatee, all of which are uniformly held to pass to the residuary devisee, the testator had no purpose in his mind at the time of executing his will to pass such an estate to the residuary devisee. 'It is not necessary that the testator's mind should be active in including it.' *Goodright v. Downshire*, 2 B. & P. 600. The contrary intention of the testator spoken of in the books, as that which will prevent such legacy going to the residuary devisee, is something more than the fact that the testator supposed that he had made a valid legacy to someone of a portion of his estate, but which the court held void and inoperative." *Thayer v. Wellington*, *supra*. In the following cases use of the same words, in substance, were held not to take lapsed devises out of the operation of the residuary clause: *Roberts v. Cook*, 16 Ves. Jr. 451; *Brown v. Higgs*, 4 Ves. Jr. 709; *In re L'Hommiedieu*, 32 Hun (N. Y.) 10; *Tindall's Executors v. Tindall*, 24 N. J. Eq. 512; *Riker v. Cornwell*, 113 N. Y. 123, 20 N. E. 602.

The conclusion is inevitable, if the principles above announced are to be considered as controlling, that the property includ-

ed in the lapsed devise to Mrs. Darby fell within the general residuary clause of the will and passed to appellant, D. F. S. Gallo-way.

Objection is made to the jurisdiction of the chancery court upon the original complaint of appellant, but inasmuch as the allegations of the cross-complaint are confessedly sufficient to give the court jurisdiction, and having taken jurisdiction for any purpose, the court will completely settle the rights of the parties in the subject-matter of the controversy.

The decree is therefore reversed, and the cause remanded, with direction to dismiss the cross-complaint of appellees, and to quiet the title of appellant to all the property in controversy.

JENKINS v. QUICK.

(Supreme Court of Arkansas. Dec. 2, 1912.)

1. APPEAL AND ERROR (§ 201*)—OBJECTION BELOW—STATEMENT BY COURT—EVIDENCE.

Where, in replevin to recover a horse traded on condition that plaintiff could reclaim it unless defendant's horse was as represented, no objection was made to the court's statement that plaintiff's replevin affidavit which stated that defendant obtained possession of the horse by false pretenses had nothing to do with the trade contract, such objection could not be considered on review.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1251-1257; Dec. Dig. § 201.*]

2. TRIAL (§ 244*)—INSTRUCTIONS—SINGLING OUT EVIDENCE.

It was not error in replevin to refuse an instruction stating and emphasizing for what purpose plaintiff's replevin affidavit could be considered in evidence; it being improper to single out particular testimony, and direct the jury to consider it.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 577-581; Dec. Dig. § 244.*]

3. WITNESSES (§ 392*)—IMPEACHMENT—STATEMENTS IN REPLEVIN AFFIDAVIT.

Plaintiff's replevin affidavit stating that defendant obtained possession of the horse by false pretenses was not relevant evidence where plaintiff did not deny making it; it having no tendency to controvert plaintiff's contention that the trade contract under which defendant claimed the horse was a conditional one.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1249-1251, 1257; Dec. Dig. § 392.*]

4. TRIAL (§ 260*)—INSTRUCTIONS—REQUESTS COVERED BY CHARGE.

In replevin for a horse traded to defendant on condition that plaintiff could reclaim it if defendant's horse were not as represented, an instruction to consider only whether defendant's horse possessed certain desirable qualities then mentioned, and whether she failed to possess certain undesirable qualities then mentioned, and that any captious objection by plaintiff could not be pertinent, was sufficiently covered by an instruction that plaintiff could not recover if defendant merely guaranteed that he would be responsible in damages, considered with the court's acceptance of defendant's suggestion that the jury could not con-

sider any mere captious objection of plaintiff to the horse he received.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651-659; Dec. Dig. § 260.*]

5. TRIAL (§ 124*)—ARGUMENT OF COUNSEL.

In replevin for a horse conditionally traded to defendant for a horse which plaintiff claimed was not as represented, it was highly improper for plaintiff's counsel to state in his closing argument that any man who would commit the crime which the testimony showed the defendant to have committed against the plaintiff ought to be in the penitentiary, especially where defendant was an important witness in his own behalf.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 302; Dec. Dig. § 124.*]

6. TRIAL (§ 133*)—CURE OF ERROR—ARGUMENT OF COUNSEL.

Such argument was harmless, however, where the court sustained an objection, and directed the jury not to consider it, and the attorney apologized to the jury, and withdrew the statement.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 316; Dec. Dig. § 133.*]

Appeal from Circuit Court, White County; Hance N. Hutton, Judge.

Action by T. J. Quick against Harold Jenkins. From judgment for plaintiff, defendant appeals. Affirmed.

S. Brundidge, of Searcy, for appellant. J. N. Rachels, of Searcy, and John E. Miller, for appellee.

WOOD, J. The appellee sued appellant in replevin to recover the possession of a horse. His affidavit set up the allegation of ownership, and the usual statutory requirements. Appellant denied the allegations of the plaintiff, and set up that he had sold the horse obtained from the appellee, and that he was not in the possession thereof at the time the suit was brought. The contention of the appellee was that he had traded horses with the appellant on condition that if the mare obtained from appellant in exchange for the horse of appellee possessed certain qualities which appellant guaranteed her to possess, or if appellee was not satisfied with her, that he should be permitted to rue the trade. Appellee testified that the appellant in making the trade said to the appellee, concerning the mare: "If you are not satisfied with her and she don't do what I say, you come back, and I will give you the horse back." The testimony of appellee tended to prove that the mare was unsatisfactory to him, and that he attempted to have appellant take her back, but that appellant refused. On the other hand, it was contended by appellant, and the evidence in his behalf tended to prove, that he traded his mare for appellee's horse, and that the trade was in no manner a conditional one.

[1] During the progress of the trial, the court permitted the appellant to introduce an affidavit of the appellee made before the justice of the peace before whom the suit was instituted, in which the appellee charg-

ed that the appellant "did obtain of affiant the possession of one horse of the value of \$150 by false pretenses." When appellant offered the affidavit, the court remarked: "You can introduce the affidavit if you want to, but it will not have anything to do with the contract between these parties as to the horse trade." The appellant did not except to this remark of the court.

[2] The appellant offered the following prayer for an instruction, which the court refused, to wit: "If you find from the testimony that, after the consummation of the trade between the plaintiff and defendant, the plaintiff executed an affidavit in which he charged the defendant with having obtained a horse from the plaintiff under false pretenses, that this is a circumstance which the jury may take into consideration in determining the question as to whether or not the trade for the horse was conditional or unconditional, and if you believe from the testimony, both direct and circumstantial, that at the time the trade was made the only condition existing between the parties was included in the contract of sale and that in the event the mare should not prove to be as represented, the defendant would make compensation to the plaintiff, then the plaintiff is not entitled to recover in this action, and you will find for the defendant." The appellant contends that the refusal to give this prayer was error. In *Railway Co. v. Lyman*, 57 Ark. 512, 22 S. W. 170, we held that it was not error to refuse an instruction which singles out a particular class of testimony in the case, and directed the jury to consider it in connection with the other evidence. See, also, *Winter v. Bandel et al.*, 30 Ark. 383; *Newton v. State*, 37 Ark. 333; *Carpenter v. State*, 62 Ark. 287, 36 S. W. 900; *Western Coal & M. Co. v. Jones*, 75 Ark. 86, 87 S. W. 440; *Quertermous v. State*, 95 Ark. 48, 127 S. W. 951. Appellant did not except to the remark of the court stating that the affidavit did not have anything to do with the contract between the parties, and therefore he cannot complain of this language here. The affidavit was in evidence, and therefore must have been considered by the jury in connection with the other evidence; but the court did not err in refusing an instruction stating and emphasizing for what purpose the affidavit should be considered.

[3] The affidavit was not relevant evidence because the appellee did not deny that he made it, and there was nothing in the affidavit that tended to controvert the contention that the trade between appellant and appellee was a conditional one, as contended by the appellee.

[4] The appellant presented the following prayer for instruction, which the court refused, to wit: "You are instructed that, in determining the question as to whether or not the mare in fact came up to the representations of Mr. Jenkins, they must consid-

er only the question as to whether she possessed certain desirable qualities as then mentioned, or whether she failed to possess certain undesirable qualities as then mentioned, and any captious objection would not be pertinent for them to consider." In its oral charge the court instructed the jury in part as follows: "Mr. Jenkins contends that he guaranteed that this mare had certain qualities, was reliable, and that upon this guaranty he would have been responsible in damages, and, if that was the contract, this action is improperly brought, and should have been brought for damages and not for the possession of the property, but, if the contract was that it was only a conditional sale that Mr. Quick was to complete on trying the horse to see if it had certain qualities, then that would have been a conditional sale, if the horse had not come up to requirements or representations, then Mr. Quick could have demanded the return of his horse." And while the court was delivering his oral charge one of the attorneys for appellant interposed with the following language: "There is some testimony whether the mare in fact came up to the recommendations of Mr. Jenkins, and they must only consider as to whether or not the mare in fact possessed certain desirable qualities, as those mentioned, or whether she failed to possess other undesirable qualities than mentioned, and any captious objection would not be pertinent for them to consider." Whereupon the court responded, "Yes," thereby virtually approving the above language of the attorney as a part of the oral charge. Conceding that the prayer for instruction No. 2 was correct, it was fully covered by the instructions which the court gave, and to which appellant saved no exceptions. It is not error to refuse to grant prayers for instructions, where such prayers are fully covered by other instructions. *Chicago Mill & Lumber Co. v. Ross*, 99 Ark. 597, 139 S. W. 632; *Williams v. State*, 100 Ark. 218, 139 S. W. 1119; *St. L., I. M. & S. Ry. Co. v. Aiken*, 100 Ark. 437, 140 S. W. 698.

[5] In the closing argument counsel for appellee used the following language: "I want to say that any man who would commit the crime which I believe Harold Jenkins has committed against Uncle Tom Quick as shown by the testimony in this cause ought to be in the penitentiary."

[6] Upon objection being made, the court sustained the objection, and directed the jury not to consider the statement. The attorney for the appellee thereupon apologized to the jury, and withdrew the statement. The remarks, although only the expression of the opinion of counsel, were highly improper, and tended to reflect upon the integrity of one of the parties, who was also an important witness in the case. But the conduct of the court in sustaining the objection to the language and in directing the jury not to consider it, and the conduct of offendin-

counsel in apologizing and withdrawing the improper statement, was sufficient to remove any prejudice that might have otherwise been created in the minds of the jury.

Finding no reversible error, the judgment is affirmed.

VILLINES v. STATE.

(Supreme Court of Arkansas. Dec. 9, 1912.)

1. COSTS (§ 316*)—CRIMINAL PROSECUTIONS—JUDGMENT—AMENDMENT.

As under Kirby's Dig. § 2446, providing that in case of conviction there shall be a judgment for costs against accused, no discretion is allowed the trial court, a judgment of conviction may after the expiration of the term at which it was rendered be amended nunc pro tunc so as to require accused to pay the costs.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 1143, 1144; Dec. Dig. § 316.*]

2. MOTIONS (§ 54*)—NUNC PRO TUNC ORDERS—EFFECT.

A nunc pro tunc order necessarily relates back to the date as of which it should have been entered.

[Ed. Note.—For other cases, see Motions, Cent. Dig. § 65; Dec. Dig. § 54.*]

3. PARDON (§ 9*)—EFFECT—"COSTS."

An absolute pardon will not excuse one convicted of crime from the payment of "costs," for they are neither fines nor forfeitures, and are not imposed by way of punishment, and hence a complete pardon granted one convicted of crime cannot be interposed to defeat a nunc pro tunc order amending the judgment, so as to impose on accused the burden of paying the costs.

[Ed. Note.—For other cases, see Pardon, Cent. Dig. §§ 16-22; Dec. Dig. § 9.*]

For other definitions, see Words and Phrases, vol. 2, pp. 1633-1640; vol. 8, p. 7620.]

Appeal from Circuit Court, Searcy County; G. W. Reed, Judge.

Joseph Villines was convicted of voluntary manslaughter, and after his complete pardon by the Governor the court entered a nunc pro tunc order amending the original judgment so as to provide that he should pay the costs of his conviction, and accused appeals. Affirmed.

The defendant was convicted on the 6th day of October, 1911, at an adjourned term of the Searcy circuit court, of the crime of voluntary manslaughter, and his punishment assessed by the jury at imprisonment in the penitentiary for a period of two years. The judgment of the court, pronounced upon this verdict, sentenced the defendant to imprisonment in the penitentiary for that period of time, but it was silent upon the question of the costs of the conviction and did not provide that these costs should be paid by the defendant, and that their payment should be enforced against him. Later, and at a subsequent term of the same court, a motion was filed by the prosecuting attorney for a nunc pro tunc order, amending the original judgment to provide that defendant should pay the costs of his conviction, and payment thereof should be enforced against him.

The defendant prayed an appeal from the judgment of the court sentencing him to the penitentiary, but before the appeal had been perfected the Governor of the state granted him a full pardon from this sentence. The petition for the nunc pro tunc order was heard and granted by the court after the pardon had been issued by the Governor. Evidence was offered at the hearing of the petition, the effect of which was to show that, upon pronouncing the sentence, the presiding judge made no order in regard to the costs; although in explaining his action, in amending the original judgment, he said it was his intention that a judgment for costs should be entered such as was usually entered in these cases.

Guy L. Trimble, of Harrison, for appellant. Hal L. Norwood, Atty. Gen., and Wm. H. Rector, Asst. Atty. Gen., for the State.

SMITH, J. (after stating the facts as above). [1] Upon overruling the motion for a new trial, the law prescribed the judgment that should be entered as follows: "In judgments against the defendant, a judgment for cost in addition to the other punishments, shall be rendered, which shall be taxed by the clerk for the benefit of officers rendering services and in case of failure by defendant to pay said costs they shall be paid by the county where the conviction is had." Kirby's Digest, § 2446. No other judgment can be entered up by the court, as no discretion is allowed under the law, and it is immaterial what the judge might have said or omitted to say in pronouncing sentence. The law imposes the burden of paying cost as an incident to conviction, and the judgment is not properly entered of record until it is so provided. It is true here that this nunc pro tunc order was not made until after the expiration of the term at which the conviction was secured, but there is no objection to this being done. In the case of Thurman v. State, 54 Ark. 120, 15 S. W. 84, where the defendant had escaped and was absent several years and was recaptured and sentence formally pronounced by the court in which the conviction was had, Judge Cockrill, speaking for the court, said: "The statute does not require that the sentence shall be pronounced and judgment entered at the same term at which a plea of guilty is entered, and the entering of the judgment at a subsequent term does not alter or conflict with anything done by the court at the previous term. There is therefore no lack of power in the court, and the judgment may be deferred until a subsequent term." The appellant insists that, at the hearing of the petition for a nunc pro tunc order, they made a showing, which was practically undisputed, that the presiding judge in pronouncing judgment made no order in regard to the costs, and, in view of this omission,

could not, after the expiration of the term at which that judgment was pronounced, enlarge its scope by inserting a provision which it should have contained in the first instance; and in support of this contention quotes the following language used by Judge Frauenthal in deciding the case of *Railway v. Bratton*, 93 Ark. 234, 124 S. W. 752: "The entry in the record should correspond with the judgment which was actually pronounced, and the court has the power, and it is its duty, even at a subsequent term, to make such changes in the entry as to make it conform to the truth. But where the judgment expresses the entire judicial action taken at the time of its rendition, the court has no authority, after the expiration of the term, to enlarge or diminish it in matters of substance, or in any matter affecting the merits. Under the guise of an amendment, there is no authority to revise a judgment, or to correct a judicial mistake, or to adjudicate a matter which might have been considered at the time of the trial, or to grant an additional relief which was not in the contemplation of the court at the time the judgment was rendered. 'The authority of a court to amend its record by a nunc pro tunc order is to make it speak the truth, but not to make it speak what it did not speak, but ought to have spoken.'" A part of the above language being quoted from the opinion by Judge Cockrill in the case of *Hershy v. Baer*, 45 Ark. 240.

In the *Bratton* Case, above cited, the administrator had recovered a judgment against the defendant railway company for killing his intestate, but the judgment entered did not recite that the sum recovered should be a lien against the railway and its equipment, and the plaintiff insisted that the judgment should be amended at the subsequent term of the court, at which his motion was heard, to give him the benefit of the lien to which he was entitled upon the entry of his original judgment. The court made the order as prayed, and upon the appeal Judge Frauenthal used the language above quoted; but the order and the action of the trial court in amending the judgment in the administrator's favor and awarding him a lien by a nunc pro tunc order was reversed, and it was further said in the same opinion: "In the case at bar, the plaintiff was entitled, upon a recovery of the damages for which he sued, to have a lien upon the property of defendant, and under certain circumstances of the case to have that lien mentioned in the judgment. But he was not entitled to have such lien under any and all circumstances of the case; he was not entitled to the lien in the event the suit had not been brought within one year after the claim had accrued. He was therefore not entitled to the lien necessarily and as a matter of course. Section 6662 of Kirby's Digest provides that the lien mentioned in the preced-

ing section shall not be effective unless suit is brought upon the claim within one year after said claim shall have accrued. Before, therefore, a judgment could have been declared for said lien, it must first be found that the suit was brought within the time specified in the above section. In order to declare and mention said lien in the judgment, it was necessary that the court itself should make a finding and then an adjudication, and, if no such finding and adjudication was actually made by the court, the omission cannot now be supplied by an amendment of the judgment. For such amendment did not speak the truth, but did speak what should have been done, but was not." This case is not like the *Bratton* Case for the reason that no finding is necessary to be made to determine whether the defendant should be liable for the costs. The law fixes that liability as a consequence flowing necessarily and of course from his conviction.

In the case of *In re Jones*, 100 Ark. 231, 140 S. W. 24, which was a habeas corpus proceeding to take Eunice Jones from the custody of the county convict contractor because the judgment for the fine against him did not direct that, in default of its payment, the defendant be imprisoned until the fine and costs were paid, it being contended that he had never been committed to jail within the meaning of the law, because of that omission, but the court said: "This contention is without merit. The law requires that, 'where the punishment of an offense is by fine, the judgment shall direct that the defendant be imprisoned until the fine and costs are paid,' etc. Kirby's Digest, § 2443. And such direction should have been included in said judgment against Jones, in default of payment of the fine levied. Its omission, however, did not render the judgment void; it was a clerical misprision which could have been corrected even after the expiration of the term." See, also, the case of *Bobo v. State*, 40 Ark. 229.

[2, 3] It is also urged that the defendant had been pardoned at the time the nunc pro tunc order was made, and that there was no felony conviction out of which his obligation to pay costs could arise, and that the order was erroneous for that reason. But the nunc pro tunc order necessarily related back to the date as of which it should have been entered, and the pardon has the effect, and no other, that it would have had if the judgment with proper recitals had been entered at the time of the trial and the pardon had been subsequently granted by the Governor. The effect of such a pardon is discussed in the case of *Edwards v. State*, 12 Ark. 123, where the defendant had been sentenced to the penitentiary for manslaughter, but had been granted an absolute pardon by the Governor. After an execution was issued to the sheriff for the costs of the prosecution, he applied to the circuit court to

quash the execution, exhibiting his pardon and claiming that it released him from the payment of the costs. The court said: "Costs are neither fines nor forfeitures, nor are they imposed by way of punishment or as amercement at common law, but by way of sequence to every judgment whether in civil or criminal cases as a matter of common justice to the parties complainant, witnesses, and officers of the court, although the judgment is in favor of the complainant alone. Costs then partaking, in no respect, of the nature either of punishment or of guilt, are without the sphere of the legitimate legal operation of a pardon, however general in its terms."

In the case of *Ex parte Purcell*, 61 Ark. 17, 31 S. W. 738, which was a petition for a writ of habeas corpus where petitioner had been convicted of simple assault and fined \$50, a pardon was granted, "absolving him from the payment of said sum of \$50 of the said judgment and all the effect and consequences thereof." The clerk of the court issued execution for the collection of the costs, and defendant was placed in jail, and the chancellor on hearing the petition refused to order his release until the costs were discharged. Upon appeal the court held that the chancellor erred in refusing the relief prayed by the defendant, but in doing so quoted and approved the *Edwards Case*, above cited, and expressed these views upon the subject of civil liability for costs where pardon had been granted by the Governor: "It appears that one of the reasons why a general pardon cannot exonerate the criminal from the payment of costs is that they go and belong to individuals, and not the public. Logically then a general pardon extends to all the judgment that the public has an interest in, but not to that part in which individuals only are interested. Upon reason, then, we think a general pardon exonerates from the payment of the fine proper, because that is a public concern, and for the same reason it takes away the criminal character of the judgment for the costs—the imprisonment part—leaving the civil obligation still resting upon the delinquent to be enforced as other civil obligations."

Judgment affirmed.

REEVES v. MOORE et al.

(Supreme Court of Arkansas. Dec. 9, 1912.)

1. LOGS AND LOGGING (§ 3*)—SALE OF TIMBER—VALIDITY—EVIDENCE—SUFFICIENCY.

In an action by the grantee of timber rights to enjoin his grantor from preventing the removal of such timber and for reformation of the contract, where the grantor asked a cancellation on the ground of fraud, evidence *held* to show that the grantee was entitled to the timber on the property specifically described in the contract, but to no more; the contract not having been obtained by fraud of plaintiff, and defendant not having made the

claimed representations as to the accretions to the land described so as to estop him from denying that he owned them when the contract was made.

[Ed. Note.—For other cases, see *Logs and Logging*, Cent. Dig. §§ 6-12; Dec. Dig. § 3.*]

2. BOUNDARIES (§ 46*)—AGREEMENTS—SCOPE.

While, when there is dispute as to the true location of a boundary line, the parties may, by parol, fix a line which will, when followed by possession, be conclusive between them, the grantee of timber rights on defendant's land which had been added to by accretions cannot demand that the accretions to which he is entitled, defendant having purchased adjoining property, shall be determined according to the boundary for such adjoining property, fixed by defendant and its then owner by parol at a time prior to the formation of the accretions.

[Ed. Note.—For other cases, see *Boundaries*, Cent. Dig. §§ 212-226, 249-251; Dec. Dig. § 46.*]

3. NAVIGABLE WATERS (§ 44*)—DIVISION.

In case of accretions where the shore line is not irregular, they should be apportioned by giving to each section a proportion of the outer boundary line of the accretions in the ratio that the old shore line, on the particular section, bore to the whole of the old shore line, and though the main stream has gone west of the new shore line, leaving only a chute dividing the accretions from a former island in the river, the measurements must be made from such chute as the new shore line.

[Ed. Note.—For other cases, see *Navigable Waters*, Cent. Dig. §§ 266-278, 281, 282; Dec. Dig. § 44.*]

4. APPEAL AND ERROR (§ 1033*)—PERSONS ENTITLED TO ALLEGE ERROR.

One complaining of a decree cannot take advantage of errors which are in his favor.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4052-4062; Dec. Dig. § 1033.*]

Appeal from Lee Chancery Court; Edward D. Robertson, Chancellor.

A bill by W. D. Reeves against John P. Moore and another. From a decree for defendants, plaintiff appeals. Affirmed.

Jacob Fink, of Helena, P. D. McCulloch, of Marianna, W. W. Hughes, of Forrest City, and Rose, Hemingway, Cantrell & Loughborough, of Little Rock, for appellant. P. R. Andrews, of Helena, and H. F. Roleson, of Marianna, for appellees.

SMITH, J. Appellant, who was the plaintiff below, filed his complaint in the chancery court of Lee county on September 12, 1907, and alleged: That on April 4, 1899, he and the defendant John P. Moore entered into a contract, whereby, for the consideration of \$600, the said Moore sold and conveyed to plaintiff the privilege of cutting and removing from his land at Walnut Bend, Ark., the ash, cypress, cottonwood, oak, walnut, and sycamore timber on certain described lands and the accretions thereto; the lands being described as follows: The S. E. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ and the S. W. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of section 6; sections 7, 8, and 17 and accretions thereto; and section 9; and the E. $\frac{1}{2}$ of S. W. $\frac{1}{4}$ of section 9—all in town-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes 151 S.W.—65

ship 2, range 6. The contract further provided that this privilege and sale by agreement is to continue for the term of five years, but the right to cut and remove the timber was to cease at the end of five years. That later, for the additional consideration of \$100, the contract was amended to include the elm trees. The amendment was dated December 7, 1899. Plaintiff further alleged: That, being unable to remove the timber within the prescribed time, he entered into another contract with the said Moore under date of June 8, 1901, whereby, for an additional consideration of \$250, he bought the privilege of cutting and removing from the lands described in the first contract, above mentioned, all the young sapling cottonwood trees, and in addition there was given 10 years' time in which to cut and remove the young cottonwood saplings, and the other contract was extended to expire 10 years from the said 8th day of June, 1911. That the contracts were recorded, although they were never acknowledged. That in making the contracts Moore represented that the accretions embraced a certain tract of land, which, subsequently, was adjudged to belong to one Dan Martin, in a suit for its possession, determined in the Lee county circuit court and also the accretions to section 20 and the accretions south of sections 21 and 22 to the river. That, since selling said timber to the plaintiff, the said Moore has procured a deed to the lands last above described from one Dan Martin and is now attempting to set up his newly acquired title against his timber deed to the plaintiff. That all of the title which Moore had acquired by his deed from Martin inures to the plaintiff's benefit. The complaint further alleged that the said Moore had entered into a fraudulent conspiracy with his son and codefendant, Frierson Moore, whereby, for a fictitious consideration of \$40,000, the said Moore had conveyed all of the land in controversy and had caused his deed therefor to be recorded. Plaintiff prayed that defendants be enjoined from conveying or incumbering plaintiff's timber rights, and that the deed to Frierson Moore be set aside as fraudulent, and that the defendant John P. Moore be required to give plaintiff a deed properly acknowledged to the end that it might be recorded.

On September 18, 1907, plaintiff amended his complaint, alleging that at the time of the execution of the deed to him, set up in the original complaint, Moore was claiming to own the large body of land, contiguous to the lands specifically described, as accretions thereto, and the plaintiff purchased in reliance upon the representations of said Moore; that he owned said lands and was selling the timber thereon; that, by reason of said representations and his reliance upon them, the title acquired by the said Moore in his deed from Martin passed to the plaintiff; that defendant's said purchase inures to

plaintiff's benefit; and he prays that he also be decreed to have the right to cut and remove the timber from the lands conveyed by the said Martin to defendant. Defendant John P. Moore answered, denying any understanding as to the extent of the accretions referred to in the contract, or that any part of sections 20, 21, and 22 was included in the agreement; that all the lands in said section were acquired by him subsequent to his agreement with plaintiff; and that he made no representations to the plaintiff that anything in sections 20 or 21 or the accretions thereto was intended to pass by said deeds. And for further answer he said that he conveyed to his son, Frierson Moore, for the actual consideration of \$40,000; and that his son had no knowledge of the existence of the timber contract in plaintiff's favor. He further alleged that he was an old man; that the lands were not easily accessible from the city of Helena where he lived; and that he had not been on them for more than 20 years, and knew nothing of the character or value of the timber growing thereon, while the plaintiff was advised and represented to him that there was only a very small amount of timber thereon, and that it was small in size and poor in quality and of little value, and induced him to convey said timber for a trifling part of its actual value; and that like misrepresentations were made by the plaintiff to secure an extension of the time, and an amendment to the contract to include timber not originally included. Defendant tendered back the money which he had received and asked that his contract with plaintiff be canceled. Frierson Moore answered on the same date his father did and denied any knowledge of plaintiff's rights and alleged that he had paid \$40,000 for the lands. Plaintiff filed notice of its pendens September 12, 1907.

[1] The record is a voluminous one, but the evidence will be stated briefly. The plaintiff was a sawmill man of wide experience and was successfully operating upon an extensive scale. The defendant John P. Moore was a large landowner and a man of large wealth, but much advanced in age. It appears that to the lands in sections 7, 8, 17, 20, 21, and 22 vast accretions had formed, as to the extent of which neither plaintiff nor defendant appear to have had any very accurate conception at the time of their trade. It further appears that, some years before the first conveyance from Moore to Reeves, a negro man, named Dan Martin, occupied and cleared a tract of land which Mr. Moore claimed to own and for the possession of which he brought suit April 7, 1900; but this suit was determined adversely to him at the fall term of Lee circuit court 1901. Moore's contention before and at trial was that the land occupied by Martin was accretion to his land, while the judgment of the court sustained Martin's contention.

that it was an independent island. It is altogether probable that Reeves had no definite idea of the vastness of his purchase, and it is entirely certain that Moore did not know just what he was selling. The consideration paid proves, in comparison with the value of the timber sold, to have been only nominal, and even that price was not paid in cash. Neither party appears to have been in any need of money, but Reeves executed his note for the entire consideration of \$600. None of the witnesses placed the value of the timber at less than \$15,000, and one witness claimed to have negotiated a sale at \$100,000, which was not consummated because of the controversy about the title. However, to a large extent, this disparity between consideration and value is accounted for by the fact that accretions continued to be made and cottonwood was shown to be a timber of extremely rapid growth and especially so in its sapling stage, and it appears further that in recent years very valuable commercial uses are made of cottonwood timber that was formerly not merchantable, because of its size.

We are not impressed with the contention made by the plaintiff that the defendant made any particular representation as to the lands upon which the timber was conveyed and in reliance upon which plaintiff purchased. In fact plaintiff's contention in this respect, and the securing of 10 additional years, in which to remove the timber after having had nearly two years for that purpose, are the only circumstances which appear to give color to Moore's contention that Reeves knew what he was buying and deceived defendant to his disadvantage.

The chancellor set aside the deed from J. P. Moore to his son, Frierson, and the evidence fully warranted that action. It would be tedious and unprofitable to set out the evidence which leads to that conclusion; but it is reasonably certain that this deed was executed, after Moore had discovered how poor a bargain he had made, for the purpose of avoiding its consequence.

It appears that the trade between Moore and Reeves was the consummation of negotiations pending between Moore and the negro, Dan Martin; that Martin had offered to buy the timber on the accretions to Moore's "Diamond Place," which are the lands described as being in sections 6, 7, 8, 17, and 9, there being no accretions, however, to sections 6 and 9; that Martin had no money and wanted to buy the timber by the thousand, but Moore appears to have disliked Martin and to have been distrustful of him and refused to sell the timber, except for \$600 in cash. Martin, after several unsuccessful attempts to raise the money from other parties, finally applied to Mr. Reeves to either advance him the money or to buy the timber and let him log it. Both Moore and Reeves testified that the trade which

was closed by the first contract was the identical one which Martin had attempted to negotiate; Reeves' evidence being that he took Martin's statement absolutely and that he had no information, except that obtained from him. But he does say that Mr. Moore, in pointing out the lands on his map, swept his hands across the map to the river, saying that he owned all the lands and accretions indicated by his gesture and which would include all the lands, the timber on which is here sued for. We think this evidence is not sufficient to sustain the allegations of plaintiff's amended complaint that Moore made representations about the extent of his accretions, upon which plaintiff relied and acted, and which defendant cannot therefore now be heard to question. We reach this conclusion because the deed does not describe all the accretions now claimed, because the extent of these accretions has been unknown and their ownership to some extent uncertain; and because Moore denies that he sold any except that described; and because he did not then own all this land, although he may have claimed a part of it; and for the further reason that the description of the lands now claimed by appellant included Dan Martin's own land, and he, of course, had not offered to buy the timber on his own land. Appellant says that, at the time of the first conveyance, Moore claimed to be the owner of the land and claimed it as an accretion to his "Diamond Place." It does appear that he attempted to recover the land from Dan Martin on that theory. As has been stated, he was unsuccessful in his attempt to do so, and we think that the plaintiff is in no position to take advantage of that fact. Accordingly, we hold that Reeves is entitled to the timber on the land specifically described in his contract; but, when that conclusion has been reached, the case is still one of difficulty.

[2] It appears that one Judge T. J. Ashley and a Mr. Beard owned sections 20, 21, and 22 and the accretions thereto, all of which were sold to Mr. Moore, subsequent to the date of the last contract, and that these lands with the "Diamond Place" comprise all the accretions to the main shore. The deed from Martin to Moore conveyed, not only the land which had been adjudged to be an island in the litigation, but also the lands which may have been an accretion to this island.

Appellant insists, and the proof tends to show, that about 1870 a line was run by agreement between Mr. Moore and Judge Ashley, who were then the owners, respectively, of sections 17 and 20 and the accretions thereto. But the evidence as to this line consists of a deposition of Judge Ashley, taken in the case of Moore against Martin and read here as his deposition by the consent of the parties, and it does not fully appear just what the extent and purpose of this line was farther than to mark the point up to which

each might clear land; but it is not expressly stated in the deposition that they were apportioning the accretion between them. But, on the contrary, he makes the following statement in regard to the line and its purpose: "Q. Where is the line between your and Moore's land? A. Running from the northwest corner of the original fractional section 20 straight to the river. Q. How was that line established? A. About the year 1870, by Mr. Bailey, as the surveyor of Phillips county at that time. Q. Was there any kind of agreement between you and Mr. Moore? A. (This question was objected to and not answered. And on cross-examination it appears that he testified as follows:) Q. Mr. Ashley, about the line between you and Moore, is it not a fact that there was no agreement at all, except along that Armstead line where he built? Moore cleared up to it on one side and you on the other? A. Yes, sir. Q. You cleared up to a certain line, and you recognized the line, and he recognized it? A. Yes, sir; that is it. There was no other agreement. He cleared up to this line and I cleared up to this line."

The recent case of *Malone v. Mobbs*, 145 S. W. 193, held that where there is doubt, dispute, or uncertainty as to the true location of a boundary line, the parties may by parol fix a line which will, at least when followed by possession with reference to the boundary so fixed, be conclusive between them, although the possession is not for the full statutory period. We adhere to this rule, but its application is not determinative of the question here considered. True, the case quoted from was one where the accretion were apportioned; but in that case the accretions had entirely formed, and the law permitted and enforced a parol agreement to fix the boundary, because the very purpose of such agreement is to make definite and certain that which is uncertain and in dispute. Here there is no express showing that they were apportioning the accretions between themselves. And it affirmatively appears that at the time of the survey the accretions did not extend more than a half of a mile from their common corner, and a considerable part of this space was taken up by accretions, which were then in process of formation. In the deposition of Judge Ashley, before quoted from, he said: "Q. When you came there in 1870, how far was the river from the line of these sections? A. About one-half of a mile. Q. How far is it down now? A. I expect probably a mile. Q. State what the character of the formation was. That is, how was it formed in the year 1870 till the time you left there? A. Formed by accretion. Q. In what way? A. By gradually making up the land."

At the present time there is land for more than a mile and a half from this common corner; but, if the line which Moore and Ashley agreed upon as a boundary was pro-

jected to the river, it would extend for a distance of a mile across land which was not in existence when the line was established, and there would be included the Dan Martin land and what may have been accretions to it. In other words, would include accretions which were probably made to an island. It appears from the record in the suit against Martin that Moore sued for only 85.84 acres; but, when Martin conveyed to Moore, there was not only conveyed by its metes and bounds the land involved in that litigation, but also a large area of other lands which are the lands that Reeves said Moore represented he owned as accretions to his lands. But for Moore's purchase from Martin and from Ashley and Beard, there would be some question among them as to the apportionment of these accretions. It may have been that Moore bought from Martin only to acquire color of title to fortify himself in the future, in the defense of his possession; but, however this may be, there is too much uncertainty about the location and purpose of this conventional boundary to hold that it must be accepted as the boundary of the accretions for the benefit of one who knew nothing about it. The *Mobbs* Case, above cited, is authority for holding that grantees may claim the benefit of the agreement of their grantors and they need not have had knowledge of that agreement at the time of their purchase to claim the benefit; but we are distinguishing the facts of this case from the *Mobbs* Case and hold that Moore is not estopped from saying that Reeves should have only the accretions which were properly apportionable to the lands described in the conveyance to him.

[3] It is necessary to determine how these accretions should be apportioned. The Mississippi river has entirely changed its course along the front of the lands under consideration, and to such an extent is this true that what was once the main river and the boundary between this state and Swearingen Island, which is in the state of Mississippi, has filled, until now in places it is only a chute, called Old river, and the main river flows to the west of this island, placing it on the Arkansas side of the river. Appellant now insists that only the present shore of the Mississippi river should be taken into account, and that the bank of Old river should not be measured in determining the present shore line, as was done by the master under the directions of the court in apportioning the accretions among the different sections of land. But we think that the court's directions to the master were proper: that is, that he should take as the present shore line, the line running from the point where the accretions commenced to the point where they ended, even though in doing so the present bank of the main stream was departed from when the measurements were made to extend along the bank of the Old river. To adopt the rule contended for by

appellant would either leave some accretions unapportioned, or would leave the accretions to section 7 in such a shape that the stream of Old river would divide its accretions into two disconnected parts. The rule adopted by the court below is in conformity with the rule announced in the case of *Malone v. Mobbs*, cited above, where the rule for apportioning accretions between coterminous proprietors is announced substantially as follows: The accretions should be apportioned by giving to each section a proportion of the outer boundary line of the accretions in the ratio that the old shore line on the particular section bore to the whole of the old shore line, and then drawing lines from the points of division, thus made in the outer boundary line, to the points at which the old shore line is intersected by the boundaries separating the different sections. In other words, each section should have a part of the outer boundary line in the same proportion to the whole of the outer boundary line that its proportion of the old shore line bore to the whole of the old shore line, with lines drawn from the respective dividing points on the old shore line. In the case just quoted from, Judge Hart, speaking for the court, said: "The rule just applied was the one generally recognized as the proper one to follow, unless there are such irregularities in the shore line as to make it inequitable, and this rule was there adopted as the one to be followed in this state, unless there are peculiar circumstances to modify it, as where the shore line happens to be elongated by deep indentations or sharp projections. The exception does not apply to the rule adopted by the court below."

[4] It might be said that the above apportionment does not take into account the question of whether the land conveyed by Martin to Moore was accretion to the mainland or to Martin's Island, but treats it all as if it were accretion to the main shore. But this is necessarily to the appellant's advantage, and appellee in his cross-appeal makes no objection to this method.

Upon the whole case we are of the opinion that the decree of the chancellor is correct, and it is affirmed.

EMPLOYERS' INDEMNITY CO. v. WILLARD et al.

(Supreme Court of Tennessee. Sept. Term, 1911.)

1. APPEAL AND ERROR (§ 80*)—JUDGMENTS APPEALABLE—FINAL DECREE.

A final decree, which is appealable, is one that disposes of the entire merits of the case.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 429, 432, 450, 456, 457, 494-509; Dec. Dig. § 80.*]

2. APPEAL AND ERROR (§ 78*)—JUDGMENTS APPEALABLE—FINAL DECREE.

A decree overruling a plea in abatement to the jurisdiction is not upon the merits, so as to be final and appealable.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 426, 464-483; Dec. Dig. § 78.*]

3. APPEAL AND ERROR (§ 359*)—JUDGMENTS APPEALABLE—DISCRETION OF CHANCELLOR.

Shannon's Code, § 4389, permitting the chancellor in his discretion to allow an appeal from his decree determining the principle involved, and ordering an account or partition, before the account is taken, or the sale or partition made, and providing that he may allow such appeal on overruling a demurrer, or may permit a party to appeal from a decree which settles his right, though the case may not be disposed of as to others, has not been extended beyond the particular cases enumerated therein, so that the chancellor has no discretion to authorize an appeal from a decree overruling a plea in abatement to his jurisdiction.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 1936-1940; Dec. Dig. § 359.*]

Appeal from Chancery Court, Hamilton County; T. M. McConnell, Chancellor.

Action by the Employers' Indemnity Company against D. H. Willard and others. From a judgment for plaintiff, defendants appeal. Appeal dismissed.

Chambers & Cooper and Williams & Lancaster, all of Chattanooga, for appellants. Shields, Cates & Mountcastle, of Knoxville, and Burkett, Miller & Moore, of Chattanooga, for appellee.

LANSDEN, J. The defendant Willard is a resident of Washington county, and the complainant company is a foreign corporation doing business in this state, after complying with the laws in respect thereto. Willard had brought suit in the law court at Johnson City against the company to recover damages for an alleged breach of contract, and while this suit was pending the company filed the bill in this case against Willard and others in Hamilton county, seeking, among other things, to enjoin the suit pending in Washington county and have a complete settlement of all the matters existing between it and all of the defendants in this suit. Each of the defendants filed pleas in abatement to the jurisdiction of the chancery court of Hamilton county, and, after different motions and amendments, issue was finally joined upon the pleas, and upon the proof the chancellor overruled these and sustained his jurisdiction. The decree then recites as follows:

"And the chancellor being of opinion that it is proper to allow an appeal at this time, the same is allowed to such of the defendants as desire to avail themselves thereof, upon giving bond for said appeal as required by statute. But defendants Willard, Fisher, Miller, and the United States Fidelity &

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Guaranty Company do not appeal from that part of the decree allowing them 20 days in which to make further defense in case they are cast in this appeal."

[1] This appeal must be dismissed, because it is premature. This is not a final decree, nor is it an appeal that lies within the discretion of the chancellor, under section 4889 of Shannon's Code. A final decree, in the sense that an appeal as a matter of right lies from it, is one that disposes of the entire merits of the case. *Younger v. Younger*, 90 Tenn. 25, 16 S. W. 78, and cases cited.

[2] A decree overruling a plea in abatement to the jurisdiction does not pass upon the merits in any particular.

[3] By section 4889 of Shannon's Code, the chancellor may in his discretion allow an appeal from "his decree determining the principle involved and ordering an account or a sale or partition, before the account is taken, or the sale or partition is made; or he may allow such appeal on overruling a demurrer; or he may allow any party to appeal from a decree which settles his right, although the case may not be disposed of as to others."

It has uniformly been held by this court that the chancellor's discretion in allowing appeals under this section of the Code is limited to the cases therein enumerated. Manifestly, this appeal is not either of those cases, and it is therefore premature. *Younger v. Younger*, 90 Tenn. 25, 16 S. W. 78; *Sigler v. Vaughn*, 11 Lea, 135; *Bomar v. Hagler*, 7 Lea, 85; *Barksdale v. Butler*, 6 Lea, 454; *Hume v. Bank*, 1 Lea, 220.

The appeal is dismissed at the cost of the appellant.

GLEASON et al. v. PRUDENTIAL FIRE INS. CO.

(Supreme Court of Tennessee. Dec. 19, 1912.)

1. APPEAL AND ERROR (§ 1022*)—REVIEW—FINDINGS.

A concurrent finding by a master and chancellor will be sustained on appeal, where there is any evidence in its behalf.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4015-4018; Dec. Dig. § 1022.*]

2. INSURANCE (§ 349*)—FIRE INSURANCE—PAYMENT OF PREMIUMS.

Where a fire insurance policy provided that the failure of the insured to pay any premium note when due should lapse the liability of the company, and a premium note contained a like provision, the insured's failure to pay it according to its tenor will avoid the policy.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 891, 895-902, 913; Dec. Dig. § 349.*]

3. INSURANCE (§ 64*)—INSOLVENCY OF COMPANY—CREDITORS' BILL.

Where an insurance company was insolvent, a bill filed by one who sought to recover

under a policy for loss sustained, when otherwise good as a creditors' bill, cannot be rejected because the complainant is not entitled to recover under the policy; all other creditors being given an opportunity to come in.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 89; Dec. Dig. § 64.*]

4. INSURANCE (§ 63*)—FIRE INSURANCE—MUTUAL ASSESSMENT COMPANIES.

Mutual assessment fire insurance companies have no capital stock, the policy holders being in a way stockholders, and the cash paid in for premiums and the premium notes constituting the company's assets; and hence, upon the insolvency of such company, a policy holder cannot recover premiums paid in or avoid premium notes.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 86-88; Dec. Dig. § 63.*]

5. INSURANCE (§ 70*)—FIRE INSURANCE—MUTUAL ASSESSMENT COMPANIES—INSOLVENCY—EFFECT.

The appointment of a receiver for an insolvent mutual assessment fire insurance company terminates all contracts, regardless of the payment of premium and the period to continue.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 93; Dec. Dig. § 70.*]

6. INSURANCE (§ 536*)—FIRE INSURANCE—PROOF OF LOSS—WAIVER.

Where the local agent, as well as the adjuster, of a fire insurance company, promised to furnish insured with blanks on which to make proof of his loss, their failure to furnish insured blanks within the time stipulated by the policy is a waiver of the condition requiring insured to make proofs within that time.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1323; Dec. Dig. § 536.*]

7. INSURANCE (§ 536*)—FIRE INSURANCE—PROOF OF LOSS.

Where an insurance company became insolvent and a receiver was appointed after insured suffered a loss, but before the time for filing proofs had expired, and the court fixed a time within which creditors were required to file petitions establishing their claims, that order superseded the requirement of filing proofs of loss.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1323; Dec. Dig. § 536.*]

8. INSURANCE (§ 143*)—ACTIONS ON POLICY—LOCATION OF RISK.

Where by mistake a fire policy misdescribed the location of the property insured, insured's remedy is to seek reformation; but no action can be maintained upon the policy where the property destroyed was not in the location described.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 265-272; Dec. Dig. § 143.*]

9. INSURANCE (§ 115*)—INSURABLE INTEREST—INTEREST OF HUSBAND.

A husband, having a freehold estate in the property of his wife and the right to control it, has an insurable interest therein.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 139-157, 177; Dec. Dig. § 115.*]

10. EVIDENCE (§ 594*)—WEIGHT—UNCONTRADICTED TESTIMONY.

In an action against an insurance company, where the testimony of insured was in no way impeached, nor was there any attack made on his character, his statement as to the facts

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Index

must be accepted as true, when standing uncontradicted.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2431; Dec. Dig. § 594.*]

11. INSURANCE (§ 353*)—FIRE INSURANCE—WAIVER OF STIPULATIONS OF POLICY.

Where the agent, in inducing insured to accept a fire policy, agreed to give him seasonable notice of the maturity of a premium note, that agreement, being part of the consideration of the contract, will prevent the insurer from declaring a forfeiture for nonpayment of the note, when no notice was given.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 905-907, 1032, 1033; Dec. Dig. § 353.*]

Appeal from Chancery Court, Knox County; James Maynard, Jr., Special Chancellor.

Bill by M. D. Gleason and others against the Prudential Fire Insurance Company. From a decree for defendant, petitioners appeal. Reversed and remanded.

Saylor & Moore, of Knoxville, for appellant Martin. Wm. Davis, of Tazewell, for appellant Phelps. Jerome Templeton and C. W. Lester, both of Knoxville, for appellant Gleason. Jerome Templeton, of Knoxville, for appellant Sellers. Webb & Baker, of Knoxville, for appellants Leeson and Drummond. Walter H. Anderson, of Harriman, and Hughett & Hughett, of Knoxville, for appellants Adkisson. Wright & Jones, of Knoxville, for appellant Birdwell. W. A. Owens, of La Follette, for appellant Silcox. Green, Webb & Tate, of Knoxville, for receiver.

GREEN, J. This bill was filed by the complainant, claiming to be a creditor of defendant insurance company, and seeking to recover the amount alleged to be due him under a policy of insurance which had been issued to him. The bill was also filed as a general creditors' bill, alleging the insolvency of the company, and asking for the appointment of a receiver, and that its affairs be wound up under the supervision of the chancery court.

A receiver was appointed for the company, and publication was made for creditors, and numerous intervening petitions were filed in the cause.

A final decree was passed by the chancellor, and the case is for the second time before us, and several questions which will hereafter be disposed of relative to the rights of the complainant and of various petitioners are involved on this appeal.

The first matter arising is as to the right of the complainant himself to a recovery on his policy. This policy appears to have been issued June 5, 1909, for \$2,000, on a stock of goods, storehouse, and fixtures. The premium on the policy was \$72, for which complainant executed two notes, for \$36 each, dated June 5, 1909, and payable, respectively, in 30 and 60 days.

No payment was made on either note until August 20th, when complainant paid \$20 to the insurance company's collector.

The complainant contends that at this time an agreement was made between him and the collector whereby both of these notes should be extended until November 15th. The fire occurred on November 4th. The contention made for the receiver is that, upon the payment of the \$20 aforesaid, the first note was extended until October 1st, and the second note was extended until November 1st.

Indorsements upon the notes bear out the receiver's contention, and it is in evidence that the company wrote to the complainant early in October, calling his attention to the fact that his note due October 1st was unpaid. The company's agent, who dealt with complainant in regard to this policy, and made the collection of the \$20, also states that, upon receipt of that payment, extensions were made as claimed by the receiver.

On behalf of the complainant, he himself and two other witnesses testify that at the time of the \$20 payment the company's agent agreed with the complainant to extend both notes until November 15th.

[1] Much is said by counsel for each side reflecting on the credibility of testimony offered in behalf of the other.

This controversy, along with the others arising in the case, was referred to the master for determination. The master reported against complainant's claim, and this report was confirmed by the chancellor.

We see no reason for departing from the rule that we will uphold a concurrent finding of the master and chancellor, where there is any evidence to sustain it. There is abundant evidence to sustain the finding here, and it must be regarded as conclusive.

[2] This being the case, and complainant being in default on these notes at the time of this loss, he is not entitled to any recovery against the company.

The policy provides on its face that, on the failure of the assured to pay any premium note when due, it "shall lapse and the liability of the company thereon be suspended, and no loss or damage shall be collectible from the company, if loss or damage shall occur to the insured during the period of such lapse caused by arrearage."

The notes also provide, if they are not paid at maturity, that "the policy shall be null and void," and so remain until same shall be fully paid.

"Failure to pay an installment or premium on a fire policy at maturity will defeat the assured's recovery for a loss that occurred during his default, where both the policy and the installment notes provide that the policy shall lapse upon default in payment of

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

premium." *Dale v. Continental Insurance Co.*, 95 Tenn. 88, 31 S. W. 268.

"A policy of insurance containing a stipulation to the effect that nonpayment at maturity of any premium note given by the assured and accepted by the insurer would forfeit the policy is rendered void and nonenforceable by the nonpayment of the note at maturity." *Ressler v. Fidelity Mutual Insurance Co.*, 110 Tenn. 411, 75 S. W. 735.

"Where a life insurance policy provides that it shall lapse and be void if the premiums thereon are not paid when due, it is well settled that such policy will be forfeited if the premiums are not paid as stipulated." *Life Insurance Co. v. Galbraith*, 115 Tenn. 471, 91 S. W. 204.

Without further discussion, therefore, it is obvious that the complainant is not entitled to recovery upon his policy, when rules of law fully established in this state are applied to the facts herein concurrently found by the master and chancellor.

Accordingly, the decree of the chancellor must be affirmed, in so far as it denied relief to the complainant on his policy.

[3] Another question arises on this bill. It was drafted as a general creditors' bill, and a fiat for injunction obtained from the chancellor. Some days elapsed before it was filed. Immediately thereafter, Leeson and Drummond presented to the chancellor a bill in the nature of a general creditors' bill against the company, which was allowed to be filed pro tempore as a sort of petition in Gleason's suit. Leeson and Drummond had been officers of defendant corporation, as well as creditors, and they denied the validity of Gleason's claim, and said they filed their bill to insure the winding up of the company by the court, if Gleason failed to establish his claim.

Some preliminary proceedings were had before the chancellor, and he made an order sustaining Gleason's bill as a creditors' bill; but such order was conditioned on the validity of Gleason's claim, and provided, if such claim proved ill founded, then the bill of Leeson and Drummond should be treated as the general creditors' bill.

The final decree dismissed Gleason's bill outright, and it is here said that this action, as well as the former order conditionally sustaining the bill as a general creditors' bill, were both erroneous. These criticisms are well made.

Upon the insolvency of the company becoming apparent, as it did, from the answer to Gleason's bill, the chancellor should have unconditionally sustained said bill as a creditors' bill. It was the first one presented and filed, and there is no reason for saying it was not preferred in good faith. Its status as a creditors' bill could not be affected by the ultimate decision of the merits of complainant's demand, if other creditors inter-

vened. The condition of the corporation, not the individual right of Gleason to recover, should have been chiefly considered by the chancellor in making the preliminary order. There was no justification for the bill of Leeson and Drummond as a creditors' bill. They could have come into Gleason's suit by petition, and thereby have secured and made certain the administration of the affairs of this corporation by the court, irrespective of the final disposition of Gleason's claim.

The order of the chancellor provisionally sustaining the Gleason bill as a creditors' bill was erroneous, and properly excepted to. The subsequent decree dismissing said bill outright was also erroneous. Petitions had been filed in the cause, and the administration of the corporation's affairs undertaken, and the bill of Gleason should have been retained as the general creditors' bill, even though he failed to establish his claim. He was properly taxed with part of the costs. He should pay such of those as accrued with respect to the trial of his claim.

The chancellor's decree will be modified, so as to sustain the Gleason bill as a general creditors' bill.

A number of controversies arising upon intervening petitions are before us on this appeal, which we proceed to consider separately.

G. W. Sellers.

This petitioner took out a policy for \$2,500, on his residence in Newport. The policy was dated May 19, 1909, and was to run three years. The petitioner paid the premium exacted by the company. The property was destroyed by fire August 24, 1910. The creditors' bill was sustained, and a receiver appointed, it will be remembered, on November 15, 1909.

The petitioner claims that, having procured and paid for insurance for a term of three years from May 19, 1909, the insolvency of the company did not terminate this contract, but that the receiver is liable for this loss. Petitioner avers that no part of his premium was returned to him or offered to him by the receiver, but, on the contrary, a call or demand for contingent premium has been made upon him. An answer was filed by the receiver, in which he denied petitioner's right to recover, and the receiver also filed his answer as a cross-bill to recover from petitioner the contingent premium aforesaid.

This company was a mutual insurance company, authorized by chapter 461, of the Acts of 1907.

This case, on other features, was before this court at the last term, coming from the Court of Civil Appeals by certiorari. We had occasion at that time to consider the nature of such companies, and the nature of the contract between such companies and their members. These matters were fully discussed in an opinion of the Court of Civil

Appeals, which we affirmed. *Gleason v. Insurance Co.*, 2 Higgins, 376.

In that case it was held that a member of one of these mutual companies was liable for the amount of his premium note, even though the company had failed and was unable to continue the policy of insurance, and there had accordingly been a failure of the consideration for which the note was given. It was said that the members of such companies were both insurers and insured; they were not only policy holders in such cases, but quasi stockholders; and that their premium notes were assets in the hands of such companies for the payment of creditors.

[4] Companies organized upon the plan of this one have no capital stock. The cash paid in for premiums and the premium notes constitute their assets, and the policy holders or members sustain a relation to the company very similar to that of stockholders. They can no more recover premiums paid in, nor avoid premium notes, in case of insolvency, than could stockholders in an ordinary corporation recover money paid in subscription to stock, or avoid notes given for subscription to stock.

So the insolvency of a company like this gives no right to a policy holder to recover any premium paid, or to avoid the payment of any premium note, so long as the company has outstanding debts.

[5] Upon a loss by fire, the rights of the policy holders against the company are matured. Such policy holders then become creditors, and are entitled to have subjected to their claims all the assets of the company, and, if necessary, to call on other policy holders for contingent premiums provided by statute. The contract between its members and such companies as this is peculiar. However, such companies have existed for a long time, and the rights of the parties to such contracts have been frequently considered by the courts of this country, and the rules of law with reference thereto are now firmly established. The authorities are as follows:

"Upon the appointment of a receiver on the ground of insolvency, the outstanding policies of the company are canceled by operation of law, and subsequent losses under such policies are not liabilities which may be enforced against the receiver. This rule is not changed, even though by the terms of the policy the company is required to give notice to the insured in case it desires to cancel the policy. Holders of policies on which premiums have been paid for a term extending beyond the insolvency have valid claims against the company for unearned premiums. A statute making the officers personally liable on policies issued by them when they knew the company to be insolvent does not render a policy issued under such condition void. The policy is binding on the company, with the individual liability

of the directors superadded. The right of holders of unmatured policies is to share in the assets after payment of debts, while the holders of matured policies are regarded as creditors." 22 Cyc. 1421.

"On the other hand, the insolvency of the company does not terminate the obligation of policy holders to contribute to the payment of losses which have occurred prior to insolvency, and those giving premium notes are also liable to assessment for the payment of unearned premiums on business done under the cash plan. Assessments cannot be collected from holders of policies which are issued in violation of law. And they can only be made on existing members; that is, members whose policies are still in force at the time of insolvency. Assessments cannot be made on persons who, having had policies in the company, have surrendered and canceled them; and the receiver is bound by the prior action of the officers of the company in settling with policy holders and canceling their policies so as to relieve them from assessment. A member may also be relieved from liability on showing that he became such through fraud or mistake." 22 Cyc. 1422, 1423.

The Supreme Court of Massachusetts has said:

"It is an incident of the peculiar contract and relation which each member of a mutual insurance company enters into with the other members that the injunction and judicial sequestration of all the property of the corporation terminates its liability for future losses." *Commonwealth v. Mass. Mutual Fire Ins. Co.*, 119 Mass. 45.

Speaking of the results of insolvency, the Supreme Court of Minnesota observes:

"The effect was to terminate all contracts of insurance at the date of the appointment of the receiver. These contracts were not debts or fixed liabilities of the company. In respect to them, its liability depended upon the contingency of losses by the assured during the life of the policies, and when losses have not occurred before the adjudication of insolvency, the only liability to the policy holder is for the breach or cancellation of the contracts by the adjudication of the insolvency, and the consequent suspension of all business by the company, and its disability to fulfill its contracts of indemnity, and the measure of damages is the surrender value of the policies." *Taylor v. North Star Ins. Co.*, 46 Minn. 198, 48 N. W. 772.

The same result was reached in *Doane v. Millville Mutual M. & F. Ins. Co.*, 43 N. J. Eq. 522, 11 Atl. 789.

Other cases to this effect are collected in Cyc., under the sections above quoted, and all the cases to which we have had access announce the same rule.

That is to say, that upon insolvency of a mutual insurance company, such as the one

being wound up, its outstanding policies are canceled by force of law, and no recovery can be had against it for subsequent losses. The only damage to which a policy holder is entitled, under these circumstances, is a pro rata of his unearned premiums, or any surrender value the policy may have, if anything be left after the payment of creditors.

We must therefore hold that petitioner Sellers is not entitled to recovery on his policy. As observed in *Doane v. Insurance Co.*, supra, this result may seem hard; but it is the best that can be reached, by reason of the peculiar incidents of such contracts of insurance with companies so organized.

With reference to the cross-bill of the receiver against this petitioner, it is conceded upon the brief of counsel for the receiver that this petitioner is only liable for the contingent premium to the extent that an assessment may be necessary to pay losses accruing between the date of his policy and its termination. Such, in fact, is the provision of the statute. Therefore the chancellor's decree must be modified in this respect; otherwise, it will be affirmed.

Inasmuch as this case has to be remanded for various further proceedings, the contingent liability of Sellers may be established by appropriate action of the receiver later, if necessary.

We have examined the authorities cited by counsel for petitioner, but think that they are not applicable here. This company was organized under our statute, and the rights of its members or policy holders cannot be determined by rules of law applicable to policy holders in standard or old line insurance companies.

J. W. Birdwell.

This petitioner had a policy for \$2,000 on a stock of goods located in Johnson City. The loss occurred August 10th, and amounted to \$2,485.66.

This policy was issued by Dulaney, the local agent of the company at Johnson City. Notice was given the company respecting the fire, and three or four days thereafter Drummond, an adjuster for the company, came to Johnson City to investigate.

The petitioner was away from town on the day Drummond arrived, and did not see him, but did see him within 30 days after the fire. At that time Drummond agreed to come back to Johnson City shortly and adjust or settle the loss.

[8] The defense interposed by the receiver in this case is that formal proofs of loss were not filed within 60 days, as required by the policy. The petitioner testifies, as said above, that Mr. Drummond, within 30 days after the fire, when he saw him in Knoxville, promised to come up and adjust matters in a short while. He also testifies that, upon the occasion of Drummond's first trip to

Johnson City, when petitioner was absent, Drummond stated then that he would be back in a few days. It seems that Drummond never did come back to Johnson City, in accordance with these promises, and a short while after the 60 days had expired formal proofs of loss were filed with the company by this petitioner.

In addition to the foregoing, petitioner testifies that he applied to Dulaney, the local agent, immediately after the fire, for a proof of loss blank. Dulaney stated that he had never been supplied with such blanks, but later, on the occasion of Drummond's trip to Johnson City, three or four days after the fire, Drummond promised to have such blanks sent to Dulaney, and Dulaney in turn promised to deliver one of them to petitioner. Petitioner says further that, when he met Drummond in Knoxville, Drummond promised to send him a proof of loss blank. Neither Drummond nor Dulaney ever supplied this petitioner with these blanks, as they had promised. The foregoing is the testimony of petitioner, and no proof is introduced in behalf of the receiver to the contrary.

We are of opinion that the conduct of the agents of the company with respect to this petitioner amounted to a waiver of the company's right to insist on proofs being filed within the 60 days. The general rule of law is:

"When the company, with knowledge that notice and proofs have not been given and furnished, as required by the policy, so acts in relation to the matter as to lead the assured to reasonably believe that the policy is still in force and binding, there is a waiver of objection to the manner or time of notice and proofs, and accordingly the company cannot take advantage of the default." 19 Cyc. 857.

"Negotiations or proceedings by the company with reference to settlement of loss will be a waiver of failure to give notice or make proof of loss." Id. 865.

Without, however, considering the effect of these negotiations, indicating that it proposed a settlement, the company is precluded from making the defense here relied upon by the promises of both the local agent and the adjuster to supply the insured with the blank proofs of loss, which was never done.

Authorities are uniform, "if the agent offers to furnish blanks and fails to do so, the want of proofs is waived." 19 Cyc. 862.

This question is clearly discussed in *Kenton Insurance Co. v. Wigginton*, 89 Ky. 330, 12 S. W. 668, 7 L. R. A. 81, and other authorities are cited to the same effect in note 26, 19 Cyc. 862.

For the reasons stated, we think the chancellor was in error in dismissing Birdwell's petition, and his action in this respect will be reversed.

F. B. Martin.

F. B. Martin had a policy for \$700, covering his barn and contents. The property insured was destroyed by fire on October 13, 1909.

The only defense interposed to his claim is that he failed to file proofs of loss with the company within 60 days after the fire. As has been stated, the policies of this company contained a provision in ordinary form requiring such proofs to be filed within that time.

[7] The defense was thought to be good by the chancellor, and the petition dismissed. We are of opinion that the chancellor was in error. The creditors' bill in this case was filed November 11th, and sustained November 15th, and the usual publication made with respect to creditors.

In the order appointing the receiver, etc., all creditors were required to come into the case "by petition," and file and prove their respective claims on or before June 13, 1910. It seems to us that this order of the court superseded the requirement of the policy as to the filing of proofs of loss. Creditors were required by said order to present their claims "by petition" in court. It would have availed Martin nothing to have presented his claim otherwise. At the time the creditors' bill was sustained only 33 days had elapsed of the 60 days allowed him in which to file proofs.

There was no necessity for petitioner to have filed proofs of loss with the receiver. The receiver could not have considered such proofs presented to him, according to the terms of the policy, as if the company was a going concern. It would have been a useless performance for Martin to have undertaken to present his claim to the receiver in this way. He was required by the chancellor's order to present his claim "by petition," and proofs of this claim had to be made upon such petition in court.

By its very language, the order of the court extended the time for filing all claims until June 13, 1910. As has been said before, this order superseded the limitations of the policy.

There can be no objection to the form in which Martin submitted his claim in his petition. He therein stated the character of the loss with detail and particularity, and the petition was, of course, sworn to. This petition set out the value of the barn, and hay, oats, corn, etc., therein contained, by items, the whole aggregating more than \$700, and there is no question but that there was a total loss.

For the reasons stated, the decree of the chancellor on Martin's petition will be reversed, and this claim allowed.

Levi Silcox.

This Intervener had a policy for \$1,200 on a large quantity of lumber, which was destroyed by fire September 25, 1909.

[8] The policy described the property insured as 90,000 feet of oak and poplar lumber on Central avenue, La Follette, Tenn. As a matter of fact, the lumber was actually stacked a mile west of the town of La Follette, and was not on Central avenue.

The chancellor dismissed this petition, and it is argued by counsel for Silcox upon appeal that the location of the property given in the policy was the mistake of the agent of the company. Proof is introduced tending to show that the agent, when writing this policy, was correctly informed as to its location, and that the erroneous location given in the policy was due to his mistake. However this may be, whoever made the mistake in the outset, we do not think there can be a recovery upon this petition and upon this policy for the property that was actually destroyed. The matter of the location of the risk is one of highest importance in all insurance contracts. Premiums vary according to the location of the risk, and the location otherwise enters into the contract between the parties.

If the agent did make a mistake in writing up this policy, as from the proof herein he appears to have done, the remedy of petitioner is to ask for a reformation of the policy, so as to make it evidence the contract actually made between him and the company.

There can be no recovery under a policy covering lumber on Central avenue, in La Follette, for the destruction of lumber a mile west of the town of La Follette, unless there be a reformation of the policy.

The decree of the chancellor denying relief on this petition will be affirmed; but the cause will be remanded in this respect to permit of amendments to the petition along the lines suggested.

W. Walker Adkisson and Wife.

[9] The only question raised upon this petition is whether the husband has an insurable interest in the wife's general estate. The title to the property insured and destroyed was in Mrs. Adkisson, but the policy was issued to Adkisson and wife, and it is insisted on behalf of the receiver that Adkisson did not have any interest in this property, and that there can be no recovery on this policy. This defense is not well made.

It appears in the proof that the property was Mrs. Adkisson's general estate. Her husband, therefore, had a freehold estate therein, with the right to control it, and various other rights respecting it, which are well recognized. Standing in this attitude to the property, he had an insurable interest in it. We have so held in former unreported cases. Many authorities to this effect are collected in a note to Tyree v. Virginia F. & M. Ins. Co., 66 L. R. A. 657. The husband has a beneficial interest in such property, and he is also treated in many of the cases as agent for the wife respecting such property.

The decree of the chancellor, dismissing this petition, will therefore be reversed.

G. L. Phelps.

[10, 11] Phelps took out a policy for \$1,000 for 12 months, on September 6, 1909, on certain property of his. This property was destroyed by fire on October 5, 1909. The premium on this policy was \$25, of which \$12.50 was paid in cash at the time the policy was issued, and for the balance Phelps executed his note for \$12.50, due October 1st.

The defense to this claim is that the loss occurred on October 5th, when the premium note, due October 1st, was still unpaid, and that, under the terms of the policy, failure to pay any premium note at maturity had the effect of suspending the policy and depriving the insured of the right to collect for a loss occurring while he was so in arrears.

Phelps testifies that when he took out this policy of insurance he told the agent that he could pay the entire premium in advance, if necessary; but the agent informed him that this was not required, that he might pay one-half then and give his note for the remainder. Phelps says he objected to this arrangement on the ground that he could not remember, or might forget, when his premium note matured. The agent then, according to Phelps, promised him, and made an agreement with him, that he (Phelps) should have timely notice of the maturity of this note from the company, and upon this assurance of the agent, Phelps says, he took the policy upon the terms above stated. He further says that he received no notice whatever from the company in respect to this note until October 9th, and that in response to this notice he immediately mailed a check to the company for the \$12.50. This check was mailed to the company on October 11th, and, the loss having occurred on October 5th,

it returned the check and denied liability under the policy; but the agent who issued this policy to Phelps is not introduced by the receiver, nor is any attack made on the character of Phelps, and he stands uncontradicted in this record. We must, therefore, accept his statement of the facts with reference to the issuance of this policy as true.

The agent having agreed that the company would give notice in advance of the maturity of this note, and the company having failed to do so, it cannot now be heard to insist upon a forfeiture of the policy by reason of nonpayment of the note on the day it fell due. This promise of the agent was an inducement offered Phelps for taking out the policy, and was offered prior to the issuance thereof. It was part of the consideration of the contract, and was within the apparent scope of the agent's authority.

"A forfeiture is to be regarded as waived when the agent or the insurer agrees that he will give the insured notice of the falling due of any premium note." 19 Cyc. 799.

The case of *Alexander v. Continental Insurance Co.*, 67 Wis. 422, 30 N. W. 727, 53 Am. Rep. 869, was a case where the agent agreed to give notice of the maturity of the installments of the premium, and the court held the insured entitled to rely upon such promises, even though the installments were several years past due.

Other cases to the same effect are therein cited in support of the above quotation from Cyc.

So that, under the authorities, we think the chancellor was correct in holding that the company could not insist on a forfeiture of this policy, upon the facts heretofore stated.

A decree will be entered, disposing of these various matters as herein indicated, and the cause remanded for further proceedings.

SPIVY v. MARCH et al.

(Supreme Court of Texas. Dec. 18, 1912.)

1. ACKNOWLEDGMENT (§ 37*)—CONVEYANCES OF MARRIED WOMEN—VALIDITY—CERTIFICATE.

The statute (Paschal's Dig. art. 1003) providing that in case of the conveyance of the separate property of the wife she shall be privately examined by a judge of the Supreme or District Court, or notary public, and if, upon the conveyance being explained to her, she shall acknowledge it and state that she does not wish to retract, the officer shall file a certificate to that effect, but that any certificate showing that the requisites of the law have been complied with shall be sufficient, a certificate, reciting that the grantors, husband and wife, appeared before the notary and acknowledged that they signed and delivered the foregoing deed, and that, the wife, being examined apart from her husband, after having the deed explained to her, stated that she signed the same of her own will and accord, without fear or restraint, was sufficient, though not containing the clause that she did not wish to retract.

[Ed. Note.—For other cases, see Acknowledgment, Cent. Dig. §§ 183, 199-216; Dec. Dig. § 37.*]

2. TRESPASS TO TRY TITLE (§ 6*)—TITLE OF PLAINTIFF.

Failure of the acknowledgment of a deed by a married woman to state that she did not wish to retract will not defeat a suit by her remote grantee against a mere intruder, where she lived near the land, and for over 50 years neither she nor her heirs ever questioned the deed.

[Ed. Note.—For other cases, see Trespass to Try Title, Cent. Dig. §§ 5-9, 15, 16; Dec. Dig. § 6.*]

Error to Court of Civil Appeals of Sixth Supreme Judicial District.

Action by R. B. Spivy against D. W. March and others. The Court of Civil Appeals granted judgment (133 S. W. 529) reversing judgment for plaintiff, and he brings error. Judgment of Court of Civil Appeals reversed, and that of the district court affirmed.

J. H. Turner, of Henderson, and H. I. Myers and N. B. Morris, both of Palestine, for plaintiff in error. John R. Arnold, of Henderson, for defendants in error.

BROWN, C. J. The case was submitted to the judge of the district court, without a jury, who filed this statement of facts and entered judgment accordingly:

"This is a suit in trespass to try title by plaintiff against defendants for a tract of 209 acres of land, a part of the Jose Durst survey situated in Rusk county, Tex.

"I find the land was duly conveyed from the state to Jose Durst and from Durst to Alexander Jordan. Prior to 1857 the land was partitioned between the heirs of Alexander Jordan; S. $\frac{1}{2}$ being given to the children and heirs, and the N. $\frac{1}{2}$ to the widow, who had married Jack Anderson.

"In this partition the S. $\frac{1}{2}$ was blocked up and given to the children in severalty; the 209 acres in suit, together with 160 acres more adjoining the 209 acres on the east,

making 369, at that time in one body, was allotted to Emma Jane Hensley, who was the child and heir of Alexander Jordan, and who had married Sam Hensley. Emma Jane Hensley and her husband lived on this land; the home place being on the 209 acres of land.

"In 1857 Emma Jane Hensley and her husband sold the 209 acres in suit to C. A. Few, and were paid for same in stock and property by Few. C. A. Few soon after took possession of the land by tenant. I find the land was the separate property of Emma J. Hensley, and that the certificate of acknowledgment to her deed is defective, but that she received the consideration for the land acquired in the sale, delivered possession of the land to Few, and the defendants show no right, legal or equitable, through her. In 1866 C. A. Few deeded the land to R. B. Tutt. W. W. Morris acquired the land at execution sale, in part, and by deed from Hollingsworth for balance, who also acquired part of same from Tutt's estate by execution sale.

"In 1885 W. W. Morris' estate was partitioned, and this 209 acres of land was set apart to Reed B. Spivy, a legatee under the will of W. W. Morris.

"I find that W. W. Morris paid taxes on this 209 acres of land from date of his deed until death, and Reed Spivy since, and claimed this 209 acres of land.

"I find that March paid no taxes on this 209 acres of land as such. I find this S. W. March, deceased, claimed and claims now 160 acres of the Hensley 369 acres, not claimed by the plaintiff and not in this suit, and that Hensley and March were talking about the sale of this 160 acres of land at the time testified by McCrary.

"I find that in 1877 or 1878 the courthouse in Rusk county was burned, and many of the records were destroyed by fire, and that the recitals in the sheriff's deed and the evidence is sufficient to establish their existence of execution and orders of sales returned.

"I find that defendants show no conveyance to the land, or any part of same, except a deed from Nancy Anderson, who was Nancy Jordan in 1868, including a strip about 40 feet wide on the north end of the 209-acre tract, and this deed could convey no title, because the land had been set apart to Jane Hensley, and Nancy Jordan, or Anderson, was a party to the divestor long before, and March had notice.

"Conclusion of Law.

"I therefore conclude that, while the plaintiff's title is irregular and in some respects defective, defendants have shown no title, legal or equitable, and as against defendants the plaintiff is entitled to recover; and it is so ordered.

"W. C. Buford, Judge,

"Fourth Judicial District of Texas."

The defendants took all necessary steps to perfect an appeal to the Court of Civil Appeals of the Sixth District, and assigned these errors:

"(1) The trial court erred in admitting, over the objections of the defendants, and considering as evidence, the record of a deed from Emily Jane Hensley and husband, Samuel Hensley, to C. A. Few, because said deed was void on account of the lack of a legal certificate of acknowledgment of the execution of said deed by said Emily Jane Hensley, wife of Samuel Hensley.

"(2) The trial court erred in holding that plaintiff acquired a recoverable title through the deed from Emily Jane Hensley and husband to C. A. Few.

"(3) The court erred in admitting, over the objection of defendants, and considering as evidence, the deed by James H. Everett, sheriff of Rusk county, to Hollingsworth and Morris.

"(4) The court erred in admitting and considering as evidence of a conveyance of the land in suit the deed from S. P. Hollingsworth to W. W. Morris."

"(6) The court erred in holding that plaintiff acquired the title of John O. Tutt.

"(7) The court erred in permitting plaintiff, over the objections of defendants, to introduce as evidence that portion of the deposition of Mrs. Few stating that her husband, C. A. Few, put a man on it [the land in suit] to take care of it, because the same was shown by the deposition of that witness to be hearsay; she having testified in her deposition: 'I was never on the place. I never saw the land.'

"(8) The court erred in finding, 'Few soon after took possession of the land by tenant,' because this finding is based on hearsay testimony.

"(9) The trial court erred in finding, 'the N. $\frac{1}{2}$ [of the Durst league was given] to the widow, who had married Jack Anderson,' because the judgment of the district court gives the whole of the N. $\frac{1}{2}$ of that league to the heirs of John Jordan.

"(10) The trial court erred in finding that defendants show no conveyance to the land, or any part of the same, except a deed from Nancy Anderson, who was Nancy Jordan in 1868.

"(11) The trial court erred in holding that defendants have shown no title, legal or equitable, for which reason, as against defendants, the plaintiff is entitled to recover."

The honorable Court of Civil Appeals reversed the judgment of the district court, and rendered judgment for the defendants below. The case is now before this court on writ of error.

The right of plaintiff in error depends upon the validity of the deed from Hensley and wife to C. A. Few, under whom the plaintiff claimed by regular chain of transfers. The land was the separate property

of Emily J. Hensley. The deed to Few is in proper form; but it is objected that the certificate of acknowledgment to the deed was not and is not in legal form in omitting the words, "she wished not to retract it."

[1] The defendant in error showed no title to the land from any source. By the facts he is shown to be a naked trespasser who seeks to avail himself of a technical error in the certificate of the officer who took Mrs. Hensley's acknowledgment of her execution of the deed made by her and her husband to C. A. Few.

At the time the certificate was made by the officer, this statute was in force: "Art. 1003. That when a husband and his wife have signed and sealed any deed or other writing purporting to be a conveyance of any estate or interest in any land, slave or slaves, or other effects, the separate property of the wife, or of the homestead of the family, or other property exempted by law from execution, if the wife appear before any judge of the Supreme or District Court, or notary public, and being privily examined by such officer, apart from her husband, shall declare that she did freely and willingly sign and seal the said writing, to be then shown and explained to her, and wishes not to retract it, and shall acknowledge the said deed or writing so again shown to her to be her act, thereupon such judge or notary shall certify such privy examination, acknowledgment, and declaration, under his hand and seal, by a certificate annexed to said writing to the following effect or substance, viz.: State of Texas, County of _____: Before me, _____, judge of, or notary public of, _____ county, personally appeared _____, wife of _____, parties to a certain deed or writing bearing date on the _____ day of _____, and hereto annexed, and having been examined by me privily and apart from her husband, and having the same fully explained to her, she, the said _____, acknowledged the same to be her act and deed, and declared that she had willingly signed, sealed, and delivered the same, and that she wished not to retract it; to certify which I hereunto sign my name and affix my seal, this _____ day of _____, A. D. _____. But any certificate showing that the requisites of the law have been complied with shall be as valid as the form here prescribed; and such deed or conveyance, so certified, shall pass all the right, title, and interest which the husband and wife, or either of them, may have in or to the property therein conveyed." Paschal's Digest.

The last clause of the statute is sufficient authority for sustaining the certificate in this case, because it appears that Mrs. Hensley declared that with her husband she signed, sealed, and delivered the deed to C. A. Few, and upon her privy examination "she, after having the deed explained to her," declared that she signed it "of her own free

will and accord, without fear or compulsion on the part of her husband." She had the opportunity to retract, but instead of doing so she affirmed that it was her free and uninfluenced action. In addition, it is beyond dispute that Mrs. Hensley and her children lived near the land for many years, and that neither she nor her heirs ever made claim to the land.

In *Belcher v. Weaver*, 46 Tex. 293, 28 Am. Rep. 267, Chief Justice Roberts 'made a thorough analysis of that statute, and said: "The general rule upon this subject is that there must be a substantial, though not a literal, compliance with the terms of the statute, and that, although words not in the statute are used in the place of others that are, or words in the statute are omitted, yet, if the meaning of the words used is the same, or they represent the same fact, or, if the omission of a word or words is immaterial, or can be supplied by a reasonable and fair construction of the whole instrument, the certificate will be held sufficient. * * * It follows, then, that any artificial distinctions being made for the purpose of showing that one of the nominal parts is not specifically embraced, or that one part is defectively stated, will not avail, if from the evident sense of the whole instrument a reasonable conclusion can be arrived at that the requisites of the law have been complied with."

The rule of construction to be applied to such instruments as above copied is that the courts will give a liberal construction to the language of such certificates, and will sustain them, if it reasonably appears from the language used that the married woman "did not wish to retract it."

In the case cited above the learned judge construed the word "contract" to mean "retract." "Contract" means to enter into, while "retract" means to withdraw from; and any but the most liberal interpretation of those words would have shown that the woman did not wish to make the conveyance. That the substance of the language of the statute will be sufficient when used in the privy acknowledgment of a married woman, is sustained by the following cases: *Belcher v. Weaver*, 46 Tex. 293, 28 Am. Rep. 267; *Norton v. Davis*, 83 Tex. 32, 18 S. W. 430; *Masterson v. Harris*, 37 Tex. Civ. App. 145, 83 S. W. 423; *Adams v. Pardue* (Civ. App.) 36 S. W. 1015. Many cases might be cited to the same effect; but we find no case in which it has been held that a certificate of this character, which omitted the words, "she wished not to retract it," was condemned, if from the language of the certificate it appears with reasonable certainty that the instrument was explained to the woman, and that she then expressed herself to be satisfied with the transaction. Each certificate must be judged by its own terms, and we believe it to be the well settled and sound

rule that any language which shows that the statute has been substantially complied with must be sustained.

The words, "that she did not wish to retract it," are of no greater importance than others. Those words simply express her satisfaction with the transaction at that time; and if that state of mind should, by other words, be shown to have existed the certificate would be valid. We here copy the certificate:

"State of Texas, County of Rusk:

"Personally appeared before me, the undersigned notary public, Samuel Hensley and Emily J. Hensley, his wife, both to me well known, who acknowledged that they signed, sealed and delivered the above and foregoing deed to C. A. Few (by making their marks). And the said Emily J. Hensley, wife of Samuel Hensley, being by me examined privily and apart from her husband and after having the deed explained to her, says that she signed the same by making her mark of her own free will and accord, without fear or restraint on the part of her husband. Given under my hand and official seal this Sept. 8, 1887. [Signed] William M. Ross, Notary Public."

This certificate shows that the husband and wife together executed and acknowledged the deed, after which the wife was removed from the presence of the husband, so that she would be entirely free from his influence. The officer took the precaution to explain the deed to Mrs. Hensley, so that she could not be misled by anything said to her by her husband or other person as to the effect of the conveyance; and, thus informed and guarded by the officer, she declared "that she signed the same of her own free will and accord." Thus she declared that she was free from any compelling influence, and without any "fear or restraint on the part of her husband." The law offered to her the opportunity to *retract*, but in strong language she, in effect, affirms the transaction. We will suppose that Mrs. Hensley had appeared before this court, and, knowing that she could retract, had in the language of the certificate expressed herself, would not this or any other court say that she was satisfied with the transaction? It is safe to construe the language of the certificate as if the court were performing the duties of the officer; and if Mrs. Hensley, with the same warning, should use the words of this certificate, would it not reasonably appear to such court that she was satisfied? Adding to this the fact that for the remainder of her life she recognized the deed as valid, can there be a reasonable doubt on this question?

[2] It is not necessary for us to decide in this case whether a stranger to the title should ever be permitted to interpose this defense, but we are firmly convinced by authority and sound reasoning that under such

conditions a court should construe the language as Mrs. Hensley and her heirs have construed it by their inaction for a half century. If a stranger to the title be permitted to make such objection, courts should cast upon him the burden of establishing the invalidity.

We have in this case, by the decision of the Court of Civil Appeals, a stranger setting up a defect which the vendor refused to assert. The injustice and unreasonable character of the proposition forbids that this court should approve it, unless required to do so by precedents that we dare not disregard. We do not find the decisions of our courts to be of that character.

It is ordered that the judgment of the Court of Civil Appeals should be reversed, and that the judgment of the district court be affirmed.

COLEMAN v. ZAPP et al.

(Supreme Court of Texas. Dec. 18, 1912.)

1. JUDGMENT (§ 1*)—WHAT CONSTITUTES.

The judgment of a court is that which it pronounces, that is, the judicial act by which it declares the decision of the law upon the matter at issue; its entry being a ministerial act affording permanent evidence of the judicial act.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1, 3, 4; Dec. Dig. § 1.*]

For other definitions, see Words and Phrases, vol. 4, pp. 3827-3842; vol. 8, pp. 7695, 7696.]

2. JUDGMENT (§ 293*)—ENTRY—EFFECT OF FAILURE.

The failure to correctly or fully enter a judgment upon the minutes does not annul it, but merely makes its record imperfect.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 578; Dec. Dig. § 293.*]

3. JUDGMENT (§ 326*)—NUNC PRO TUNC ENTRY.

A court has inherent power to correct a judgment by entry nunc pro tunc, so as to properly recite the effect of its judgment.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 628; Dec. Dig. § 326.*]

4. JUDGMENT (§ 299*)—CORRECTION—TIME.

A court's jurisdiction over its judgment records does not end with the term; the case being regarded as pending until the judgment is correctly recorded.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 583-586; Dec. Dig. § 299.*]

5. LIMITATION OF ACTIONS (§ 39*)—PROCEEDINGS TO CORRECT JUDGMENT—"ACTION."

A proceeding by scire facias to correct a judgment, the entry of which omitted to show that it was against a certain party for a certain sum, is not an "action" to correct a judgment within Rev. St. 1895, art. 3353, providing that every action other than for the recovery of realty for which no limitations are otherwise prescribed shall be brought within four years next after the right to bring same shall have accrued.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 190-211; Dec. Dig. § 39.*]

For other definitions, see Words and Phrases, vol. 1, pp. 128-140; vol. 8, p. 7563.]

6. JUDGMENT (§ 294*)—ENTRY.

The right of parties to have a judgment entry correspond with the terms of the judgment is not affected by rule 48 for the government of the district courts (142 S. W. xxi), requiring counsel for the successful party to prepare the form of the judgment and submit it to the court.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 579, 614; Dec. Dig. § 294.*]

7. JUDGMENT (§ 321*)—CORRECTION—DEFENSES—LACHES.

A delay of six years, from the time of rendition of a judgment and its imperfect entry to the application for a nunc pro tunc entry, to supply an omitted part, would not bar such relief, where the position of the parties had not meanwhile changed and no intervening rights had accrued so as to make it inequitable to grant the relief.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 619, 620; Dec. Dig. § 321.*]

8. JUDGMENT (§ 318*)—ENTRY—CORRECTION.

The right of a party to have a judgment entry corrected or amended to speak the truth cannot be exercised to the prejudice of innocent third persons.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 633; Dec. Dig. § 318.*]

9. ATTACHMENT (§ 13*)—RIGHT—REVIVAL OF JUDGMENT.

An attachment was properly issued in scire facias to have a judgment entry corrected by adding an omitted part, and to revive the judgment; the proceeding to revive being merely a suit for the debt.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. § 23; Dec. Dig. § 13.*]

Error to Court of Civil Appeals of Third Supreme Judicial District.

Petition for scire facias by Helen Zapp and another against Kate Coleman. From a judgment of the Court of Civil Appeals (135 S. W. 730), affirming a judgment awarding the relief sought, the defendant named, a judgment creditor, brings error. Affirmed.

W. L. Eason and Tom G. Dilworth, both of Waco, for plaintiff in error. E. W. Handler and Williams & Williams, both of Waco, for defendants in error.

PHILLIPS, J. In the trial court this was a proceeding by scire facias, instituted by the defendants in error in the year 1909, to have entered nunc pro tunc and to revive a judgment rendered in 1903 in their favor against the plaintiff in error, in connection with which proceedings an attachment was sued out and levied. The judgment involved was originally obtained in 1898, but no execution was issued within one year from its rendition. In 1902 levy of an execution sued out on the judgment was made upon property belonging to the plaintiff in error, who thereupon filed an injunction suit to restrain its sale upon the ground that the judgment was dormant and the property levied upon exempt. In that suit defendants in error, defendants therein, pleaded their judgment and prayed that it be revived. Another party intervened claiming a lien upon the property seized. Upon a hearing of the case the court rendered the following

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

judgment, according to the docket entry in the judge's handwriting (the Kate McChesney mentioned being the plaintiff in error, such being her name at that time): "4/8/03. Judgment for plaintiff perpetuating the injunction heretofore issued, and for defendants for balance due on the judgment sued on by them, viz., \$1,823, against Kate McChesney, alias Winnie Clark, and her husband so far as he may be liable and for intervenor against both plaintiffs for amount of its debt, etc., to which defendants except and give notice of appeal." In the entry of the judgment upon the minutes, however, that part of it which awarded a recovery in favor of these defendants in error against the plaintiff in error of \$1,823 was omitted. This proceeding, instituted by defendants in error in 1909 as stated, by petition filed in the same cause, proposed no change in the judgment as entered in the minutes, other than to incorporate in it, in proper form, such omitted portion and as actually decreed by the court.

It is contended by plaintiff in error that the proceeding was an "action" to correct a judgment and therefore barred by the limitation provided in article 3358, R. S. 1895, which is as follows: "Every action other than for the recovery of real estate, for which no limitation is otherwise prescribed, shall be brought within four years next after the right to bring the same shall have accrued, and not afterwards."

The solution of this question lies primarily in the substantial distinction which exists between the rendition and the entry of a judgment, and between the exercise of powers inherent in a court and those which depend for their operation upon the petition of parties.

[1] The judgment of a court is what the court pronounces. Its rendition is the judicial act by which the court settles and declares the decision of the law upon the matters at issue. Its entry is the ministerial act by which an enduring evidence of the judicial act is afforded.

[2] The failure of the minute entry to correctly or fully recite what the court judicially determined does not annul the act of the court, which remains the judgment of the court notwithstanding its imperfect record. *Freeman on Judgments*, § 38.

[3] Hence it is that from the earliest times the power of correcting or amending their records, by nunc pro tunc entry, so as to faithfully recite their action, has been possessed and exercised by the courts as an inherent right, independent of any statute, and, in the absence of express provision, unaffected by limitation. *Freeman on Judgments*, § 56; *Ency. Pl. & Prac.* vol. 18, p. 459. Our statutes providing for the correction of mistakes in the record of judgments and decrees (articles 1356 and 1357, *Sayles' Civil Stat.*) govern the procedure of its exercise; but they are only cumulative of this

inherent power of the courts to have their records at all times speak the truth. If a court is made aware that through mistake or omission its records do not recite its judgment as actually rendered, we do not doubt that it is not only the right but the duty of the court, of its own motion and after due notice to the parties, to order the proper entry. The nature of a judicial record, the accuracy of which is the peculiar concern of the court and which for that reason and to that extent remains within the court's control, forbids that its correctness as an expression or evidence of judicial action should depend upon the inauguration of a proceeding by the parties; and it is therefore plain that such a proceeding only invokes an authority which the court may exercise of its own accord. In *Ximenes v. Ximenes*, 43 Tex. 458, Judge Moore quoted the following language from the opinion of Judge Wheeler in *Burnett v. State*, 14 Tex. 456: "Every court has the right to judge of its own records and minutes, and, if it appear satisfactorily to them that an order was actually made at a former term and omitted to be entered by the clerk, they may at any time direct such order to be entered on the records as of the term when it was made." And then announced: "And there can be no doubt, we think, that this court may, at a subsequent term after a final judgment, if there is the proper predicate for it, correct clerical errors or mistakes, cure defects of form, or add such clause as may be necessary to carry out the judgment of the court, make the entry in the minutes correspond with and correctly express the judgment actually rendered, as shown by the entire record." In *Whittaker v. Gee*, 63 Tex. 435, it was held by Chief Justice Willie as follows: "Frequent decisions of this court have settled the right to have a judgment amended after the expiration of the term at which it was obtained, when, through mistake or clerical error, the record does not speak fully or truly the judgment actually rendered in a cause."

A proceeding of such character, whose only purpose is to have the judgment entry speak truly the judgment as rendered, neither asserts nor seeks the enforcement of any new right. It presents no issue between the parties except in respect to the accuracy of the record, and otherwise involves the adjudication of nothing between them. It is powerless to reopen the controversy as closed and sealed by the judgment, and makes no such attempt. The inquiry under it is not what judgment might or ought to have been rendered, but only what judgment was rendered; and such is the sole issue to be determined. If an amended or corrected entry be ordered, the status of the parties and their relative rights, as decreed and fixed by the judgment, remains untouched and unaltered, in no sense adjudicated anew, but only judicially evidenced as originally determined. The result is that only that is done by the

court which it had the inherent power to originally do as a part of its decision of the case, and which it would have done in the interest of a truthful record.

[4] It is as much the concern and duty of the court to have its records faithfully recite its judgments as it is to render the judgments themselves, and for that reason it is held that its jurisdiction over its records does not end with the term. In this sense a case is regarded as pending until the judgment rendered is correctly recorded. It is the right of parties to have such a record; and it ought not to be the law, and in our opinion it is not the law, that they are under the necessity of instituting an independent suit to obtain it.

[5] A proceeding of this nature cannot, therefore, be regarded as an "action" within the meaning of the statute referred to, and is not affected by the limitation therein provided.

It is not questioned here that in the injunction case above mentioned a judgment for \$1,823 in favor of the defendants in error against the plaintiff in error was actually rendered by the court, and it is therefore beyond dispute that, because of the omission of this much of what the court pronounced, the entry upon the minutes failed as a record to evidence the entire judgment rendered in the case.

It should also be noted that this proceeding did not have for its purpose the correction or amendment of the judgment rendered by the court as distinguished from the entry of the judgment upon the minutes. It sought only to amend the entry, *nunc pro tunc*, so as to include that which was omitted and thereby afford a faithful record of the whole judgment. In other words, it did not seek the amendment or correction of a judicial mistake as distinguished from a clerical mistake or omission. It is clearly distinguishable, therefore, from the cases of *De Camp v. Bates* (Civ. App.) 37 S. W. 644, in which a writ of error was refused by this court and which is now invoked by the plaintiff in error (*Railway Co. v. Haynes*, 82 Tex. 448, 18 S. W. 605), and others which involved the correction, not of the entry of a judgment, but what was charged to have been a mistake in its rendition. In *De Camp v. Bates* the judgment as rendered was against a partnership. It was so entered without running also against the individual members of the partnership. Suit was filed to so correct it as to include a judgment against them individually. The trial court refused the relief, because, among other reasons, the evidence was not sufficient to show that the judgment as entered was not the judgment actually rendered. The case in effect was that as the judgment, not only as entered but as rendered, was not against the individual members of the partnership as it was claim-

ed it should have been, the court was asked to correct the judgment so as to so render it. An amended rendition of the judgment was really the relief sought, which is distinctly different in its nature from an effort only to have accurately entered what had been correctly rendered.

In *Railway Co. v. Haynes*, the trial judge, in his computation of the damages he intended to award the plaintiffs, omitted a certain amount through oversight, and accordingly rendered judgment for a mistaken amount. The mistake consisted in the rendition of the judgment. It was a judicial mistake, not a clerical one, and was properly held as not subject to correction by the trial court on mere motion after adjournment of the term.

These two cases well illustrate the distinction which lies clearly defined between a suit to correct a judgment because of a mistake of the court in its rendition, whereby an improper judgment is rendered but its entry is in accordance with the rendition, and a proceeding to correct or supply the minutes of the court so as to have them truly recite the judgment actually rendered. To correct in the trial court, after adjournment of the term, a judgment as rendered, an independent action is necessary, as its jurisdiction of the case is at an end. In the latter instance the court may, at a subsequent term, of its own motion or upon the application of parties, order the proper entry because the inherent power that it possesses as a court over its own records endures for the sake of their verity.

[6] The right of parties to have the entry correspond with the judgment rendered is not affected, as is contended by counsel for plaintiff in error, by rule 48 for the government of the district courts (142 S. W. xxi), which provides that counsel of the party for whom a judgment is to be rendered shall prepare the form of the judgment to be entered and submit it to the court. While that rule imposes a proper duty upon counsel for the successful party and should be enforced, its operation is not such as to make the records of the court depend upon the diligence or care of counsel in the case. The court has an independent concern in the correctness of its records, and its right in the premises cannot be disposed of by the negligence or omission of attorneys for the parties.

[7] We do not regard the question of laches as involved in the case. True, there was an interval of six years between the date of the rendition of the judgment and the application for the *nunc pro tunc* entry; but laches means more than mere delay. The position of the parties had undergone no change, no intervening rights had accrued, and nothing was shown that made inequitable the granting of the order for a prop-

er entry of the judgment. In the injunction case the plaintiff in error admitted in her pleadings that she owed the defendants in error the amount awarded; the judgment was therefore fairly rendered; it remained unsatisfied; and it was, accordingly, but right and just that it should be entered so that it might possess the force and virtue to which as a judgment it was entitled.

[8] While it is our opinion that the right to have the entry of a judgment corrected or amended so as to truthfully speak the judgment as rendered is not affected by statutes of limitation, we do not wish to be understood as holding that it may not be defeated by the laches of the party invoking it, under a correct application of that doctrine. It should be also stated that it can never be availed of to the prejudice of the rights of innocent third parties.

[9] The defendants in error in this proceeding sought to revive the judgment by scire facias, in addition to having a proper entry of it carried to the minutes, and in connection with their suit to so revive the judgment, as has been said, an attachment was sued out and levied. It is contended that an attachment could not lawfully issue in such a scire facias proceeding.

The judgment was dormant under the statute because no execution had been issued within a year from its rendition. No execution could issue in the first place until it was entered in the minutes. *Brown v. Reese*, 67 Tex. 318, 3 S. W. 292; *Hubbart v. Willis State Bank*, 55 Tex. Civ. App. 504, 119 S. W. 711. It was entitled to be revived, but until revived it could not be enforced by execution. Though dormant and its revival was sought by scire facias, it was nevertheless a debt. *Slaughter v. Owens*, 60 Tex. 671. While the technical judgment upon a scire facias to revive a judgment is ordinarily only that execution issue, effect should be given to the substance of the proceeding rather than its form. As the judgment was a debt, the proceeding to revive it was nothing more nor less than a suit for debt, and the attachment was accordingly authorized. As early as *Bullock v. Ballew*, 9 Tex. 498, it was recognized that an action to revive a judgment is substantially an action of debt. With a judgment debtor about to make a fraudulent disposition of his property the law would impose upon an owner of a dormant judgment a hard condition if, with the right to an execution refused, it likewise denied him the right to an attachment upon the institution of a suit to revive his judgment.

The honorable Court of Civil Appeals has correctly disposed of the case. Its judgment and that of the district court should be affirmed, and it is so ordered.

GILES v. STATE.

(Court of Criminal Appeals of Texas. Dec. 11, 1912.)

1. CRIMINAL LAW (§ 949*) — NEW TRIAL — GROUNDS—VERIFICATION.

A judgment of conviction will not be set aside on the ground that accused, as shown by his verification alone in support of his motion for new trial, was taken by surprise, in that his attorneys, who had been employed by his relatives, refused to go into the case at the last moment, and before he had opportunity to employ other counsel, and that he was thereby deprived of witnesses who could establish a defense.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2337-2344; Dec. Dig. § 949.*]

2. CRIMINAL LAW (§ 1114*)—RECORD—ABSENCE OF TESTIMONY AND BILLS OF EXCEPTIONS—QUESTIONS REVIEWABLE.

Where the record on appeal does not contain the testimony or bills of exceptions, the question whether an issue was material, and that accused was entitled to have the jury pass on certain testimony, will not be considered.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2918, 2921; Dec. Dig. § 1114.*]

Appeal from Criminal District Court, Dallas County; Barry Miller, Judge.

Merritt Giles was convicted of burglary of a railroad car, and he appeals. Affirmed.

C. E. Lane, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted of burglary of a railroad car; his punishment being assessed at two years' confinement in the penitentiary.

[1] The grounds of the motion for a new trial are not verified, other than by the fact that appellant swore to the motion. The first ground of the motion sets out the fact that he was taken by surprise, in that his attorneys, who had been employed by his relatives, refused to go into the case at the last moment and before he had opportunity to employ other counsel; that he was deprived of any witnesses by reason of that fact; that he could establish a defense by several witnesses whose names are mentioned, and by whom he could prove an alibi. This is in no way verified, except by his personal affidavit. The attorneys who were supposed to have been employed by his relatives were not brought before the court, nor was any evidence offered to show that his statement was true. A judgment of conviction usually will not be set aside simply upon the affidavit of counsel, without verification in some manner by bill of exceptions or facts introduced to show the truthfulness of the statement.

[2] By the second ground of the motion he says he could show he was arrested by a policeman named Briggs, and that on the trial Hardy swore that he was the man who arrested defendant. He says this was a material issue, and that he was entitled to

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

have the jury pass on this testimony. These matters are all too late, when raised in the motion for new trial, and in the absence of the testimony and bills of exception, which are not sent up with the record, we cannot intelligently revise any of these questions.

The judgment is affirmed.

BIGLIBEN v. STATE.

(Court of Criminal Appeals of Texas. Dec. 11, 1912.)

1. WITNESSES (§ 344*)—EVIDENCE—REPUTATION OF PROSECUTRIX.

Accused, on a trial for rape on a female under the age of 15 years, may, to affect her credibility, show that prior to the time of the alleged offense she had been an inmate of houses of ill fame, but he may not prove, as affecting her credibility, isolated or independent acts of immorality.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1120, 1125; Dec. Dig. § 344.*]

2. WITNESSES (§ 344*)—EVIDENCE—REPUTATION OF PROSECUTRIX.

Though accused, on a trial for rape on a female under the age of 15 years, showed on the cross-examination of prosecutrix that her act with him was the first act committed, he could not impeach her by showing her prior individual and isolated acts of immorality.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1120, 1125; Dec. Dig. § 344.*]

3. CRIMINAL LAW (§§ 417, 444*)—HEARSAY EVIDENCE—AGE—FAMILY RECORDS.

Where an entry of date of birth is made in a family Bible at or about the time of birth, and this fact is proven, the entry is admissible to prove the date of birth, but when the father is living and in attendance in court, and the entry is shown to be in his handwriting, he must be called to testify that the entry was made contemporaneous with the event.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 950-957, 1028; Dec. Dig. §§ 417, 444.*]

4. CRIMINAL LAW (§ 1120*)—EVIDENCE—REVIEW—RECORD.

The sustaining of objections to questions propounded is not reviewable on appeal, where the answers to the questions are not stated in the record and the record does not state what could have been proven.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2931-2937; Dec. Dig. § 1120.*]

Appeal from District Court, Nueces County; W. B. Hopkins, Judge.

John Bigliben was convicted of crime, and he appeals. Reversed and remanded.

Pope & Taylor and H. R. Sutherland, all of Corpus Christi, for appellant. U. E. Lane, Asst. Atty. Gen., for the State.

HARPER, J. Appellant was prosecuted and convicted of rape on Maud Elaine Sargent, a girl alleged to have been under 15 years of age, and his punishment assessed at five years' confinement in the penitentiary.

[1] In this case it is shown by several bills of exception that the prosecuting witness, Miss Maud Sargent, testified to an act of intercourse with appellant on the 25th day

of December, 1910, and that appellant while cross-examining her asked several questions, and she answered as stated; the questions and answers being: "Q. You told Mrs. Thomas how you happened to do wrong in the first instance? Did you tell her that? A. Yes, sir. Q. That you told Mrs. Thomas that the first time that you had carnal intercourse with a person was with this defendant? A. Yes, sir. Q. Was that true? A. Yes, sir. Q. How came you to tell Mrs. Thomas? A. Because she asked me how I came—how it was that I came to have to go to such a place as the rescue home. Q. How came you to have to go to such a place as the rescue home, and you told her of this one particular act of intercourse, was that it? A. I told her how I came to make the mistake the first time; yes, sir. Q. Did you state to Mrs. Thomas that the first time that you had carnal intercourse with a person was with this defendant? A. Yes, sir. Q. Was that true? A. Yes, sir." Several questions along this line were asked the witness by appellant's counsel, and he then asked her, "Do you know if you swear a lie you can be sent to the penitentiary?" and she answered that she did, when the question was asked, "Now, do you mean to swear that on the 25th day of December, 1910, was the first time you ever had carnal intercourse with any man?" when the district attorney objected on the ground that same was immaterial and irrelevant, which objection was sustained by the court. Appellant's counsel stated to the court that the witness had testified to an act of intercourse with the defendant on December 25, 1910, and had said this was the first act of intercourse she ever had with any man, and he was asking these questions with the purpose and expectation of proving that prior to December 25, 1910, she had visited houses of prostitution belonging to Ida Mitchell, Hannah Brandt, and Ida Murray, and while in those houses she had had intercourse with a dozen different men, naming them, all prior to December 25, 1910, when the state's counsel moved the court to exclude that portion of the witness' testimony in which she stated this was the first act of intercourse, and that she had so told Mrs. Thomas, which motion was by the court sustained. Appellant, when offering his testimony, tendered testimony to show that the prosecuting witness had been an inmate of these three houses of prostitution, and while in those houses had submitted to acts of intercourse with Will Lingenfeldt and 24 others, naming each of them, all prior to the time she stated she had had this act of intercourse with appellant. The court refused to permit appellant to ask her if she had had intercourse with these men or either of them in these houses of prostitution prior to December 25th, and refused to permit the defendant to offer any proof that she had been an i-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Index

mate of these houses prior to that time, or had had intercourse with these men, on the ground that he had stricken from the record all testimony that would show that the act of intercourse with appellant was the first act of intercourse.

Appellant in a number of bills excepted to the action of the court in striking this testimony from the record, and in excluding this testimony, specially excepting on the ground that, while the court had stricken from the record the testimony of the witness that this was the first act of intercourse, yet the court had permitted to remain in the record as evidence before the jury the testimony that at the time of this intercourse "she bled and it pained her, and that she almost fainted at the time." In this case the prosecuting witness testifies positively to the act of intercourse with appellant on December 25th, while appellant positively denies having had intercourse with her on that date, or at any other time. Of course, if the prosecuting witness was under 15 years of age, it would be immaterial whether or not she had had intercourse with any other man, for if appellant had intercourse with her he would be guilty under the statute; yet if a witness has become so morally depraved as to become an inmate of a public house of prostitution, and offers her body for sale publicly, we think testimony showing that fact ought to be admitted as affecting her credit as a witness in this character of case. And when the defendant offered testimony that, prior to the time she says she had this act of intercourse with appellant, she was an inmate of a house of prostitution in Corpus Christi, receiving men and selling her person to them, this conduct showed such a depraved state of morals as to render such testimony admissible. We have always held that, when a person has been charged with or convicted of any offense which would involve moral turpitude, it may be shown to affect their credit. In this case a girl claiming to be under 15 years of age says she had an act of intercourse with a certain man. He denies it, and offers to show, as affecting her credit as a witness, that she was an inmate of a house of prostitution immediately prior to that alleged act, and he ought to have been permitted to introduce evidence of that fact; the court, of course, instructing the jury the purpose for which said testimony was admitted. Of course, it is not intended to hold that other isolated acts of intercourse may be shown as affecting her credit, or for any other purpose; it is only where by her whole conduct and course in life she manifests that low state of morals which would place her in the category of what is known

as a common prostitute, that it becomes admissible. *McGrath v. State*, 35 Tex. Cr. R. 415, 34 S. W. 127, 941.

[2] The court did not err in refusing to permit appellant to prove individual acts of intercourse, and, if her testimony that the intercourse with appellant was the first act had not been stricken from the record, it would not have been permissible to impeach her on that point, as he had drawn it out on cross-examination, and it would be impeachment upon an issue that would furnish no defense, yet the fact that she was an inmate of a house of prostitution ought to have been admitted.

[3] Another sharply contested issue in the case was the age of the prosecuting witness. She testified she would become 15 years old on January 11th, 17 days after the date on which she says the offense was committed. The defendant offered proof that she had told a number of people that she was 16 years of age at that time, and her appearance, etc., appears proven in the record. In rebuttal the state introduced in evidence what the prosecuting witness says was the family Bible with the date of her birth entered therein, as she says, in her father's handwriting. The record discloses that her father was living, and in attendance on court, and the witness says she does not know when the entry was made by her father. When an entry of date of birth is made in a family Bible, at or about the time of birth, and this fact is proven, it is admissible to thus show the date of birth. But when the father is living and in attendance on court, and the entry is shown to be in his handwriting, and no testimony is offered as to when he made the entry in the Bible, it should not be admitted; but, if it is desired to prove that fact, let him be called, or some witness called who can testify that the entry was made contemporaneous with the event. An entry of this character shown to have been made at or about the date of birth is, if anything, stronger evidence than one's memory.

[4] There are a number of other questions presented, but we deem it unnecessary to discuss them. Those bills which attempt to complain of the failure to permit them to show that the prosecuting witness and her father attempted to blackmail several people by stating, if they would pay so much money, prosecutrix and her father would leave the country, otherwise prosecutions would be instituted, are not in condition we can review them, for, while the questions propounded are shown, the answers to the questions are not stated, nor is it stated what could have been proven.

The judgment is reversed, and the cause is remanded.

YOUNG et al. v. STATE.

(Court of Criminal Appeals of Texas. Dec. 11, 1912.)

1. HOMICIDE (§ 310*)—ASSAULT TO KILL—INSTRUCTIONS—AGGRAVATED ASSAULT.

Where it might have been found from the testimony in a prosecution for assault to kill that there was no intent to kill, but simply a shooting to frighten, or merely to injure, an instruction that if the assault resulted in a killing, which would have been manslaughter, a verdict of aggravated assault would be proper in view of the fact that no killing occurred, was too restrictive; and the refusal of an instruction that, if serious bodily injury was inflicted with a deadly weapon under circumstances not amounting to an intent to kill or maim, the offense would be an aggravated assault, was error.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 657-661; Dec. Dig. § 310.*]

2. HOMICIDE (§ 86*)—ASSAULT WITH INTENT TO KILL—"AGGRAVATED ASSAULT."

Where there is no intent to kill, but simply a shooting to frighten or even to inflict injury without killing, the offense is aggravated assault.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 112; Dec. Dig. § 86.*]

For other definitions, see Words and Phrases, vol. 1, pp. 270-271.]

3. HOMICIDE (§ 84*)—"ASSAULT WITH INTENT TO COMMIT MURDER"—ELEMENTS OF OFFENSE.

To constitute the offense of assault with intent to murder, there must be an assault with a specific intent to kill actuated by malice; but many cases may arise where there is a specific intent to kill, and yet where the assault would not be an assault with intent to kill where no killing resulted.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 110; Dec. Dig. § 84.*]

For other definitions, see Words and Phrases, vol. 1, pp. 541-542; vol. 8, p. 7583.]

4. CRIMINAL LAW (§ 761*)—TRIAL—INSTRUCTIONS—PROVINCE OF JURY—ASSUMPTION OF FACTS.

In a prosecution for assault to kill, a charge assuming as a fact that defendants, or one of them, were in the wrong from the beginning, and had assaulted the prosecuting witness with unlawful intent, when such conduct on the part of defendants was a disputed issue, was erroneous as a charge on the weight of the evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1731, 1738, 1754-1764, 1771; Dec. Dig. § 761.*]

Appeal from District Court, Jasper County; W. B. Powell, Judge.

Will Young and Tom Longwood were convicted of assault to murder, and they appeal. Reversed and remanded.

J. J. Lee, of Jasper, for appellant. C. E. Lane, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. This conviction was for assault to murder. Young was given 15 years, and his codefendant, Tom Longwood, was given 2 years.

On the 16th day of March, this year, appellants, while en route from the town of Remlig to Browndell, carried with them in a hand grip some whisky, which Young had

received at the express office. Between the two places they met prosecuting witness Oakes and his companion by the name of Alvis. Oakes asked for whisky and finally a sale was made to him of a pint of whisky. There is testimony tending to show that Oakes attempted to arrest appellants, and that he undertook to draw a pistol. Appellant Young drew a pistol, and fired at Oakes two or three times; one shot taking effect in his arm. The testimony is seriously in conflict as to whether Oakes was shot at after he was disarmed. He was disarmed during the trouble. The testimony is widely variant in regard to the circumstances attending the difficulty. The testimony of Alvis, who was with Oakes, is about as follows: "Mr. Oakes bought a pint from them [meaning whisky]. I did not know the fellow that came along. Mr. Oakes had a \$5 bill, and got the change from that man. [This seems to have been a passing white man, who was not, however, used as a witness in the case.] Mr. Oakes said, 'You go on with us,' and Will Young got his pistol from under his overalls." Oakes denied this testimony of Alvis. He remarked that "we would all go together," and defendant's testimony is to the effect that Oakes reached for his pistol and said, "Hold up," and Alvis jerked his pistol and fired one shot, striking Longwood in the hip or leg. Longwood was shot by somebody. The state's contention was that the ball that struck the arm of Oakes also struck Longwood. Young's testimony is to the effect that he thought he was being held up by somebody, and he did not know but they were going to rob him at the time Oakes reached for his pistol, and Alvis pulled his and fired. Alvis denied having any pistol. The testimony further shows as soon as the firing began Alvis ran in one direction and Longwood in the opposite direction. The testimony is also directly in conflict as to how Longwood obtained the pistol that belonged to Oakes. The defendants' testimony is that Oakes when struck in the arm dropped his pistol, and, when Longwood came back, Young told him to pick it up, and they would not return it to Oakes for fear he might raise further trouble with them, or shoot them, and the pistol was given to somebody else, and finally returned to Oakes. Oakes' testimony is to the effect that he did not draw his pistol, and, after Longwood returned to the scene of the trouble after his flight, that appellant Young made him get the pistol from off Oakes' person. Appellant Young testified he did not intend to kill Oakes; that he could have done so with ease, especially after Oakes' pistol had dropped. The parties were only a few feet apart. Oakes' testimony indicates Young did intend to kill him. It is unnecessary to go into a detailed statement of the testimony. It may be generally stated that it is as seriously in conflict as testimony well could be. The defendants

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

say that they did not know that Oakes was an officer, and state, further, if they had known he was an officer, they never would have exhibited their whisky, and especially would not have sold any.

There are two propositions submitted for revision: First, the court failed to submit to the jury all the phases of aggravated assault made by the testimony, and practically directed the jury that, unless the minds of appellant at the time of the assault were incapable of cool reflection, they would be guilty of an assault with intent to murder, even though there was no specific intent to kill said Oakes by them; second, that the charge of the court was upon the weight of the evidence in many places, and assumed in several portions of the charge that defendants or one of them had an unlawful intent, and that an offense had been committed by them, and was, therefore, prejudicial to them.

[1] The court in his charge limited the jury in their consideration of aggravated assault to the theory that had the assault resulted in a killing, and it would have been manslaughter, then the jury would be justified in returning an aggravated assault verdict in view of the fact that no killing occurred. It is contended that this charge is entirely too restrictive, and that the jury should have been further instructed that it would have been an aggravated assault when serious bodily injury is inflicted upon the person assaulted, and when committed with a deadly weapon under circumstances not amounting to an intent to murder or maim. We are of opinion that the contention of appellant is correct.

[2] If there was no intent to kill, but simply by shooting at him to frighten him or even to inflict injury upon him without killing, then the assault would be of no higher grade than aggravated assault.

[3] In order to constitute the offense of assault with intent to murder, there must be an assault, and there must be a specific intent to kill, and this must be actuated by malice. There are many cases that arise and can arise where there was a specific intent to kill, and yet the assault would not be an assault with intent to murder where the killing did not occur. There must always be, however, the specific intent to kill in any event in order to constitute an assault with intent to murder. This question was fully discussed by Judge Ramsey in *Henderson v. State*, 55 Tex. Cr. R. 15, 115 S. W. 45. That case is quite similar to this in the main contention. The judgment in that case was reversed upon the grounds urged here for reversal. The court should have given in charge to the jury the law of aggravated assault here contended for by appellants.

[4] The charge of the court, we think, is subject to the criticism that it is on the weight of the evidence. To make this clear

the following portion of the charge is quoted: "When one offense is actually committed by one or more persons, and others are present, and, knowing the unlawful intent, aid by acts or encourage by words or gestures those actually engaged in the commission of the unlawful act, all are principal offenders, and may be prosecuted and convicted as such. The mere presence of Tom Longwood at the place where the shooting took place does not make him a principal. He must not only have been there, but must have known of the intent of his codefendant to assault J. M. Oakes, and, so knowing such unlawful intent, aided by acts or encouraged by words or gestures the said Will Young in the commission of the offense. No act done by Tom Longwood after all the shooting was over, however reprehensible it may have been, can make him a principal offender. His action or words in reference to the offense must have all been committed and said before the assault was made. If after the first shots were made by Will Young the said Tom Longwood came back and held a pistol on said Oakes, while his codefendant, Will Young, shot or shot at him again, if he did do so, such would make him, the said Longwood, a principal offender from such time. But if the shooting occurred between his codefendant Will Young and said Oakes, and he, said Longwood, knew nothing of the unlawful intent, and did not participate in the difficulty until after the shooting was over, he would not be a principal and you cannot convict him in this case." It will be noticed that the charge assumed a state of facts as if these parties were in the wrong, and especially the defendant Young. It may be stated as a fact that there was no question that Young fired two or three times. The state contends he fired four or five times. This is denied by defendants' witnesses, they stating that he only fired twice, and that, after Oakes was disarmed, he fired no more. The charge here assumes, or at least apparently assumes, the fact that defendants were in the wrong, and especially Young, from the beginning, and were the assaulting parties. The charge does not put it in the alternative, but assumes that Young was doing these things, and in such manner as to indicate that he was in the wrong. It is the rule in Texas under our statute that the charge must be so framed as not to assume facts against the defendant where the issues are in dispute. The jury is to decide those matters, and the charge must be so framed as not to invade the province of the jury. See *Ponton v. State*, 35 Tex. Cr. R. 597, 34 S. W. 950; *Bradford v. State*, 25 Tex. App. 723, 9 S. W. 46; *Searcy v. State*, 1 Tex. App. 440; article 715, White's Ann. Code of Crim. Procedure. To illustrate, the court charged the jury that the mere presence of Longwood would not make him a principal. He must have known of the intent of Young to assault Oakes, and, so

knowing such unlawful intent, encouraged said Young in the commission of the offense. This charge assumes a material fact in the case, or one of the material facts, and that was that Young had an intent and an unlawful one, and further that such unlawful intent was to assault Oakes, and the further material fact that Young had committed an offense. Upon another trial the charge in these respects will be given so as to avoid being upon the weight of the evidence.

The judgment is reversed, and the cause is remanded.

GASTON v. STATE.

(Court of Criminal Appeals of Texas. Dec. 11, 1912.)

CRIMINAL LAW (§ 1090*)—APPEAL—RECORD—NECESSITY OF STATEMENT OF FACTS.

Where there is neither statement of facts nor bills of exceptions accompanying the record, no question is raised on which the Court of Criminal Appeals can pass.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2653, 2789, 2803-2827, 2927, 2928, 2948, 3204; Dec. Dig. § 1090.*]

Appeal from Criminal District Court, Dallas County; Robt. B. Seay, Judge.

Ocey Gaston was convicted of robbery, and he appeals. Affirmed.

O. E. Lane, Asst. Atty. Gen., for the State.

HARPER, J. Appellant was prosecuted and convicted of robbery, and his punishment assessed at five years' confinement in the state penitentiary.

There being neither a statement of facts nor bills of exceptions accompanying the record, there is no question raised we can pass on. The indictment properly charges an offense, and the court in his charge submits this offense to the jury.

The judgment is affirmed.

MORGAN v. STATE.

(Court of Criminal Appeals of Texas. Dec. 11, 1912.)

CRIMINAL LAW (§ 1097*)—RECORD—QUESTIONS REVIEWABLE—REFUSAL OF INSTRUCTIONS.

Where the record on appeal from a conviction of murder in the first degree contains no statement of facts, the refusal to submit a lesser degree in the charge cannot be reviewed on appeal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2862, 2864, 2926, 2934, 2938, 2939, 2941, 2942, 2947; Dec. Dig. § 1097.*]

Appeal from Criminal District Court, Dallas County; Barry Miller, Judge.

Frank Morgan was convicted of murder in the first degree, and he appeals. Affirmed.

C. E. Lane, Asst. Atty. Gen., for the State.

HARPER, J. Appellant was prosecuted and convicted of murder in the first degree, and his punishment assessed at life imprisonment in the penitentiary.

The record is before us without a statement of facts. The appellant in his motion for new trial complains that the court should have submitted the lesser degree of murder than murder in the first degree in his charge. Without a statement of facts we cannot determine whether this should have been done or not; but from the nature of the offense, murder in an attempt to rob, we are inclined to think, if the facts were before us, we would hold that the court properly only submitted murder in the first degree.

There are many other grounds in the motion for new trial; but, in the condition the record is in, nothing is presented for us to review.

The judgment is affirmed.

GERRON v. STATE.

(Court of Criminal Appeals of Texas. Dec. 11, 1912.)

1. CRIMINAL LAW (§ 1090*)—APPEAL—RECORD—SUFFICIENCY.

The sufficiency of the evidence to support a verdict and judgment cannot be reviewed, where the record contains no statement of facts or bills of exception.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2653, 2789, 2803-2827, 2927, 2928, 2948, 3204; Dec. Dig. § 1090.*]

2. CRIMINAL LAW (§ 1090*)—APPEAL—RECORD—SUFFICIENCY.

Rulings on the admission of evidence cannot be reviewed, where the bills of exception thereto are not contained in the record.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2653, 2789, 2803-2827, 2927, 2928, 2948, 3204; Dec. Dig. § 1090.*]

Appeal from Criminal District Court, Dallas County; Barry Miller, Judge.

Henry Geron was convicted of burglary, and he appeals. Affirmed.

O. E. Lane, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted of burglary; his punishment being assessed at two years' confinement in the penitentiary.

[1, 2] The record is before us without statement of facts or bills of exception. The grounds of the motion for new trial are based on the insufficiency of the evidence to support the verdict and judgment, and two additional grounds allege that the court erred in excluding evidence and in admitting evidence as set out in bills of exception. The bills of exception are not in the record.

The judgment is affirmed.

GERRON v. STATE.

(Court of Criminal Appeals of Texas. Dec. 11, 1912.)

Appeal from Criminal District Court, Dallas County; Barry Miller, Judge.

Henry Gerron was convicted of burglary, and he appeals. Affirmed.

C. E. Lane, Asst. Atty. Gen., for the State.

PRENDERGAST, J. The appellant was indicted by proper indictment for burglary, and under a correct charge was convicted.

There is neither bills of exceptions nor statement of facts. The questions attempted to be raised by the motion for new trial cannot be considered without a statement of facts.

The judgment is therefore affirmed.

McDOWELL v. STATE.

(Court of Criminal Appeals of Texas. Dec. 11, 1912.)

1. HOMICIDE (§ 308*)—TRIAL—INSTRUCTIONS.

An instruction that if the jury believed from the evidence beyond a reasonable doubt that defendant on the specified day, with a knife which was then and there from the manner of its use a deadly weapon, did cut and kill deceased as charged in the indictment, they should find defendant guilty of murder in the second degree, was erroneous as authorizing a conviction, though defendant may have killed deceased in self-defense, or been guilty of no higher offense than manslaughter, or unintentional killing.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 642-648; Dec. Dig. § 308.*]

2. HOMICIDE (§ 309*)—SUDDEN PASSION—EVIDENCE—INSTRUCTIONS.

Where defendant and deceased had been intimate friends before the killing, and had had no previous difficulty, and there was no ill will or grudge between them prior to the fight which culminated in the homicide, it was error not to charge in accordance with White's Ann. Pen. Code 1911, art. 1149, that if defendant killed deceased under the influence of sudden passion, but by the use of means not calculated to produce death, he would not be guilty of homicide, unless it appeared there was a specific intent on his part to kill deceased.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 649-656; Dec. Dig. § 309.*]

3. HOMICIDE (§ 309*)—TRIAL—INSTRUCTIONS—EVIDENCE.

Where, in a prosecution for homicide, there was no evidence of provocation other than the blows inflicted on deceased by accused at the time of the difficulty, it was error to charge on manslaughter that the provocation must arise at the time, and must not be caused or brought about by any former provocation, etc.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 649-656; Dec. Dig. § 309.*]

4. HOMICIDE (§ 300*)—INSTRUCTIONS—SELF-DEFENSE.

In a prosecution for homicide, an instruction that if the jury believed that deceased was advancing on defendant and striking at him, and defendant had a knife in his hand, with which he had been whittling before the trouble commenced, and while defendant was backing and attempting to ward off the blows of defendant he struck him with the knife unintentionally and accidentally, and with no intent to injure or hurt him, then defendant should be acquitted, was objectionable as infringing the right of self-defense, since if defendant was

warding off the blows of deceased, who was striking at defendant while he was retreating, and by such means deceased was cut with defendant's knife, and with no intent on defendant's part to injure him, then defendant was entitled to an acquittal, and if defendant under such circumstances struck deceased with a knife, with or without an intent, he might not be guilty, being entitled to stand on his right of self-defense.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 614-632; Dec. Dig. § 300.*]

Appeal from District Court, Collin County; J. M. Pearson, Judge.

Clint McDowell was convicted of murder in the second degree, and he appeals. Reversed and remanded.

Clarence Merritt, of McKinney, for appellant. C. E. Lane, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted of murder in the second degree; his punishment being assessed at five years confinement in the penitentiary.

[1] Submitting the issue of murder in the second degree, the court thus charged the jury: "If you believe from the evidence beyond a reasonable doubt that the defendant, in the county of Collin and state of Texas, on the 21st day of May, 1911, as alleged, with a knife which was then and there from the manner of its use, a deadly weapon, did cut T. W. Allred and thereby kill T. W. Allred as charged in the indictment, you will find him guilty of murder in the second degree, and assess his punishment at confinement in the state penitentiary for any period that the jury may determine and state in their verdict, provided it be not less than five years." There were quite a number of exceptions to this charge urged below and insisted upon as grounds for reversal here. This charge has been condemned in many cases as being incorrect. It would authorize the conviction of appellant for murder in the second degree, although he may have killed in self-defense, or have been guilty of no higher offense than manslaughter, or even if it was an unintentional killing. For this error the judgment must be reversed. *Clark v. State*, 51 Tex. Cr. R. 519, 102 S. W. 1186; *Best v. State*, 58 Tex. Cr. R. 327, 125 S. W. 909; *Smith v. State*, 57 Tex. Cr. R. 585, 124 S. W. 679; *Patton v. State*, 62 Tex. Cr. R. 71, 136 S. W. 459; *Anderson v. State*, 144 S. W. 282.

[2] It is contended the court erred in not charging the provisions of article 1149 of the Revised Penal Code, to the effect that if they believed defendant killed the deceased under the influence of sudden passion, but by the use of means not calculated to produce death, defendant would not be guilty of homicide, unless it appeared that there was a specific intent on the part of the defendant to kill the deceased. It seems that the evidence in this connection raised several

issues: First, that appellant intentionally stabbed the deceased; second, that it was an accident; third, that appellant did not intend to kill deceased; fourth, that he was acting in self-defense; and, fifth, that the facts presented manslaughter. The weapon used was a pocketknife. This weapon, of course, might or might not be a deadly weapon, owing to the manner of its use and the attendant circumstances. Some of the evidence for the state indicates that appellant intentionally stabbed the deceased, and under circumstances that did not suggest self-defense or manslaughter. Several witnesses testified that the trouble came up between two other parties than the defendant and deceased, and appellant said "let them have a fair fist fight." The deceased interfered and used violent epithets towards appellant, and struck him one or more licks, causing pain and bloodshed; that appellant was backing away, and did back 15 or 18 feet from the deceased who was following him up, inflicting the blows mentioned. Appellant's testimony would suggest that he was acting in self-defense, that he had his knife in his hand whittling at the time of the difficulty, and was squatting down or was kneeling down on the ground at the time deceased first struck him. The testimony all shows without contradiction that defendant and deceased were young men barely grown, had been intimate friends and "chums," and, so far as the record is concerned, they seemed not to have had any previous difficulty. Some of the testimony shows just immediately prior to the trouble they had their arms around each other, both somewhat under the influence of intoxicants. This was in a friendly, manner. It may be stated as an undisputed fact from the evidence that the difficulty came up all in a moment, and that there was no ill will or grudge between them prior to the incidents of the fight itself. Appellant testified he did not intend to kill his heretofore friend. We are of opinion under these circumstances upon another trial the court should submit to the jury the provisions of the article referred to.

[3] Another error is assigned on the charge of the court with reference to manslaughter. The court instructed the jury in this connection that the provocation must arise at the time, and must not be caused or brought about by any former provocation, etc. Upon another trial the charge should be limited to the facts. There was no provocation testified to by any witness other than the licks inflicted by deceased upon appellant at the time of the difficulty.

[4] The court charged the law of self-defense from real and apparent danger, then followed it immediately with this charge: "If you find and believe from the evidence that Wood Allred was advancing on the defendant and striking at him, and you further believe from the evidence that the defendant

had a knife in his hand, which he had had in his hand and was whittling with before the trouble commenced, and that while defendant was backing and attempting to ward off the blows of Wood Allred, and you further believe from the evidence while warding off the blows of his assailant that he struck Wood Allred with the knife unintentionally and accidentally, and with no intent to injure or hurt him, then you will acquit the defendant, and say by your verdict not guilty." The criticism of this charge as it is given seems to be correct. This would indicate an infringement on the right of self-defense. If appellant was warding off the blows of the deceased, who was striking at him while appellant was retreating, and by this means he cut the deceased with his knife and with no intent to injure, they should acquit. If under those circumstances he struck the deceased with the knife with or without intent, he might be not guilty, and stand upon his right of self-defense. Upon another trial the question of accidental cutting of the deceased should be given disconnected with the theory of self-defense, or at least given in such way as not to infringe the right of self-defense.

For the errors indicated, the judgment is reversed, and the cause is remanded.

JENNINGS v. STATE.

(Court of Criminal Appeals of Texas. Dec. 11, 1912.)

CRIMINAL LAW (§ 1131*)—APPEAL—REQUEST TO WITHDRAW.

The rules of the Court of Criminal Appeals require that a request to withdraw accused's appeal must be signed in person and sworn to by accused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2971-2979, 2985; Dec. Dig. § 1131.*]

Appeal from Criminal District Court, Dallas County; Barry Miller, Judge.

Roy E. Jennings, alias Arthur Walker, was convicted of burglary, and he appeals. Affirmed.

C. E. Lane, Asst. Atty. Gen., for the State.

HARPER, J. Appellant was prosecuted and convicted of burglary, and his punishment assessed at 10 years' confinement in the state penitentiary.

Accompanying the record is a letter from appellant's attorney, stating that it is appellant's desire to withdraw his appeal. The rules of this court provide that such request must be signed in person and sworn to by the person convicted of crime. However, there is no statement of facts accompanying the record, and there is no question raised in the motion for new trial that we can review under such circumstances.

The judgment is affirmed.

CORBIN v. STATE.

(Court of Criminal Appeals of Texas. Dec. 11, 1912.)

CRIMINAL LAW (§ 1090*)—RECORD—QUESTIONS REVIEWABLE—DENIAL OF MOTION FOR NEW TRIAL.

Questions raised in a motion for new trial cannot be considered on appeal, where there is neither statement of facts nor bill of exceptions in the record.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2653, 2788, 2803-2827, 2927, 2928, 2948, 3204; Dec. Dig. § 1090.*]

Appeal from Criminal District Court, Dallas County; Barry Miller, Judge.

Tom Corbin was convicted of crime, and he appeals. Affirmed.

C. E. Lane, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted of the offense of incest; his punishment being assessed at two years' confinement in the penitentiary.

There is neither a statement of facts nor bills of exception in the record. The matters attempted to be raised in the motion for new trial cannot be considered in the absence of a statement of facts.

The judgment is therefore affirmed.

FIELDS v. STATE.

(Court of Criminal Appeals of Texas. Dec. 11, 1912.)

INDICTMENT AND INFORMATION (§ 87*)—FINDING OF INDICTMENT—DATE OF OFFENSE.

Where the record shows that the term of court at which an indictment was found and trial had thereunder began on April 1st and adjourned on June 29th, and that the trial and conviction were had on June 20th, and that on May 22d the grand jury in open court presented the indictment charging the offense on May 4th, the recital that the indictment was filed April 22d was a typographical or other error, and the indictment as a matter of fact was found and presented to the court subsequent to the date of the offense alleged therein, as required by White's Ann. Code Cr. Proc. arts. 433, 434.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 244-255; Dec. Dig. § 87.*]

Appeal from Criminal District Court, Dallas County; Robt. B. Seay, Judge.

Henry Fields was convicted of theft, and he appeals. Affirmed.

Ellis P. House, of Dallas, for appellant.
J. E. Lane, Asst. Atty. Gen., for the State.

PRENDERGAST, J. By proper indictment and under a correct charge appellant was convicted of the theft of a mule.

There is no bill of exceptions in the record. Neither is there any statement of facts. Nor is there any motion for a new trial. After this case was submitted, the appellant, through his attorney, filed a suggestion to the court that the indictment

charges that the offense was committed on May 4, 1912, and claims that the indictment was filed in said court on April 22, 1912. Therefore the indictment charging the offense was committed after the indictment was filed, and it must necessarily result in the reversal of this case.

The record conclusively shows that the term of court at which this indictment was found and trial had convened on April 1, 1912, and adjourned on June 29, 1912. The trial and conviction were had on June 20, 1912. The record further conclusively shows that this order was entered at the very time the indictment was returned into court: "Wednesday, May 22, 1912. On this the 22d day of May, A. D. 1912, came the grand jury for the body of the county of Dallas, a quorum being present, and in open court presented, and delivered to the judge of the criminal district court of Dallas county, Texas, the following bills of indictments, indorsed 'A True Bill' and signed by their foreman, J. C. Rugel, to wit: The State of Texas, No. 11,487, v. Henry Fields, Theft of a Mule." Then follows a copy of this indictment in this case charging that the offense was committed on the 4th day of May, 1912. At the foot of the indictment it is shown in an attempted copy of the indorsement on the indictment, "Filed April 22, 1912." Taking the record as a whole, there can be no doubt but that this statement purporting to be a copy of what is indorsed on the indictment, showing it was filed April 22, 1912, is clearly a mistake and should have been, "Filed May 22, 1912." Therefore we conclude that as a matter of fact this indictment was found, presented to the court in open session on May 22, 1912, and was then filed, and not before then, and that the recitation that it was filed April 22d, instead of May 22d, is clearly a typographical or other error. C. C. P. arts. 433, 434, and cases noted thereunder in White's annotation.

Therefore, there being no error assigned and none appearing, the judgment will be affirmed.

CHESTER v. STATE.

(Court of Criminal Appeals of Texas. Dec. 11, 1912.)

CRIMINAL LAW (§ 1097*)—APPEAL—NECESSITY OF STATEMENT OF FACTS.

Questions attempted to be raised by motion for new trial cannot be considered without a statement of facts.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2862, 2864, 2926, 2934, 2938, 2939, 2941, 2942, 2947; Dec. Dig. § 1097.*]

Appeal from Criminal District Court, Dallas County; Robt. B. Seay, Judge.

Roy Chester was convicted of burglary, and he appeals. Affirmed.

C. E. Lane, Asst. Atty. Gen., for the State.

PRENDERGAST, J. The appellant was indicted by proper indictment for burglary, and under a correct charge was convicted.

There is neither bills of exceptions nor statement of facts. The questions attempted to be raised by the motion for new trial cannot be considered without a statement of facts.

The judgment is therefore affirmed.

ELDER v. STATE.

(Court of Criminal Appeals of Texas. Dec. 11, 1912.)

1. LIBEL AND SLANDER (§ 155*)—EVIDENCE—PREPARATION TO COMMIT CRIME.

On prosecution for slandering defendant's wife by charging misconduct with S., circumstances tending to show preparation on the part of S. for the commission of the offense are admissible as tending to show the commission of such offense.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 430-436; Dec. Dig. § 155.*]

2. LIBEL AND SLANDER (§ 155*)—CRIMINAL PROSECUTION—EVIDENCE.

Where accused was charged with slandering his wife in charging her with misconduct with S., and accused sought to use the flight of S. as an incriminating circumstance, the court properly permitted him to testify to a statement made to him by the wife as furnishing a reason for his flight consistent with their innocence.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 430-436; Dec. Dig. § 155.*]

3. WITNESSES (§ 277*)—CROSS-EXAMINATION—SCOPE.

Where the state claimed that defendant had slandered his wife to manufacture evidence to obtain a divorce, that he might marry M., the court properly permitted the state to cross-examine defendant with reference to his attentions to M.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 925, 979-984; Dec. Dig. § 277.*]

4. CRIMINAL LAW (§§ 419, 420*)—HEARSAY.

Where accused was charged with slandering his wife, and several young men testified to facts damaging to the wife's reputation for chastity, though denying any ill will toward her, evidence that a boy whose name was unknown to the witness had told witness that the boys around T. where the parties resided had it in for the wife, because she would not permit them to hang around the telephone office, was hearsay, and inadmissible.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 973-983; Dec. Dig. §§ 419, 420.*]

5. CRIMINAL LAW (§ 789*)—INSTRUCTION—REASONABLE DOUBT.

Where, in a prosecution for slandering defendant's wife by charging her with improper intimacy with S., defendant did not deny speaking the language charged, but claimed it was true, and there was evidence justifying a reasonable man in believing that his wife had been unduly intimate with S., it was error to refuse to charge that, before accused could be convicted, the jury must find beyond a reasonable

doubt that the statements were false, and that they were maliciously and wantonly made.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1846-1849, 1904-1922, 1960, 1967; Dec. Dig. § 789.*]

Appeal from Taylor County Court; Thomas A. Bledsoe, Judge.

J. F. Elder was convicted of slander and he appeals. Reversed and remanded.

Ben L. Cox, of Abilene, for appellant. C. E. Lane, Asst. Atty. Gen., for the State.

HARPER, J. In this case appellant was prosecuted and convicted of slandering his wife, in that he charged her with a lack of chastity, and his punishment assessed at a fine of \$300 and 30 days' imprisonment in the county jail.

The facts are of that nature that we do not think any good purpose could be accomplished by stating them; they in some respects being rather obscene. If appellant wrongfully made the charges alleged, he would richly deserve the punishment fixed by the jury. Appellant did not deny using the language alleged, but hinged his defense on the proposition that what he stated to Mr. Browning was true.

[1] The record discloses that Charley Skillern, whom appellant charged with having sexual intercourse with his wife, was attending the telephone at night; the wife of appellant sleeping in an adjoining room. On the night in question appellant pretended to leave the town on a night train, and shortly thereafter he says he placed a ladder against the walls of the building in which the telephone office was situated, and, climbing up the ladder, he claims he saw Skillern and his wife in a very compromising position. Skillern fled, leaving his hat, tie, and some other wearing apparel. This Skillern explains in a way entirely consistent with his and Mrs. Elder's innocence, but while Skillern was testifying, and while appellant was cross-examining him in regard thereto, appellant propounded to Skillern the question: "If he (Skillern) had not that night purchased from Lee Rutherford some condoms?" The state objected to the witness being permitted or required to answer this question, which objection was sustained, and appellant by proper bill shows he reserved an exception to the ruling of the court. Appellant offered to testify and introduce other testimony that on the night in question Skillern did purchase condoms from Rutherford, but, on objection being made by the state, the court refused to permit him to introduce such testimony. As we have stated, this case was tried wholly on the issue of whether or not the statement was true, and as the allegation was that appellant had stated "he had caught Skillern in bed with his (appellant's) wife," and, exhibiting Skillern's hat and collar, said, "This is what I got out of that f—k—g scrape last

night," we are of the opinion that this testimony about the purchase of condoms that night should have been admitted. It would be a circumstance tending to show preparation on Skillern's part to have intercourse with some person, and was a legitimate circumstance to have been proven under the facts in this case.

[2] The court did not err in permitting Skillern to testify to a statement made to him by appellant's wife, as this furnished a reason for his flight, consistent with his and her innocence, and, as appellant was seeking to use this flight as an incriminating circumstance, it was proper to permit it to be explained.

[3] The state's theory was that the allegations were wholly untrue and slanderous, and that it was an effort to manufacture testimony upon which appellant could obtain a divorce from his wife, that he might marry a Mrs. Moore. Under such circumstances, we do not think the court erred in permitting witness to state, and defendant to be cross-examined, as to his attentions to Mrs. Moore just prior to this occasion, for, if true, it might furnish such incentive as contended for by the state.

[4] The court over the objection of defendant permitted the state to prove by the witness Browning "that a boy, whose name he had forgotten, told him (Browning) that the boys around Trent had it in for Mrs. Elder because she would not permit them to hang around the telephone office." This was hearsay and inadmissible, and under the circumstances of the case peculiarly harmful. Several young men had testified to facts damaging to Mrs. Elder's reputation for chastity, and whose testimony would tend strongly to support the contention of appellant. These young men denied entertaining any ill will toward Mrs. Elder, and no testimony was introduced showing that they did entertain such feelings, unless it be the hearsay statement testified to by Mr. Browning. Mr. Browning was unable to give the name of his informant, and he did not claim that the person making the statement individuated or had any reference to the young men who testified for appellant in this case, and yet this hearsay statement was introduced to affect their testimony and render it less credible.

[5] The appellant requested the court to charge the jury: "You are instructed that, if you should find from the evidence that the defendant made the statements that he is alleged to have made to the witness Browning, you are instructed that, before you could convict the defendant, it would be necessary for you to further find beyond a reasonable doubt that said statements were false, and that same were wantonly or maliciously made by the defendant." As before stated, that appellant used the language al-

leged was not a contested issue, and under the peculiar facts of this case we think this charge should have been given. It correctly called the attention of the jury to the material issues in the case—whether or not the allegation was true, and whether or not it was wantonly or maliciously made. Whether the statement was false or true, appellant, according to the state's testimony, saw his wife and Skillern in a position that would arouse suspicion in almost any man. Skillern testified: "I saw Mr. Elder at the depot, and I also saw Tom McLeod and Charlie Bishop. I went back up to the telephone office from the station and pulled off my hat, collar, and tie and shoes, and was preparing to go to bed. Mrs. Elder had been in the telephone office prior to this time, and she had been sitting on the opposite side of the bed to me. That is, she was sitting on the side next to the door that opens into the other room, and I was sitting on the side of the bed toward the switchboard. Mr. Elder came up a ladder to the north window of the telephone office and stuck his head in at the window, and says, 'God damn you, I have caught you.' I says to him: 'That is not the way to come in. Get down, and come around to the door if you want to come in.' He then went down the ladder, and I started to the door to let him in, and Mrs. Elder said to me, 'You had better get out of the telephone office because Frank is drinking, and he might hurt you.' Mr. Elder had gone down the ladder, at this time, and hadn't yet come up the steps to the door. I did get out of the telephone office by jumping down on the awning from the back window of the room where Mrs. Elder's things were, and I ran away." If while laboring under a false impression, if such be the fact, appellant made the remarks alleged, they were highly improper, yet in such state of case the issue should be clearly presented as to whether it was maliciously and wantonly done. *Stayton v. State*, 46 Tex. Cr. R. 207, 78 S. W. 1071, 108 Am. St. Rep. 988; *Tippens v. State*, 43 S. W. 1001.

We do not deem it necessary to discuss the other questions presented in the motion for new trial, but, on account of the above errors, the judgment is reversed, and the cause is remanded.

BLACK v. STATE.

(Court of Criminal Appeals of Texas. Nov. 13, 1912. On Motion for Rehearing, Dec. 4, 1912.)

1. CRIMINAL LAW (§ 1076*)—APPEAL—BONDS—FORM.

Where an appeal bond, copied in the record, is not in compliance with Code Cr. Proc. 1895, arts. 903 and 904, relating to forms thereof, the appeal will be dismissed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2726; Dec. Dig. § 1076.*]

On Motion for Rehearing.

2. CRIMINAL LAW (§ 1093*)—APPEAL—BILL OF EXCEPTIONS—VAGUENESS—REVIEW.

A bill of exceptions stating that certain testimony was "leading, too general, and prejudicial," which failed to show in what connection the evidence was offered, is too vague to present a question for review.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2828-2833, 2919, 2920; Dec. Dig. § 1093.*]

3. INTOXICATING LIQUORS (§ 146*)—"SALE" OF LIQUOR.

Where accused let another have some whisky to be repaid in whisky, it was a sale.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 159, 160, 163; Dec. Dig. § 146.*]

For other definitions, see Words and Phrases, vol. 7, pp. 6291-6306; vol. 8, p. 7793.]

4. CRIMINAL LAW (§ 1120*)—APPEAL—RECORD—QUESTIONS PRESENTED.

Where the record on appeal shows certain questions to a witness, but no answers, no question is presented for review.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2931-2937; Dec. Dig. § 1120.*]

5. WITNESSES (§ 337*)—IMPEACHMENT—PRIOR OFFENSES.

The defendant having testified, the state could properly show that he had been arrested on a charge of burglary.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1113, 1129-1132, 1140-1142, 1146-1148; Dec. Dig. § 337.*]

6. INTOXICATING LIQUORS (§ 233*)—UNLAWFUL SALE—EVIDENCE.

In a prosecution for the unlawful sale of intoxicating liquors, evidence to show that defendant had access to a quantity of whisky at the time of the alleged sales was admissible.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 293-297, 298½; Dec. Dig. § 233.*]

7. CRIMINAL LAW (§ 1159*)—APPEAL—VERDICT—CONCLUSIVENESS.

Where, though the testimony is unsatisfactory, yet, if true, would with the facts support the verdict, it will not be disturbed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3074-3083; Dec. Dig. § 1159.*]

Appeal from District Court, Panola County; W. C. Buford, Judge.

Jasper Black was convicted of pursuing the business of selling intoxicants in prohibition territory, and he appeals. Affirmed.

Brooke & Woolworth, of Carthage, for appellant. O. E. Lane, Asst. Atty. Gen., for the State.

HARPER, J. Appellant was prosecuted and convicted of the offense of pursuing the occupation of selling intoxicating liquors in prohibition territory, and his punishment assessed at two years' confinement in the penitentiary.

[1] The appellant after conviction attempted to appeal his case by filing an appeal bond. The bond copied in the record is not drawn in accordance with the law. It does not recite that appellant has been convicted of any offense, does not disclose the punish-

ment assessed, and does not bind the appellant "to abide the judgment of this court" in this case. Neither has it been approved by the judge trying the case, and in no sense is it in compliance with articles 903 and 904 of the Code of Criminal Procedure.

For these reasons, the cause must be dismissed.

On Motion for Rehearing.

At a former day of this term this case was dismissed on account of defective appeal bond. Appellant has filed his affidavit and a certificate of the clerk showing that the bond copied in the record is not the bond on file in the district court, but the bond, as filed by appellant, is in full compliance with the law governing appeals, and, of course, is entitled to have this cause reinstated. The clerk states: "On the last day of the term the motion for a new trial was by the court in all things overruled as shown by records in the said cause, and that on the said 25th day of April the said district court of Panola county, Tex., adjourned for the term, and that on the said day there was filed in my office by the attorneys for Jasper Black an appeal bond, of which said bond the following is an exact and literal and verbatim copy, and which said bond was approved by the Hon. W. C. Buford, judge of the said district court, and W. D. Anderson, sheriff of Panola county, Tex.; that the same was not made a part of the record of the said cause, and was not copied in the transcript of the case of Jasper Black, which was appealed to the honorable Court of Criminal Appeals of the state of Texas, and was by oversight left out of said transcript containing the record of said appeal, and that the copy of the said appeal bond was left out entirely by the carelessness of myself, and was not in any way the fault of either of the attorneys who were and are representing the defendant."

[2] There are a number of bills of exception in the record; No. 1 reading as follows: "Be it remembered that upon the trial of the above numbered and styled cause, and while Lenwood Neal, a witness, was on the stand for the state, that the state asked said witness the following question: 'Q. Did you ever give Jasper Black groceries when you didn't get some whisky before you let him have the groceries?' To which the defendant then and there objected for the reason that the same was leading and was too general, and was calculated to prejudice the minds of the jury against the defendant, which said objection the court then and there overruled and permitted the witness to answer as follows: 'A. No, sir; I don't think I did.' To which said action of the court the defendant then and there in open court excepted, and here tenders his bill of exceptions, and asks that the same be filed and approved and made a part of the record in this cause."

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

It will be seen by reading this bill it is too vague and indefinite to present any question for review. The appellant was charged with pursuing the occupation of selling intoxicating liquors in prohibition territory, and was alleged to have made sales to this witness, and, when we turn to the testimony of this witness, we learn that he says he sold the appellant groceries and received whisky in payment therefor. It is thus seen that the connection in which the testimony was offered is not stated, and the objection that it was "leading, too general, and prejudicial" does not present the matter in such way that we could act thereon without reference to the statement of facts, and, when we turn to the statement of facts, we find the question and answer are germane and admissible.

[3] Bill of exceptions No. 2 does not present the question sought to be raised in a way we can review it, but, if we again turn to the statement of facts, it shows that appellant let the witness Raspberry have two quarts of whisky to be repaid in whisky. This, under our law, was a sale, and the testimony admissible.

[4] In bills Nos. 3 and 4 it is shown that appellant objected to certain questions propounded the witness Aber Collins on cross-examination. The answers to the questions, if the witness answered them, are not stated in the bills, consequently they present no question for review. In regard to those matters the court instructed the jury: "The testimony which has been admitted before you with reference to the other transactions than the Neal transaction—that is, the transaction with Raspberry and the transaction with Collins—you cannot consider or estimate them as sales within the meaning of the two sales above defined, but said testimony was admitted before you to enable you the better to pass upon the questions as to whether or not the defendant did or did not engage in the occupation of selling intoxicating liquor."

[5] In bills Nos. 5 and 7 it is shown, the defendant having testified, the state was permitted to prove that he had been arrested charged with burglary. This is an offense of the grade of felony, and there was no error in admitting the testimony.

[6] The question attempted to be raised in bill No. 6 is likewise in such condition that we cannot review it. The attendant circumstances are not stated, and the answer of the question propounded is not given. However, if we turn to the statement of facts, the purpose of the testimony was to show that appellant had access to a quantity of whisky at the time he is alleged to have made the sales and pursued the occupation, and it was admissible for that purpose.

[7] The only other ground in the motion

complains of the insufficiency of the testimony. We frankly admit that the testimony of Neal is not of a very satisfactory character, yet the jury believed his testimony, and, if true, it and the other facts and circumstances in evidence support the verdict, and under such circumstances we do not feel inclined to disturb it.

The judgment is affirmed.

FEATHERSTONE v. STATE.

(Court of Criminal Appeals of Texas. Dec. 11, 1912.)

1. CRIMINAL LAW (§§ 1090, 1122*)—APPEAL—RECORD—MATTERS TO BE INCLUDED.

Where the record does not contain the evidence, or any bills of exception, the failure of the court to charge on a plea of temporary insanity cannot be reviewed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2653, 2789, 2803-2827, 2927, 2928, 2940-2945, 2948, 3204; Dec. Dig. §§ 1090, 1122.*]

2. CRIMINAL LAW (§§ 1090, 1120*)—APPEAL—RECORD—MATTERS TO BE INCLUDED.

Where the record does not contain the evidence, or any bills of exception, the exclusion of evidence cannot be reviewed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2653, 2789, 2803-2827, 2927, 2928, 2948, 3204; Dec. Dig. §§ 1090, 1120.*]

3. CRIMINAL LAW (§ 1121*)—APPEAL—RECORD—MATTERS TO BE INCLUDED.

Where the record does not contain the evidence, its sufficiency to support a conviction cannot be reviewed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2938, 2939; Dec. Dig. § 1121.*]

Appeal from Criminal District Court, Dallas County; Robt. B. Seay, Judge.

Massey Featherstone was convicted of assault with intent to murder, and he appeals. Affirmed.

C. E. Lane, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted of assault with intent to murder; his punishment being assessed at five years' confinement in the penitentiary.

[1-3] The record is before us without the evidence or bills of exception. The grounds of the motion for new trial are based on the alleged insufficiency of the evidence to support the conviction, and failure of the court to charge on the plea of temporary insanity, and in excluding certain evidence as shown by bills of exception, and in not permitting defendant to introduce certain evidence. None of these objections are in any manner verified. The evidence not being before us, the insufficiency of the evidence cannot be reviewed.

The judgment is affirmed.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

ORTIZ v. STATE.

(Court of Criminal Appeals of Texas. Dec. 11, 1912.)

1. CRIMINAL LAW (§ 594*)—CONTINUANCE—ABSENT WITNESS—SEVERANCE.

Under the statute providing that a case shall not be continued to obtain a severance, defendant's motion for a continuance until his fugitive partner in the homicide, who had been jointly indicted with him, should be apprehended and placed on trial or until they could have an opportunity to agree upon a severance of the case was properly refused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1321, 1322, 1332; Dec. Dig. § 594.*]

2. CRIMINAL LAW (§ 1091*)—APPEAL AND ERROR—BILL OF EXCEPTIONS.

Where the bill of exceptions to evidence included evidence, some of which was clearly admissible, and none of which was clearly inadmissible, it was too general for consideration and did not present error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2803, 2815, 2816, 2818, 2819, 2823, 2828-2833, 2843, 2931-2933, 2943; Dec. Dig. § 1091.*]

3. CRIMINAL LAW (§ 518*)—EVIDENCE—CONFESSION.

The fact that the defendant in a homicide case by request takes persons to the place where they find the dead body is admissible in evidence, although he was under arrest and unwarned; the statute requiring that a confession shall be in writing and made after due warning, where the defendant is under arrest, not applying where the statements of the accused lead to discovering the fruits of the crime.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1157-1162; Dec. Dig. § 518.*]

4. CRIMINAL LAW (§ 518*)—EVIDENCE—CONFESSION—FRUITS OF CRIME.

Evidence that the defendant, while under arrest and unwarned, gave information from which the officers found decedent's watch, a fruit of the crime and an indication of defendant's guilt, was properly admitted in a murder case.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1157-1162; Dec. Dig. § 518.*]

5. CRIMINAL LAW (§ 1091*)—APPEAL AND ERROR—BILL OF EXCEPTIONS.

The bill of exceptions should be sufficiently full and certain as to disclose the error and prejudice to defendant and to overcome the legal presumption of the correctness of the trial court's rulings.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2803, 2815, 2816, 2818, 2819, 2823, 2828-2833, 2843, 2931-2933, 2943; Dec. Dig. § 1091.*]

Appeal from District Court, Hidalgo County; W. B. Hopkins, Judge.

Abraham Ortiz was convicted of murder, and he appeals. Affirmed.

C. E. Lane, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. This is a murder conviction with the death penalty assessed. In brief, the evidence discloses that the deceased with his wife, who was the main state's witness in the case, had returned from Reynosa, a little village on the Mexican side of

the Rio Grande, into Texas, and that appellant and Domingo Gonzales, while they were traveling along the road, made an attack on her husband with a club and killed him, crushing his skull. They then took her a short distance from the road and each in turn forced her to have carnal intercourse with them. This they repeated more than once. It is also shown that they took money from the pockets of her husband. While one of them would have intercourse with her, the other would stand by the dead body and watch it. Then the other would have intercourse with her, while the other party would return to the body. After they had finished these matters, which occupied two or more hours, they started to leave her. After going a short distance, they held a conversation not heard by the witness, when Domingo Gonzales returned to where she was and forced her to go with him to the residence of another Mexican whom the witness called Ysidro. Ysidro was brother-in-law to appellant. Witness spent the night and the next day at the residence of Ysidro with Domingo Gonzales, as she testifies, under compulsion and for fear of her life. Late the next evening Domingo Gonzales went away to get some groceries. When this occurred she made her escape and informed the justice of the peace of these matters, whereupon followed an investigation of the whole transaction, the subsequent arrest of appellant and his trial and conviction. Domingo Gonzales fled the country. The indication from this record is that he is still a fugitive from justice, never having been arrested. There is quite a lot of other testimony, but we are of opinion that this is a sufficient statement of the matters to bring in review the questions raised, except as they may be referred to in discussing the bills of exception.

[1] The first bill of exceptions relates to the motion made by appellant to have his case continued until Domingo Gonzales is apprehended and placed on trial. He was charged also with this offense, and is now at large, not in custody of the authorities, and was so absent without any fault or collusion on the part of the defendant. Wherefore he moves this case be postponed and continued, as a matter of law, until such time as Gonzales can be apprehended and placed on trial, or until such time as they may have an opportunity to agree upon the severance of the case. Domingo Gonzales was under indictment for this murder also, as appellant charges in this motion. There is no merit in this motion, and the court correctly overruled it. The statute provides that the case shall not be continued in order to obtain the severance, and, where a severance involves a continuance, as a rule the severance will not be granted. Whatever exception in matters of continuance might grow out of this statute in favor of accus-

parties in order to have a fair trial is not necessary here to discuss. The statute clearly did not intend to operate in a case like this.

[2] The second bill of exceptions is very lengthy and sets out at length in questions and answers much of the testimony of the widow of the deceased. A great deal of this testimony was clearly legitimate, and some of it may or may not be objectionable owing to the purpose for which it was introduced, or for what it was to be used, or the connection in which it came. The objections are general and stated as follows: "Because the said questions and each of them sought to elicit testimony which is incompetent, immaterial, and irrelevant, and calculated to inflame the minds of the jurors, and prejudice them against the defendant, and to each and all of which answers to said questions the defendant objected because all of the said answers and each of them to said questions are incompetent, immaterial, and irrelevant, and calculated to inflame the minds of the jurors and prejudice them against this defendant." A bill of exceptions is too general for consideration if it includes a number of statements, some of which are clearly admissible, and there is nothing in the objection directly pointing out the supposed objectionable portions of the evidence. Branch's *Crim. Law*, § 47; *Payton v. State*, 35 Tex. Cr. R. 510, 84 S. W. 615; *Tubb v. State*, 55 Tex. Cr. R. 623, 117 S. W. 858; *Cabral v. State*, 57 Tex. Cr. R. 304, 122 S. W. 872. Where evidence is introduced over objection, some of which is admissible and some of which is on doubtful grounds or which might be objectionable, it is the duty of the objector to specify in the bill the particular portion to which objection is urged. General objections of the character set out here are not usually sufficient. They are in the nature of a general demurrer. It has heretofore been stated in the decisions, and may be restated, that general objections to the admission of evidence are in the nature of general demurrers and will not be sufficient if the testimony admitted was admissible for any purpose in the case. If the testimony in this bill could be admissible for any purpose, then the objections are too general to be entertained. This rule is well recognized by the authorities, and it has been frequently so held. An inspection of the bill in connection with all the testimony contained therein does not manifest by any means that any of the testimony was inadmissible. Some of it was clearly admissible. As to whether or not some of the other would be admissible would depend upon circumstances, and an inspection of the entire statement of facts, were we permitted to go to that instrument, would indicate that all of it was admissible, but in the way the bill is presented we deem it unnecessary to discuss the question.

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[3] There is another bill of exceptions which recites that, while the witness Dionicio Lerma was on the stand testifying in behalf of the state, he was asked the following questions and made the replies thereto as follows: "Q. The defendant took you out there? A. Yes, sir. Q. What did he take you there for—why was he taking you there? A. Yes, we told him (asked him) where he took the body and he said he would take us. Mr. Dougherty: We object to this testimony as the defendant was then under arrest, and it is inadmissible on the ground that an admission made by the defendant while under arrest, without having been warned as to the consequences, is not admissible. The Court: This is an exception to the rule, Doctor, it is admissible. Mr. Dougherty: We take an exception. And the court overruled said objections and admitted said testimony." This bill does not state, as a matter of fact, that appellant was under arrest at the time, but we may infer from the statement in the bill that he was, and that this statement was made while he was under arrest. There is nothing to indicate that he was not warned; but we suppose he was not warned, and it may be granted that the statements were not in writing as required by the statute. The court says this is an exception to the rule, and it is admissible. Conceding all these things, we are unable to see where error is shown. If it was intended to urge that the defendant was under arrest and took the parties to the body, or defendant said he would take them to the body, it might be clearly admissible if by these means they discovered where the dead body was. This bill does not exclude that idea by any means. The expression or answer of the witness, "Yes, we told him (asked him) where he took the body and he said he would take us." This bill does not show the body had been previously found or that by reason of what the defendant did they had discovered things that they had not otherwise, which indicated defendant's guilty participancy in the killing. It is an exception in the statute which authorizes the confession to be taken in writing after due warning, etc., if confession led to discovery of fruits of the crime. That phase of the statute does not apply, if by reason of the confession, warned or unwarned, or statements of the accused, although under arrest, lead to discovering the fruits of the crime, etc. This bill does not exclude that idea, and rather tends to show that the purpose was to take them to the body. It does not even show that he went to the body with them and pointed it out. It only conveys the idea that he would do so. But we take it that in view of the entire bill as it is presented, which seems to be rather confused, the defendant, however, did take the parties to the body of the deceased. This is shown by the following questions and answers: "The defendant took

out there? A. Yes, sir. Q. What did he take you there for—why was he taking you there? A. Yes, we told him (asked him) where he took the body and he said he would take us." So it seems he did take them to the dead body, and if by reason of that fact they discovered the body, and that it was in fact killed, or came to its death by violence, or at the hands of some person other than himself, this would be admissible testimony, although he was under arrest and unwarned.

[4] Another bill recites that, while Mr. William Brewster was testifying for the state, he was permitted to testify that appellant made a statement to him in regard to a watch that he had taken off the dead man. Objection was urged to this because appellant was under arrest. He was further asked if he (witness) knew at any time where the watch was. This was answered in the negative, and the following question was asked: "And were you by reason of the statement made to you enabled to discover that watch, and did you discover it in pursuance of his admission to you?" This was answered in the affirmative. "Mr. Dougherty: We take an exception. The Court: Let him answer the question. Q. Well, what did he say to you in regard to the watch?" Then follows quite a lengthy answer, the substance of which is: About eight days before this witness was testifying, defendant told the witness that the watch was at his house and to go to his sister-in-law's or brother-in-law's or his little boy and tell them to give him (Brewster) the watch; that they knew where it was, and Brewster went and they informed him the watch was not there; that it had been taken to Reynosa, Mexico, by appellant's boy, and he said that the watch was at his grandmother's, who was defendant's mother-in-law. Witness then went there and talked to the old lady, and finally she dug up the watch; she had it buried in a corner of the house. The court overruled appellant's objection above stated and admitted this testimony. The objection urged was that the admission was made while defendant was under arrest. The statute expressly provides, as we understand it, that, where defendant is under arrest and makes statements which lead to the discovery of the fruits of the crime, etc., they can be used, although the party was under arrest and unwarned and the admission or confession not reduced to writing. The evidence discloses, as we understand it, that deceased had a watch at the time of the homicide. By this bill appellant admitted having this watch and told the officers where they could find it. After going to the place designated, the parties whom he pointed out as having charge of the watch, or who would deliver the watch to the officer, informed him the son of appellant had carried it to his grandmother's, mother-in-law of appellant, across the

river, to a little village known as Reynosa. There they found the watch. Under this state of case, and under these facts, we are of opinion that the court correctly admitted this evidence. The bill shows on its face that the officers knew nothing of the whereabouts of the watch until appellant disclosed its whereabouts. There was no error in the ruling of the court.

[5] There is one other proposition we wish to state generally in regard to these bills of exception; that is this: That the bill of exceptions should be made so full and certain in its statements as that in and of itself it will disclose all that is necessary to manifest the supposed error. *McGlasson v. State*, 38 Tex. Cr. R. 362, 43 S. W. 93; *Walker v. State*, 9 Tex. App. 200; *Eldridge v. State*, 12 Tex. App. 208; *Davis v. State*, 14 Tex. App. 645; *Wilkerson v. State*, 31 Tex. Cr. R. 90, 19 S. W. 903; *Carter v. State*, 40 Tex. Cr. R. 229, 47 S. W. 979, 49 S. W. 74, 619; *Hooper v. State*, 29 Tex. App. 616, 16 S. W. 655; *Flanigan v. State*, 51 S. W. 1116; *Coffey v. State*, 60 Tex. Cr. R. 73, 131 S. W. 219; *Green v. State*, 60 Tex. Cr. R. 530, 132 S. W. 807; *Spencer v. State*, 61 Tex. Cr. R. 60, 133 S. W. 1049; *Branch's Crim. Law*, § 45.

There is another proposition which is germane to the above; it is this: Legal presumption is that the ruling of the trial court is correct unless the bill shows otherwise. *Edgar v. State*, 59 Tex. Cr. R. 252, 127 S. W. 1053; *Moore v. State*, 7 Tex. App. 20. In stating these rules it would be advisable also to say that, in order to have the matters contained in the bill of exception reviewed, the statements must be sufficiently clear to manifest to this court the question at issue, and it is alleged prejudicial effect. The writer is of the opinion that, if the bill is sufficiently clear and explicit to manifest to this court the error complained of, then this court should entertain and rule upon the supposed error. Of course the bill must be clear and sufficiently so to manifest this error, and the grounds urged against the rulings of the court in the admission or rejection of testimony must be stated. It is a rule that the appellate courts will not consider grounds of objection not stated. It is not my purpose here to enter into any discussion with reference to the sufficiency of the bills of exception or the statements of the grounds of objection, but the above rules are stated in a general way. The whole end and object and purpose of the trial of an accused person is to see that he gets a full, fair, and legal trial, and, if he is dissatisfied with the rulings of the court, he must show in some legitimate way that the rulings of the court are erroneous, sufficiently so to overcome the legal presumption of the correctness of the decision or rulings of the trial court. The law lays down no particular form of bills or manner of presenting these questions except that they must be sufficient to overcome the legal

presumption of the correctness of the rulings of the trial court and sufficiently clear for this court to understand the error of which complaint is made.

We are of opinion, after a careful review of this record and the bills as presented, that it has not been made to appear that the rulings of the trial court were erroneous.

Finding no such error in the record as in our judgment requires a reversal, it is affirmed.

ORTIZ v. STATE.

(Court of Criminal Appeals of Texas. Dec. 11, 1912.)

1. CRIMINAL LAW (§ 1090*)—APPEAL AND ERROR — BILL OF EXCEPTIONS — MOTION FOR CONTINUANCE.

The refusal of a continuance cannot be reviewed where there is no bill of exceptions to the point.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2653, 2789, 2803-2827, 2927, 2928, 2948, 3204; Dec. Dig. § 1090.*]

2. CRIMINAL LAW (§ 594*)—CONTINUANCE—FUGITIVE WITNESS.

It was not error to refuse a continuance sought because of the absence of defendant's fugitive partner in the crime.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1321, 1322, 1332; Dec. Dig. § 594.*]

3. CRIMINAL LAW (§ 1090*)—APPEAL AND ERROR—BILL OF EXCEPTIONS—ADMISSION OF EVIDENCE.

Error in the admission of evidence in a rape case could be considered where it was not shown by a bill of exceptions.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2653, 2789, 2803-2827, 2927, 2928, 2948, 3204; Dec. Dig. § 1090.*]

4. RAPE (§ 49*)—EVIDENCE—TIME OF COMPLAINT.

The testimony of prosecutrix in a rape case that she was prevented by force by defendant's partner in the crime from making complaint until the night of the following day was properly admitted; it being always permissible in rape cases to prove that complaint was made at the first opportunity.

[Ed. Note.—For other cases, see Rape, Cent. Dig. § 70; Dec. Dig. § 49.*]

Appeal from District Court, Hidalgo County; W. B. Hopkins, Judge.

Abraham Ortiz was convicted of rape, and he appeals. Affirmed.

C. E. Lane, Asst. Atty. Gen., for the State.

PRENDERGAST, J. Appellant was convicted of rape, and the death penalty assessed. We do not propose to give in detail the evidence—simply an outline of it. On Sunday, February 18, 1912, Florencia Luis, with her husband, Martin Martinez, went over from Hidalgo county, Tex., across the river into Mexico to the little town of Reynosa where they made some purchases of little things, such as hosiery, peppers, tomatoes, etc., which she brought back with them in a paper bag. Her husband, when in Rey-

nosa, had about \$20 in money. He spent some \$2 or \$3 of this and carried the remainder wrapped with a cloth in his pocket when they left there. He also had a certain open-faced watch which he also carried in his pocket. After completing their purchases they came back from Mexico, passing through the town of Hidalgo on their way to the camp of a man who lived near there where they were at work. In going from Hidalgo they passed a cemetery perhaps two-thirds of a mile from the town and reached some 600 or 700 yards beyond this cemetery. Shortly before they passed along there, a workman in the cemetery saw the appellant and his companion, Domingo Gonzales, together near this cemetery. Soon after this said Florencia and her husband met these same persons, but had no conversation with them at the time, merely the ordinary greetings. They were strangers to one another. Florencia and her husband, after meeting them, proceeded on their way, but went only a short distance when appellant and Gonzales slipped up behind them and, without any warning or knowledge by either, appellant struck her husband in the back of the head with a large stick two licks, one following the other. From the first he began staggering, but with the second lick appellant crushed his skull and killed him. Gonzales at the time was armed with a knife and at once after the murder of her husband, by actual force and threats to kill her, forced Florencia to go into the brush some 75 or 100 feet from where her husband lay and immediately ravished her. Appellant remained at the body of her husband while Gonzales ravished her; she begging, protesting, and pleading. Immediately after Gonzales ravished her he called appellant, furnishing him his knife and Gonzales taking from appellant the club with which the killing had been done. Appellant then by actual force and threats of killing her immediately proceeded also to ravish her; Gonzales going back to the husband's body while this was being done. Within the space of about two hours they alternately ravished her in the same way, each three times. It seems at first they were not sure they had killed her husband dead, which accounted for the fact that each watched the body while the other, the first time, ravished the woman. After each of these first acts they then took the body of the husband into the brush some 100 feet from the road and left it there. This killing and first ravishment occurred about 5 o'clock in the evening. They both remained there with the woman from that time until about dark, 7 o'clock in the evening. It is not specifically stated by any witness, yet from what is stated and the surroundings described we conclude that the place where this murder and rape occurred was an un-

frequented and secluded place and that it was in the timber or brush. After keeping the woman there approximately two hours and each, after murdering her husband, ravished her three times, the two by agreement separated. Appellant indicated to Gonzales where he was going, stating first to one place in Texas and the other over in Mexico. Gonzales was to take and did, by force and threats of murdering her if she refused to go, force her to go with him after night to some place where he was staying, the distance not given, but from the evidence we conclude not a great way from where this murder and rape occurred. He took her to his room, forced her to stay in the room with him that night, worked right around the house all the next day and prevented her from escaping or communicating with any one until about night. He then left the place to go some distance to buy supplies. Florencia, seeing this, immediately communicated to the other man and woman at this house what had been done to her, induced them to accompany her to the road a short distance from the house, when she left them and ran as rapidly as she could all the way from there to the camp where she and her husband had been working. She immediately communicated to persons there what had occurred to her and her husband, sought their protection, and induced some of her friends to go with her nearly a mile to the justice of the peace. They did so, and she at once informed the justice of the peace of the murder of her husband and the rapes that had been committed upon her.

It seems that her story of the horrible and unprecedented crimes was such as to stagger the credulity of the justice of the peace, so much so that he did not then, it being night, himself or have any of the other officers investigate the matter, but deferred it till morning. In the meantime she told her story to her husband's employer and other friends, and they themselves personally and in addition induced the officers the next morning to make an investigation. They obtained from her a description of the locality where the murder and rapes had been committed, and upon making an investigation found, and identified later, the body of her husband with the back of his skull crushed, a pool of blood where the body had first fallen at the road and where it had been removed some 100 feet from the road in the brush where it was found. They also on the ground in this same immediate locality, some 75 or 100 feet from the road in the brush, found some of the articles of merchandise she says she and her husband had purchased at Reynosa, and where persons had been lying on the ground and prints of the feet and body were such as to confirm the woman's detail of the rapes that had been committed upon her. Four

such places, if not six, the evidence shows, were thus found. She did not know the names of either of her husband's and her assailants, but gave such a description and information of the name of one of them and some data about the other that her friends and the officers at once sought Gonzales, but failed to find and arrest him. He escaped. They did find appellant, and the woman fully and completely identified him as the man who had struck the licks that killed her husband and who had immediately and repeatedly ravished her shortly thereafter. Appellant was taken to the vicinity where the crime had been committed, and, when asked if he could point out where the killing occurred, the instrument with which the licks were struck, and where the body was, stated that he could and he himself took the parties to the place showing the pool of blood where her husband had first been felled which had been covered with sand, and to the body secreted in the brush. He also then identified the stick with which the killing was done. We doubt if the criminal annals of this state will show such atrocious crimes as this record discloses. The court gave a full and correct charge in the case. There is no complaint whatever thereof, either of commission or omission.

[1, 2] Appellant urges in his motion for new trial that the court erred in overruling his motion for a continuance on account of the absence of said Domingo Gonzales, his companion and partner in these crimes. The motion does not appear in the record, no bill of exceptions was taken thereto, and none appears in the record. The record discloses that the officers hunted for Gonzales to arrest him for these crimes, but that he made his escape. We cannot consider this point without it being shown by a bill of exceptions; but, even if there had been a bill, the court correctly overruled the application.

[3] In some grounds of the motion for new trial it is urged that the court erred in permitting the testimony of certain witnesses on certain points, but this is not shown by bills of exceptions in the record and cannot be considered. However, there are four bills of exceptions in the record; three of them complaining of certain testimony of said woman Florencia Luis, the other of the testimony of a doctor.

This is a companion case to another against the same appellant for the murder of said Florencia's husband (151 S. W. 1056, this day decided. All the bills of exceptions in this case are fully as defective and insufficient, if not more so, than those in said other case, and the decision and discussion of them in that case pretermits any further in this. The only difference between the two cases and the character of objections is that the charge in this case is for the rape of said Florencia and in the other case it

s for the murder of her husband. The three crimes of murder, rape, and robbery by appellant and his said companion and partner in crime are so interwoven and connected that the testimony properly admissible to tell of one almost necessarily, if not quite so, includes each of the others.

[4] However in this, the rape case, there is another reason and ground why the testimony of said Florencia of the fact of her being prevented by force from complaining of the rape that had been committed upon her and complaining thereabout Monday night following the act the day before, being as soon as she could do so, is admissible in that it is always permissible in trials for the crime of rape for the state, as a part of its case, to prove that the ravished woman made complaint at the first opportunity she had. Her testimony in this case showing that she was prevented by appellant's partner and companion in the crimes from making complaint earlier than she did and doing so as soon as she could is especially and peculiarly applicable in this case. *Pefferling v. State*, 40 Tex. 486; *Rogers v. State*, 1 Tex. App. 188; *Topolanck v. State*, 40 Tex. 160; *Ruston v. State*, 15 Tex. App. 324; *Lights v. State*, 21 Tex. App. 308, 17 S. W. 428; *Johnson v. State*, 21 Tex. App. 368, 17 S. W. 252; *Rhea v. State*, 30 Tex. App. 483, 17 S. W. 931; *Castillo v. State*, 31 Tex. Cr. R. 146, 19 S. W. 892, 37 Am. St. Rep. 794. It is needless to cite the many other cases.

We have carefully gone over and studied the evidence and record in this case, as well as that in said companion case, and it is our opinion that the guilt of the appellant is shown beyond dispute, and that no error has been committed in the trial of the case which would authorize or justify this court to reverse the judgment of the lower.

The judgment will therefore in all things be affirmed.

SHAFFER v. STATE.

(Court of Criminal Appeals of Texas. Nov. 18, 1912. Rehearing Denied Dec. 18, 1912.)

1. CRIMINAL LAW (§ 1120*)—APPEAL—BILL OF EXCEPTIONS—LEADING QUESTIONS.

A bill complaining of questions asked by the state's attorney of a witness as to a conversation at 7:30 and then at 9 did not show the questions to be leading and suggestive where the witness' answer was not given.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 2931-2937; Dec. Dig. § 1120.*]

2. CRIMINAL LAW (§ 1091*)—APPEAL—QUALIFIED BILL OF EXCEPTIONS.

Where the court qualified defendant's bill complaining that some of the state's witnesses were in sight and hearing of the witness' testifying, although the rule had been invoked by stating that the witnesses were out of sight

and hearing of the witness on the stand, error was not presented.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 2803, 2815, 2816, 2818, 2819, 2823, 2828-2833, 2843, 2931-2933, 2943; Dec. Dig. § 1091.*]

3. CRIMINAL LAW (§§ 419, 420*)—EVIDENCE—HEARSAY.

In a trial for burglary accompanied by an assault upon a young woman, evidence that defendant told his foster mother of his engagement to the young woman soon after it occurred and some months before the offense, was properly excluded, being hearsay.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 973-983; Dec. Dig. §§ 419, 420.*]

4. CRIMINAL LAW (§ 1170*)—APPEAL—HARMLESS ERROR—EVIDENCE.

It was not error to sustain an objection to a question asking defendant's foster mother as to defendant's general character and acts during his lifetime, where it had already been proven by the same witness that defendant's reputation as a peaceable, law-abiding citizen was good.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 3145-3153; Dec. Dig. § 1170.*]

5. CRIMINAL LAW (§ 657*)—PUNISHMENT OF COUNSEL FOR CONTEMPT—ABSENCE OF JURY.

It was not error to punish defendant's counsel, in the jury's absence, on account of his repeatedly refusing to abide by the court's ruling excluding certain questions.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 1534; Dec. Dig. § 657.*]

6. CRIMINAL LAW (§ 1091*)—APPEAL—BILL OF EXCEPTIONS—SUFFICIENCY.

A bill showing the exclusion of questions whether defendant had fights when he was a boy did not show error where it did not state what the witness would have testified.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 2803, 2815, 2816, 2818, 2819, 2823, 2828-2833, 2843, 2931-2933, 2943; Dec. Dig. § 1091.*]

7. CRIMINAL LAW (§§ 413, 419, 420*)—EVIDENCE—SELF-SERVING DECLARATION.

In a trial for burglary accompanied by assault and followed by an attempt on the part of defendant to commit suicide, evidence that defendant told his foster mother the day after the crime was committed that he did not know how the wound on his throat was inflicted and that it was not self-inflicted, being hearsay and self-serving, was properly excluded.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 928-935, 973-983; Dec. Dig. §§ 413, 419, 420.*]

8. CRIMINAL LAW (§§ 419, 420*)—EVIDENCE—HEARSAY.

In a trial for burglary accompanied by an assault and followed by an attempt on the part of defendant to kill himself with a razor, evidence as to conversations between defendant's foster mother and the officers relative to their finding blood and a blood-stained handkerchief was properly excluded.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 973-983; Dec. Dig. §§ 419, 420.*]

9. CRIMINAL LAW (§ 730*)—REMARKS OF COUNSEL—INSTRUCTIONS.

Side remarks of the state's attorney in a burglary case did not constitute error where the court instructed the jury to disregard them.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 1693; Dec. Dig. § 730.*]

10. CRIMINAL LAW (§ 338*)—EVIDENCE—ADMISSIBILITY.

Defendant's testimony that he had been in jail several months before trial and had but a few days to engage counsel was properly excluded.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 752-757, 788, 801, 855; Dec. Dig. § 338.*]

11. CRIMINAL LAW (§§ 419, 420*)—EVIDENCE—HEARSAY.

Defendant's testimony as to what the newspapers had published regarding the crime was properly excluded where he stated that all his information was hearsay.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 973-983; Dec. Dig. §§ 419, 420.*]

12. CRIMINAL LAW (§ 1170*)—APPEAL—HARMLESS ERROR—OPINION EVIDENCE—INSANITY.

Where the defense was insanity, it was not reversible error to refuse to permit a witness who had testified to defendant's appearance after the offense to state whether he looked like an insane man.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3145-3153; Dec. Dig. § 1170.*]

13. CRIMINAL LAW (§ 1091*)—APPEAL—BILL OF EXCEPTIONS.

A bill complaining of the exclusion of evidence presented no error where it failed to give such a statement of the case or questions as to show that defendant was injured by the exclusion.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2803, 2815, 2816, 2818, 2819, 2823, 2828-2833, 2843, 2931-2933, 2943; Dec. Dig. § 1091.*]

14. WITNESSES (§ 277*)—DEFENDANT AS WITNESS—CROSS-EXAMINATION.

Where defendant testified that he could not remember after 10 o'clock on the night of the offense, the court properly permitted him to be cross-examined as to whether his lack of remembrance was due to a blow received prior to that hour.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 925, 979-984; Dec. Dig. § 277.*]

15. CRIMINAL LAW (§ 338*)—EVIDENCE—FEE PAID TO ATTORNEYS ASSISTING PROSECUTION.

Evidence as to the fee paid attorneys who assisted in the prosecution was properly excluded.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 752-757, 788, 801, 855; Dec. Dig. § 338.*]

16. CRIMINAL LAW (§ 364*)—EVIDENCE.

In a trial for burglary, followed by defendant's attempt to cut his throat, the court properly permitted the chief of police to testify about defendant's condition and about his writing of statements concerning the offense upon scrap paper soon after his arrest.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 805, 808-810, 813, 816-818; Dec. Dig. § 364.*]

17. CRIMINAL LAW (§ 485*)—EXPERT TESTIMONY—HYPOTHETICAL QUESTION.

The substance of such testimony by the chief of police was properly included in a hypothetical question asked by the state on rebuttal of defendant's defense of insanity.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1073, 1074; Dec. Dig. § 485.*]

18. CRIMINAL LAW (§ 474*)—EVIDENCE—INSANITY.

Where, in a trial for burglary which followed by defendant's attempt to commit suicide, the defense was insanity resulting from a blow, the court properly permitted the doctor who treated defendant to testify that there was no evidence of concussion.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1061; Dec. Dig. § 474.*]

19. CRIMINAL LAW (§ 773*)—INSANITY—INSTRUCTION.

In a trial for burglary, where the defense was insanity from a blow received before the commission of the offense, it was not error to instruct that insanity justifying defendant's acquittal was "a defect of reason and diseased of the mind," and to refuse defendant's requested instruction that insanity such as would excuse the crime was "that state of mind in which the person is mentally irresponsible through loss of consciousness such as is normally produced from any cause which is shown to be capable of producing it."

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1821-1828; Dec. Dig. § 773.*]

20. CRIMINAL LAW (§ 814*)—INSTRUCTIONS—EVIDENCE TO SUSTAIN.

Where in a trial on an indictment alleging burglary in the daytime in the first count and burglary in the nighttime in the second, the evidence clearly established nighttime burglary, and the court charged that defendant should be acquitted if it was not nighttime burglary, it was not error to submit the second count only.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1821, 1833, 1839, 1890, 1895, 1883, 1890, 1924, 1979-1985, 1987; Dec. Dig. § 814.*]

Appeal from Criminal District Court, Harris County; C. W. Robinson, Judge.

L. B. Shaffer was convicted of burglary, and he appeals. Affirmed.

D. F. Rowe and Leonard Doughty, both of Houston, for appellant. C. E. Lane, Asst. Atty. Gen., for the State.

PRENDERGAST, J. The appellant was indicted for burglary in two counts, the first, daytime, and the second, nighttime. Both charged that it was done with intent to murder Bertha Woodworth, and the house burglarized was the private residence of W. W. Woodworth. The nighttime count only was submitted. The jury convicted appellant and fixed his penalty at six years in the penitentiary. The records in this case are voluminous. The record proper has 90 pages of typewritten matter, the statement of facts 105, and appellant's printed brief 61.

In the consideration of this case and the questions raised, we have given all of these records a thorough investigation. A large number of witnesses were introduced. While all this is true, the main questions are few. It is unnecessary to give any lengthy statement of the testimony. We will give such of it only as we think is necessary to so discuss and decide the questions.

The family of W. W. Woodworth consisted of himself, his wife, and his said daughter Bertha. His business and duties required him

away from his said home in Houston, most of the time, and he was there very little. The family had rented and occupied as private residence a certain house in the city of Houston at the time and before the burglary which is charged to have been committed on December 3, 1910. During the spring and early summer of 1910 a young man, it seems, by the name of Rogers was paying attention to Bertha. About then the appellant became acquainted with her and so manipulated as to turn her against said Rogers and caused her to dismiss him and accept appellant as her suitor. Early in July she and appellant became engaged to be married. In the latter part of November, 1911, it seems that Bertha in some way learned of appellant, in inducing her to dismiss Rogers and no longer associate with him or receive his attentions, had misrepresented Rogers in some way, and she and Rogers did then become aware of it. It seems that this, or something else, about a week before December 3, 1910, resulted in Bertha breaking the engagement of marriage with appellant; he claiming, however, that this did not occur until about the night before the offense as charged to have been committed. The burglary occurred just before or about daylight on Saturday morning December 3, 1910, while it was still dark. Bertha testified that she saw appellant on the Thursday night before, and that he then threatened to kill her or breaking their engagement. On Friday night, early in the night, she phoned to said Rogers and had him to come to her house; he reaching there about between 5 and 6 o'clock. A little later, about 7 o'clock, appellant appeared upon the scene and found Rogers there in company and conversation with Bertha. He thereupon became incensed and demanded to know what his business was there. Rogers then accused appellant of being the cause of Bertha's dismissing him (Rogers), and some words and altercation then occurred between them in the presence and in the house of Bertha and her mother. Bertha and her mother desired appellant to leave the house, and, upon his declining to do so, they requested Rogers to forcibly put him out of the house, which Rogers then did. Appellant claims that in this altercation and forcible ejection Rogers struck him a blow on the face on the side of the nose. Rogers, Bertha, and her mother all testified that he did not strike him any blow, but they all substantially testified that he did roughly take hold of him and forcibly eject him from the house and closed the door on him. Rogers shortly afterwards left the house and was not in or about it any more during that night or the next day. Appellant testified that after he was thus ejected from the house he walked up and down the sidewalk of the block in which this house was situated in the city of Houston until about or after 10 that night, and that he remembered what he did and where he went, detailing more or

less of this, but that after about 10 that night, on this trial, he did not remember anything that occurred during the remainder of that night or early the next morning.

The testimony further shows, without doubt and without material contradiction, that the next morning, Saturday, December 3, 1910, just before or about daylight, and while still dark, the appellant appeared at the said Woodworth's house and attempted to get in it, but, not succeeding otherwise, he kicked out one of the glass sidelights of the entrance and through that then got into said house, and thereupon went up the stairway to the second story and to the door of the room which was occupied as the bedroom of Bertha and her mother that night; that he was familiar with the house, both up and down stairs, and knew where Bertha and her mother slept; that, upon reaching the bedroom door, he demanded an entrance, but was refused by Bertha and her mother, who were then still in bed and undressed. He thereupon proceeded to burst in the panels of the door and through this break entered the said bedroom, Bertha and her mother screaming and running, and Bertha went out of the room through one of the windows on to the second story of the front gallery; appellant following her with a black-handled open razor and after her with it. That in attempting to escape from him she got outside of the banisters of the gallery, holding and clinging thereto, leaning as far away from him as she could; that in some way she then fell from this gallery to the ground below, the appellant attempting to cut her all this time, causing her to fall in attempting to escape. He thereupon hurriedly retraced his steps, went back through the window, through the room and door which he had succeeded in breaking through, down the stairway out on the front gallery below, and then proceeded to cut and slash Bertha with this razor, inflicting serious wounds upon her therewith; that he cut her neck, attempted to cut her throat, cut her on top of the head, cut her finger on one hand and the thumb on the other, and that, in perpetrating these wounds upon Bertha, he broke the edge of the razor off, part of this broken piece lodging in her hair at the wound in her head. Another piece was broken off and lodged in her finger. These pieces of the razor were found by the physician who was at once called in to dress her wounds. She was confined to her bed some three weeks from the wounds. By the screams of Bertha and her mother, the neighborhood was aroused and some men came to where she was; the appellant thereupon fleeing. Shortly after this he went into the back premises of a neighbor of the Woodworths and with the same razor cut his own throat, partially severing part of the windpipe and vocal organs. A pool of blood, the razor, and a handkerchief saturated with blood were found apparently where he fell or lay down when he cut his throat.

Shortly after this he appeared at the back door of this neighbor, knocked at the door, and, upon her opening it, she discovered him with his hair disheveled, no hat on, and blood all over him, and was so frightened that she immediately slammed and locked the door and ran from the house. Shortly afterwards he was apprehended and taken to one of the infirmaries in the city, and a doctor was immediately called to attend him. The nurse or person who called this physician briefly told him the condition of the appellant, and he instructed the nurse to administer anesthetics and that he would reach there as soon as he could and dress his wound and give him attention; that he shortly afterwards did appear at the infirmary, found appellant with his throat cut, as stated, and had other anesthetics and morphine administered to him, and proceeded to dress and sew up his wound. The razor found with the handkerchief saturated with blood at the pool of blood was identified by the witnesses as the razor with which he had cut Bertha Woodworth; the witnesses sitting in the broken pieces found in her head and finger with the broken razor. The doctor at the infirmary dressed his wounds between 8 and 9 o'clock, and, just after the wounds were thus dressed and sewed up, Mr. Kessler, the chief of police, who had been called by the crime to the scene thereof soon after it occurred, appeared at the infirmary, saw appellant, and talked with him about the facts of the case. He asked him questions and he replied partially vocally, though his voice was much affected by his self-inflicted wounds, but, in addition to nodding his head and thus talking, he wrote briefly of what had occurred, and then and there gave it to the chief of police. On this occasion, in substance, he told the chief of police that said Rogers had assaulted him in the early part of the night or evening before; that when he had this conversation with appellant, and appellant told him these things and wrote what he did, he was conscious and sensible and nothing was wrong with him beyond his wounds, and, while he said he could not speak, he told this witness about cutting this young lady and, as he understood from him, had later inflicted the wounds upon himself. The writing thus made by appellant and given to the chief of police was produced and identified. It was written or scribbled on pads of paper—the chief would ask him the questions and he would answer with the scribbling, or shake or nod his head, as he was asked the questions. The appellant thereupon introduced this writing of appellant which was as follows: "I tried, killed that girl over Mrs. Woodworth and myself, give it to the police." "I got beat up by Rogers, he works over No. 7 fire station arrest him." This witness further testified: "When he read those things to me, he made no claim he did not know what he was doing the night be-

fore; there was no pretense in his conduct there with me that he had lost his mind or was insane, or anything wrong with him the night before; he was pretty rational when talking to me." The infirmary physician who first reached him between 8 and 9 o'clock carefully examined him, washed and dressed his wounds, and he testified, in substance, that he examined him thoroughly, and there were no other wounds or bruises on him whatever than the self-inflicted cut on his throat, and there were no external signs of violence, and he had no bruises or wounds on his face, nor was his face or eyes swollen.

Appellant's defense was insanity, he claiming and testifying that he knew nothing about his breaking in the Woodworth house or his assaulting or cutting Bertha or himself; that, after he was ejected from the house about 7 o'clock the night before, he remembered what he did and where he went and practically all until about 10 o'clock that night, and that he remembered nothing after that; that after he was ejected from the house and assaulted and struck by said Rogers the night before that he did not feel right; that he felt like something was the matter with him; that it did not occur to him to go to any of his friends or a doctor, or away from his proximity to the Woodworth house to get help or to have anything done for him; that he did not know, while he was testifying, what was his trouble that night—what was the matter with him; that it had been so long since then that he could not swear whether his then condition was due to the lick he claimed to have received from Rogers the night before; that he did not know what there was to cause him to just forget and everything to become a blank after 10 o'clock that night; that he did not then, at the time he was testifying, know of anything else that could have caused it.

His foster mother testified that she did not see him until the next evening about 3 o'clock after all of this occurred on the morning before, and he had been in the infirmary and his wounds dressed and sewed up about 8 or 9 o'clock that morning; that at that time—3 p. m.—the side of his face was swollen, and that it was black and blue and green; that the side of his face showed the color was purple, broken, and bruised; that his whole face was discolored and he had a pale, greenish appearance as of a person having lost a great deal of blood, and his swollen face had greenish streaks all over it.

While not a single one of appellant's many bills comply with the rules (section 857, p. 557, and section 1123, p. 732, of White's C. C. P.), yet we will briefly take up and pass upon the questions attempted to be raised by them.

[1] By appellant's first bill he complains that this question was asked by the state's attorney: "You spoke of this conversation at 7:30 and then at 9. I don't understand

explain that," because it was leading and suggestive. The bill in no way shows that it was leading or suggestive, nor does the question. The answer of the witness is not given. This shows no error. His next bill complains that the court would not permit the stenographer, at his request, to read a certain question which had been asked, to which he excepted. This shows no error. The third bill contains about 3½ pages of typewritten matter of questions and answers and colloquies between the counsel and the court, and that the court then asked this question, "When was it, let us get this time straight?" That he objected to the court stopping him in his cross-examination and asking the above question. Then the bill proceeds to show that the witness, in answer to the questions, attempted to explain. No error is shown by this bill.

[2] By his fourth bill he complains, in substance, that some of the state's witnesses were in sight and hearing of the witness testifying, although the rule had been enforced and they sent out of the room. The court in explaining the bill states that the witnesses were in a room out of sight and hearing of the court or witnesses on the stand. This bill shows no error.

[3] The seventh bill contains 13½ pages of typewritten matter and, among other things, shows that the appellant attempted to prove by his foster mother what he had told her about his engagement to Bertha Woodworth soon after it occurred in July, 1910, and some months before the alleged offense. We get from this bill that appellant was seeking to introduce this testimony, and the court would not permit him to do it because it was hearsay and improper. The bill shows no error whatever, but it does show a patience and long suffering by the court that should not have occurred. When appellant offered his testimony, which we think was clearly hearsay and inadmissible, it was promptly objected to by the state, and the court sustained the objection, and then, at appellant's instance, the court retired the jury and had a long controversy and colloquy with appellant's counsel about the matter. When the appellant offered his testimony and it was objected to by the state and the objection sustained and the evidence excluded, this should have ended the matter, and the court should have proceeded with the trial, as the bill shows he repeatedly attempted to do, but was in effect prevented by appellant's attorney. There is no eighth bill in the record, and the court refused to approve his ninth bill.

[4] By the tenth bill it is shown that appellant asked his foster mother, in substance: As thoroughly as possible the general character as she observed it, and the acts and conduct of the defendant as evincing his disposition, whether it was that of a quarrelsome or peaceable person, and wheth-

er it was that of one who respected the rights of others, or whether it was that of a murderer or a harmless person, tell all about it during his whole lifetime. This was objected to by the state as immaterial and irrelevant and as attempting to prove character in the wrong way, and that it was the opinion of the witness about matters that are not relative to appellant's marriage engagement to Bertha. The court sustained the objection. It is not stated what the witness would have testified. In approving the bill the court qualified it by stating that it was already proved by the witness that appellant's reputation as a peaceable, quiet, and law-abiding citizen was good. By the eighteenth bill appellant attempted to prove by another witness what his reputation was as an upright citizen. And by the twentieth, by another witness, that his reputation was that of a gentle and humane disposition. These bills, and neither of them, show any reversible error.

[5, 6] The eleventh bill, of five pages of typewritten matter, shows that appellant attempted to prove that he did not have fights when he was a boy. And in his fourteenth that, when the court would not let the witness answer certain questions along the same line, the court threatened, or perhaps did, as he states in qualifying the bill, fine or punish him for contempt on account of his repeatedly refusing to abide by the ruling of the court; that all this occurred in the absence of the jury. This bill does not state what the witness would have testified. None of this shows any error.

[7] By his fifteenth bill appellant complains that the court would not permit his foster mother to testify what he told her about 3 o'clock the next day after the crime was committed about daylight of that day, that he did not know how his wound on his throat was inflicted, and that it was not self-inflicted. The court correctly sustained the state's objection to this because it was hearsay and self-serving and it shows no error.

[8] By his seventeenth bill appellant complains that the court would not let him show the conversations between Mrs. Sheperd, appellant's foster mother, and the officers about their finding the said handkerchief saturated with blood at the pool of blood where the razor was found; the court stating that he could prove any fact by any person who knew such fact about the handkerchief, but not conversations between the witness and other persons. There was no error in this.

[9] No error is shown by appellant's nineteenth bill wherein he complains of some side-bar remark of the state's attorney during the trial; the court stating that he instructed the jury not to consider the remarks of counsel for the state. Nor was there any error shown in a side-bar remark by the prosecuting attorney, as complained of in his twenty-first bill.

[10] Neither was there any error in the court refusing to permit the appellant to testify that he had been in jail for some months prior to his trial, and that he had but a few days ago engaged counsel, which was done through his foster mother.

[11] There was no error in refusing to permit appellant to show what the newspapers had published of the occurrence the day after it occurred; the witness stating that he had no personal knowledge of the reports in the newspaper, and that all of his information was hearsay.

[12] There is no reversible error shown by appellant's thirty-second bill to the action of the court in refusing to permit Mrs. Miller to testify that appellant looked like he was insane when he appeared at her back door and knocked and she saw him bloody all over, etc. The court permitted the witness to testify to the condition of the appellant at the time, and simply excluded her expression that he looked like an insane man.

[13] Besides this bill does not in any way give such a statement of the case or questions as to show this court that any injury whatever has occurred to him thereby.

[14] The court correctly held that the state had a right in cross-examination of the appellant to have him testify, in substance, that he could not say whether his lack of remembrance after 10 o'clock the night of the assault was due to the lick he received as complained in appellant's bill No. 33.

[15] Nor did the court err in refusing to permit appellant, as complained in his bill No. 34, to prove that Mrs. Woodworth, Bertha's mother, paid a large fee to Messrs. Lane, Walters & Storey, attorneys, to prosecute him.

[16] Nor did the court err in permitting the witness Kessler, the chief of police, to testify about appellant's condition and his writing and delivering what he did to him on the morning after the crime, as substantially stated in the statement above, as complained by appellant in his thirty-fifth bill. Nor did the court err, as complained in his thirty-seventh bill, in not permitting his expert Doctor Ross to give an illustration of some patient, which was not in point in this case.

[17] His bill No. 39, complaining that the court erred in cross-examination of his expert Doctor Ross in permitting the state to include in the hypothetical question the substance of the testimony of the chief of police, shows no error.

[18] Nor did the court err in permitting the state's witness Dr. Green, who treated appellant and dressed his wounds the morning of his cuts, to testify that there was no evidence of concussion of the appellant.

[19] The court in this case gave a correct charge on insanity, strictly in accordance with charges on the subject which this court has many times and uniformly approved as

a correct charge on that subject. *Nugent v. State*, 46 Tex. Cr. R. 67, 80 S. W. 84; *Hurst v. State*, 40 Tex. Cr. R. 379, 46 S. W. 635, 50 S. W. 719; *Cannon v. State*, 41 Tex. Cr. R. 467, 56 S. W. 351; *Tubb v. State*, 55 Tex. Cr. R. 618, 117 S. W. 858; and many other cases might be cited, but it is unnecessary. In his motion for new trial he complains of this charge because he claims it was error "in restricting the insanity which would acquit defendant in this case to 'a defect of reason and disease of the mind'; whereas the insanity shown to exist in this case, if defendant did commit the act, was caused solely by concussion, and was almost instantaneous, and was not such as would commonly be called a 'disease,' and the jury were wholly misled by the charge into believing that they could not acquit on account of such insanity as was described by Dr. F. B. Ross, which they could not have understood as a 'disease,' and they were thereby misled to the prejudice of the defendant. And this especially in view of the fact that the correct proposition of law was called to the attention of the court in defendant's special charge No. 1, which should have been given." This special charge is to this effect: "Insanity such as will excuse the crime alleged herein is that state of mind in which the person is mentally irresponsible through loss of consciousness such as is normal, produced from any cause which is shown to be capable of producing it."

The evidence in this case, without question and without doubt, shows that appellant's mind, for all of his life previous to the time of the commission of this crime and afterwards, was that of a normal, ordinary sane person. The effect of his testimony on the subject is that from some cause unknown to him and for which he cannot account, he, at the time he testified in this case, could not remember what occurred from about 10 o'clock the early part of the night of December 2, 1910, till after he, late in the evening of the next day, realized that he was in the infirmary with his throat cut, and he claimed that he had been struck in the face by the side of the nose about 7 o'clock the night before by said Rogers in the house of Mrs. Woodworth and in the presence of her and her daughter, Bertha. Rogers, Mrs. Woodworth, and Bertha testified Rogers did not then strike him as claimed by him. Then he put Dr. F. B. Ross on the stand who sufficiently showed that he was an expert, and he was asked a long hypothetical question purporting to recite, from appellant's standpoint, all of the testimony tending to sustain his contention, and then the said doctor was asked: "If you know in your professional and scientific mind whether the action of such an assault comports with that of a sane or insane mind?" He answered: "Up to the time of injury to himself, the blow on the head, I will say there would be no question about the soundness of mind. Now it

is possible for a blow of that kind to create a concussion, and there are different degrees of concussion, and one suffering from concussion might do acts that were utterly at variance with his former character." He further shows in his testimony that, as a matter of opinion, it was a very difficult question to answer; that the way the question was put there were two possibilities—the symptoms related in the question were symptoms of a concussion, but, on the other hand, angry and ordinary human emotions might prompt the same thing. That the symptoms of concussion which were detailed to him in the question were not explained completely so as to show the proper effects of a concussion, and that several requisites of such effect are wholly lacking in the question. Then the same witness, in answer to the state's hypothetical question, states that he would answer that the appellant was not insane.

Whart. Crim. Ev. vol. 1 (10th Ed.) § 417d, says: "In all cases where medical experts are called as witnesses, their testimony should be received with great caution, and like opinions from neighbors and acquaintances should be regarded as of little weight if not well sustained by reasons and facts that admit of no misconstruction, and supported by authority of acknowledged credit. And in all cases the amount of reliance to be placed upon such an opinion depends upon the means of judging of the mental condition of the person, and the facts upon which such opinion is based." In note 2 cited from this text he also cites with approval what Judge Maxwell says in *Burgo v. State*, 26 Neb. 639, 42 N. W. 701: "Ordinary medical expert testimony in regard to insanity, particularly where graduates of different schools of medicine are pitted against each other, is of the most unreliable character." And a Mississippi case, *Russell v. State*, 53 Miss. 367: "It was said that medicine not being an exact science, the testimony of a medical witness on the question of sanity or insanity is at best of an exceedingly unsatisfactory character, and is often as much calculated to mislead as to guide to a correct conclusion."

In section 417e, Mr. Wharton says: "Thus, in those jurisdictions where the right and wrong test obtains in insanity, and such inquiry is permissible and proper, the fact that a person is unable to discriminate between right and wrong is best ascertained, not by the opinion of any medical witness nor by any medical theory, but by the acts of the individual himself. And such acts and conduct on the part of one accused of crime, showing conclusively that he had sufficient reason to contemplate the act that he did and its consequences at the time he did it, are of more value as evidence on the question of capacity than the opinions of witnesses, however learned or experienced

they may be." And in note 2 he approves what was said in *Rankin v. Rankin*, 61 Mo. 295: "And where the mental capacity is thoroughly established by evidence other than by hypothetical reasoning of experts, their mere speculation on the subject is entitled to but little weight." And in *State v. Hockett*, 70 Iowa, 442, 30 N. W. 742: "And expert testimony in a prosecution for crime which is made up largely of mere theory and speculation, and which suggests mere possibilities, ought never to be allowed to overcome clear and well-established facts."

In the recent work of *Legal Medicine*, by Stewart, § 142, he says: "We now know that insanity is a disease just as much as typhoid fever, and that frequently we can trace its rise, progress, culmination, and disappearance. We should never forget this, but treat it as a disease and those suffering from it as other patients, diagnosing their symptoms and treating them as sick people requiring the best of care."

14 Cyc. 385 defines disease as: "Any derangement of the functions or alteration of the structure of the animal organs; a morbid condition resulting from some functional disturbance or failure of the physical function which tends to undermine the constitution." All of the authorities on insanity treat it and discuss it as a mental disease—a disease of the mind. As a matter of fact, it is a mental disease, whatever the cause, and however long or short the duration. Clearly so, as distinguished from a disease of the hands or feet or lungs or stomach, or any other disease of the body other than the mind. Clearly, in our opinion, the special charge requested by appellant, above quoted, is not the law and should not have been given, and the charge complained of is correct and was not subject to the criticism made on it by appellant and did not and could not have prejudiced appellant's rights as claimed by him. Code Cr. Proc. 1911, art. 743.

[20] The court did not err in submitting only the second count in the indictment. The evidence clearly established nighttime burglary as contradistinguished from a daytime burglary, and the court charged the jury in effect that if it was not a nighttime burglary, submitting the requisites thereof for a finding, to acquit appellant. The jury did not fix the lowest punishment for nighttime burglary, but fixed a higher penalty.

There is nothing in appellant's contention criticising the charge of the court in defining murder in quoting the statutory definition thereof: "Every person with a sound memory and discretion," etc. The record shows that the court, in hearing appellant's ground of his motion for new trial attacking the juror Lawrenson, heard evidence thereon, and, after hearing the evidence, overruled the motion. No error is shown in this.

The judgment is affirmed.

BYRD v. STATE.

(Court of Criminal Appeals of Texas. Nov. 18, 1912. Rehearing Denied Dec. 18, 1912.)

1. CRIMINAL LAW (§ 101*)—COURTS—JURISDICTION—TRANSFER OF CAUSES.

A transfer of a prosecution under an indictment returned in the district court for pursuing the occupation of selling intoxicating liquors in local option territory to the county court is properly denied.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 198-205; Dec. Dig. § 101.*]

2. INDICTMENT AND INFORMATION (§ 87*) — STATUTORY OFFENSES—REQUISITES OF INDICTMENT.

An indictment charging the commission of a statutory offense subsequent to the passage of the statute need not contain the allegation that the offense was committed subsequent to the passage of the statute, and the indictment is good on its face.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 244-255; Dec. Dig. § 87.*]

3. INTOXICATING LIQUORS (§ 205*)—PURSUING THE OCCUPATION OF SELLING LIQUORS IN LOCAL OPTION TERRITORY—INDICTMENT—REQUISITES.

Under the Code, providing that an indictment need only allege the facts which will enable accused to plead the judgment given on it in bar of any prosecution for the same offense, an indictment alleging that accused on or about October 5, 1910, unlawfully pursued the occupation of selling intoxicating liquor, and on a given date made a sale to one man and on a different date a sale to another man, and that during the months of June, July, August, September, October, November, and December, 1910, and January, February, March, and April, 1911, all anterior to the filing of the indictment, made sales to persons to the grand jury unknown, is not defective for not alleging that during all the time accused continued to pursue the business.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 225; Dec. Dig. § 205.*]

4. INTOXICATING LIQUORS (§ 148*)—"PURSUING THE BUSINESS OF SELLING INTOXICATING LIQUORS."

The offense of pursuing the business of selling intoxicating liquors in local option territory is a distinct offense from that of making a sale of intoxicating liquors, and is a felony.

[Ed. Note.—For other cases, see Intoxicating Liquors, Dec. Dig. § 148.*]

5. CRIMINAL LAW (§ 1091*)—INDORSEMENT ON INDICTMENT OF WITNESSES—BILL OF EXCEPTIONS.

Where the court, in approving the bill of exceptions complaining of the denial of a motion to require the state to indorse on the indictment the names of all its witnesses, stated that the indictment contained the indorsement of witnesses who were all of the main witnesses, the bill presented no error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2803, 2815, 2816, 2818, 2819, 2823, 2828-2833, 2843, 2931-2933, 2943; Dec. Dig. § 1091.*]

6. CRIMINAL LAW (§ 1166½*)—RULINGS ON CHALLENGES—REVIEW.

Where no objectionable juror served in the case, accused could not complain of rulings on challenges to jurors.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3114-3125; Dec. Dig. § 1166½.*]

7. CRIMINAL LAW (§ 730*)—IMPROPER ARGUMENTS OF PROSECUTING ATTORNEY—CORRECTION BY COURT.

Where accused objected to the remarks of the district attorney, and the court at once reprimanded him and orally directed the jury not to consider the remarks, and also gave the charge requested by accused, the remarks did not call for a reversal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1693; Dec. Dig. § 730.*]

8. CRIMINAL LAW (§ 372*)—PURSUING BUSINESS OF SELLING LIQUOR IN LOCAL OPTION TERRITORY—EVIDENCE—ADMISSIBILITY—OTHER SALES.

Under an indictment alleging that accused pursued the business of selling liquor in local option territory, the state may show sales of liquor on dates other than the date mentioned in the indictment, and proof of sales is a circumstance to show that accused engaged in the business.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 833, 834; Dec. Dig. § 372.*]

9. CRIMINAL LAW (§ 1169*)—EVIDENCE—MATERIALITY.

The age of a state's witness is immaterial, and the mere fact that a witness is permitted to state his age presents no error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 8068, 8137-8143; Dec. Dig. § 1169.*]

10. INTOXICATING LIQUORS (§ 233*)—PURSUING BUSINESS OF SELLING LIQUOR IN LOCAL OPTION TERRITORY—EVIDENCE—ADMISSIBILITY.

Under an indictment alleging that accused, on or about a designated date, pursued the business of selling liquor in local option territory, and that in enumerated months he sold liquor, the state was properly permitted to show the amount of liquor received by accused and that it was delivered at the place where he carried on the business.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 293-297, 298½; Dec. Dig. § 233.*]

11. INTOXICATING LIQUORS (§ 235*)—PURSUING BUSINESS OF SELLING LIQUOR IN LOCAL OPTION TERRITORY—EVIDENCE—ADMISSIBILITY.

The refusal to permit accused, charged with pursuing the occupation of selling liquor in local option territory, to show that it was the custom of patrons of his place of business to have him order intoxicating liquors for them was proper where each witness called to testify was permitted to state whether or not he had requested accused to order liquor for him.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 299; Dec. Dig. § 235.*]

12. CRIMINAL LAW (§ 413*)—EVIDENCE—HEARSAY EVIDENCE.

Where accused did not testify, declarations made to third persons could not be proved because self-serving.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 923-935; Dec. Dig. § 413.*]

13. CRIMINAL LAW (§ 1059*)—INSTRUCTIONS—REVIEW—OBJECTIONS—NECESSITY.

Under Code Cr. Proc. 1911, art. 743, providing that no criminal case shall be reversed for error in the charge unless the charge was excepted to at the time of the trial or in the motion for new trial and the error pointed out an exception to a charge in a criminal case must specifically point out the error, and, while the complaint to the charge may be preserved by bill of exceptions or by a ground in the mo-

tion for new trial, the error must be specifically pointed out.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2871; Dec. Dig. § 1059.*]

Davidson, P. J., dissenting in part.

Appeal from District Court, Brown County; John W. Goodwin, Judge.

John Byrd was convicted of crime, and he appeals. Affirmed.

Harrison & Wayman, of Brownwood, for appellant. O. E. Lane, Asst. Atty. Gen., for the State.

HARPER, J. Appellant was prosecuted and convicted of pursuing the occupation of selling intoxicating liquors in local option territory, and his punishment assessed at 2½ years' confinement in the penitentiary.

[1] Appellant moved to transfer this case to the county court. This was decided adversely to the contention of appellant in the cases of *Fitch v. State*, 58 Tex. Cr. R. 366, 127 S. W. 1040, and *Mizell v. State*, 59 Tex. Cr. R. 228, 128 S. W. 127.

[2] The indictment is also assailed, but we do not deem it necessary to discuss all the grounds; they having been passed on so often by this court. *Mizell v. State*, 59 Tex. Cr. R. 226, 128 S. W. 127; *Slack v. State*, 61 Tex. Cr. R. 362, 136 S. W. 1073; *Dozier v. State*, 62 Tex. Cr. R. 258, 137 S. W. 679, and cases cited. However, appellant assigns, as an additional ground to those heretofore passed on, the ground that, as the indictment charged that the offense took place on or about the 5th day of October, 1910, and the law under which he was prosecuted only became effective July 10, 1909, that the indictment is invalid, because it did not contain the words "and subsequent to the passage of the law." As the date of the offense is alleged 15 months after the law became effective, no such allegation was necessary. Indictments can only be quashed for defects apparent on the face thereof, and, as the offense is alleged to have been committed subsequent to the passage of the law, it was good on its face. The authorities cited by appellant do not sustain his contention. In Alabama, from which state a number of cases are cited by appellant, it is not necessary to allege the date of the offense unless it is a material ingredient of the offense, and in that state, on an indictment in which no date was alleged, it was held that a date ought to be alleged, or the indictment make it manifest that the act was committed subsequent to the passage of the law. In this case a date is alleged, and the indictment charges the offense to have been committed subsequent to the passage of the law.

In the case of *Hodnett v. State*, 66 Miss. 26, 5 South. 518, a Mississippi case cited by appellant, the date alleged as the date of the commission of the offense was prior to the passage of the law, consequently for this de-

fect the indictment was declared invalid. In that case it was held the indictment must allege the offense to have been committed subsequent to the passage of the law. This indictment does so charge. In the case of *State v. Massey*, 97 N. C. 465, 2 S. E. 445, a North Carolina case cited by appellant, the law as amended became effective February 16th, and thereafter, on April 1st, the pleader in the indictment did not allege the elements of the offense as defined by the amended act, and, the indictment having alleged the offense as subsequent to the passage of the act, the court held the indictment bad because it failed to allege the elements of the offense at the alleged date of the commission thereof. As hereinbefore stated, none of the cases cited by appellant sustain his contention, but all the authorities hold the indictment valid, drawn as in this case on that issue.

[3] Appellant further contends that, as the indictment alleges "that on or about the 5th day of October, 1910, the appellant did then and there unlawfully engage in and pursue the occupation and business of selling intoxicating liquor in violation of law, and did, on a given date, make a sale to one man, and on a different date make a sale to another man," etc., and that during the months of June, July, August, September, October, November, and December, 1910, and January, February, March, and April, 1911 (all being anterior to the filing of the indictment), did make sales to persons to the grand jury unknown," it is defective in that it did not contain an additional allegation that during all that time appellant continued to engage in and pursue the business and occupation. Having alleged that appellant on a given date pursued the business or occupation, this allegation would admit proof that appellant was engaged in such occupation within any time prior to the presentment of the indictment within the period of limitation, or, in this instance, subsequent to the enactment of the law, covering the months charged in the indictment. *Cudd v. State*, 28 Tex. App. 124, 12 S. W. 1010; *Abrigo v. State*, 29 Tex. App. 143, 15 S. W. 408; *Shuman v. State*, 34 Tex. Cr. R. 69, 29 S. W. 160. The offense denounced by this statute is the pursuing of a business or occupation, not the making of a sale, but evidence that sales have been made is admissible as proof going to show that one is engaged in the business, and the state having alleged that he was pursuing the occupation and business, and adduced proof as to sales over a period of time as tending to show that he was so engaged, if the state should attempt a second prosecution covering the same period of time, a plea of former conviction would necessarily be sustained; but, having once made a proper allegation that he was pursuing the business and occupation, it was not necessary to re-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

peat such allegation each time a sale was alleged to have been made, as the allegation that "he on or about a given date" covered and admitted proof over a period prior to the filing of the indictment generally for the full period at which the law has fixed a limitation as a bar, but in this instance from and after the law became effective until the filing of the indictment herein, and the court so limited the testimony. Subdivision 6 of article 439, Code of Criminal Procedure; *State v. White*, 41 Tex. 64; Wharton's Precedents of Indictments and Pleas, 9. The indictment in this case follows the forms in this respect as laid down in White's Annotated Penal Code, §§ 156, 158, 159, 160, 162, and 163, and which have been frequently approved by this court. Our Code provides that the certainty required in an indictment is only such as will enable the defendant to plead the judgment that may be given upon it in bar of any prosecution for the same offense, and this conviction would bar any further prosecution of appellant for the offense charged, under the evidence adduced, from and after the law became effective until the date of the filing of the indictment herein.

[4] The indictment in this case charges appellant with pursuing the business or occupation of selling intoxicating liquors, and is a distinct offense from making a sale of intoxicating liquors, and is a felony in this state, and the court did not err in so holding. *Fitch v. State*, 58 Tex. Cr. R. 366, 127 S. W. 1040.

[5] The appellant filed a motion requiring the state to indorse on the indictment the names of all its witnesses. The court overruled the motion and, in approving the bill, states the indictment contained the following indorsement: "Found on the testimony of Ed Blevins: Names of witnesses: Ed Blevins, A. N. Davenport, Elmer Jones, Tom Ward, T. B. Speed, Dan Harris, T. A. Morrison, L. L. White, C. C. Lockwood"—and the court states these were all of the main witnesses. As thus qualified, the bill presents no error. Section 327, White's Ann. Proc., and authorities cited.

[6] In two of the bills defendant complains of being required to exhaust peremptory challenges on two jurors, S. F. Haynes and W. G. Churchill. As to the juror Churchill, he did not serve on the jury, was not challenged by defendant, but was challenged by the state. As defendant did not exhaust any challenge on that juror, and he did not serve on the jury, he has no ground for complaint. The juror Haynes answered that he had an opinion formed from hearsay, but such an opinion would not influence his verdict; that he had talked with none of the witnesses. This juror was challenged both by the state and defendant, and did not serve on the jury. The court did not err in his ruling. Subdivision 13 of article 673. In addition to this, it is not shown

that any objectionable juror served in the case.

[7] In another bill it is shown that defendant objected to certain remarks of the district attorney, and the court at once reprimanded that official and orally instructed the jury not to consider such remarks, and in addition to this he gave the charges requested by defendant in this respect, and, under such circumstances, the remarks were not of that nature that would call for a reversal of the case.

[8] There are a number of bills of exception objecting to the court permitting witnesses to testify to sales of whisky on dates other than the date named in the indictment. The indictment charged that appellant pursued the business or occupation on or about the 5th day of October, and each sale testified to was a circumstance tending to show that appellant was engaged in that business. As we discussed this question in passing on the sufficiency of the indictment, we do not deem it necessary to do so again.

[9] In another bill it is shown that a witness for the state was asked his age. The age of the witness could not be material in this case, and the fact that he stated his age presents no error.

[10] The record in this case discloses that appellant from on and after June 9, 1911, signed for and had consigned to him the following shipments of intoxicating liquor:

| | |
|----------|---|
| June 9. | One cask of beer, weight 250 pounds. |
| June 22. | Two boxes of liquor, weight 110 pounds. |
| June 29. | One cask of beer, weight 250 pounds. |
| June 30. | One box of liquor, weight 50 pounds. |
| July 8. | Two boxes of liquor, weight 100 pounds. |
| July 11. | Two boxes of liquor, weight 100 pounds. |
| July 15. | Box of liquor, weight 70 pounds. |
| July 25. | Two boxes of liquor, weight 100 pounds. |
| July 29. | One package of liquor. |

These items continue on through the months of August, September, October, November, December, January, and February, showing shipments of liquors to appellant in quantities. It was shown that appellant receipted for these shipments, and that draymen during these months delivered packages to appellant's place of business. In admitting all this testimony there was no error, as appellant was charged with pursuing the business or occupation of selling intoxicating liquors, and it was permissible for the state to show the amount of liquors received by him, and that it was delivered at the place where the evidence would show that appellant carried on this business.

[11] In another bill it is complained that the court refused to permit appellant to show that it was the custom of patrons of his place of business to have appellant order intoxicating liquors for them. The court permitted each witness called to testify whether or not he had requested appellant

to order liquors for such witness, and it was not error to exclude evidence of the "general custom." If appellant ordered the the liquors he received for others, he knew that fact, and could have had such person summoned to testify in the case.

[12] What the defendant may have told another person would be but a self-serving declaration. Inasmuch as the defendant did not testify in this case, he could not make evidence for himself by proving by others that on a given occasion he had told them certain things.

[13] Beginning with paragraph 21 up to and inclusive of paragraph 32, complaints of the various paragraphs of the court's charge are criticised in the following language: "Because the court erred in charging the jury as follows, to wit:" Then follows a paragraph of the charge. No error is pointed out, nor attempted to be pointed out, merely the paragraph of the charge being set out in *hæc verba*. What is the object and purpose of requiring a motion for new trial to be filed in the court trying the case? Is it not to call the attention of the trial judge to the error, if error there be, that he may correct his mistake, and thus avoid the necessity of an appeal? Appellant in his brief cites us many civil cases in which the Courts of Civil Appeals and our Supreme Court have held that in civil cases this is a sufficient assignment, and that in the assignments of error filed later, or in the propositions stated under the assignments in the brief, the error may then be specifically pointed out for the first time, and asks why a more strict rule should be enforced and applied in cases where men's lives and liberty are at stake than in cases where mere property rights are affected. Upon the writer's accession to the bench, he entertained the views now so forcibly presented by appellant's counsel, and gave voice to such an opinion in the case of *Ryan v. State*, 142 S. W. 878, and we feel even now that there is no just ground to make such distinction in the two character of cases, but if anything a more liberal rule should be applied in criminal than in civil cases, for life and liberty are far more dear to an individual than his property rights. Yet the Court of Criminal Appeals is not the lawmaking power in this state, and it is bound by such rules of procedure as the lawmaking body may prescribe; and, as the Legislature has deemed it proper to provide different rules governing appeals, we are not to pass upon the wisdom of such legislation, but merely to enforce and abide the law as they have written it. If the law is wrong, this court ought not to be requested nor expected to ignore or change the law, but application should be made to the lawmaking body. In its wisdom the Legislature has seen fit to prescribe in civil cases on appeal that the charge shall be deemed to have

been excepted to without any exception having been taken.

Article 1318 of Sayles' Revised Civil Statutes 1897 provides: "The charge of the court shall constitute a part of the record, and shall be regarded as excepted to and subject to revision for errors therein, without the necessity of taking any bill of exception thereto." Thus it is seen that the Legislature has provided that in civil cases the charge of the court is subject to review by the appellate court although not excepted to, and this permission has been construed by the courts to be a command to review it under such circumstances, even though unexcepted to if the error be such as it might and probably did work an injury. Again article 1363 of the Revised Civil Statutes provides: "The ruling of the court in giving, refusing or qualifying, if requested, instructions, shall be regarded as excepted to in all instances." However, the reverse of this is the rule in criminal cases, and made so by legislative enactments. As to why they prescribed a different rule is not for us to theorize over, but merely to obey, if they have done so. And by reading the Code of Criminal Procedure it will be seen that they have provided that the charge of the court shall not be regarded as excepted to, but it requires specific complaint to be made, and, if this is not done, we are without authority to review the charge of the court. Article 743 of the Code of Criminal Procedure provides that no criminal case shall be reversed by this court on account of error in the charge of the court unless the charge was excepted to at the time of the trial or in the motion for new trial, and the error pointed out.

As hereinbefore stated, as to why the Legislature made this distinction in civil and criminal cases is a question not for us to determine; that they have made it is manifest; and that they had authority so to do cannot be denied, and this court feels and has always felt bound thereby. The difference in the rules thus prescribed is best illustrated by stating that any defect in a charge in a civil case may be reached by a general demurrer or exception, and the specific objections to the charge may be called attention to by propositions under the general exception, while in a criminal case it takes a special exception to reach the error in the charge—the exception must specifically point out the error, whether saved by bill of exception, or by a ground in the motion for new trial. If this difference in procedure is deemed unwise, application should be made to the Legislature to change it. And this construction is not of recent origin, as some seem to think. Emphatic attention was called to it by Judge Davidson in the case of *Quintana v. State*, 29 Tex. App. 402, 16 S. W. 258, 25 Am. St. Rep. 730 (in which the deci-

sions are collated up to that time), and the rule there prescribed has been followed in an unbroken line of decisions now for more than 20 years. In that case he said: "The primary object or purpose of a bill of exception reserved to a charge of the court is to call the attention of the trial judge to the particular matter complained of, so that he may be afforded an opportunity to correct any error he may have fallen into, to the end that the rights of the defendant may not be prejudiced. A general exception does not accomplish this. Another reason why the bill of exception should point out specifically the errors complained of is to enable this court to ascertain what error was committed without having to examine other portions of the record. This is not done by a general exception. The bill must be so certain and full in its statements that the errors complained of are made to appear by the allegations of the bill itself." And we want to reiterate that while the complaint to the charge may be preserved by a bill of exception or by a ground in the motion for new trial, but when it is preserved in either way, the error, as stated in that opinion, must be specifically pointed out. *Sims v. State*, 30 Tex. App. 606, 18 S. W. 410; *Benavides v. State*, 31 Tex. Cr. R. 175, 20 S. W. 369, 37 Am. St. Rep. 799; *Mayes v. State*, 33 Tex. Cr. R. 42, 24 S. W. 421; *Hearne v. State*, 43 Tex. Cr. R. 436, 66 S. W. 773; *Hudson v. State*, 44 Tex. Cr. R. 258, 70 S. W. 764.

We have cited no case decided since the writer of this opinion has been on the bench, but, to disabuse the minds of some that this is but a recent rule of decision, we have cited only opinions of our predecessors, and many more could be collated. Individually the writer thinks the rule in both civil and criminal cases should be the same in this respect, and he also thinks the same rules of procedure should govern on appeal whether the case is a felony or misdemeanor, but the Legislature has otherwise provided, and we cannot undertake to legislate by judicial construction. In the present day and time when much is being said about simplifying court procedure, it seems to him that some one would make an effort to have the Legislature provide one rule of procedure on appeal applicable alike to all courts and to all cases, whether civil or criminal, felony or misdemeanor. We have said this much, as the Legislature will shortly convene, that steps may be taken, if it is desired, to have the Legislature take action on these matters. But until the Legislature is prevailed on to act, the law as written by them will be applied to all cases on appeal. There is no sound reason that we can see why a man, when convicted for a felony, may, after ad-

journment of court, file an appeal bond and be prohibited from so doing when convicted of a misdemeanor; no reason why in a felony case he should be granted 90 days to prepare and file a statement of facts and bills of exception, and only 20 days in case of a misdemeanor; no reason why in a felony case he may first complain of the charge of the court in his motion for new trial, and not be permitted also to do so in a case of misdemeanor; no reason why he should be required to ask a special charge to cure any omission in the charge in a misdemeanor case, and not be required to do so in case of a felony; no reason why he can reach any error in the charge of the court in a civil case by a general exception, or in fact by no exception, and yet in criminal cases, of the grade of felony, be required to file a special exception and point out the error, and be absolutely denied this right in a case of the grade of misdemeanor. But such is the law, and, so long as it is the law, it will be respected and followed, and, as the law has thus been written, we cannot consider such complaints of the charge of the court, nor the failure to give the special charges requested, unless fundamental error be presented, and this law will be applied to all alike when called to our attention in future.

There are a great number of grounds stated in the motion for new trial, and we have carefully reviewed each of them and each bill of exception filed in the record, and none of them present reversible error. The evidence in the case shows that appellant received a very large amount of whisky, shows a number of sales, and evidence of each sale was admissible as tending to show that appellant was engaged in the business and occupation. *Robinson v. State*, 147 S. W. 245. The testimony as a whole fully supports the verdict.

The judgment is affirmed.

DAVIDSON, P. J. I think the indictment should charge distinctly and affirmatively that the alleged sales occurred while the accused was pursuing the business of selling intoxicants. The statute requires that at least two sales be made while the accused party is engaged in the prohibited business of selling intoxicants. The two sales, or more sales, would not be sufficient unless they occur while the party was engaged in such business.

In regard to the procedure relating to exceptions to charging the jury, I have heretofore written to some extent. I will, when time affords, write at some length my views of such practice and what is sufficient under the present statutory provisions.

WARD v. STATE.

(Court of Criminal Appeals of Texas. Nov. 13, 1912. Rehearing Denied Dec. 18, 1912.)

1. CRIMINAL LAW (§ 598*)—CONVEYANCE—ABSENCE OF WITNESSES—DILIGENCE.

Accused applied immediately after his arrest for a subpoena for a witness residing in another county to appear on the day set for trial five days later. The sheriff returned the subpoena unserved on the ground that the witness could not be found. No other process was attempted to be procured, though accused and the witness had been together after the indictment in the county in which the indictment was found and the case was set for trial. *Held*, that the court in its discretion properly denied a continuance because of want of proper diligence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1335-1341; Dec. Dig. § 598.*]

2. ASSAULT AND BATTERY (§ 54*)—"AGGRAVATED ASSAULT"—ACTS CONSTITUTING.

Pen. Code 1911, arts. 1008, 1009, 1011, 1022, define an assault and battery and declare that, when an injury is caused by violence to the person, the intent to injure is presumed; that an assault and battery may be committed by the use of anything capable of inflicting the slightest injury; and that an assault becomes aggravated when committed in the house of a private family. Accused, while a guest at the home of prosecutrix, went into her bed at night and was discovered by her brother. He claimed that he had received her permission to come to her bed, and that he roused her during the night by touching her with a stick, and that she then awoke and opened the door for him. She denied that she had given her consent. *Held*, that he was properly found guilty of aggravated assault.

[Ed. Note.—For other cases, see Assault and Battery, Cent. Dig. §§ 75-78; Dec. Dig. § 54.*]

For other definitions, see Words and Phrases, vol. 1, pp. 270-271, 539-540; vol. 8, p. 7582.]

3. CRIMINAL LAW (§ 1088*)—QUESTIONS REVIEWABLE—ARGUMENT OF STATE'S ATTORNEY—BILL OF EXCEPTIONS.

The bill of exceptions complaining of the argument of the state's attorney must show the circumstances under which the argument was made, and that accused requested a charge directing the jury to disregard the argument and the refusal of the court to give any charge.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2746-2751, 2757, 2766, 2782, 2802, 2899; Dec. Dig. § 1088.*]

4. CRIMINAL LAW (§ 721½*)—ARGUMENT OF COUNSEL—REFERENCE TO ABSENCE OF WITNESSES FOR ACCUSED.

The state's attorney may in his argument to the jury comment on the absence of a witness for accused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1673; Dec. Dig. § 721½.*]

5. CRIMINAL LAW (§ 1059*)—QUESTIONS REVIEWABLE—INSTRUCTIONS—OBJECTIONS.

Where a special charge is refused and accused merely excepts thereto, taking a bill of exceptions and quoting the charge without giving any reason why it should have been given, and in the motion for new trial merely complains of the refusal to give the charge, giving the number thereof and nothing more, the court will not consider the question.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2671; Dec. Dig. § 1059.*]

6. CRIMINAL LAW (§ 1059*)—QUESTIONS REVIEWABLE—INSTRUCTIONS—OBJECTIONS.

In a misdemeanor case the only way the charge of the court can be attacked on appeal is by specially excepting to any omission therein at the time of the giving of the charge, and requesting in writing a charge covering the point, and specially excepting to the refusal to give the requested charge, assigning the reasons why the court's charge shows an omission and why the special requested charge should have been given.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2671; Dec. Dig. § 1059.*]

7. INDICTMENT AND INFORMATION (§ 189*)—OFFENSES INCLUDED—LESSER OFFENSE.

Under Code Cr. Proc. 1911, art. 771, providing that, on a prosecution for an offense consisting of different degrees, accused may be found guilty of any degree inferior to that charged in the indictment, and article 772, subd. 2, providing that an assault with intent to commit any felony includes all assaults, and article 837 providing that a verdict is not contrary to the law and evidence where accused is found guilty of an offense of an inferior grade to, but of the same nature as, the offense charged, one indicted for an assault with intent to rape, and for an attempt to have carnal knowledge of a female without her consent, and with burglary at nighttime, with intent to have carnal knowledge of the female without her consent, may be convicted of aggravated assault.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 582-596; Dec. Dig. § 189.*]

Appeal from District Court, Frio County; J. F. Mullally, Judge.

Joe Ward was convicted of aggravated assault, and he appeals. Affirmed.

Jno. T. Bivens, of Pearsall, De Montel & Fly, of Hondo, and Hicks & Hicks and B. W. Teagarden, all of San Antonio, for appellant. C. E. Lane, Asst. Atty. Gen., for the State.

PRENDERGAST, J. On September 28, 1911, the grand jury of Frio county indicted the appellant in three counts: First for an assault with intent to rape Annie Lee Burgin; the second for an attempt to have carnal intercourse with her without her consent, said attempt not constituting an assault with intent to commit rape; and third with burglary at night of the house of T. I. Burgin, actually occupied as a private residence by him and his family, without his consent, and with intent by force, etc., to have carnal knowledge of said Annie Lee Burgin without her consent, she not being his wife. On the trial, all of these counts were submitted to the jury, and so was an aggravated assault. The jury convicted appellant of aggravated assault and fixed his penalty at a fine of \$100 and 12 months in jail.

It is unnecessary to give any extended statement of the evidence. It, however, shows that the appellant, a young man 18 or 19 years old, went with his cousin to the residence of T. I. Burgin at night as the guest of Burgin with the avowed pur-

pose and intent on the part of appellant to have sexual intercourse that night with Annie Lee Burgin, the young daughter of T. I. Burgin. He claims and testified that, along in the night shortly before midnight and before he and his cousin and some two brothers of the girl and the girl herself went to bed, he had a private interview with the girl and got her consent to have sexual intercourse with him that night, and that about 2 o'clock that night, after having made two attempts previously to reach her, he did so for the purpose of having intercourse with her with her consent. The testimony for the state, by the girl and her two brothers, excludes the idea that appellant had the opportunity or procured her consent. Her mother was away from home. The girl was the only female of the family present that night. The way the house, the beds, and the rooms were situated, it made it proper, if not necessary, that she should sleep in the rear room of the house, the other members of the family in other rooms, and one, if not two, of her brothers, with the appellant and his cousin, on beds made down for them respectively on the front gallery of said Burgin's residence. That appellant went into the room where the girl slept for the purpose of having intercourse with her is shown without question, testified to by appellant, and in no way disputed. Her older brother, whose bed was on the gallery, having had his suspicions aroused by the acts and whispered conversation of the appellant and his cousin, listened and watched appellant's movements, and when appellant, for the second or third time, falsely pretending to get up and go to the rear of the house towards where the girl slept for the purpose of attending to a call of nature, heard him in the room and on the bed, hearing this by the creaks of the bed, hurriedly arose from his bed on the front gallery, went back through the house, opened the door of his sister's room, struck a match, and discovered the appellant in bed with his sister. This brother on this point, among other things, testified that when he pushed the door of his sister's room open and struck a match he discovered appellant on the bed with his sister, his sister being on the front side of the bed and appellant on the back of it; that appellant, when this occurred, came over his sister and she jumped up and he (the witness) holloed for his father; that appellant was undressed, only having on his shirt and drawers; that, when he opened the door and saw appellant, his sister was on the side of the bed between him and the appellant, the appellant being on the far side of the bed next to the window; that appellant was then leaning with his right elbow down, facing the witness, something like he was trying to brace himself to raise up, or to brace his head about half up; that his sister's and appellant's heads were

at the same end of the bed; that when he struck the match appellant just came rolling over his sister; that his sister jumped up, but appellant got up before she did and jumped out and ran out at the door. That when he looked in he could not tell whether appellant was touching his sister in any way or not; he was lying close to her, right by the side of her; he could not tell whether he had his hands on her or not; that his right hand was like this (illustrating); that he could not tell how his left hand was; that he did not know where his other hand was.

On this point Annie Lee Burgin testified that when she lay down on the bed that night, it being quite late, she pulled off her shoes and lay down on the bed with her clothes on and went to sleep; that when her brother holloed she felt appellant rolling over her, and that was all she knew; that she felt appellant rolling over her. Again she testified that, when she was awakened by her brother holloing and striking the match, appellant was crawling over her and that was the first thing she knew. That appellant went over her; that he was lying on the bed between her and the window, and that he just crawled over her; that she did not know whether with his hands and feet or not; that she was frightened and could not say.

Appellant himself testified, among other things, that he and his cousin after they supposed Annie Lee Burgin's brothers were asleep got up and went around the house and located where the girl was sleeping, and that, her brother having detected them around there, he and his cousin came back and went to bed again on the gallery; that still later, supposing her brother was asleep, he alone got up and went around to the window where the girl was asleep; that he whispered to her and could not wake her up; that he could not reach her and had to get a little stick and touch her, call her attention, to wake her up; and that when she woke up she rolled over on the side of the bed close to the window and he had some conversation with her, and that she later got up and opened the door of the room for him, and that he went in that way. She disputed all of that testimony by appellant. Again appellant testified that, after he and his cousin had gone around and peeped in the window and saw where the girl was sleeping, they came back to bed, and that he alone got up the third time about 1 or 2 o'clock and went to the window and whispered, supposing she was asleep—she made out she was asleep, if she heard she never answered—and then he went and got a stick and touched her and she awoke; that he touched her with a stick; that he talked to her at the window and she rolled over to the window close to him where they whispered together and talked. Then he claims

she got up from the bed, opened the door, and he went into the room and got on the bed from that way and not through the window.

[1] Appellant's first complaint is that the court committed reversible error in overruling his application for continuance on account of the absence of his said cousin, Monroe Ward, who was with him on the night of this claimed assault, and that he expected to prove by him that they were together at the residence of the prosecutrix on the night of the alleged assault, and that Monroe interviewed the prosecutrix in his behalf and obtained her consent that he (appellant) should on that night have intercourse with her on the premises. On the trial appellant testified he himself interviewed her and got her consent. That she only wanted to see his cousin before she went to bed.

The record shows that the appellant was indicted on September 28, 1911, the indictment returned into court about 4 o'clock that evening, and that he was arrested about 5 of the same evening, and that he immediately made an application to the clerk of the court for a subpoena for said Monroe, who resides in Medina county, to appear on October 3d following, being the day on which the case was set for trial. It is shown that this subpoena was promptly issued and sent (mailed) to the sheriff of Medina county, received by him the next day, and returned and filed before the case was called for trial, showing that the witness Monroe Ward was not to be found in Medina county. The state contested by affidavits and by the district attorney the diligence for this witness, and showed that the appellant and his said cousin, Monroe Ward, were together in the city of Pearsall in Frio county, where the prosecution was had and indictment found, and that they were so together in Pearsall after indictment found and the case had been set for trial, and that they had so been together both in the forenoon and afternoon of said date in Pearsall. Appellant in no way disputed the contest of the district attorney or in any way disputed the affidavits of the parties showing the facts above. Neither did the appellant, in his motion for new trial, in any way contest the facts set up by the district attorney and shown by affidavits in opposition to his motion for continuance, nor did he procure the affidavit of said absent witness to what he would testify, nor why he was not present on the trial. Appellant is not entitled in law to a first or any other continuance. It is all in the discretion of the court. In our opinion, there was no error by the court in overruling this motion for continuance nor in not granting a new trial because thereof. We think the court was clearly justified in holding that no diligence was used to procure this witness and to believe that he was not present by the consent, if not the procurement, of appellant himself for the very purpose of obtaining a

continuance on account of his absence. Besides, the record clearly shows that the cause was called for trial and the trial begun on October 3, 1911; that it continued until some time during October 6th. The witness is shown to have lived only 17 miles from Pearsall, the county seat of Frio county, where the trial occurred. The return of the sheriff of Medina county on the process issued to that county is shown to have been made on the 2d day of October, 1911, returned and filed in the trial court October 3, 1911. No other process whatever was issued, nor was the attendance of the witness attempted to be procured after the overruling of appellant's motion for a continuance. Doubtless, if process had then been issued for the witness to Frio county, where he unquestionably was when the subpoena was issued, he could and would have been obtained in the first instance if he had not been run off and kept away by the appellant for the purpose of procuring a continuance. Or if other process had been issued on the return of the first, he would have been secured before the trial concluded. *Giles v. State*, 148 S. W. 317, and authorities therein cited.

[2] Appellant's next contention is that the verdict of the jury was contrary to the law and the evidence, and that the evidence does not show that the appellant committed any assault and battery on the prosecutrix, and, if so, no intent to injure her. We have given the substance of some of the testimony on this subject above in the statement of the case. That, together with the other evidence in the case, in our opinion would have justified the jury to believe and find that the appellant did commit an assault and battery upon the prosecutrix in the house and residence of her father. No charge was asked, and none given on circumstantial evidence, and no complaint whatever in any way made because such charge was not given. We think the whole trend of the testimony, together with and in addition to that stated above, would justify the jury in finding, as stated above, that an assault and battery with intent to injure was committed by appellant in the prosecutrix's father's house and in response to the correct and specific charge of the court on the subject.

Our statute (P. C. art. 1008) expressly enacts that "the use of any unlawful violence upon the person of another with intent to injure him, whatever be the means or degree of the violence used, is an assault and battery." The next article (1009) is: "When an injury is caused by violence to the person, the intent to injure is presumed. * * * The injury intended may be either bodily pain, constraint, a sense of shame, or other disagreeable emotion of the mind." Judge White in his note (section 969, P. C.) says: "In assault and battery, the necessary act, viz., the 'use of violence upon the person of another,' is easily understood. But the necessary 'intent to injure him' is not

so easily explained by an affirmative description. Still, the necessary act being proved, the necessary intent to injure is known to exist as a legal necessity, whether we can discover, understand, or explain it or not; so that the two concurring will constitute the legal injury of assault and battery, unless it be shown that the act was accidental or the intention was innocent. It may therefore be said that practically, in legal contemplation, the proof of the necessary act either is or carries with it the proof of the necessary intention to injure, so as to constitute the legal injury, unless it is rebutted by evidence showing that the legal presumption should not be indulged, which may not be by showing an absence of intention to injure, but by showing that the intention was innocent with which the act was done. *McKay v. State*, 44 Tex. 43." The least touching of another's person willfully is a battery. *Norton v. State*, 14 Tex. 387; *Johnson v. State*, 17 Tex. 515. From the state's evidence, there can be no doubt that the jury were authorized to believe that appellant went into this house where this girl was, without her consent, to commit and did commit an assault and battery upon her. They were so authorized to find from appellant's own evidence, together with all the other facts and circumstances. That he did intend to commit an assault and battery upon her is unquestionable; that it was with her consent, or without it and with intent to injure her, was correctly submitted by the court and found against appellant by the jury.

Again, article 1011, P. C., says: "An assault and battery may be committed by the use of any part of the body of the person committing the offense, as of the hand, foot, head, or by the use of any inanimate object, as a stick, knife, or anything else capable of inflicting the slightest injury, or by the use of any animate object, as by throwing one person against another, or driving a horse or other animal against the person." Then article 1022, P. C., prescribes: "An assault or battery becomes aggravated when committed under any of the following circumstances: Subdivision 3. When the person committing the offense goes into the house of a private family and is there guilty of an assault and battery."

An assault and battery ipso facto is an aggravated assault when the house of a private family is entered and it is committed therein. *State v. Cass*, 41 Tex. 552. As stated above, in our opinion the evidence justified the jury to find the appellant guilty of an aggravated assault and battery. The above disposes also of appellant's complaint that the court erred in submitting to the jury at all the offense of aggravated assault.

[3] Appellant has two bills of exceptions complaining of certain remarks of the state's attorney in argument before the jury, quoting a very brief statement of what the at-

torney said, which is complained of. The bills and neither of them show the status of the case, the occasion for the argument, nor anything else connected with it, except merely and simply that he complained of certain language in argument by the state's attorney to the jury. We have frequently recently passed upon these questions and announced the law as we find it settled for many years that in a misdemeanor case, and even in felony cases, it is necessary for the bills to show the circumstances under which such remarks are made. This character of bills are just like any other, and they must conform to the rules many years ago laid down by this court and adhered to before we can consider such questions. Section 557, p. 557, and section 1123, p. 732, of White's C. C. P., where some of the cases and rules are cited. Besides, appellant is not shown to have requested any written charge to the jury to disregard such remarks, and the court did not refuse any such charge. *Clayton v. State*, 149 S. W. 119. It is unnecessary to cite the many other cases to the same effect.

[4] As to the state's comment upon the absence of appellant's witness, his cousin Monroe Ward, there was no reversible error, even if a charge had been asked because of the state's attorney so commenting. *Sweeney v. State*, 146 S. W. 888, and cases therein cited.

[5] The rule is so well and so long established in this state and uniformly adhered to that where a special charge is requested and the court refuses it, and the appellant merely excepts thereto, taking a bill and quoting such charge, without giving any reason therein showing why it should have been given or was called for, and in the motion for new trial merely complaining that the court erred in refusing to give such special charge, giving the number thereof and nothing more, that this court will not consider such assignment, we deem it unnecessary to again discuss the question. See *Byrd v. State*, 151 S. W. 1068, this day decided and the cases therein cited; *Ryan v. State*, 142 S. W. 878; *Berg v. State*, 142 S. W. 884; *Perkins v. State*, 144 S. W. 244; *Giles v. State*, 148 S. W. 320, where many of the cases are collated. This disposes of several complaints of appellant which are only so stated, as shown by the record.

[6] It is also so well established and so long, in this state, by the uniform decisions that in a misdemeanor case the only way the charge of the court can be successfully attacked or assailed is by specially excepting to any omissions therein at the time the charge is given, and then requesting in writing written charges covering the point and specially excepting to the refusal to give such charges as refused, assigning the proper reasons why the court's charge shows an

omission and why the special charge requested should be given covering the point, that we deem it unnecessary to take up appellant's complaint in this way to some features of the court's charge. *Giles v. State*, 148 S. W. 320; *Perkins v. State*, supra; *Mealer v. State*, 145 S. W. 354.

[7] The only other question raised and necessary to be decided is appellant's contention that the indictment herein did not authorize the court to submit to the jury in its main charge the question of aggravated assault and battery, on the statute so providing above quoted, because there was no allegation in either of the counts in the indictment charging that an assault and battery was committed in a private residence. Both the statute and the uniform decisions of this court thereunder are expressly against appellant and need no discussion. Article 771, C. C. P., is: "Where a prosecution is for an offense consisting of different degrees, the jury may find the defendant not guilty of the higher degree (naming it), but guilty of any degree inferior to that charged in the indictment or information." And the next article is: "The following offenses include different degrees: Subdivision 2. An assault with intent to commit any felony, which includes all assaults of an inferior degree." And article 837, C. C. P., prescribes on what grounds a new trial may be granted and for no other. Subdivision 9 says: "Where the verdict is contrary to law and evidence. A verdict is not contrary to the law and evidence, within the meaning of this provision, where the defendant is found guilty of an offense of inferior grade to, but of the same nature as, the offense proved." See *Lacoume v. State*, 143 S. W. 626, and cases therein cited.

The judgment is affirmed.

SNELL v. HAM.

(Court of Civil Appeals of Texas. Amarillo. Nov. 16, 1912. Rehearing Denied Dec. 14, 1912.)

1. APPEAL AND ERROR (§ 76*)—FINAL JUDGMENT.

The fact that a judgment was entered nunc pro tunc did not affect its finality.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 426-443; Dec. Dig. § 76.*]

2. PARENT AND CHILD (§ 3*)—PARENTS NEEDED TO SUPPORT—CONTRACT FOR NECESSARIES.

A parent is under a legal and moral duty to support minor children; and while he can only be charged for necessities furnished by a stranger for his minor child by his express or implied promise to pay, such promise may be inferred from his legal duty to furnish necessities.

[Ed. Note.—For other cases, see Parent and Child, Cent. Dig. §§ 33-62; Dec. Dig. § 3.*]

3. PARENT AND CHILD (§ 3*)—ACTIONS AGAINST PARENT—INSTRUCTIONS—PROMISE TO PAY.

In an action against a father for wearing apparel furnished to a minor child, the court charged that, to entitle plaintiff to recover, the jury must find an express or implied authority given by defendant to his children at the time of the purchase to pay plaintiff therefor, and that there must have been an express promise by defendant to plaintiff at the time of the purchase to make defendant responsible for payment for goods received by his children other than necessities of life. *Held*, that the charge was erroneous, having omitted consideration of whether the articles furnished the children were necessities, and not stating what would constitute an express or implied promise, and it was also calculated to impress the jury that explicit evidence of a promise was essential.

[Ed. Note.—For other cases, see Parent and Child, Cent. Dig. §§ 33-62; Dec. Dig. § 3.*]

4. PARENT AND CHILD (§ 3*)—SUPPORT OF MINOR CHILDREN—LIABILITY FOR NECESSARIES.

If articles furnished to minor children were reasonably necessary for their support and comfort, the father's promise to pay therefor would be inferred, in absence of a showing that he was ready to himself supply the children therewith.

[Ed. Note.—For other cases, see Parent and Child, Cent. Dig. §§ 33-62; Dec. Dig. § 3.*]

5. PARENT AND CHILD (§ 3*)—SUPPORT OF MINOR CHILDREN—PARENT'S LIABILITY.

To charge a parent with payment for articles, other than necessities, furnished minor children, the children must have been expressly authorized by the father to purchase them, or he must have permitted their purchase with knowledge thereof, leading the seller to believe that they were purchased with his consent, or must have expressly agreed to pay for them; and this is true, whether the child had been emancipated or not, if the seller did not know thereof.

[Ed. Note.—For other cases, see Parent and Child, Cent. Dig. §§ 33-62; Dec. Dig. § 3.*]

6. PARENT AND CHILD (§ 3*)—PARENT'S LIABILITY.

If goods furnished a minor child were necessary, so that the law would imply the parent's promise to pay therefor, his knowledge that the seller expected him to pay would be immaterial, on his liability.

[Ed. Note.—For other cases, see Parent and Child, Cent. Dig. §§ 33-62; Dec. Dig. § 3.*]

7. PARENT AND CHILD (§ 3*)—PARENT'S LIABILITY—NECESSARIES FOR CHILDREN.

It was error not to charge, in an action against a parent for clothing furnished a minor child, that direct and positive evidence was not necessary to prove defendant's promise to pay for such necessities.

[Ed. Note.—For other cases, see Parent and Child, Cent. Dig. §§ 33-62; Dec. Dig. § 3.*]

8. CONTRACTS (§ 108*)—EMANCIPATION OF CHILD—PUBLIC POLICY.

An agreement by a parent to emancipate his minor children, so as to relieve himself of their support for necessities, is invalid, as contrary to public policy.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 498-503, 505, 507, 509-510½; Dec. Dig. § 108.*]

Error from Crosby County Court; Pink L. Parish, Judge.

Action by R. M. Snell against C. D. Ham. Judgment for defendant, and plaintiff brings

error. Reversed, and remanded for new trial.

J. W. Burton, of Crosbyton, for plaintiff in error. R. A. Sowder and D. W. Puckett, both of Lubbock, for defendant in error.

HUFF, C. J. R. M. Snell, plaintiff in error, sued C. D. Ham, defendant in error, on an open account for \$124.10, in the justice court, and obtained judgment therefor in said court, from which judgment defendant appealed to the county court of Crosby county, and upon trial in that court, January 26, 1911, judgment was rendered that the plaintiff take nothing and defendant recover his costs, from which judgment plaintiff brings the case to this court on petition and bond for writ of error.

The account is for wearing apparel furnished defendant's three boys, John, Orvin, and Julius, who at the opening of the account were 12, 13, and 15 years of age, respectively. The account was opened July 28, 1909, and closed August 13, 1910, and appears to be for wearing apparel, such as hats, caps, shoes, shirts, pants, gloves, rompers, and the like. At the time the first items were purchased and charged, defendant and his boys were present in the store, and the goods selected and delivered while all were present. At that time the defendant told plaintiff to keep the boys' account separate from his, as the boys were going down east to pick cotton, and he wanted to make the boys pay their own account. During the running of the account the defendant was frequently in the store when the boys got the goods, and at no time did he forbid or object to the plaintiff making sale of goods to the boys, or notify plaintiff he would not pay for them. Plaintiff did charge the items which the boys got on the daybook or blotter separately from those purchased by the defendant for himself, but in carrying the items to the ledger the individual purchases for himself personally and for the boys were charged to the account of the defendant. Before starting the account, the boys with their father had purchased goods, and the father sometimes paid for them, and sometimes the boys paid for them. Defendant testified at the trial in January, 1911, the boys had been away from home about two years. He could not control them and let them do whatever trading or anything else they wanted to. He said they would break him up if he tried to keep them, and that he never told Mr. Snell he would pay the boys' account if they did not, but supposed he looked to them for the money. Plaintiff testified that he looked to the defendant for the bill, and did not know that the boys were not at home living with their father. It is shown that Orvin worked for a Mr. Hendricks in the spring of 1910, and received the pay, and that his father never called on Mr. Hendricks for the money. Defendant's wife, the mother of the boys, was adjudged insane and sent to the asylum in

the spring of 1909. The above is believed to be a sufficient statement of the case in order to understand the questions discussed.

[1] First. We overrule appellee's motion to dismiss the petition for writ of error, based on the ground that the judgment appealed from is not final, and failed to dispose of the issues. The fact that it was a nunc pro tunc judgment does not affect its finality. The county court had the power and authority to enter such judgment.

[2] Second. The appellant complains of the court's charge in the first, second, and third assignments of error. In some of the particulars pointed out by the assignments, we believe the charge complained of to be erroneous, and to have injuriously affected the rights of the plaintiff in error. "The English authority is strong to the point that a father can never be liable for necessities furnished his children, unless he has expressly or impliedly authorized the child to purchase them, or expressly or impliedly contracted to pay for them. There is no legal obligation on a parent to maintain his child independent of the statutes, and therefore a third person, who may relieve the latter, even from absolute want, cannot sue the parent for reasonable remuneration, unless he expressly or impliedly contracted to pay. The mere moral obligation on a parent to maintain his child affords no legal inference of a promise to pay a debt contracted by him, even for necessities. Some American authorities have gone almost, if not quite, as far as the English rule." Note to *Bennett v. Gillette*, 74 Am. Dec. 779. In the case of *Moore v. Moore*, 31 S. W. 533, it was there said, on page 534: "It is the common law that a father who supports his child has no claim for indemnity against the latter's estate. His legal duty to support them is well recognized in this state"—citing *Bell v. Schwartz*, 56 Tex. 357; *Kendrick v. Wheeler*, 85 Tex. 252, 20 S. W. 44; *Fowlkes v. Baker*, 29 Tex. 137, 94 Am. Dec. 270. As we understand the decisions of the court of our state, the English rule as above set out is not followed in this state. *Fowlkes v. Baker*, supra.

We quote from *Porter v. Powell*, 79 Iowa, 151, 44 N. W. 295, 7 L. R. A. 176, 18 Am. St. Rep. 353, an opinion by the Iowa Supreme Court, which we think announces the rule more in consonance with the rule as we understand it in this state. That court quotes from 5 Wait, Act. & Def. 50, the following: "The duty of parents to support, protect, and educate their offspring is founded upon the nature of the connection between them. It is not only a moral obligation, but it is one which is recognized and enforced by law. * * * In order to hold persons liable in any case for goods furnished, their actual authority for the purchases must be shown, or circumstances proven from which such authority may be implied. * * * The legal obligation of parents in respect to support extends only to those things which are

necessary, and if a parent refuses or neglects to provide such things for his child, and they are supplied by a stranger, the law will imply a promise on the part of the parent to pay for them." That court then says: "Without further citation of authorities, we announce as our conclusion that it is the legal as well as moral duty of the parent to furnish necessary support to their children during minority; that a parent cannot be charged for necessities furnished by a stranger for his minor child, except upon an express or implied promise to pay for the same; and that such promise may be inferred on the ground of the legal duty imposed." Judge Willie, in *Fowkes v. Baker*, 29 Tex. 137, 94 Am. Dec. 270, says: "Much conflict of authorities exists as to the ground upon which rests the legal liability of a father for necessities furnished his infant child. Some insist that it grows out of the natural duty of the parent to provide sustenance and support for his offspring. Others say it is a question of agency and authority, and that a parent is only bound for such articles as are furnished with his consent, express or implied. The former doctrine is laid down by Chancellor Kent, and with him is the weight of American authority. * * * The question, therefore, as to whether articles purchased by the minor are necessary or not, became important only as it regulates the amount of evidence necessary to establish the father's liability. The authority of the parent to make the purchase must be proved in the one case, and in the other it is inferred, unless rebutted by circumstances showing that the parent had supplied the infant himself, or was ready to supply him." *Parsons on Confs.*, vol. 1, p. 253.

[3] Assignments 1 and 2 object to paragraph 3 of the court's charge, which is as follows: "You are further charged herein that, before plaintiff can recover from the defendant, you must believe from the evidence that there was an express or implied authority given by the defendant to his children to purchase said goods, or that there was an express or implied promise at the time of the purchase of the goods on the part of the defendant to pay said plaintiff for said goods or be responsible for the payment of the same. You are further charged that there must have been an express promise on the part of the defendant to the plaintiff, at the time of the purchase of same, to be responsible for the payment of the same, before the plaintiff can recover from defendant for anything bought or received by his children from plaintiff, other than necessities of life." We believe this charge, as given, was such error as should reverse the case. The charge quoted leaves out of consideration whether the articles were necessities or not. The jury are not told in the charge, as applied to the facts of the case, what would constitute an express or implied

authority or promise. Upon what facts could the jury imply a promise or authority? As drawn, it was calculated to impress the jury that explicit evidence as to authority or a promise must be introduced.

[4] We think the jury should have been told the law does not require that the father give express authority or that he make an express promise to pay for necessities furnished his children, but that it was the legal duty of the father to furnish his children with the necessities, and if the articles sold to the children were reasonably necessary to their support and comfort, then that such promise would be inferred, and their verdict should be for the plaintiff, unless rebutted by circumstances showing the father himself supplied the children, or was ready to do so.

[5] If the articles were not necessities, or any portion of them were not, then as to such as were not necessities the plaintiff must show that the children were expressly authorized by the father to purchase such articles, or that he expressly agreed to pay for the same, or if the father knew that they were being purchased by the children, and he stood by and permitted them to purchase the goods, and his words, acts, or conduct induced the plaintiff to believe that they were being purchased by his consent and permission, for which he would be responsible, and if the father did not object to the same being so purchased, and did not notify the plaintiff that he would not be responsible therefor, for such articles so purchased, the father would be liable to the plaintiff; and this would be true, if as a matter of fact he had emancipated the children, and plaintiff did not know of such emancipation. The objections to the second paragraph of the charge of the court, set out in the plaintiff's third assignment, are sustained, for the reasons set out in the assignment and propositions thereunder.

[6] We think the phrase in the charge: "And the defendant knew that the plaintiff expected defendant to be responsible"—is erroneous. If the facts under the law imply a promise, his knowledge of what plaintiff expected was immaterial.

[7] The fourth requested special instruction, refused by the court, of which complaint is made in the fifth assignment, while perhaps not correct in every particular, is sufficient to call the court's attention to the omission in the main charge, and the court was in error in not charging that direct and positive evidence was not required to prove authority or a promise on the part of the defendant to pay for necessities. Under the most restrictive rule as to the father's liability, held in England and in this country, by some courts, for necessities, it has universally been held that it may be shown by circumstances. "The authority of the infant to bind the father by contract for necessities is inferred both in England and this country from very slight evidence." *Parsons on Con-*

tracts, vol. 1, page 301; *Hunt v. Thompson*, 3 Scam. (Ill.) 179, 36 Am. Dec. 538; *McMillen v. Lee*, 78 Ill. 443.

[8] It has been suggested by the appellee that the defendant emancipated the three boys. We do not think the evidence sufficient to raise that issue. It, in our opinion, more nearly evidences abandonment. The mother of these boys was in the asylum. The assertion of the father that he saw they would break him up, and he permitted them to go, in the absence of some fact showing extravagance or incorrigibility on the part of the boys, we do not think sufficient to show emancipation, especially when it is shown they were with their father frequently in the purchase of the goods. The eldest was only 15 years of age. We would hesitate, under the strongest evidence, to hold that the father, by agreement with children of their age, could relieve himself from his legal liability to support, care for, and maintain them. If he can agree for them to leave his home and go from under his control, free to go at will, then they would fall under the term of "delinquent and neglected children," as defined by article 2184, Revised Statutes 1911 (Acts of the Legislature 1907, p. 135, § 1): "For the purpose of this chapter the words 'dependent child' or 'neglected child' shall mean any child, under sixteen years of age, who is dependent upon the public for support, or who is destitute, homeless or abandoned, or who has not proper parental care or guardianship." Children the age of these three boys should be taken charge of by the authorities at the public cost, if turned out or permitted to leave home without money and without care from a parent or guardian.

Will the policy of the law permit a father to make an agreement with his infant children which will result in turning them out homeless on their own responsibility? Can he thus evade or shift his responsibility? While it is not necessary to a decision of this case, we believe an agreement by the father to so abandon his minor children is against the policy of the law, and that he cannot evade his legal or moral responsibility to care for his children by any such arrangements.

For the errors above pointed out, this case is reversed, and the cause remanded for a new trial; and it is so ordered.

ANDERSON v. CROW.

(Court of Civil Appeals of Texas. El Paso. Dec. 5, 1912.)

1. BROKERS (§ 86*)—COMMISSIONS—PROCURING CAUSE OF SALE OF REAL ESTATE—EVIDENCE.

Evidence held to support a finding that a broker employed to procure a purchaser of real estate was the procuring cause of a sale.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. §§ 116-120; Dec. Dig. § 86.*]

2. BROKERS (§ 63*)—COMMISSIONS—FRAUDULENT ACT OF OWNER.

The right of a broker procuring and effecting a sale to his commission may not be defeated by the fraudulent act of the owner in withdrawing the property from the broker prior to the making of a contract.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. §§ 79, 81, 94-96; Dec. Dig. § 63.*]

3. BROKERS (§ 86*)—COMMISSIONS—FRAUDULENT ACT OF OWNER—EVIDENCE.

Evidence held to support a finding that an owner employing a broker to procure a purchaser of real estate fraudulently withdrew the property from the broker to defeat the right to commission earned by procuring a purchaser and effecting a sale.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. §§ 116-120; Dec. Dig. § 86.*]

4. BROKERS (§ 84*)—COMMISSIONS—FRAUDULENT ACT OF OWNER—EVIDENCE.

A fraudulent intent of an owner employing a broker to procure a purchaser of real estate in withdrawing the property from the broker to defeat the right to a commission may be inferred from the surrounding facts; and a fraudulent connivance on the part of the owner and purchaser to defeat the right to commission may be inferred from the fact that the parties took the matter up directly with each other, when both knew of the efforts of the broker to effect a sale, and from the further fact that the purchaser had previously made an effort to eliminate the broker.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. §§ 104, 105; Dec. Dig. § 84.*]

5. BROKERS (§ 56*)—COMMISSIONS—WHEN EARNED—EVIDENCE.

Where a broker employed to procure a purchaser of real estate produced several persons willing to purchase, and a sale was made to some of them, the broker had earned his commission.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. §§ 85-89; Dec. Dig. § 56.*]

6. LIMITATION OF ACTIONS (§ 46*)—ACTION BY BROKER FOR COMMISSIONS.

A cause of action by a broker for commissions for procuring a purchaser of real estate actually purchasing accrues when the sale is finally consummated.

[Ed. Note.—For other cases, see *Limitation of Actions*, Cent. Dig. §§ 240-253; Dec. Dig. § 46.*]

7. LIMITATION OF ACTIONS (§ 195*)—BURDEN OF PROOF—RECORD.

A defendant has the burden of showing that the cause of action sued on is barred by limitations.

[Ed. Note.—For other cases, see *Limitation of Actions*, Cent. Dig. §§ 711-716; Dec. Dig. § 195.*]

8. APPEAL AND ERROR (§ 909*)—QUESTIONS REVIEWABLE—PRESUMPTIONS.

Where a cause was tried on the second amended petition filed after the running of limitations, in lieu of the first amended petition filed before the running of limitations, and the first amended petition is not in the record, the court, on appeal will not assume that the first amended petition was based on the contract described in the original petition; but since the record fails affirmatively to show that the cause of action was barred the contention that the action was barred must be overruled.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 3675; Dec. Dig. § 909.*]

9. APPEAL AND ERROR (§ 742*)—ASSIGNMENTS OF ERROR—PROPOSITIONS.

Assignments of error submitted as propositions, without disclosing the point, as re-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

quired by Courts of Civil Appeals rule 30 (142 S. W. xlii), will not be considered on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3000; Dec. Dig. § 742.*]

10. TRIAL (§ 252*)—INSTRUCTIONS—IGNORING ISSUES.

A requested instruction ignoring issues raised by the evidence is properly refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 506, 506-612; Dec. Dig. § 252.*]

11. TRIAL (§ 233*)—INSTRUCTIONS—REQUISITES.

An instruction properly submitting an issue in a case need not include all the other material issues submitted by other instructions, and the former instruction is not misleading.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 527-530; Dec. Dig. § 233.*]

12. TRIAL (§ 260*)—INSTRUCTIONS—REFUSAL OF REQUEST.

Where, in an action for commission for procuring a purchaser, the undisputed testimony showed that the commission should be \$1 per acre, and the court in its charge limited the recovery to 50 cents per acre, the refusal of a special charge limiting the recovery to one-half of the contract price was not prejudicial.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651-659; Dec. Dig. § 260.*]

13. TRIAL (§ 260*)—INSTRUCTIONS—REFUSAL OF INSTRUCTIONS COVERED BY CHARGE GIVEN.

Where, in an action by a broker for commission for procuring a purchaser, the court charged that the burden of proof was on plaintiff to establish the fact that he was the procuring cause of the sale by a preponderance of the evidence, and the instructions, in their entirety, indicated the questions to be determined in favor of plaintiff before the jury could find for him, the refusal of a charge that the burden of proof was on plaintiff to prove the material allegations of the petition was not reversible error.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651-659; Dec. Dig. § 260.*]

14. APPEAL AND ERROR (§ 742*)—ASSIGNMENTS OF ERROR—PROPOSITIONS—REQUISITES.

An assignment of error not supported by a proper proposition, but which merely refers to propositions under another assignment of error, will not be considered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3000; Dec. Dig. § 742.*]

15. BROKERS (§ 87*)—COMMISSIONS—ACTIONS—RECOVERY.

Where a broker's right to a commission for procuring a purchaser was by virtue of his agreement with a third person, who had been employed by the owner to procure a purchaser, and the third person, in writing, had assigned to the broker all interest in his claim for commission against the owner, the broker could recover the entire commission on procuring a purchaser.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 181; Dec. Dig. § 87.*]

16. JUDGMENT (§ 253*)—AMOUNT OF RECOVERY—CONFORMITY TO PLEADING.

The amount plaintiff may recover is limited by the allegations of the petition.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 443, 444; Dec. Dig. § 253.*]

Appeal from District Court, Harris County; Charles E. Ashe, Judge.

Action by J. W. Crow against John C. Anderson. From a judgment for plaintiff, defendant appeals. Affirmed.

W. W. Anderson and Ed. H. Bailey, both of Houston, for appellant. Maco & Minor Stewart and R. W. Houk, all of Houston, for appellee.

HIGGINS, J. This was a suit by appellee for the recovery of commission alleged to be due by appellant, arising out of the sale of 9,525 acres of land contracted for sale to C. S. Fowler & Bro., of San Antonio, Tex., a firm composed of C. S. Fowler and J. G. Fowler, by written contract dated December 5, 1908, by the terms of which appellant contracted to convey the same to Fowler & Bro., or whomever they might designate. The contract price was at the rate of \$16 per acre, and in accordance with the contract the land was conveyed by Anderson to G. W. Gale, J. R. Cottingham, B. L. Nailor, and C. S. Fowler & Bro. by deed dated March 25, 1909. A trial before a jury resulted in a verdict and judgment in favor of appellee for the sum of \$4,762.50, with interest from March 25, 1909, from which this appeal is prosecuted.

The material allegations of the petition, briefly stated, are that the land was placed in the hands of J. M. Lee for sale in August, 1907; that by the terms of the agreement between the parties Lee undertook to effect a sale of the land at \$15 per acre, or to find, produce, or interest parties in the purchase of same, who would purchase the same at such price or terms acceptable to Anderson, in consideration of which Anderson was to pay Lee the sum of \$1 per acre for each acre sold, payable when sale was consummated; that such agency continued up until the sale to Fowler and others was consummated; that Lee associated with himself the plaintiff, Crow, under a partnership agreement, whereby they were to act together in finding a purchaser or effecting a sale and to divide the commission, which agreement was acquiesced in and approved by Anderson; that Crow called the land to the attention of B. L. Nailor and Fowler & Bro., who became interested therein and entered into negotiations for the purchase of same and concluded to purchase same, which fact was communicated to Anderson, and after much delay and negotiation they, in connection with others, did purchase the same; that after Fowler & Bro. became interested in the land they and the defendant conspired together to defraud Lee and Crow out of the commission, and in furtherance of that purpose Anderson pretended to withdraw the land from sale, but, as a matter of fact, he did not withdraw the same, and at the time Fowler & Bro. were negotiating for the land with Anderson and completing arrangements to buy the same; that Lee and Crow found the purchasers to

whom the land was sold, and were the procuring cause by which the sale was made, and would themselves have effected the sale had it not been for the connivance of the defendant and the purchasers. It was further alleged that Lee had assigned his one-half interest in the claim for commission to Crow.

By the first assignment it is urged the court erred in refusing a peremptory instruction for defendant; the contention being that under the pleading and proof the plaintiff, as a matter of law, was not entitled to recover. This necessitates a review of the testimony, which is voluminous, and we will not undertake to state the same in detail, but will confine ourselves to those portions thereof bearing upon the decisive and controverted issues in the case.

In August, 1907, it appears Anderson placed the land for sale in the hands of Lee, who associated Crow with himself upon the terms indicated in the pleadings. They interested Nailor and Fowler & Bro. in the land, and the same was shown to Nailor by Lee and Crow; Nailor, in the inspection, representing himself and Fowler & Bro. The land and price of \$15 per acre being satisfactory, the prospective purchasers submitted an offer for the land, the terms of which were by the agents submitted to Anderson, who accepted the same. Thereupon Lee and Crow, in October, 1907, went to San Antonio for the purpose of entering into contract with the purchasers, but after arriving there Fowler & Bro. declined to enter into same, assigning as their reason the condition of the money market, which was then in a serious condition, due to the financial panic of that year. Nailor was willing to consummate the proposal made by them, but Fowler & Bro. declining to do so, the trade at that time, and for the time being, was dropped by all of the parties. Anderson was advised that these prospective purchasers had been procured by Lee and Crow, and was aware that Crow was co-operating with Lee in endeavoring to sell the land. The land remained for sale in the hands of Lee until it was withdrawn by Anderson by telegram, dated September 24, 1908. After October, 1907, Lee and Crow continued their efforts to sell the land, and on August 20, 1908, they entered into negotiations with J. M. Magill of Bay City, Tex., for the sale of the land at \$16 per acre, the price at which they were then authorized to sell the same by Anderson. Magill, being satisfied with the land and price, submitted a proposal to purchase, and Lee and Crow went to Carlinville, Ill., for the purpose of submitting same to Anderson, being there on September 14 and 15, 1908. Anderson declined to accept the terms of purchase proposed by Magill, but submitted a counter proposition through Lee and Crow, which Magill declined to accept, and these negotiations appear to have been dropped about September 24, 1908. After Octo-

ber, 1907, no further effort to purchase the land was made by Fowler & Bro. until about the middle of August, 1908. T. K. Gore, an employe of Fowler & Bro., was acquainted with Anderson, and with his land also, and in August, 1908, at request of C. S. Fowler and in behalf of Fowler & Bro., he wrote Anderson, asking for a price upon the land. In this connection it may be said that the testimony is sharply conflicting upon the issue of whether or not the land was first called to the attention of Fowler & Bro. by Gore, or Lee and Crow, and also as to whether or not the efforts of Lee and Crow were the procuring cause by which the Fowler & Bro. contract of sale was effected, or whether it was due to the activity of Gore in inducing his employers to purchase the same. All of these issues being resolved in favor of Lee and Crow by the jury, we are therefore, in this statement of the facts, making no effort to recite the conflicting evidence bearing thereon, but are stating only those portions which support the jury's finding. Immediately following up the writing of this letter to Anderson by Gore in August, 1908, Fowler & Bro., in person and through Gore, entered into active negotiations for the purchase of the land, both C. S. Fowler and Gore making trips to Carlinville in the conduct thereof; the exact dates of these trips and conferences with Anderson not being shown, but probably before the withdrawal by Anderson of the land from the hands of Lee and Crow. On December 3, 1908, J. G. Fowler went to Carlinville, and there, on December 5, 1908, the contract of sale was entered into.

The uncontradicted testimony shows that after October, 1907, Fowler & Bro. did not thereafter negotiate for the purchase of the land through Lee and Crow; but it is the contention of the plaintiff that he continued his efforts to effect the sale, and continued to urge upon them the advisability of its purchase, and that it was his efforts in the matter which finally resulted in the consummation of the contract of sale, and as supporting this contention we think his testimony sufficient, and quote therefrom as follows:

"I left them two or three days after that [referring to the time when Lee and Crow conferred with Fowler & Bro. and Nailor in San Antonio, in October, 1907, at which time further negotiations were broken off on account of the money panic]. I think on the evening of the 26th of October I left them, and I did not see them any more, because I went North myself then. I did not see them any more until November 16th at San Antonio, and at that time, that date, it was a very disagreeable rainy day, and I arrived in town the night before, and I called them over the phone instead of going to the office. I was stopping at the Hot Wells Hotel, and instead of going to see them, as I had proposed doing, I remained at the hotel on ac-

count of the bad weather, and called them on the phone, and then I stayed over until Monday, and then I saw Mr. Nailor and Mr. Fowler both and renewed the proposition with them, and discussed the situation. Well, of course, at that time in November things had not improved any at all, and the situation remained the same. I did see them after that. I saw them very many times after that. The next time after that I saw them was on the 22d of November. I was in San Antonio on that day, and I asked him whether or not—I mean by 'him' C. S. Fowler. I am referring to C. S. Fowler all the time. I always transacted my business with him, and asked him whether or not things did not look better to him, and we talked the situation over in a general way; and the next day I chanced to be going down in the country, and he was on the train, and we talked over an hour or so about this matter, and, of course, other current events that were happening, talked over the general situation; and the next time I saw him was in January. I spoke of November 22d; that was November 22, 1907, and the next time was January 21, 1908. No; I made a mistake; the 22d was the day in San Antonio, and was the time I saw him on the train. He was going to Alice, and I was going towards Corpus Christi, and we rode together on the train, and we talked over the matter in a general way. That was January 21st. I had just confused the two previous dates. Well, then, on January 27th I was called to San Antonio to consult with them about an extension of time on a payment that was coming due on the property I previously sold them, owing to the bad times. Of course, I was representing Kountz Bros. of New York in that deal, but they called me there for a consultation about getting an extension of time on this payment, and asked me to go to New York, and, of course, at the same time we talked of the Hayes ranch, and I always assumed it was a logical proposition for them to buy it, and they apparently wanted it, and Mr. Fowler never took any other attitude. Always said he wanted the property; that he would like to have it; but, under the circumstances, he said he thought Mr. Anderson was a little stiff in his earnest money. He wanted them to cover up their properties with earnest money, and that seemed to be a thing that was a consideration with them at the time. On March 16th I was in San Antonio, and had a special conference with both Mr. Fowler and Nailor in regard to this property, and March 17, 1908, we talked it over, and Mr. Nailor then renewed his proposition to go ahead, and Mr. Fowler wasn't ready; and on March 17th I arranged with J. G. Fowler—that is, the young man—to show the property within two or three days to some parties they had that they thought might be interested in buying it, and they did not materialize. I did not know who the parties

were; but he asked me if I would not show it the coming week, and he would notify me what day he wanted me there. He suggested he would want me to show it to his customers; that was a suggestion of his. August 24th was the next time I had it up with them in San Antonio and with C. S. Fowler. I discussed the advisability of them taking it; for about that time they had practically closed out the 16,000 acres at El Campo, and they were, as a matter of fact, in the market for another proposition. He told me so. That was in August, 1908, the 4th day of August, 1908; and at that time I urged upon him the importance of closing this deal, and working it out, inasmuch as his organization was operating in that neighborhood, and his advertising was running for that neighborhood; that he should close for this property. But he still held off; did not assign any special reason one way or the other; did not say he would not take it, or that he would; just left the matter standing open. As to whether the panic was over or not, or still in existence then, of course, the worst of it was over with; but everybody was still feeling the effects of it. It had hurt the land business very much. The next time I saw him after August 4th in regard to it, on the 7th day of August I spent the day with Fowler again, and another gentleman, in connection with another matter, and, of course, this deal was referred to. I don't think I ever met Fowler during all this time that I did not bring this matter to his attention, and his attitude was he was always friendly towards the proposition; but he never seemingly would come to the point where he wanted to close it. Of course, he talked of hard times and various reasons. At one time I remember he said they had decided to go back to some locality down beyond Alice. They had a lot of land left over down there. And he said they had concluded to go back down there and sell that out after it got to raining. As to what occurred after that, September 8, 1908, I visited with J. G. Fowler in San Antonio, spent most of the day, and I did discuss this deal with him at that time, and his attitude towards the property was always very friendly. He thought they ought to have the property; that they ought to have taken it before they did; but, of course, he said C. S. seemed to think different. That was the 10th of August, 1908, and the other date was the 8th of August, and I saw them the 10th of August. I was at Fowler's office, and spent the day there at the office; and the effort I made at that time to close the deal, just in a general way, we were discussing another proposition and, being with them all day, of course, about what had happened, and the times and conditions were talked over; and we referred to the Edna ranch as one of the propositions we had had up. He did not make me any definite answer on it then. I was with them the day of August 11th also;

spent the entire day with them on that day. On the 11th this deal was referred to incidentally. I never was with them on any occasion during all the time I was meeting them, I never brought this up. I thought it was a proposition they ought to have, and they agreed to take it, and they never called it off. I always expected them to buy it. I could not understand why they did not. It was a mystery to me. The last date I have been talking about was August 11, 1908, and I saw them after that on the 12th of August also, and that night I left San Antonio; and the next time I saw them in regard to it was on December 22d. That was at their office in San Antonio. And I do not recall whether the question was discussed at that time or not. I just called on them briefly on that date. As to when the deal was actually closed by Mr. Anderson to Fowler Bros. by contract, I understand the contract was made November, 1908. That's the information I have. I don't know the date. I never saw the instrument. Yes; I did, during the month of August, 1908, talk with Fowler Bros. in regard to this five times, as I have enumerated. This memorandum I have is just a memorandum of the dates. I am not using it to testify from, just to refresh my memory. This memorandum was not made at the time this transaction occurred. I made it from the daily diary that I keep. I took off the dates. These are some of my annual diaries, and I keep a record every day of what I do, etc., and that is how I happened to be able to give these dates exactly. That is all; otherwise, of course, I couldn't be so exact about it. * * * I never recognized the deal with Fowler Bros. as over; they had never called it off. I never seen any letter from Mr. Fowler saying he had called the deal off. I have seen a letter from Mr. Fowler; but he didn't say that. The letter referred to of November 13th is the letter that Mr. Fowler wrote Mr. Anderson, or Mr. Lee, asking him to eliminate me from the proposition, and take him in and them two handle it and divide the commission; and Mr. Lee sent me that letter to San Antonio. I was there at the time—the day Fowler wrote that letter—and he sent it to Mr. Lee, and Lee forwarded it back to me by return mail, and wrote a letter within a day or so and asked Mr. Fowler to show me what he had written; but Mr. Fowler never showed me the letter. * * *

Referring to the visit of Lee and Crow to Anderson at Carlinsville on 14th and 15th of September, 1908, Crow testified: "I certainly think it would interfere with our carrying out the deal for Mr. Anderson to sell it to our customer without our knowledge and consent. Mr. Anderson certainly knew that Fowler Bros. were our customers. He did know that. We spent a half day—we spent a full day, almost, in conversation with Mr.

Anderson when we were there; and we rehearsed everything that had happened in connection with our efforts to make the sale, and we used it as an argument to get Mr. Anderson to accept the proposition that we were having at that time. We referred to the hard times and the panic that had caused Fowler Bros. not carrying through their deal. That was in September, 1908. We went over all of our transactions with Fowler Bros. and Nailor. We rehearsed the whole thing; spent the afternoon of the first day we were there, and the evening, talking over those matters with Anderson especially. That was the 14th and 15th of September. Mr. Anderson did not tell me Fowler Bros. had been to see him, or had under consideration the purchase of this ranch with him. We discussed with him Fowler and Mossheim and Magill, and those parties where the negotiations had assumed definite form, and where there was a good prospect of making a sale. I did take up the Magill deal and explain it in detail to him. I explained my connection with the Magill deal. * * * When I was in Carlinsville, I explained the Magill deal to Anderson just as it was. I told him, of course, Mr. Lee and I were associated. Mr. Lee explained that to start with in introducing me. I was the man that had been associated with him in these deals in the effort to sell this ranch, and we had come for the purpose of presenting another proposition; and during the afternoon and evening, especially at night, we spent some two hours in Mr. Anderson's bank going over what had happened during the past year, all the incidents of the panic that had interfered with our success in closing the sale, and we talked especially over the Fowler matter, because that had been presented to him in the form of a definite proposition; and we went further into explanations on that as to why it was not closed. I told Mr. Anderson in person how the matter had dragged along; that I was disappointed that it was never closed up."

From the foregoing testimony of Crow, it will be noted he continued his efforts to effect a sale to Fowler & Bro. after the failure of the original effort in October, 1907, and these efforts continued up until the month of August, 1908. During the first half of that month he was in San Antonio for a number of days upon different occasions, and repeatedly discussed with Fowler & Bro. the Anderson land, and endeavored to effect a sale thereof to them; and, in considering whether or not his efforts were the procuring cause by which the sale to Fowler & Bro. was effected, it was most significant that it was during this same month, and shortly after Crow's last visit to San Antonio and conference with Fowler, that Fowler, through his employé, Gore, initiated the negotiations with Anderson direct, which finally terminated in his purchase of the land.

[1] Under the facts and testimony detailed above, we think the jury amply sustained in their finding that the efforts of Crow were the procuring cause of the sale. The fact that the negotiations were not conducted through Lee and himself we deem of no importance, under the circumstances, in determining the question of Anderson's liability. The testimony discloses that upon one occasion prior to this time C. S. Fowler had suggested to Lee the elimination of Crow from any participation in the right to the commission. This was denied by Fowler in his deposition; but the untruthfulness of his denial was conclusively shown by the production of his letter to Lee, making the proposal. The testimony of the two Fowlers upon other important issues was likewise shown to be untrue by their letters.

[2-4] As above stated, it is true the sale was not negotiated by Crow and Lee, and the land had been withdrawn from Lee's hands prior to December 5, 1908, when the formal contract of sale was entered into, but these facts do not impair their right to the commission; they having found and produced the purchasers and labored with them to effect a sale, all of which facts were known to Anderson. Their right to the commission could not be defeated by the seller and purchaser entering into negotiations with each other direct, or by the act of Anderson in withdrawing the land from the hands of the agents prior to the making of the contract, if such withdrawal was for the fraudulent purpose of defeating the right of the agents to the commission. *Graves v. Bains*, 78 Tex. 94, 14 S. W. 256; *McDonald v. Cabiness*, 98 S. W. 945; *Goodwin v. Gunter*, 142 S. W. 667. And under all of the circumstances connected with this matter it cannot be said that the finding of the jury that the withdrawal was for such a fraudulent purpose has no support in the evidence. A fraudulent intent of this kind necessarily cannot ordinarily be proven by direct testimony, and it may be inferred and found to exist from all of the surrounding facts and circumstances. A fraudulent connivance upon the part of Anderson and Fowler & Bro. to defeat the right of the agents to their commission may in like manner be inferred, and especially from the fact that the parties took the matter up direct with each other, when both knew of the efforts the agents had been making to effect the sale, and from the further fact that Fowler had theretofore made an effort to eliminate Crow.

[5] We see no merit in the contention that there is a variance between the verbal contract and the correspondence between the parties, and overrule same. We also overrule the contention that there was no evidence showing a contract to pay a commission; neither is there any merit in the contention that a recovery of the commission could not be had, because the testimony

shows that the persons to whom Lee and Crow had offered the land were Fowler & Bro. and Nallor; whereas the sale was made to Fowler & Bro. only. All of these parties were found and produced by Lee and Crow, and the fact that the negotiations were with the two parties jointly, whereas the contract of sale was made by Anderson to Fowler & Bro. alone, would not affect their right to a commission.

[6-8] There is no merit in the contention that the cause of action was barred by the two years' statute of limitation. The commission was earned and the cause of action accrued when the sale was finally consummated by execution and delivery of the deed on March 25, 1909. The cause was tried upon a second amended petition, filed April 17, 1911, which upon its face shows that it was in lieu of a first amended petition, filed February 24, 1911. The original petition declared upon a contract alleged to have been made with Crow; whereas the second amended petition alleges, and the proof discloses, a contract with Lee. The burden is upon the appellant to show that the cause of action was barred by limitation; and, the first amended petition not appearing in the record, we are unable to determine whether it declared upon the contract described in the original petition, or upon the contract with Lee. If it declared upon the Lee contract, it was filed within two years after the cause of action accrued, and was therefore not barred by limitation. We will not assume that the first amended petition was based upon the same contract described in the original petition; and, the record failing affirmatively to disclose that the cause of action was barred by limitation, this contention must likewise be overruled.

[9] The second, third, and fourth assignments complain of the action of the trial court in overruling certain exceptions to plaintiff's petition, and the twelfth assignment of the refusal to give a special charge requested by the defendant. They are all submitted as propositions, but as such are insufficient, because they do not disclose the point. See rule 30 for Courts of Civil Appeals (142 S. W. xiii). They are therefore not considered.

[10] Assignments complaining of the refusal of special charges 5, 6, 12, and 15 are overruled. They all entirely ignored the vital issue of whether or not the efforts of Lee and Crow were the procuring cause of the sale; and No. 12 is further defective in ignoring the issue of whether or not Anderson fraudulently withdrew the land from the hands of Lee prior to making the sale.

[11] The ninth assignment is overruled. Under the facts and testimony heretofore quoted, there is ample evidence to show that the efforts of Lee and Crow were the procuring cause of the sale. As to the further objection to the charge that it excluded other

material issues, it is sufficient to say that same properly submitted the important issue of procuring cause; and it was not necessary in that one paragraph to include all of the other material issues in the case. There is no merit in the further contention, under this assignment, that the jury may have been misled by this portion of the charge.

[12] The tenth and eleventh assignments complain of the refusal of the court to give special charges limiting the right of the plaintiff, Crow, to recover only one-half of the contract price of \$1 per acre agreed upon by Lee and Anderson as a commission. The undisputed testimony shows that the commission was to be \$1 per acre, and the court in his general charge limited plaintiff's recovery to 50 cents per acre; and we therefore cannot see how appellant could possibly be injured by the refusal of these charges.

[13] The court did not err in refusing a special charge, requested by the defendant, to the effect that the burden of proof was upon the plaintiff to prove all of the material allegations in his petition by a preponderance of the testimony. The determining and controlling issue of liability in this case was whether or not the efforts of Lee and Crow were the procuring cause of the sale, and the court, in his general charge, instructed the jury that the burden of proof was upon the plaintiff to establish this fact by preponderance of the evidence, and the charge of the court, in its entirety, sufficiently indicated the questions of fact to be determined by the jury in favor of plaintiff before they could find in his favor; and it was therefore not reversible error to refuse the special charge of which appellant is here complaining. *Blum v. Strong*, 71 Tex. 321, 6 S. W. 167; *Howard v. Britton*, 71 Tex. 286, 9 S. W. 73; *Railway Co. v. Dotson*, 15 Tex. Civ. App. 73, 38 S. W. 642; *Davis v. Davis*, 20 Tex. Civ. App. 310, 49 S. W. 727; *Kirby v. Estell*, 24 Tex. Civ. App. 106, 58 S. W. 254.

[14] The fourteenth assignment is not considered, because unsupported by proper propositions. We are here referred to the first, second, and third propositions under the ninth assignment, and for the reasons stated in *San Antonio Foundry Co. v. Drish*, 38 Tex. Civ. App. 214, 85 S. W. 440, this is not regarded as a proper method of briefing. Under the fifteenth assignment we are likewise referred to the first, second, and third propositions under the ninth assignment, and for the reasons stated we do not consider these propositions. We do not regard the charge as subject to the criticisms made in the fourth, fifth, and sixth propositions under this assignment, and overrule the same.

Under the sixteenth assignment we are again referred to the first, second, and third propositions under the ninth assignment, and for the reasons indicated we decline to refer

to these propositions. As to the fourth and fifth propositions under this assignment, we do not regard the charge subject to the criticism there made; but if so, it is not such an error as would require reversal of the cause at the hands of this court, under rule 62a adopted by the Supreme Court for the government of Courts of Civil Appeals (149 S. W. x), effective November 15, 1912.

The seventeenth assignment is overruled; the criticism of the court's charge here made being regarded as hypercritical.

Assignments 18 to 27, both inclusive, are disposed of by what has been heretofore said, and are overruled.

[15, 16] By cross-assignments of error appellee complains of the action of the trial court in limiting his recovery to a commission of 50 cents per acre. As heretofore stated, the testimony discloses an agency contract between Lee and Anderson, by which Anderson was to pay him a commission of \$1 per acre for effecting the sale. There is no privity of contract whatever between Crow and Anderson; Crow's right to a commission being by virtue of his agreement with Lee. Lee, by instrument in writing, transferred and assigned to Crow all of his right, title, and interest in his claim for commission against Anderson, and was amply sufficient to transfer to Crow and support a recovery by him of the entire commission. However, Crow, in his petition, alleged the transfer by Lee of a half interest in his claim for a commission, and is therefore limited in his recovery by this pleading to one-half of the commission.

The judgment is in all things affirmed.

PYE et al. v. WYATT.

(Court of Civil Appeals of Texas. Galveston. Nov. 2, 1912.)

1. JUSTICES OF THE PEACE (§ 135*)—JUDGMENTS—INJUNCTION.

To warrant injunction against enforcement of a judgment of a justice of the peace, it must be wholly void for want of jurisdiction and not merely erroneous.

[Ed. Note.—For other cases, see *Justices of the Peace*, Cent. Dig. §§ 426-447; Dec. Dig. § 135.*]

2. PLEADING (§ 8*)—CONCLUSIONS.

In a suit to enjoin collection of a judgment recovered in the justice court, averments that it was void, and that the justice of the peace had no jurisdiction over the subject-matter of the suit or the person of plaintiff, are purely legal conclusions, and are not such averments of facts to warrant the granting of an injunction on the ground of invalidity for want of jurisdiction.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. §§ 12-28½; Dec. Dig. § 8.*]

3. JUSTICES OF THE PEACE (§ 135*)—JUDGMENT—RESTRAINING ENFORCEMENT—PRIVILEGE AS TO VENUE.

That a judgment in the justice's court was recovered against plaintiff in a district other than that in which he was properly entitled to

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

be sued will warrant its being enjoined, for the privilege to be sued in a given district is a matter a party is required to plead and prove and the determination of which will not affect the validity of the judgment.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 426-447; Dec. Dig. § 135.*]

4. COURTS (§ 120*)—AMOUNT IN CONTROVERSY.

Where the amount in controversy in an action in the justice court was less than \$20, the judgment cannot be corrected by injunction in the district court.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 413-436; Dec. Dig. § 120.*]

5. JUSTICES OF THE PEACE (§ 106*)—PRACTICE—NONSUIT.

Under Rev. St. 1895, art. 1301, providing that when the case is tried by the judge a party may take a nonsuit at any time before the decision is announced, and article 1877, providing that the same mode of procedure shall apply to justice's courts, a party may take a nonsuit after the justice has announced what his decision will be and before formal judgment is rendered.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 349, 350; Dec. Dig. § 106.*]

6. JUSTICES OF THE PEACE (§ 135*)—JUDGMENT—NONSUIT.

In an action to enjoin the judgment recovered in justice court on the ground that defendant had been defeated in a previous action where a judgment of nonsuit had been entered, an allegation that the justice in the first action stated that he would be compelled to render judgment for the defendant is not equivalent to an allegation that judgment had been announced so that no nonsuit could be taken.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 426-447; Dec. Dig. § 135.*]

7. JUDGMENT (§ 948*)—CONCLUSIVENESS—NECESSITY OF PLEADING.

Res adjudicata must be pleaded and proven, and a judgment recovered after plaintiff had been defeated in a previous action is not void where that defense has not been proven and pleaded.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1787-1794; Dec. Dig. § 948.*]

Appeal from, District Court, Jefferson County; W. H. Pope, Judge.

Suit by W. C. Wyatt against B. F. Pye and others. From an order granting a temporary injunction, defendants appeal. Reversed and rendered.

REESE, J. This is an appeal from an order of the district judge granting a temporary injunction. There are no briefs nor assignments of error in the record, which contains only the petition and answer, the order of the judge, and the appeal bond. The petition presents, in substance, the following material facts as grounds for the injunction: S. Beck, who is made defendant in the injunction proceeding, instituted suit in the justice's court (in which precinct or county is not stated) on April 16th (year not stated). The defendant B. F. Pye was the attorney of Beck. It appears that the plaintiff's cause of action in said suit was

an assignment of wages by an employe of Wyatt to Beck. This cause came on for trial on June 12th (year not stated). Quoting from the petition: "And after the justice of the peace, J. B. Synnott, had heard the evidence and argument of counsel on the following day, the 13th day of June, he informed the defendant B. F. Pye that he would be compelled to render judgment for the defendant; that as soon as the defendant Pye found what the judgment of the court would be, later in the day, he, without warrant of law, justice, or right, had the said justice of the peace to enter a nonsuit in said case, and then afterwards in order to harass this plaintiff and to obtain an advantage over him, filed the suit in Galveston county, in the city of Galveston, in the justice court of precinct No. 1, which had no jurisdiction either of the subject-matter or of the parties, and no jurisdiction was alleged or proven, and obtained the void judgment out of which this execution had been issued. Plaintiff shows: That this subject-matter was fully litigated and tried in J. B. Synnott's court, and by all the canons of right and justice and law a judgment should have been rendered and in fact was given in favor of plaintiff, but, as aforesaid, it was not entered up, and instead a judgment of nonsuit was entered after the defendant Pye discovered that he could not recover. That the suit in Galveston county was brought without any color of right, and that the court had no jurisdiction over either the subject-matter or the parties, and plaintiff, believing that the said matter had been settled in J. B. Synnott's court, and further knowing that said Galveston justice court had no jurisdiction over him or the subject-matter, was ignorant of the fact that any judgment was rendered against him, and that any execution had been issued, and believed that the vexatious matter had been dropped. That the conduct of defendant B. F. Pye is most reprehensible and outrageous in filing said suit in Galveston county, and, when the smallness of the sum is considered, the judgment being only for \$11.20, this plaintiff believes that said suit was done for the purpose of annoying and harassing him, and has injected loss and damages on him by reason of his acts." An execution was issued on this judgment rendered by the justice court of Galveston county and placed in the hands of A. W. Land, constable of precinct No. 1 (county not stated), who, at the instigation of the said Beck and Pye, was about to levy the same upon the property of appellee, and injunction is prayed for to restrain him from doing so, and also to restrain Beck and his attorney, Pye, from recovering. Upon presentation of the petition to the district judge a temporary writ was ordered to issue. The defendants appeal from this order.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

[1] The right of appellee to the writ depends upon whether or not the judgment was void, and this depends upon whether or not the justice's court had jurisdiction of the subject-matter of the suit and of the defendant Wyatt at the time of the rendition of the judgment. If the judgment was merely erroneous, appellee cannot have it corrected through the means of an injunction in the district court.

[2] It is true that the general statement is made in the petition that the judgment is void, and that the justice of the peace had no jurisdiction of the subject-matter of the suit, nor of the person of appellee; but these are purely legal conclusions. The amount in controversy, upon which the jurisdiction of the justice's court depends, is not shown, nor is there any statement of facts tending in the remotest degree to show that the justice's court did not have jurisdiction of the person of appellee, and authority to render the judgment, by proper legal service of citation upon him, or regular appearance by him. Such general allegations of purely legal conclusions as to essential facts in a petition for injunction cannot be considered as statements of facts.

It is stated that the judgment was rendered, and it cannot be impeached in this way. We might conclude by inference from the amount of the judgment—\$11—and the fact that it is the same subject-matter that was litigated in Justice Synnott's court, that the matter in controversy was within the jurisdiction of the justice's court, and, in the absence of any allegation in the remotest degree tending to show that appellee had no proper legal notice of the suit, it might be presumed from the mere rendition of the judgment that the court had acquired jurisdiction of his person. It is alleged that appellee is now—that is, at the time of the filing of the suit—a resident of Jefferson county; but there is no allegation that he was not a resident of precinct No. 1, Galveston county, at the time that suit was instituted.

[3] It would not, however, have made any difference if appellant had been at that time a resident of Jefferson county, and properly suable only in the precinct of his residence there. This would have been a matter of personal privilege which he was required to plead and prove in that court, and if he failed to do so, or if he did so and his plea was overruled, this would not have affected the validity of the judgment. It would only have rendered it erroneous and subject to revision on appeal.

[4] If the amount thus in controversy was less than \$20, such error could not be corrected by injunction in the district court. *H. & T. C. Ry. Co. v. Young*, 137 S. W. 380.

[5, 6] If reliance is placed upon the facts alleged with regard to the previous action in Justice Synnott's court, that cannot help appellee. We gather from the allegations of the petition that the nonsuit was taken by the plaintiff Beck before the decision of the justice was announced. *R. S. 1301; Hoodless v. Winter*, 80 Tex. 638, 16 S. W. 427. The information given by the justice to Beck's attorney, Pye, "that he would be compelled to render judgment for the defendant," as alleged in the petition, cannot be taken as an allegation, or as intended as an allegation, that the decision had been announced before the nonsuit was taken. It is further stated "that, as soon as the defendant Pye found what the judgment would be," he later in the day had the justice enter a nonsuit. It is not alleged that any objection was made thereto. From the allegations of the petition it appears that the defendant Beck was strictly within his rights when he took the nonsuit, and had the cause dismissed. This was not a bar to another action. *Foster v. Wells*, 4 Tex. 101. The statute cited relates to the practice in the district and county courts, but by article 1677, R. S., is made applicable to justice's courts as well.

[7] But if the facts alleged had shown that the nonsuit was taken too late, and after a judgment had been announced in favor of the plaintiff, appellee Wyatt, and so the matter was *res adjudicata*, still this would have been a defense that the defendant would have been required to set up, in the action in Galveston county, and cannot be made the ground of an indirect appeal by way of injunction, in the absence of allegation of fraud, or that appellee was prevented, through no fault of his own, from making the defense. It is true that it is alleged that the appellant Beck had no cause of action against appellee, that he had a good defense to the action, and there is a general charge that the action of appellant Pye, as attorney for Beck, in bringing the second suit in Galveston county, was outrageous; but these facts do not tend to show that the judgment was void. Appellant Beck may be a loan-shark, as alleged, a creature against whom there is a well-grounded and universal prejudice; but that does not affect the validity of the judgment. *H. & T. C. Ry. Co. v. Young*, *supra*. The petition presented no grounds for the issuance of the writ of injunction, and the district judge erred in not so holding.

The order granting the writ is vacated, and the temporary writ is dissolved. *Cariker v. Dill*, 140 S. W. 845; *Railway Co. v. Lunn*, 141 S. W. 538; *Beaty v. Goggan*, 131 S. W. 631; *Hudson v. Smith*, 133 S. W. 487.

RALLS et al. v. PARISH et al.

(Court of Civil Appeals of Texas. Amarillo.
Nov. 10, 1912. Rehearing Denied
Dec. 14, 1912.)

1. COUNTIES (§ 35*)—REMOVAL OF COUNTY SEAT — ELECTION CONTEST — BURDEN OF PROOF.

The burden was on parties contesting a decision that an election for the removal of the county seat had resulted favorably to removal to show that the old county seat town was within a radius of five miles of the center of the county, and that the voters originally voted for the county seat as located.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 38-45; Dec. Dig. § 35.*]

2. EVIDENCE (§ 84*)—PRESUMPTIONS—COUNTY SEAT—LOCATION.

The court cannot presume that, because a part of the plat of an existing town was within five miles of the center of the county, any part of the town itself, as it previously existed, was within that radius; that being a matter of proof.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 106; Dec. Dig. § 84.*]

3. APPEAL AND ERROR (§ 934*) — PRESUMPTIONS—SUPPORT OF JUDGMENT.

The evidence should be viewed in the light most favorable to the judgment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3777-3781; Dec. Dig. § 934.*]

4. EVIDENCE (§ 67*)—PRESUMPTIONS—STATUS OF TOWN.

It cannot be presumed, as a matter of law, that the houses in the built-up part of the town were the same in 1910 as in 1891, when the town was made a county seat.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 87, 88, 103; Dec. Dig. § 67.*]

5. DEEDS (§ 96*)—RECITALS—EVIDENCE.

Every citizen in a town was privy to a deed dedicating a section as the site of a town for use as streets, etc., whether the deed was formally accepted or not, so that recitals in such deed that a town had been built on the section were admissible in evidence in a suit by its citizens to retain the county seat at such place, especially where they themselves put the deed in evidence, without restriction.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 256-260; Dec. Dig. § 96.*]

6. DEEDS (§ 96*)—RECITALS—CONSIDERATION.

A recital in a deed as to its consideration is prima facie evidence on the question.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 256-260; Dec. Dig. § 96.*]

7. COUNTIES (§ 35*)—COUNTY SEAT CONTESTS — SUFFICIENCY OF EVIDENCE.

Evidence, in a suit by citizens of a town to contest an election by which the county seat was removed to another town, held to sustain a finding that in voting the county seat of such town the voters intended to vote with reference to the actual location of the buildings and not the town plat.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 38-45; Dec. Dig. § 35.*]

8. APPEAL AND ERROR (§ 1042*)—HARMLESS ERROR.

Any error in striking a part of the petition became harmless, where the trial court heard the evidence on the question raised thereby and filed findings thereon.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4110-4114; Dec. Dig. § 1042.*]

9. ELECTIONS (§ 203*)—LOCATION OF VOTING PLACE.

Where the voting place at a certain town was situated on the boundary line of the county, which had long been a disputed strip also claimed by another county, and the right of the voters to vote at that place had not previously been questioned, and no one outside of the precinct voted at the election, or was deprived of his vote because of the location of the ballot box, the counting of the votes cast in such box did not violate the spirit of the Constitution, though the voting place was in fact located out of the county.

[Ed. Note.—For other cases, see Elections, Cent. Dig. §§ 179, 181; Dec. Dig. § 203.*]

10. APPEAL AND ERROR (§ 1027*)—HARMLESS ERROR—FINDINGS.

Any error in findings that certain votes were not fraudulent would be immaterial, where the result of the election would not be changed if such votes were thrown out.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4033; Dec. Dig. § 1027.*]

On motion for rehearing. Rehearing ordered, and judgment below affirmed.

For former opinion, see 149 S. W. 810.

HUFF, C. J. At the last term of this court this case was reversed and rendered by this court. Appellee, the contestee, filed his motion for rehearing, and thereafter this court certified certain questions to the Supreme Court for its determination. On the 29th day of May, 1912, that court handed down its answers and opinion which had been certified to this court for its observation and guidance and which is reported in 147 S. W. 504. By that opinion it is left to us as an issue of fact to ascertain what constitutes the boundaries of Emma, and in doing so, as we understand the opinion, we must ascertain the intention of the voters at the time of selecting the county seat, as that intention will control. The Supreme Court, in its opinion, says: "The original town plat of Emma as it existed at the time it became the county seat of Crosby county, in 1891, did not constitute the county seat, but rather the collection of inhabited houses and the area pertaining to such houses constituted the town, and therefore the county seat. The town of Emma, as the voters knew it and as they intended it should constitute the county seat, should control." In the light of the opinion of this court rendered in this case and the facts in question certified to the Supreme Court, it would appear that the Supreme Court has eliminated the plat from consideration as the county seat of Crosby county, selected by the voters at the election in 1891. The contestants in this case assail the order of the county judge of Crosby county which declared the town of Crosbyton was selected by the voters at the election September 17, 1910. Article 1393, R. S. 1911, old article 815, provides: "The officers holding the election shall make return thereof to the officer ordering said election within ten days after the same was had, who shall then proceed to open said returns and

count the same and declare the result, which shall be entered upon the records of said commissioners' court and shall also state the name and place from which the same is removed and the name and the place to which the same is removed." Until this order so made is set aside or vacated, the town therein named is the county seat. The burden is on the party or the parties assailing it to show that it does not correctly name the town for the county seat. *Wallace v. Williams*, 50 Tex. Civ. App. 623, 110 S. W. 785.

[1] We hold that the burden was on the contestants in this case to show that Emma was within the radius of five miles of the center of Crosby county, and that it was the intention of the voters of 1891 to vote for such town, and that they did vote for it as located; and, unless contestants discharged that burden, it was not incumbent upon the trial court to disturb the result so announced by the order of the county judge. The contestants introduced a deed from C. A. Benedict, together with a plat of section 2, certificate 16, N. & O. B. R. R. Co. The deed is as follows: "State of Texas. C. A. Benedict of Crosby county, Texas, has laid off section 2, certificate 16, N. & O. B. R. R. Co., original grantee, Crosby county, Texas, into lots and blocks with streets and alleys as shown by the above plat, and whereas a town has been built upon said section so laid off as aforesaid to be known and called by the name of Emma; therefore, know all men by these presents, that I, the said C. A. Benedict, for and in consideration of the fact that a town has been built upon said section of land and for the purpose of securing the inhabitants of said town in the enjoyment of its streets, alleys and public square, do hereby declare that I have and do by these presents consent to the said subdivision of said section by said plat shown into lots, blocks, streets and alleys of dimensions in feet as shown by the dimensions above given. I do hereby donate unto the said citizens of the aforesaid town the free and uninterrupted use of said streets and alleys and to be held and enjoyed by them so long as so used, otherwise to revert to me, the said C. A. Benedict, or my heirs. The southeast corner of the public square to be the starting point in surveying blocks, lots, streets and alleys. [Signed] C. A. Benedict." They also introduced testimony to show that portions of the town plat were within the five-mile radius, but the facts also show that this plat was filed on the day before the election in 1891 to remove the county seat from Estacado to Emma. The deed purports to be in consideration of "the fact that a town had been built upon said section," and to secure "the inhabitants of said town in the enjoyment of its streets, alleys," etc. And further, "I do hereby donate unto the said citizens of the aforesaid town the free and uninterrupted use of said streets, and alleys." This instrument, together with the

plat, is to be treated as one instrument. The town is part of the description of the section and aids in the identification of the land.

[2] The town built on the section is no more to be discarded than the plat of the imaginary streets and alleys; but on what part of the section was it situated in 1891? Shall this court presume, because part of the plat was within the five-mile limit, that the town or any part of it was also? We think the proof ought to furnish the trial court and this court facts to show that some portion of the town was then within the required radius. The voters doubtless knew the town as it would be open to observation. Not necessarily so with the plat. It will not answer the requirements to say the filing of the plat constituted constructive notice. This is not a question of notice, but is one of "intention" on the part of the voters at the time. Did they vote for the plat or the town as then known? On this point, as we understand the record, there is no proof on this vital issue in the case; that is, the "intention" of the voters as to the boundary of the "place." The court must resort to inference to bridge the hiatus. It occurs to us the nature of the case required better evidence. It should be stated that contestants, upon the trial of the case in the court below and in this court, urged that the certificate issued by the Land Commissioner in 1891 should control in fixing the center of the county. As we understand the facts in this case, should that certificate control, then contestants made out a *prima facie* case; but the Supreme Court has settled that question adversely to contestants. The trial court filed his conclusions of facts and of law. In the fourth finding of facts he finds: "The town of Crosbyton to be situated and was on the day of the election within five miles of the geographical center of Crosby county, as shown by the certificate of August 26, 1910. and that the town of Emma is not and was not at the date of the election within said five miles, but is more than five miles from the geographical center of such county, as shown by the certificate of August 26, 1910."

[3] The trial court, after hearing the evidence, rendered his judgment, and we believe the evidence should be viewed in the light most favorable to the judgment. It has been urged by counsel that the court in his finding did not find that Emma, when first selected as the county seat, was without the five-mile radius. He must have found that Emma since 1891 up to the election in 1910 was the county seat, and that it was then being sought to be removed. We must impute to him the finding that Emma, when chosen for the county seat in 1891, was more than five miles from the center, as shown by certificate of August 26, 1910. In the order declaring Emma the county seat in 1891 it is shown by the order that 109 votes were cast to remove to Emma, 19 votes to section 1, certificate 336, and 3 votes to remain at Estacado. The evidence shows in measuring

from the center of the county as ascertained by the certificate of the Land Commissioner, August 26, 1910, the five-mile limit is reached 197 varas east of the courthouse, according to the witness Orand. This witness says: "There are some houses west of the point we came out as the five-mile radius in the town of Emma." J. C. Woody testified to houses in the town of Emma and east of the courthouse, but fails to show whether the houses are within or without the five-mile radius. The deed of dedication clearly indicates there was a town on the section before the grantor executed it. If this section was platted longer than one day before the election, the evidence does not show it. There is no testimony to show that the voters intended to vote for the platted section, unless the filing of the plat the day before is such. We think there is evidence which will support the judgment of the trial court. At least, we are not prepared to say there is none.

[4] It has been urged by appellants that from the situation of the houses the town of Emma in 1910 cannot be presumed where thus situated in 1891. This is true. The presumption will not prevail retrospectively, but the situation in 1910 was a circumstance which can be looked to for what it is worth. It does not rise to the dignity of a presumption, but it is nevertheless a fact or circumstance which may be entitled to some consideration. The fact that voters in 1891, when they cast their ballot for a section of land, said section 1, certificate 336, when they voted for a town they named Estacado or Emma, as the case might be, indicates that, if they had been voting for section 2, they probably would have so stated.

[5] It is earnestly contended by counsel for contestants the phrase, "whereas a town has been built upon said section," in the deed from Benedict, cannot and should not be considered as testimony on the question as to whether there was a town known as Emma on the section. It is urged that such recital is not evidence against third persons who are strangers to the deed. This proposition is true and sustained by the authorities cited by contestants. But are contestants strangers to the deed they offered in evidence themselves to sustain their case? Benedict, by his deed, recited, "I do hereby donate unto the said citizens of the aforesaid town, the free and uninterrupted use of said streets and alleys," and he further does so "for and in consideration of the fact that a town has been built upon said section of land and for the purpose of securing the inhabitants of said town in the enjoyment of its streets, alleys and square." That was the consideration or reason for platting the section. That is, because a town was on it, and to secure the inhabitants in the enjoyment of such streets.

[6] Recitals in the deed are prima facie evidence of such consideration. Haldeman

v. Chambers, 19 Tex. 1; *Sachse v. Loeb*, 69 S. W. 460; *Williams v. Talbot*, 27 Tex. 159. This was a dedication deed; otherwise it might be held invalid because it was uncertain as to who were the grantees. It was evidently the purpose of Benedict to deed to the public the right to the streets and alleys, and he was moved thereto because he found a town on his section to secure the inhabitants thereof in the use of the streets, etc.; they were dedicated to their enjoyment. *City of Corsicana v. Zorn*, 97 Tex. 317, 78 S. W. 924. Judge Brown of the Supreme Court said in that case: "The fact of the deed from Mrs. Zorn and her husband to the different purchasers of lots in Zorn's addition was to convey to such purchasers the right that they and all persons should be permitted to use the streets and alleys for the purposes designated upon the said plat for all time, and this conveyance vested in the public and in the city of Corsicana, as the organized representative of the public, the right to take possession of and use said streets and alleys whenever the progress and development of the town should make it necessary so to do. It is objected on the part of Mrs. Zorn that there has been no acceptance by the city of the dedication. There was no necessity for such an acceptance, for the right which vested in the purchasers of the different lots, and through them in the public, was irrevocable." Also, see *Sanborn v. City of Amarillo*, 42 Tex. Civ. App. 115, 93 S. W. 473. If this deed was to the public, every citizen in Emma and the county, while it was the county seat, held in privity whether accepted formally or not, and enjoyed certain rights in said town by virtue of said deed of which they could not be deprived. This suit is by citizens of Crosby county in behalf of the public to retain the county seat at Emma, and as evidence of the fact they introduced this deed and invoked the stipulation in the deed which is in their interest.

[7] The fact that there is recited in the deed that a town existed on the land before the deed is called a hearsay declaration, which is not evidence, so say contestants. The deed is to a town for the enjoyment of a town and its inhabitants and to make a town. If one part is admissible, why not all of it? These parties, contestants and contestee, stand in the same relation to the deed. If one part is to be treated as an unsworn declaration by a stranger, then it is so as to all of it. Complainants themselves introduced the deed and did not restrict it, or ask the trial court to do so, but now insist in this court that it was not and is not evidence as to the existence of a town on the land before the plat. We have concluded it is, and especially since contestants themselves put it in evidence without any restrictions or limitations. The trial court, according to our view, had testimony that there was a town on that section in 1891, and that it was in-

habited. The evidence does not disclose its boundaries at that time, but the testimony does show in 1910 the location of some houses at that time, none of which were proven to be within the five-mile radius, and such fact was a circumstance, though slight, upon which to base a judgment, in the absence of proof to the contrary. The record in this case is silent as to any intention on the part of the voters to vote for a town plat as the county seat in 1891. Such intention could be established only by inference. The trial court, from the evidence before him, drew the inference that the voters at the time intended to vote for the town of Emma as then known at a place more than five miles from the geographical center of the county, and that the county seat was then located at that point. On the evidence before that court we cannot say the trial judge erred in such conclusion, and, not being able to say so, it becomes our duty to affirm him upon that point.

There are a number of assignments to the action of the court in sustaining exceptions to contestants' amended petition; but in the disposition we shall make of the case, in our opinion, they become immaterial, and are therefore overruled. The opinion of the Supreme Court disposes of several of the assignments.

[8] The twelfth assignment complains of the action of the court in striking out the twenty-third paragraph of the first amended petition, in which it was alleged that 35 votes were cast at the voting box of Estacado, 30 for Crosbyton and 5 for Emma, and in which it was alleged that the votes so cast were illegal and should not have been counted, for the reason that each of said voters voted outside of the election precinct in which they resided. The names of the parties so voting were given in the petition. The court, during the trial, heard evidence on the question raised by the pleading so stricken out and filed conclusions of facts thereon. We hold that, even though the court may have been in error in striking out that portion of the petition, it became immaterial or harmless error; he having heard evidence introduced by both sides. *Harle v. Texas Southern Co.*, 39 Tex. Civ. App. 43, 86 S. W. 1048; *McClenny v. Floyd*, 10 Tex. 159.

[9] The court found as a fact that the west boundary line was not where contestants claimed it, and in the eighth finding of facts states "that the voting place of Estacado is not shown by the evidence to have been west of the west line of Crosby county." There is testimony in the record supporting this finding. It is also shown by the testimony that the people in that precinct have been voting at the schoolhouse where the election was held September 17, 1910. There is no testimony that any voter was deprived of his vote, or that there was any unfairness

by any one in holding the election at that place. *Ex parte White* (Cr. App.) 28 S. W. 542; *Am. & Eng. Enc.* vol. 10, p. 597; *Quinn v. Lattimore*, 120 N. C. 426, 26 S. E. 638, 58 Am. St. Rep. 797. In the North Carolina case the court said: "When qualified voters living near the dividing line of two townships, which line was not definitely located, in good faith registered and voted in the township in which they did not actually reside, but it appeared they had listed their property for taxation, sent their children to school for many years previous, had registered and voted in the same township, it was held the votes of such electors having been cast must be counted." In the *White Case*, above cited, it is stated: "The object of a provision of this character is to insure a fair and honest election by requiring each voter to cast his ballot at the same place where his neighbors voted and those to whom his qualifications were best known and by whom if necessary they could be challenged." From the record, it appears that the west boundary line of Crosby county was in dispute and had been for years. Its true location was difficult of ascertainment; different surveyors running different lines. The voting box at Estacado appears to be situated on the disputed strip, and until this controversy no question as to the right of the voters in that precinct to cast their ballots at that box had been questioned. The record does not show that any one living outside of that precinct cast his ballot at the election held September 17, 1910, or that any one living therein was deprived of his vote on account of the box being so situated. We do not believe the spirit of the Constitution has been violated by counting the votes so cast. It would be a harsh rule that would disfranchise a whole community because of an honest mistake or because surveyors could not agree as to the true line. We therefore overrule all assignments, whether as to pleading, exception, court's finding, or the like, bringing into question the legality of the votes so cast.

Contestants in this case object to some 70 voters because of improper conduct and influence being brought to bear on them to secure their votes in favor of Crosbyton. They set up substantially the following grounds for attacking said votes: "That in precinct No. 1 there were permitted to vote at the election 21 persons named in the pleading who voted in favor of the removal of the county seat to Crosbyton, and whose votes were counted in declaring the result of the election. That each of said 21 votes were illegal for the reason that prior to the election the C. B. Live Stock Company, a foreign corporation doing business in Crosby county, its agents and employes, for the purpose of inducing such voters to vote in favor of the removal of the county seat from Emma to Crosbyton, contracted with each of such

voters to give and donate to each of such voters certain town lots in the town of Crosbyton in consideration of their voting in favor of Crosbyton for the county seat. That each of such voters accepted such contracts and donations and were induced thereby to vote for Crosbyton. That after entering into such contracts, said live stock company, its agents and employes, organized a town-site company and conveyed the town site of Crosbyton to such town-site company, and the town-site company agreed with the live stock company to carry out the illegal contract of said live stock company with the 21 voters named in the pleading. That the live stock company further agreed with such voters to remove at its own expense all the houses, barns, and other improvements of the voters from Emma to Crosbyton. That each of such voters was influenced by such promises and contracts to vote, and did vote, in favor of the removal of the county seat from Emma to Crosbyton, and that each of such votes was therefore illegal." And also attack the votes of some 70 voters in all, including No. 1 and seven other voting precincts, on the same allegation substantially as above set out.

In appellants' thirty-second assignment of error it is complained that the court erred in his ninth finding of facts, to the effect that neither the C. B. Live Stock Company nor any of its agents offered any inducement or made any propositions looking to having as their object and purpose the giving to any voter or voters any financial consideration or aid for their votes for the removal of such county seat from Emma to Crosbyton or from Ralls, for the reason that the evidence adduced upon the trial clearly shows that between the time the election was ordered on the 8th day of August, 1910, and the day on which the same was held, on the 17th day of September, 1910, the C. B. Live Stock Company, through its duly authorized agents, did hold out to the voters of Crosby county inducements and representations looking to and having as their object the purpose of giving to such voters financial aid and consideration for their votes. Then the same question is raised by various other assignments, and in the sixty-fourth assignment appellants make the assignment that the court erred in holding and concluding that the vote of each of the following voters was a legal vote, and set out some 70 names, for the reason that the pleadings and evidence conclusively show that said witnesses were unlawfully influenced in their determination to vote for Crosbyton against Emma, by the acceptance of each of said voters of the unlawful proposition and offer of the C. B. Live Stock Company, whereby each of said voters

acquired a property interest in the town of Crosbyton, prior to the election and after the same had been ordered.

Under the sixty-fourth assignment, contestants present seven propositions setting out, in part, the testimony of each of the voters whose votes were claimed to have been illegal. The court's ninth finding of fact was as follows: "I find that neither the C. B. Live Stock Company nor any of its agents offered any inducements or made any propositions looking to and having as their object and purpose the giving to any voters or voter any financial consideration or aid for their votes for the removal of such county seat from Emma to Crosbyton, or to Ralls, and that no voters were bribed or intended to be bribed, but that the exchange of lots between the citizens of Crosby county and the manager of the town site of Crosbyton was for business considerations and without regard to the question of the county seat, and that the donation of lots for building purposes was made to the citizens of Crosby county generally, and not for the purpose of influencing voters, and that as a matter of fact no votes were influenced thereby. That there has been shown by the evidence no illegal votes to have been cast at said election in favor of either town. That on the whole evidence of Sam H. Botts it appears and is found here by the court that he was not an illegal voter and was offered and accepted no consideration for his vote; and the same is here found as to the voter Hugh Metcalfe." There is a great deal of testimony in the record with reference to the propositions and contracts by the C. B. Live Stock Company which we deem it unnecessary to set out at any length, as it would render this already too lengthy opinion cumbersome. We believe it is sufficient to state that there is sufficient evidence in the record to sustain the court's findings of fact as to those several parties set out in the assignment, and for that reason overrule said assignment and all others pertaining to the same question raised thereby.

All other assignments made in this case are overruled as having been disposed of in this opinion and that of the Supreme Court.

[10] Should the votes which it is claimed were unduly influenced be thrown out, it would not change the result of the election, as there would still be left a majority in favor of Crosbyton, and, if the court was in error in his finding of fact on this point, it could not and would not change the result of the election in our opinion.

We therefore conclude that a rehearing should be ordered, and the judgment of the court below in all things affirmed, and it is so ordered.

ST. LOUIS & S. F. R. CO. v. CARTWRIGHT
et al.

(Court of Civil Appeals of Texas. Dallas.
Dec. 21, 1912.)

APPEAL AND ERROR (§ 835*)—RECORD—CORRECTION AFTER SUBMISSION—REHEARING.

Under Court of Civil Appeals Rule 22 (142 S. W. xii), requiring all parties before submission to see that the transcript of the record is properly prepared, and providing that failure to observe omissions or inaccuracies therein shall not, after submission, be reason for correcting the record or obtaining a rehearing, one may not on rehearing present and have considered a certified copy of a judgment not shown by the transcript of the record on original hearing.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3241-3246; Dec. Dig. § 835.*]

On motion for rehearing. Overruled.
For former opinion, see 151 S. W. 630.

TALBOT, J. We held in the original opinion that the action of the court in overruling appellant's special exception No. 1, which was complained of in its fifth assignment of error, could not be reviewed by this court because no judgment or record entry was found in the record showing such ruling. Appellant now comes, and with its motion for a rehearing presents and asks to be considered a certified copy of such a judgment. This cannot be done. Rule 22 (142 S. W. xii) prescribed by the Supreme Court for the government of this court provides: "All parties will be expected before submission, to see that the transcript of the record is properly prepared and the mere failure to observe omissions or inaccuracies therein will not be admitted, after submission, as a reason for correcting the record or obtaining a rehearing."

We can see no good reason for changing our views as heretofore expressed, and the motion for rehearing is overruled.

SPENCE et al. v. FENCHLER et al.

(Court of Civil Appeals of Texas. El Paso.
Nov. 21, 1912. Rehearing Denied
Dec. 18, 1912.)

1. INTOXICATING LIQUORS (§ 274*)—PUBLIC NUISANCE—INJUNCTION.

A private person, to be entitled to a temporary injunction under Rev. Civ. St. 1911, art. 4674 (1), providing that any person pursuing the business of selling intoxicating liquors, without first procuring a license, creates a public nuisance, and may be enjoined at the suit of any private citizen, must allege that a person named pursued the business of selling intoxicating liquors without a license; and a mere allegation in the petition that liquors are kept for sale on premises described, without defendant obtaining a license, is insufficient.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 410; Dec. Dig. § 274.*]

2. INTOXICATING LIQUORS (§ 261*)—RELIEF—INJUNCTION—NUISANCE.

Rev. Civ. St. 1911, art. 4643, authorizing the issuance of injunctions where the party ap-

plying therefor is entitled to the relief demanded, does not authorize the court to enjoin a public nuisance created by one pursuing the business of selling intoxicating liquor without a license, but the party seeking the remedy must show himself entitled to the writ under the general principles of equity, unless he brings himself by pleading and proof clearly within the letter of some statute enlarging the remedy.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 400, 401; Dec. Dig. § 261.*]

3. NUISANCE (§ 60*)—ABATEMENT—STATUTES.
Rev. Civ. St. 1911, art. 4689, providing that the habitual use of any building for a bawdyhouse shall be enjoined at the suit of the state or any citizen, except where bawdyhouses are regulated by ordinances of incorporated towns and cities acting under special charters, makes bawdyhouses, except those so situated, nuisances, subject to be abated by injunction at the suit of the state or any citizen; and such right may be limited as is done in the proviso.

[Ed. Note.—For other cases, see Nuisance, Cent. Dig. § 137; Dec. Dig. § 60.*]

4. APPEAL AND ERROR (§ 920*)—REFUSAL OF TEMPORARY INJUNCTION—ABUSE OF DISCRETION—RECORD.

Where, in a suit to enjoin a public nuisance in pursuing the business of selling intoxicating liquors without a license, and in maintaining bawdyhouses, defendants, under oath, answered that plaintiffs were not injured, either in person or property, the court, on appeal from a judgment denying a temporary injunction, will presume that the trial judge did not abuse his discretion, in the absence of any statement of facts, bills of exceptions, or findings of fact in the record.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3714-3721; Dec. Dig. § 920.*]

Appeal from District Court, El Paso County; A. M. Walthall, Judge.

Action by Frank A. Spence and another against Wm. H. Fenchler and another. From a judgment denying an interlocutory injunction, plaintiffs appeal. Affirmed.

Gunther R. Lessing, of El Paso, for appellants. Beall, Kemp & Parker, Joseph U. Sweeney, Turney & Burges, and T. A. Falvey, all of El Paso, for appellees.

HARPER, J. This is an appeal from an order of the judge of the district court, El Paso county, Forty-First judicial district, in chambers, refusing to grant an interlocutory injunction against W. H. Fenchler and Bess Montell, appellees.

The appellants' petition sets up, first, a claim for an injunction under articles 4689 and 4690, Revised Civil Statutes of Texas 1911, to restrain the maintenance of a bawdyhouse, which he alleges was rented by W. H. Fenchler, or his agents, to said defendant Bess Montell, and which said bawdyhouse is in close proximity to certain property of the appellants; second, that spirituous, vinous, and malt liquors were kept for sale on said property, 214 Broadway St., El Paso, Tex., without the said defendants, or any one holding under them, having obtained a li-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

cense; and, third, under the general principles of law and equity, unaffected by statute, alleging that the keeping and maintaining of said bawdyhouse is a nuisance, and seriously damages and depreciates the rental and market value of plaintiffs' property, situated in close proximity to the said 214 Broadway, and makes the houses of the plaintiffs and others similarly situated unfitted for occupancy by respectable people, and that the rental and market value of their said property is greatly lessened by reason thereof, and seeks to have same declared a nuisance and enjoined.

Upon presentment of the petition to the judge in vacation, it was ordered that the clerk issue the usual notice to defendants to show cause why the injunction prayed for should not be granted, and set the same for hearing. Notice was given in accordance with the order of the court, and the parties defendant appeared and answered. Upon hearing the court refused the temporary writ, and entered the following order: " * * * On the 7th day of September, 1912, came on to be heard, in chambers, upon the petition of plaintiffs, and upon all the testimony before said judge, when, after having heard the pleadings and the several affidavits attached and the exhibits in support thereof and argument of counsel, the judge did then and there render judgment that said application for a temporary writ of injunction as prayed for be, and the same is hereby, refused." Whereupon appellants gave notice and perfected their appeal, as the law required.

We shall not take up the questions involved in this appeal in the order in which they are presented in the assignments of error or the briefs of the parties, but in that order which seems to us most convenient.

[1] Appellants contend that they should have their writ upon the following allegations in their petition: "That spirituous, vinous, and malt liquors are kept for sale on the said property at 214 Broadway St., without the said defendants, or any one holding under them, having obtained a license."

Article 4674 (1) provides "that any person, firm or corporation who may engage in or pursue the business of selling intoxicating liquors, without having first procured the necessary license and paid the taxes required by law, are declared to be the creators and promoters of a public nuisance, and may be enjoined at the suit either of the county or district attorney in behalf of the state, or of any private citizen thereof."

Under this statute, for appellants to be entitled to a temporary writ of injunction, they must allege, under oath, that a certain person (naming him) did engage in or pursue the business of selling intoxicating liquors. The appellants only charge in their petition that spirituous and vinous and malt liquors are kept for sale on the said premises, without the said defendant, etc., obtaining a li-

cense. There is nothing to show that the appellees, or any one of them, was connected with the keeping for sale of any liquor, or that any person in their employ kept or sold intoxicating liquor at 214 Broadway. We are therefore of the opinion that plaintiffs have failed to show that appellees were violating the statute. *Ex parte Griffin*, 60 Tex. Cr. R. 502, 132 S. W. 770.

[2] Appellants contend that any criminal act which is declared by the statute to be a nuisance is abatable at the instance of the state authorities, or any individual. This is not the law of this state. Article 4643, Stat. 1911, provides that judges of the district and county courts shall, either in term time or vacation, hear and determine all applications, and may grant writs of injunction, returnable to said courts, in the following cases: "1. Where it shall appear that the party applying for such writ is entitled to the relief demanded, and such relief or any part thereof requires the restraint of some act prejudicial to the appellant. 2. Where, pending litigation, * * * a party is about to do some act, * * * which would tend to render judgment ineffective. 3. In all cases where the applicant may show himself entitled thereto under the principles of equity, and as provided by statutes in all other acts of this state, providing for the granting of injunctions."

[3] There being no statute applicable, the party seeking the remedy of injunction must show himself entitled to the writ under the general principles of law and equity; for, as was said by Justice Neill, in *State v. Patterson*, 14 Tex. Civ. App. at page 469, 37 S. W. at page 479: "It is only where property or civil rights are involved, and irreparable injury to such rights is threatened, or is about to be committed, for which no adequate remedy exists at law, that courts of equity will interfere by injunction for the purpose of protecting such rights. * * * But courts of equity never interfere for the purpose of restraining acts constituting crime because they are criminal; for they have nothing to do with crime as such." Our Legislature has, in certain instances, enlarged this right since the above opinion was written, and assumes that any person within the jurisdiction is injured, and provides that he can make complaint and have the restraining order issued if he brings himself by pleading and proof clearly within the letter of the statute, and appellants urgently insist that article 4689, Rev. Civ. Stat. 1911, extends to them this statutory remedy. This statute reads as follows, to wit: "The habitual, actual, threatened or contemplated use of any premises, place, building or part thereof, for the purpose of keeping, being interested in, aiding or abetting the keeping of a bawdy or disorderly house, shall be enjoined at the suit of either the state or any citizen thereof: * * * Provided that the provi-

sions of this and the succeeding article shall not apply to nor be so construed as to interfere with the control and regulation of bawds and bawdyhouses by ordinance of incorporated towns and cities acting under special charters, and where the same are actually confined by ordinance of such city within a designated district of such city." The defendants, in order to bring themselves within the provision of the last clause of this statute, have pleaded, under oath, that El Paso, where the alleged bawdyhouse is situated, is a city incorporated under special charter and was regulating bawdyhouses by ordinance, and had confined same to a designated district, and that to grant an injunction would interfere with such regulation and the confinement of such houses to the limits designated by such ordinance, to which limits such houses are actually confined by virtue of such ordinance.

In one form or another, the propositions are announced that this statute, or, at least, the above-named portion of it, is unconstitutional and void.

Every possible phase of these questions was expressly decided or necessarily involved in *Ex parte Allison*, 99 Tex. 455, 90 S. W. 870, 2 L. R. A. (N. S.) 1111, 122 Am. St. Rep. 653, Id., 48 Tex. Cr. R. 634, 90 S. W. 492, 3 L. R. A. (N. S.) 622, 13 Ann. Cas. 684, construing a similar statute, and any further discussion by us would be entirely superfluous. But, in view of a trial on the merits, will add that the exact question here raised was raised by exception and passed on by the court in the case of *Lane v. Bell*, 53 Tex. Civ. App. 213, 115 S. W. 918; i. e.: "The trial court erred in holding that the premises described in the plaintiff's petition under the answer of defendants was exempt from the operation of the statute, because said proviso is invalid, in that the caption of the said House Bill No. 10, 30 Leg. Laws 1907, states that the writ of injunction may issue at the suit of the state or any citizen to prevent the use of any building, while article 362a of said Bill No. 10 provides, in substance, that such injunction shall not issue as to houses situated in an incorporated city or town acting under a special charter, etc. * * * Therefore said House Bill No. 10 is violative of article 3, § 35, of the Constitution of this state, which is as follows: 'No bill (except general appropriation bills * * *) shall contain more than one subject, which shall be expressed in its title. But if any subject shall be embraced in the act which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be so expressed.'"

The right to suppress, by injunction, the running of a bawdyhouse is mentioned in the title of the bill, and in that opinion the court says: "We fail to see how the fact that under possible contingencies the title would embrace more territory than the act

itself would render the act repugnant to that portion of the article of the Constitution, above quoted, which renders void any subject embraced in the act which is not mentioned in the title."

The Legislature, in passing this statute, intended to and did declare all bawdyhouses within the state, except those situated within a designated district of incorporated cities and towns, to be nuisances, and subject to be abated, under the provisions of this statute, by injunction at the suit of either the state or any citizen, and we hold that the Legislature had the right, under the Constitution, to so limit the extent of the statute, and that it was properly done: for it will be presumed that cities of over 10,000 inhabitants, with ample police power, could and would regulate and control such places, and that the other parts of the state are not so likely to be so well policed, and such houses would, in fact, be such a nuisance as that any citizen should have the right to enjoin them from operation.

[4] Under the proposition that appellants are entitled to the temporary writ under the general principles of law and equity, we hold that the answer of defendants, under oath, "that the plaintiffs have not been injured, either in person or property," and there being no statement of facts, bills of exceptions, or findings of facts by the judge in the record, it will be presumed that the judge refusing the temporary order did not abuse his discretion. *Whitaker v. Gee*, 61 Tex. 219.

Appellees raise the question by exception that appellants have not made proper allegation of citizenship, and that therefore they are not entitled to the relief prayed for. Without passing upon the merits of the assignment, we suggest that more definite allegation as to citizenship of the plaintiff should be made in a trial upon the merits.

In conclusion will say that the other questions raised by the parties are not material to proper disposition of this appeal and we will not pass on them.

Affirmed.

PARKER et al. v. NAYLOR et al.

(Court of Civil Appeals of Texas. Amarillo.
Nov. 23, 1912. Rehearing Denied
Dec. 21, 1912.)

1. PLEADING (§ 205*)—GENERAL DEMURRER—EXCEPTION.

Where an exception in an action for breach of a contract for the sale of land stated that plaintiffs specifically excepted to the allegations of the defendants' answer, which attempted to set up fraud in obtaining a contract differing from a prior understanding between the parties because the facts constituting the alleged fraud were wholly insufficient, indefinite, and uncertain, and failed to show any material difference between the written contract and the prior understanding, and in effect attempted to vary a written contract by parol, it

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Index

was merely a general demurrer to each of the allegations attacked.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 491-510; Dec. Dig. § 205.*]

2. PLEADING (§ 8*)—CONCLUSIONS—FRAUD AND DAMAGES.

Where the answer in a purchaser's action for breach of a land sale contract alleged that defendant had been induced to sign the contract by plaintiffs' fraudulent representations that it bound him to purchase, "assuming" a certain debt, when in fact it merely bound him to purchase "subject to" such debt, it was not demurrable for failure to allege some special damage resulting from the fraud; it not being necessary for a vendor, after setting up the fraudulent representations, to also specifically allege how he was damaged, since such allegation would be merely a statement of a legal conclusion or of a fact necessarily deducible from the facts stated.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 12-28½; Dec. Dig. § 8.*]

3. VENDOR AND PURCHASER (§ 38*)—CONTRACT OF SALE—VALIDITY—FRAUD.

Where a vendor is induced by fraudulent representations of the purchaser to sign a contract for the sale of land under the belief that it binds the purchaser to assume a certain debt when in fact it binds him merely to take subject to such debt, the contract is unenforceable though the vendor reads same before signing it, if he does not understand its legal effect.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 61-65; Dec. Dig. § 38.*]

4. EVIDENCE (§ 420*)—PAROL EVIDENCE—DELIVERY ON CONDITION.

In a purchaser's action for breach of a land sale contract, evidence that the vendor executed the contract upon condition that it should not become effective until approved by his co-owner was admissible; it being always permissible to show that a written contract was delivered effective upon condition.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1728, 1795, 1800, 1804, 1815, 1821, 1929-1944; Dec. Dig. § 420.*]

5. VENDOR AND PURCHASER (§ 16*)—SALE OR CONTRACT—PAROL STIPULATIONS—PARTNERS—AGENT.

A parol stipulation, at the time a partner or agent signs a contract for the sale of land belonging to the partnership or to his principal, that the written contract shall not become effective until the consent of his co-partner or principal shall have been obtained is binding upon the purchaser.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 17, 20; Dec. Dig. § 16.*]

6. TENANCY IN COMMON (§ 43*)—SALE—RATIFICATION BY CO-OWNER.

In order for a person to ratify a land sale contract executed by his co-owner, he must answer or agree to same with knowledge of its material terms.

[Ed. Note.—For other cases, see Tenancy in Common, Cent. Dig. §§ 130-132, 136, 137; Dec. Dig. § 43.*]

7. APPEAL AND ERROR (§ 930*)—VERDICT—EVIDENCE.

Where a general verdict is rendered for defendant in a case involving several defenses, and one defense is sustained by the evidence, it is immaterial that the other defenses are not sustained; the presumption being that the evidence was based on the defense sustained.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3755-3761; Dec. Dig. § 930.*]

8. TRIAL (§ 296*)—INSTRUCTIONS—CURE.

Under Court of Civil Appeals Rules, 62a, providing that a judgment shall not be reversed for error not reasonably calculated to produce an improper judgment, it was not reversible error in a purchaser's action for breach of a land sale contract against two co-owners of land, only one of whom signed the contract, to instruct that, to constitute a partnership, the co-owners must have entered into a partnership contract to buy and sell the land and have agreed to share equally in the profits, and that they should have a community of interest therein, where the court in another instruction stated that a mere joint ownership or a community of interest in land does not constitute a partnership even though the increase from it is divided, and that, where a joint purchase of property is made as an investment merely, each paying his proportion of the purchase money, there is no partnership; it appearing that the jury could not have been misled from a consideration of both instructions.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 705-713, 715, 716, 718; Dec. Dig. § 296.*]

Appeal from District Court, Hardeman County; S. P. Huff, Judge.

Action by C. A. F. Parker and another against S. A. Naylor and another. From a judgment for defendants, plaintiffs appeal. Affirmed.

Madden, Trulove & Kimbrough, of Amarillo, for appellants. Veale & Davidson, of Amarillo, for appellees.

HALL, J. This is the second appeal in this case. At the former trial the suit was for specific performance of a contract to convey lands, and in the alternative for damages for breach of the contract, and appellants recovered upon their alternative prayer for damages. Naylor v. Parker, 139 S. W. 93. Upon reversal, appellants, plaintiffs below, filed their second amended petition in which they abandoned that part of their cause of action seeking specific performance, and sued only for damages for breach of contract. The contract is copied in full in the former opinion, and, in so far as it is important to the questions to be considered upon this appeal, its provisions and recitals are that the appellees, S. A. Naylor and Arthur Lile, in consideration of \$1 paid, granted unto the appellants an option to buy four leagues of land known as the Sherman county school lands, situated in Cochran county, for a period of 15 days from the date of the contract, which was February 17, 1909; that, if appellants should determine to buy the land under the agreement, they should within 15 days deposit in the Western National Bank at Hereford, Tex., \$1,500 in escrow, pending the fulfillment of the agreement; that the purchase price should be \$5 per acre for the entire tract, plus an additional sum of \$500. It is further recited in the contract that the appellees owed Sherman county an average of \$2 per acre, plus \$500 for said land, and that the amount due Sherman county should be

deducted and the land "deeded to said Parker, subject to said indebtedness"; that, upon the acceptance by Parker's attorneys of the title and conveyance to him by the sellers, he should pay an additional sum of \$13,500, making a total cash payment of \$15,000; and that the remainder should be divided into three equal payments, due on or before one, two, and three years from date, respectively, with interest at the rate of 8 per cent. per annum. After setting up the stipulations of the contract in full, the petition alleged that, before the expiration of the 15 days provided in said contract, appellant Parker exercised his option to buy the lands by making the \$1,500 deposit in the bank specified, and gave appellees notice of such deposit and requested appellees to send forward for examination the abstracts of title as provided in the contract; that appellee Naylor forthwith advised appellee Lile that appellant Parker had exercised his option and demanded the carrying out of the contract; that appellees and each of them had refused to furnish the abstracts of title for examination, had declined to consummate the contract to sell the lands, and prior to the filing of said petition had expressly repudiated the same and arbitrarily, willfully, and fraudulently declined to comply with its terms. It is further alleged that appellants since the execution of said contract, had an opportunity of selling a half interest in the land to one J. N. Bolard at an advance of \$2.50 per acre, and that, at the time the contract sued upon was executed, the appellees were duly advised and notified that appellant, when contracting for an option on the land, was doing so for the purpose of reselling the same at a profit; that, at the time appellees breached the contract, the lands were of the reasonable market value of \$8 per acre, and that by said breach appellants were damaged generally, in addition to the special damages alleged, in the sum of \$60,000. It is further alleged that the contract was executed by S. A. Naylor, acting for himself and as the co-owner with Lile; that, before or at the time of the consummation of their purchase of said lands from said county, appellees formed a partnership for the purchase, handling, and sale of said lands, by which they were to pay equally the purchase price and to share equally the expense, burden of holding, handling, and selling the same, and were to share equally the income, revenues, and profits derived from said lands and the sale thereof; that each of them, as such partner, was authorized to make a valid contract for the sale of the lands; and that the contract in question was signed by appellee Naylor individually, and also with the partnership name of Naylor & Lile, and that, in so signing said contract, he was authorized to bind both himself and the said Lile. It is further alleged that, if the ap-

pellants should be mistaken in alleging that appellees were partners, they nevertheless had an understanding and agreement by which either of them was authorized to represent the other to sell the lands; that appellee Naylor was the owner of an undivided one-half interest in the lands, and by virtue of the facts already set out was bound to convey to appellants the said undivided half interest therein; that he undertook and bound himself to cause said Lile, who was the owner of the other half interest, to convey the same to appellant Parker according to said contract, and breached his obligation in that particular to the further damage of appellants in the sum of \$30,000. It was further alleged that, at the time appellee Naylor made said contract, he represented and warranted to appellant Parker that he was authorized to make the contract for the sale of said lands on behalf of himself and as co-owner, knowing full well the extent and limit of his authority, and that, if he was not authorized to represent said Lile, he knowingly, fraudulently, and willfully misrepresented his authority and induced appellant Parker to rely thereon; that appellant Parker was in fact misled and did rely upon appellee Naylor's representation, and that Naylor willfully, wrongfully, and knowingly exceeded his authority in making said contract, if he was not authorized to represent his co-owner, to the damage of appellant in the sum of \$30,000; that appellee Lile, having been informed by his co-owner immediately after the making of the contract that appellant Parker had exercised his option to purchase said lands, took no steps to repudiate the same or to deny the authority of Naylor to make the contract on behalf of them both, but on the contrary said Lile, after receiving full notice and with knowledge of all the facts, proceeded to ratify and confirm the contract, permitted Parker to act upon the same and deposit said \$1,500 in part performance thereof, and addressed a letter to the bank with which said deposit had been placed, stating that he was informed that the option contract had been executed by appellee Naylor, demanding that appellant Parker close up said purchase by executing additional contracts which he inclosed with said letter, and by these acts and others ratified and confirmed the said contract and estopped himself to deny the authority of appellee Naylor to execute the contract for him.

Appellee Naylor excepted generally, pleaded the general issue and specially in substance as follows: That in January, 1909, prior to the signing and delivery by him of the contract sued on, he was the owner of an undivided half interest in the lands in question; that appellee Lile was the owner of the other half interest, and that in the month of January, 1909, appellee Naylor was approached by appellant Parker, who in-

quired of him the price and terms upon which appellees were willing to sell their interest in said lands; that appellee Naylor, without knowledge and consent of Lile, or without any authority from Lile, proposed to accept the sum of \$3 per acre over and above the amount then due and owing by himself and Lile to Sherman county, or a gross sum to appellees of \$52,145; that the terms of said offer were substantially that appellant Parker was to pay the said sum of \$15,000 in cash and execute and deliver to appellees his certain promissory notes in the amounts and payable at the times agreed upon, and in addition thereto was to become liable and bound to assume the payment to said Sherman county the amount of money then due and owing said county; that at said time said Parker did not say whether he would or would not purchase said land, and no final agreement was reached between said appellant and appellee Naylor; that at said time he told said Parker that he (Naylor) only owned an undivided half interest in the land; that Parker well knew that the offer on the part of appellee to sell the land was conditioned upon the agreement of said Lile, and that any sale that might be made was conditioned upon and subject to said Lile's approval, and it was then and there understood and agreed between Naylor and Parker that, before any offer on his part to sell should become binding upon him or upon Lile, it would have to meet the approval of Lile; that thereafter on the 17th day of February, 1909, Parker again approached Naylor with reference to the purchase of lands and requested an option for 15 days, and, if at the expiration of said 15 days he desired to purchase, he (Parker) would do so, upon the conditions, at the price, and upon the terms theretofore agreed to between himself and the said Naylor; that Parker took from his pocket some papers which he informed Naylor were contracts, written in duplicate, to be executed by himself, Parker, and the appellees, and then and there assured appellee Naylor that said written contracts embodied and contained all the terms, conditions, stipulations, and agreements theretofore forming the tentative agreement made between himself, Parker, and appellee Naylor at said January conference and none other; that, at the time the contracts were exhibited to him, the train on which Parker desired to leave Chillicothe (Naylor's home where the contract was made) was almost due to leave; that Parker expressed a desire not to miss the train, and together with this appellee read and compared said duplicate contracts in a hurried manner; that appellee Naylor's experience in drafting, phrasing, and wording written contracts is limited, he not having occasion to study the meaning of technical phrases, not being a lawyer skilled in such matters, but for the

greater part of his life having been a farmer, almost wholly ignorant of the meaning, as well as of the binding force and effect, of legal and technical phraseology; that he had known appellant Parker for a number of years and had implicit confidence in his honesty and integrity, and was willing to believe, and did believe, all the statements and representations then and there made to him about the contents, wording, and meaning of the contract, and that said contract was made and delivered upon the same conditions as the tentative agreement theretofore had between them; that Parker was a president of a bank, highly educated, shrewd business man, and assured Naylor that the written contract was made upon the same conditions and had embodied in it all of the material provisions and stipulations in accordance with their verbal agreement, and specially assured appellee Naylor, who was induced to believe his representations, that, by the terms of the written contract, appellant was to assume the debt due him by himself and his codefendant Lile to Sherman county as part of the purchase money for the land. It is further alleged that the contract as actually signed does not assume the payment of the sum due said county or any part thereof; that the limited time in which he had to examine said contract was not sufficient in which to secure the services of a lawyer to advise him in the matter; that he relied almost wholly on the statements of appellant Parker as to the contents thereof, which statements were untrue in fact and induced him to sign the contract; that said representations were that said contract was drawn in accordance with the tentative agreement theretofore had with appellant Parker and this appellee, and had the effect to mislead and induce appellee to sign the contract, said appellant well knowing at that time that appellee would not execute and deliver the contract if he knew that appellant was not bound to assume the payment of said debt to Sherman county; that he (Naylor) was wrongfully deceived and misled by appellant in said representations into believing that appellant had obligated himself to assume the payment of said indebtedness to Sherman county; that, acting thereon, he signed said alleged contract; that he would not have signed the same had he not been misled. Appellee Naylor further pleaded that he never represented or warranted to appellants or either of them that he was authorized to sell or make contract to sell the interest of said Lile in said land; that he explained to said Parker at said January conference, and also when the contract was signed, that he owned an undivided one-half interest in the land, and that it was understood between appellee and the said Parker that the said contract would not be binding upon Lile unless he (Lile) should approve the same; that said Parker

well knew at all times that appellee Naylor had no authority, was not presuming, and had not agreed to convey Lile's interest in said lands unless the said Lile should consent thereto; that nevertheless, when Parker produced said contract for this appellee's signature, he asked appellee to sign the same "Naylor & Lile"; that this appellee then and there told Parker that he did not understand that he had a right to sign Lile's name to said contract, and then and there told Parker and gave him to understand that he did not want to sign Lile's name thereto, and that he did not know what about so signing "Naylor & Lile" to said contract, but Parker urged him to sign and told him that it would be all right to so sign it; that but for said representation on the part of Parker, and the fact that Parker urged him to sign said contract and told him that it would be all right to do so, he would never have signed Lile's name to said contract; that he had confidence in Parker's honesty and integrity, and was persuaded by him to so sign said contract; that Parker well knew that he (Naylor) was not claiming any authority to execute said contract on behalf of Lile, and did not intend to convey said land except and unless the same should be approved by Lile; that from the very first conference in January, 1909, whether or not a sale of said lands should be finally consummated was dependent upon Lile's approval thereof, and, when the alleged contract sued upon was signed, it was with the understanding that Parker would take the land subject to the agreement on the part of Lile to the contract; that at said January meeting, Parker stated that he wanted to buy all the land or none; that it was understood and agreed at the time of signing the contract that Parker was not buying this appellee's undivided interest, but was buying all the land subject to the approval of said Lile as to the sale of his portion, and that there was never at any time any offer on the part of Parker or any agreement between Naylor and Parker for the sale of Naylor's undivided interest in said land alone; that said Parker asserted that he was offering to buy and would buy all the land or none; that, after said contract was signed, said Parker again at Hereford, about the 22d day of March, 1909, asserted to appellee that he had bought all the land from him; that he did not want only his undivided interest, but had bought it all and would hold this appellee to a conveyance of all the land or none; that it was never in contemplation of the parties that Naylor's interest in said land should be conveyed to said appellant unless said Lile should also agree to convey his interest. The answer further denies the agency of Naylor and the allegation of partnership.

Appellee Lile adopted the answer of his codefendant and alleged specially that the

contract was not executed by him or by any person authorized to execute it for him; that it is not his act or deed; and that he is in no sense bound thereby. The case was tried by a jury and resulted in a verdict and judgment for the appellees. The briefs contain numerous assignments which will not be necessary to consider in detail in the disposition we make of the case.

[1] The first assignment of error is: "The court erred in overruling plaintiff's general demurrer as contained in their first supplemental petition in reply to the first amended answers of the defendants." Five propositions are urged following this assignment, and they are substantially as follows: First proposition: That the allegations in the answers of the appellees, attempting to set up deceit, misrepresentation, and fraud, were insufficient to constitute a defense because it was not alleged that there was any material difference to appellees between the pretended representation which it is claimed the appellant Parker indirectly made to the effect that the contract as drawn, embodied a provision that he should assume the indebtedness of appellees to Sherman county on the lands in question, and the stipulation contained in the contract to the effect that the amount of said indebtedness should be deducted from the total purchase price, and that Parker should buy the land subject to the indebtedness. Second proposition: The allegations in the special answers of the appellees to the effect that it was stated at the January meeting, and understood and agreed at the time the contract was signed in February, 1909, that the contract was not to be binding unless and until it was approved or ratified by appellee Lile, is obnoxious to the rule that the terms of a written contract cannot be varied by antecedent or contemporaneous parole agreements. Third proposition: The allegation to the effect that Naylor signed the contract with the mistaken belief that it contained stipulations which it did not contain is no ground for relief against the binding obligation of the contract in the absence of allegation that the other contracting party was also acting under a mistake or that he was guilty of fraud. Fourth proposition: A mistake of law does not avoid a contract in the absence of any confidential relation. Fifth proposition: The allegations of misrepresentations, deceit, and fraud are wholly insufficient, because they fail to show that the appellee Naylor did not have at hand the means of readily and fully informing himself as to the actual terms of the contract which he signed and show that he had such means. It will be seen that some of the propositions are not germane to the assignment. Appellants filed first a general demurrer to the first amended original answer of the defendants, and the following, which they term a special exception: "They specially except to the allega-

tions contained in said answers, attempting to set up fraud, in obtaining the contract sued upon, because the alleged facts constituting the alleged fraud are wholly insufficient, indefinite, and uncertain, and fail to show any material difference between the written contract and the alleged prior understanding in regard thereto, and said allegations and the allegations pretending to set up pretended conditions upon which the contract should become effective are in effect an attempt to vary by parole stipulations the terms of a written contract. Wherefore plaintiffs specially except to all of said allegations as insufficient in law, and pray the judgment of the court." It will be seen that this exception merely attacks the legal sufficiency of a portion of the petition, and is in effect nothing more than a general demurrer to each of the issues attacked thereby. *Donnell v. Currie & Dohoney*, 131 S. W. 88; *Cheek v. Herndon*, 82 Tex. 146, 17 S. W. 763; *Railway Company v. McElmurry*, 33 S. W. 249. It thus appears that we are to consider the sufficiency of that portion of the answer alleging fraud as against only a general demurrer.

[2, 3] It is insisted by appellant that because the answer did not allege some specific damage resulting to appellee by reason of the fraud of Parker in inducing Naylor to sign the contract, wherein Parker bound himself to purchase the land in question "subject to" the Sherman county debt instead of in said contract "assuming" said debt, as had been previously agreed between them at the January meeting, the answer was insufficient as against the general demurrer. We cannot assent to this contention. We think it was sufficient as against a special demurrer upon that ground. That there is a difference of both substantive rights and liabilities from the appellees' standpoint, under the contract as drawn and under the contract as it is alleged it should have been drawn, is obvious. If Parker had agreed to assume the indebtedness due Sherman county, he would have become primarily liable for the debt, and, in the event the land should not sell for enough to pay the notes executed by appellees, they would have been protected against liability for the balance by Parker's assumption. We think this is a clear legal conclusion to be drawn from the facts stated in the answer, and it is never necessary, or even proper, to allege conclusions of law. *Storer v. Lane*, 1 Tex. Civ. App. 250, 20 S. W. 852; *Mussina v. Goldthwaite*, 34 Tex. 132, 7 Am. Rep. 281; *Milburn v. Walker*, 11 Tex. 329. We must not lose sight of the fact that this is not a suit by appellees for the recovery of damages resulting from fraud and deceit. But the suit is by appellants seeking to recover damages for the breach of a contract, and the fraud in this case is pleaded as a defense only. Appellees are not seeking damages; then why should they be re-

quired in a defensive plea to specifically point out damages? By their answer appellees assert that the contract sued upon is not the one intended, and, while appellee Naylor admits signing the instrument, yet he says it does not speak the agreement with reference to the assumption of the debt, and that his signature thereto was obtained by the fraudulent statement of appellant Parker that the writing as submitted to him did bind Parker to assume the Sherman county debt, when in truth and in fact the instrument binds appellees to convey the land to Parker, subject to the Sherman county debt. If this is true, the contract is fraudulent and voidable and should not be enforced. The real inquiry is, What was the true agreement of the parties upon which their minds met? And does the written instrument speak the agreement? If it does not, was there such fraudulent representation or conduct on the part of Parker as to deceive Naylor, and was he deceived thereby? And, further, was the matter about which he was deceived material? The matter complained of was certainly material, because the value of his contract as originally agreed upon was materially lessened. There can be no question but that fraud in material matters of inducement will vitiate the contract as a whole, and that it may be used as a weapon of defense, even though the matter alleged to be fraudulent does not appear in the contract itself. *Hollifield v. Landrum*, 31 Tex. Civ. App. 187, 71 S. W. 979; *Davis v. Driscoll*, 22 Tex. Civ. App. 14, 54 S. W. 43; *Ranger v. Hearne*, 41 Tex. 258; *Halsell v. Musgraves*, 5 Tex. Civ. App. 476, 24 S. W. 359; *Plano Co. v. Nolan*, 38 Tex. Civ. App. 395, 85 S. W. 821.

In *I. & G. N. Ry. Co. v. Shuford*, 36 Tex. Civ. App. 251, 81 S. W. 1189, where appellee was induced to sign a release of damages by fraudulent representations of a physician, the court used this language: "But, however, the twenty-eighth assignment of error raises the question that, as the appellee had an opportunity to read and understand the release, she was bound by it when she signed it, and that, as she freely and voluntarily executed it, it is conclusive of her rights. If we conceded that she did voluntarily sign it, and that at the time she did not read it but fully understood its nature and legal effect, and that it is ever so binding and conclusive in its terms against her, still if its execution was procured by reason of false and fraudulent representations of material nature that induced her to execute it, she at the time believing in the truth of such statements, and, acting upon such belief, signed the release, equity would cancel it." It is shown that, while Naylor read the contract before signing it, he did not understand the legal effect of the language used, and under the circumstances the jury was warranted in believing him upon that point.

As was said by Pleasants, Justice, in *Fish-*

er v. Dippel, 46 Tex. Civ. App. 266, 102 S. W. 450: "The first assignment complains of the ruling of the trial court in not sustaining plaintiff's exceptions to defendant's answer on the ground that said answer affirmatively shows that the alleged false representations of plaintiff were not material and were not relied upon by the defendant. The proposition that a false representation which is not material or relied upon by the party intended to be influenced thereby cannot be availed of by such party as a ground for avoiding his contract is sustained by the authorities; but the answer of defendant does not show that the alleged false representations of plaintiff were not material or that they were not relied on by the defendant, and therefore the trial court did not err in overruling the exception. The representations alleged were as to the essential character and value of the subject-matter of the contract; the representations as to value not being the mere expression of an opinion, but made as a statement of fact and with knowledge that defendant had not seen the property and would not investigate the truth of said representations before acting upon plaintiff's offer. We think the materiality of such representations cannot be questioned. It is repeatedly averred in the answer that defendant relied upon the representations made by plaintiff, and the allegation there, 'He was not aware that by accepting Fisher's offer and closing the deal by telegram that a binding contract, enforceable in law under ordinary circumstances, had been entered into by him; that it was his intention at all times to see and examine the property before the trade was finally concluded by the execution of deeds, in order to verify the representations of plaintiff'—does not indicate that he did not rely upon such representations. It means no more than that he was ignorant of the legal effect of his acceptance of plaintiff's offer, and, if he had known that his acceptance by telegram of said offer constituted a binding contract for the conveyance of his land, he would not have closed the contract before seeing the land, and this is not inconsistent with the allegations that in accepting plaintiff's offer he relied upon the truth of plaintiff's representations as to the character and value of the land and the improvements."

In *Hayes v. Bonner*, 14 Tex. 629, which was an action by a vendor against his vendee to recover the lands on the ground that the latter refused to pay the purchase money, the defendant alleging that the plaintiff had fraudulently represented to him that he had a good title to the land when in fact he had no title thereto, it was held that the allegation of such fact constituted substantially a good defense to the action, and the pleading was good as against a general demurrer. To the same effect is *Morris v. Brown*, 38 Tex. Civ. App. 266, 85 S. W. 1015.

The testimony is uncontradicted that when Naylor signed the contract in question he

thought its provisions bound Parker to assume the Sherman county debt. Justice Stayton in *Lott v. Kaiser*, 61 Tex. 671, says: "There is no doubt that relief in equity will be granted when the legal effect of a transaction is misapprehended. If such misapprehension be induced or brought about by misleading statements or acts of the other contracting party, for a court of equity will not permit a person to take advantage of another's ignorance or mistake even of law, if such person knew of the misapprehension at the time of the contract and did not correct it. For to make the contract under such circumstances would be fraudulent." *Danner et al. v. Ft. Worth Impl. Co.*, 18 Tex. Civ. App. 621, 45 S. W. 856, was a case where the implement company sought to recover upon two promissory notes and to foreclose the chattel mortgage given to secure them. The defendants, by special answer, set up that the notes were given in consideration of a certain engine guaranteed by the plaintiff to do a certain character of work; that the engine was defective; and that the defects were hidden until after the engine had been placed in position for doing the work. To this answer the plaintiff replied that the defendants had signed a written order for the machine providing that 10 days' use of the machine should be conclusive evidence that it fulfilled the warranty. The defendant sought to avoid this clause on the ground that the order which had been signed by them was procured by the fraudulent representation and assurance of plaintiff's agent that it was only an order for the goods amounting to nothing except to show that the purchasers are acting in good faith and will take the goods if they find them to be as represented. The court sustained a general exception to the defendant's answer, urging fraud of the plaintiff in procuring the order for the machinery. *Tarleton*, Chief Justice, reversed and remanded the cause, and said: "In this (sustaining the general exception to defendants' answer) we think there was error. The allegations show, as against a general demurrer, active and affirmative fraud on the part of the plaintiff, consisting of false representations, misleading and inducing the execution of the order. If these allegations be true, we think they state a ground for avoiding the clause relied upon." We conclude from the authorities that it was not necessary for appellees, after setting up the representations constituting fraud, to allege specifically how he was damaged, and to have attempted to do so would have been merely the statement of a legal conclusion or at the most the statement of a fact necessarily deducible from the facts stated, neither of which they were required to do.

[4] Nor do we concur in the contention of appellants under the second proposition. The evidence of Naylor, to the effect that he signed and delivered the contract upon con-

ition and with the understanding that it should not become effective and binding upon him until it had been signed and approved by his co-owner, Lile, was not obnoxious to the rule prohibiting parol testimony to vary or contradict the terms of a written contract. It is the settled law of this state that parol evidence is always admissible to show that a written contract was delivered, effective upon conditions. *Merchants' National Bank v. McAnnulty*, 31 S. W. 1091; *Norris v. Cetti*, 15 Tex. Civ. App. 28, 79 S. W. 641; *Carleton v. Cowert*, 45 S. W. 749. Such testimony did not contradict or vary any term of the contract, but on the contrary seemed to accord with it. Upon its face, the contract purported to be the obligation of both Naylor and Lile, and by express terms bound them to convey, not Naylor's interest alone, but the entire four leagues of land owned at that time by Naylor and Lile jointly. It is not contended by appellees that any evidence would be admissible to contradict or vary the terms of the contract in the absence of fraud, but they insist that the writing fails to speak the true intention of the parties in that it does not contain all of the agreement entered into between them. Parol evidence is always admissible in such cases to show the true agreement of the parties, even though it be statements contemporaneous with the execution of the writing, provided it does not vary or contradict the writing itself.

[5] Even if we should hold, as a matter of law, that Naylor and Parker were shown to be partners, still there is evidence sufficient to sustain Naylor's contention that he signed the contract and that Parker accepted it subject to the approval of his partner, Lile; and, if this is a fact, it would be inequitable to give the contract validity against Naylor or Naylor & Lile until the same had been approved by Lile, and this is equally true if we should hold Naylor to be the agent of Lile. While Naylor, as the agent or partner of his co-owner, might have the authority to enter into a contract which would bind Lile, still if he declined to do so, but limited its binding effect by the subsequent approval of Lile, it is clear that such stipulation should not be disregarded by the court. And what has been said disposes of the second, third, fourth, fifth, sixth, seventh, eighth, ninth, thirteenth, fourteenth, twenty-seventh, thirtieth, and thirty-first assignments, raising the questions already decided in different ways.

[6] In our opinion the nineteenth assignment of error, attacking the trial court's charge upon the question of ratification, is without merit. The charge in question instructs the jury: "That before you can find that the defendant Lile ratified the alleged contract of February 17, 1909, you must find (1) that he had full knowledge of all the material terms and provisions of said contract; (2) then you must further find that after he

had obtained such knowledge, if you find that he did, he intentionally accepted and agreed to all the material terms and conditions of said alleged contract. This seems to be a clear and correct statement of the law applicable to this phase of the controversy. Appellants' assignments Nos. 24, 25, 26, 27, 28, 29, 32, 33, 34, 35, 36, and 37 present no reversible errors, and are overruled.

[7] The remaining assignments, except the fifteenth and sixteenth, question the sufficiency of the evidence and are overruled, because when a verdict is general we must indulge every presumption in favor of the verdict and judgment based upon it where the case is one involving several issues submitted to the jury for their consideration. Under such circumstances, it will always be presumed by the appellate court that the verdict was based upon the defense which the evidence fully sustains. *T. & N. O. Ry. Co. v. Gardner*, 29 Tex. Civ. App. 90, 69 S. W. 217; *Merriwether v. Dixon*, 28 Tex. 18; *Baker v. Clepper*, 26 Tex. 629, 84 Am. Dec. 591. In our opinion the evidence is sufficient to sustain the defense urged by appellees that the contract in question was signed by Naylor and accepted by Parker upon the express condition that it should not take effect until it had been approved by Lile. For this reason we have not considered in detail the several assignments questioning the sufficiency of the evidence to establish the various issues named in the assignments.

[8] The court instructed the jury that in order to constitute a partnership, as alleged by the plaintiff, it must be shown by the evidence that the defendants, Lile and Naylor, by agreement entered into a partnership contract to buy and sell the land in question, and as a part thereof they agreed to share equally in the profits as such, and that they should have a community of interest therein—that is, proprietorship of property rights in the profits in said business. Appellants complain of this charge because it instructs the jury that, in order to constitute a partnership as alleged by plaintiffs, it must be shown that the defendants by agreement entered into a partnership contract to buy and sell the land in question, and as a part of the agreement to share equally in the profits as such, and that they should have a community of interest in the profits. It seems to be a doctrine in Texas that as to third persons, even if the parties stipulate that they are not to be partners, yet if they engage in an enterprise in which they are to divide the profits as profits, they are partners. In the case of *Kelly Island L. & T. Co. v. Masterson*, 100 Tex. 38, 93 S. W. 427, the court said: "Masterson was not to receive his share of the profits as compensation for the use of his money, nor were Downey and Kelly to receive their share as payment for services, but each received the

profits as the fruit of the joint enterprise—that is, as profits—which made them partners.” In this connection, the appellants further complain of paragraph No. 3 of the general charge, which is as follows: “You are, however, further charged a mere joint ownership or community of interest in land does not constitute a partnership, even though the increase from it is divided. Where a joint purchase of property is made as an investment merely, each paying his proportion of the purchase money, they are joint tenants and not partners, and if from the evidence you find that Naylor and Lile were merely joint owners of the land in question, that they purchased the same as an investment, each paying his proportion of the purchase price, either with the intention of dividing it or making separate sales, or without an agreement to form a copartnership and to participate in the profits thereof as such, then they would be joint tenants and not partners in the land in question and not authorized to bind the other by a contract for the sale of the land, and you should so find, then Naylor had no authority to bind Lile by the contract in evidence for the sale of the land mentioned in this suit unless you find he was acting as agent of Lile therein, or that he was specially authorized thereunto by Lile to make the contract.” While the first charge upon the question of partnership as an abstract proposition is incorrect, it seems to us that paragraph No. 3, last above quoted, is not subject to the criticism contained in the brief, and when the two are considered together with the whole charge, if there was error, we think it was not such error as would require a reversal.

Rule 62a for the Courts of Civil Appeals (149 S. W. x), recently promulgated by the Supreme Court and effective November 15, 1912, provides: “No judgments shall be reversed on appeal and no trial ordered in any cause on the ground that the trial court has committed an error of law in the course of the trial, unless the appellate court shall be of the opinion that the error complained of amounted to such denial of the rights of the appellant as was reasonably calculated to cause, and probably did cause, the rendition of an improper judgment in the case,” etc. This rule is doubtless one outgrowth of the widespread agitation for reform in court procedure, which has for some time been waged by the press, urged by action of many bar associations and recommended by eminent judges, and upon its face is simple enough. The great difficulty is in making the application of the rule to the particular error. It is with some hesitation that we construe it to be applicable to the contentions arising under the fifteenth and sixteenth assignments, and, by authority of that part of the rule quoted above, we overrule said assignments. We frankly confess that more

than once during the consideration of the case we have been forced to summon the said rule as a posse comitatus to assist us in suppressing the appellants' brawling assignments and their clamorous propositions.

The judgment is affirmed.

HUFF, C. J., not sitting.

SAN ANTONIO HARDWARE CO. v. SANGER.†

(Court of Civil Appeals of Texas. San Antonio. Oct. 30, 1912. On Motion for Rehearing, Dec. 18, 1912.)

1. CORPORATIONS (§ 376*)—CORPORATE POWERS—PURCHASING OWN STOCK.

In the absence of charter or statutory prohibition, a solvent corporation, with the assent of its stockholders, may in good faith purchase its own stock for the purpose of settling the differences in its management and preserving its business integrity, although it pays more than the market price therefor.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1530; Dec. Dig. § 376.*]

2. CORPORATIONS (§ 388*) — CONTRACTS — RIGHTS AND LIABILITIES ON CONTRACTS—ULTRA VIRES.

Where a corporation's ultra vires contract has been fully executed, the courts will not interfere with the rights acquired under such contract, and, where such contract is wholly executory on both sides, neither party is estopped to deny its validity; and hence, where a corporation has purchased its own stock and received the benefit of the contract, it cannot, in an action on notes given therefor, set up the defense that the purchase was ultra vires.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1556-1567; Dec. Dig. § 388.*]

3. CORPORATIONS (§ 519*)—ACTION ON NOTES — EVIDENCE.

Evidence, in an action against a corporation upon notes given by it as part of the purchase price of its own stock, held to show that the corporation, at the time of the purchase of its stock, was solvent and its stock at par.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2035, 2038-2039; Dec. Dig. § 519.*]

4. CORPORATIONS (§ 537*) — ACTS OF INSOLVENCY — ABILITY TO PAY DEBTS — “INSOLVENCY.”

“Insolvency,” as the term is ordinarily used, is not the same thing as a mere failure to pay debts, but, in the case of an individual or corporation, it means an insufficiency of property and assets to pay debts.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 2150; Dec. Dig. § 537.*]

For other definitions, see Words and Phrases, vol. 4, pp. 3647-3655; vol. 8, p. 7689.]

On Motion for Rehearing.

5. CORPORATIONS (§ 376*) — POWERS — PURCHASE OF OWN STOCK—STATUTES.

Acts 1907, c. 166, § 3 (Rev. Civ. St. 1911, art. 1152), which authorizes a retirement or decrease of a corporation's capital stock, does not prohibit a corporation from purchasing its own stock to settle differences in its management and preserving its business integrity, with the intention of reissuing and selling it again,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

† Application for writ of error pending in Supreme Court.

especially where the seller knew of the directors' resolutions setting forth such intention.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1530; Dec. Dig. § 376.*]

6. CORPORATIONS (§ 67*)—PURCHASE OF OWN STOCK—REDUCTION OF STOCK.

When a corporation buys shares of its own capital stock, the capital stock is not reduced by that amount, nor is the stock merged.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 181-183, 449; Dec. Dig. § 67.*]

7. CORPORATIONS (§ 244*)—TRANSFER OF STOCK—LIABILITY OF TRANSFEREE.

The transferor of corporate stock directly to the corporation itself without the intervention of a trustee is not released from his liability on the stock, but is liable as though no transfer had been made.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 960-977; Dec. Dig. § 244.*]

Appeal from District Court, Bexar County; A. W. Seeligson, Judge.

Action by W. W. Sanger against the San Antonio Hardware Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Terrell & Terrell, of San Antonio, for appellant. Shook & Vanderhoeven, Houston, Boyle, Storey & Davis, E. Pendleton Lipscomb, and Phil H. Shook, all of San Antonio, for appellee.

FLY, J. This is a suit by appellee on two promissory notes for \$4,000 each, executed by appellant, credits being admitted of \$5,066.67, leaving a balance due of \$3,765.97, with interest at the rate of 5 per cent. per annum from January 25, 1910, and 10 per cent. attorney's fees. The defense was that appellee was a stockholder in the company, which was a corporation duly incorporated by the laws of Texas, holding 45 shares; that his wife also held 45 shares; that B. J. Sanger, Joseph W. Sanger, and Edwin Oppenheimer each held 10 shares which they indorsed to appellee, and he endeavored to sell all of said shares, namely, 120 shares, to the company for \$12,000, and said corporation endeavored to purchase the same and paid to him \$4,000 in cash and executed to him the two notes upon which the suit was based; that said transaction was ultra vires and null and void; that said corporation had no authority to purchase its own stock, and the effect of the same was to reduce the capital stock of said corporation in a manner unauthorized by law and unjustified by its financial condition, which was bad. Appellant offered to issue 120 shares of stock to appellee, and prayed for a cancellation of the notes and for judgment for the sums of money paid to him by appellant. The cause was tried by the court, without a jury, and judgment was rendered in favor of appellee in the sum of \$4,312.84, with interest at 5 per cent. per annum from date of the judgment and all costs.

It is admitted that the notes which form

the basis of this suit were given as part of the purchase money of 120 shares of stock in the corporation; said shares having been sold by appellee to appellant on April 28, 1908. The execution of the notes, as well as the payment of the cash, \$4,000, was duly authorized by the corporation. In the resolution authorizing the purchase of the shares it was provided "that the shares so purchased shall not be retired or merged, but shall be resold and reissued under the direction of the board of directors," and provision is made for the application of the money arising from such sale. On May 25, 1908, a special stockholders' meeting was held, and the purchase of the shares was in all things unanimously "ratified and confirmed." There was evidence tending to show that when the stock was sold it was worth its face value or more. There was evidence to show the solvency of the corporation at the time the stock was purchased and the notes executed. At the time that the purchase was authorized, the president of the corporation reported that "the financial condition of the company will not be injuriously affected by said purchase, and the available resources of the company will still be much more than double the amount of all of its obligations." Stock of the company had been selling, prior to the sale in question, at par. No creditor has ever objected to the purchase of the stock from appellee, and the statements of the corporation show that its assets were largely in excess of its liabilities. The purchase of the stock was made in good faith for the preservation of the integrity of the corporation. The corporation was chartered under the provisions of title 21, subd. 25, art. 642, Rev. Statutes 1896.

[1] There is no provision in the charter prohibiting the purchase of its stock by the corporation, nor is such action prohibited by the statutes of Texas, and in the absence of such provisions in charter or statute the general rule, as applied to corporations by the weight of authority, seems to be that a solvent corporation has the authority to purchase its own stock, where the purchase is made in good faith. It was so held in *Howe Grain & Mercantile Co. v. Jones*, 21 Tex. Civ. App. 198, 51 S. W. 24, and that case has been cited with approval in several state courts, and the doctrine of that case is recognized and sustained in a large majority of the states of the Union. We cite some of the authorities which have been thoroughly collated by counsel for appellee: *Cook on Corp.* §§ 311, 312, 313; *Adam v. Investment Co.*, 33 R. I. 193, 80 Atl. 426; *Leonard v. Draper*, 187 Mass. 536, 73 N. E. 644; *Shoemaker v. Washburn*, 97 Wis. 585, 73 N. W. 333; *Blacklock v. Mfg. Co.*, 110 N. C. 99, 14 S. E. 501; *Bank v. Bruce*, 17 N. Y. 507; *Lumber Co. v. Telephone Co.*, 127 Iowa, 350, 101 N. W. 742, 69 L. R. A. 968, 109 Am. St. Rep. 387; U.

S. Mineral Co. v. Camden, 106 Va. 663, 56 S. E. 561, 117 Am. St. Rep. 1028; *Insurance Co. v. Swigert*, 135 Ill. 150, 25 N. E. 680, 12 L. R. A. 328; *Chapman v. Iron Clad Co.*, 62 N. J. Law, 497, 41 Atl. 690; *Hartley v. Pioneer Works*, 181 N. Y. 73, 73 N. E. 576. A number of federal courts hold to the same doctrine. The rule is thus clearly stated in the cited case of *Leonard v. Draper* by the Supreme Judicial Court of Massachusetts: "The only question as to legality which has been brought to our attention arises from the fact that the note was given for capital stock of the corporation which its officers thought it desirable to have the corporation buy. It is suggested that the purchase of shares of its capital stock by a street railway company is illegal, and that therefore a note given in payment for such is void. We have been referred to no authority in support of this proposition. * * * The right of corporations to purchase their own stock, unless forbidden by statute, has been recognized. *Dupree v. Boston Water Power Co.*, 114 Mass. 37, and cases cited. We discover no element of illegality in the note."

In the cited case of *Shoemaker v. Washburn* it was held by the Supreme Court of Wisconsin: "The corporation was perfectly solvent at the time of its purchase of the Powers stock. No stockholder makes any complaint of such purchase. No creditor then existing is here complaining of such purchase. In fact, the plaintiffs appear to be the only creditors of the corporation, and its liability to them was not incurred until seven months after the purchase. There is nothing to impeach the good faith of any of the officers or directors of the corporation." The facts of the case at bar make it a stronger one than the cited case for the application of the doctrine stated. The stockholders in this case ratified the purchase of the stock, and no creditor has been heard to complain of the purchase. The purchase of the stock was represented by the president of the concern, now the sole witness for appellant, to be a method that had been devised "by which the differences heretofore existing among the officers of the company can be settled and removed and a harmonious management of the company's affairs can be effected." Further, he represented to the board of directors "that the financial condition of the company will not be injuriously affected by said purchase, and the available resources of the company will still be much more than double the amount of all of its obligations; that, unless the difficulties arising from the dissensions under which the company has labored can be removed, the company will suffer great and irreparable loss, if not insolvency; that the removal of such difficulties, which can be consummated by said purchase, will enable the company to conduct its business hereafter with success and profit; and that the purchase of said 220 shares at the price and upon the terms stated is fair to all

parties and very advantageous to the company."

The act of purchase of the stock might be ultra vires because beyond the powers conferred in its charter—that is, unauthorized by its charter—and still it would not follow that such act would not give rise to legal or equitable rights and liabilities. It was at one time held that no ultra vires act could bind a corporation or create liabilities to it. That is not the modern view, however, for it has been repudiated in a number of cases and the better view is that there is nothing in the nature of a corporation which would prevent it from acquiring rights and incurring liabilities through an ultra vires act.

[2] It has been often held, and may be considered settled, that when an ultra vires contract with a corporation has been fully executed the courts will not interfere with the rights acquired under that contract. *First Nat. Bank v. Stewart*, 107 U. S. 676, 2 Sup. Ct. 778, 27 L. Ed. 592; *Parish v. Wheeler*, 22 N. Y. 494; *Holmes v. Holmes*, 127 N. Y. 252, 27 N. E. 831, 24 Am. St. Rep. 448; *Wilson v. Carter Oil Co.*, 46 W. Va. 469, 33 S. E. 249. Where the ultra vires contract is wholly executory on both sides, neither party is estopped to deny the validity of the contract. *Nassau Bank v. Jones*, 95 N. Y. 115, 47 Am. Rep. 14. There is a conflict of opinion as to whether the full performance of an ultra vires contract by one of the parties to it would authorize an action to require performance on the part of the other. In *New York*, *Pennsylvania*, *Wisconsin*, *New Jersey*, *Indiana*, *Kentucky*, *Michigan*, *Mississippi*, and perhaps other states, it has been held that when a contract with a corporation is merely ultra vires, not being prohibited by law and not contrary to public policy, and the party contracting with the corporation has performed his part of the contract, his action cannot be defeated by a plea of ultra vires on the part of the corporation. *Bath Gaslight Co. v. Claffy*, 151 N. Y. 24, 45 N. E. 390, 36 L. R. A. 664. The same rule has been adopted in *Texas*. *Railway v. Gentry*, 69 Tex. 625, 8 S. W. 98; *Bond v. Terrell Mfg. Co.*, 82 Tex. 309, 18 S. W. 691; *Bank v. Oil Co.*, 24 Tex. Civ. App. 645, 60 S. W. 828. These decisions are based on the application of the doctrine of estoppel. In *Bond v. Terrell* it was said: "It seems now to be settled by the great weight of authority that where there is a question of contract between a corporation and another party, and the contract has been performed by the other party, and the corporation has received the benefit of the contract, it will not be permitted to plead that on entering into the contract it exceeded its chartered powers." In this case appellee had fully complied with his part of the contract and appellant is estopped to deny its liability.

It was said in the case of *Lowe v. Pioneer Threshing Co.* (C. C.) 70 Fed. 646: "It is a

mooted question in this country as to whether a corporation may purchase shares of its own stock. Many states forbid it. In the absence of a charter provision or a statute forbidding it, there is no reason why the stock should not be purchased, at least with the profits derived from the business of the corporation, where all the stockholders assent thereto." And commenting on that proposition Cook, in his excellent work on Corporations (section 311), says: "The cases which appear to uphold a contrary rule are found, upon a close examination, to come within the exceptions given above." That is to say, the purchase of its stock by a corporation is not held invalid unless it is done without the consent of the stockholders, is prohibited by charter or statute, or is done to the injury of creditors. While not in a position to know whether the proposition, as stated by the author, is absolutely correct, the cases coming under our consideration bear out the text.

It is the usual contention of those attacking a purchase of stock that when a corporation purchases its own stock the corporate funds are used and appropriated and that no property is received by the corporation except the right to resell. But that objection can amount to nothing but a limitation of the power of the corporation to purchase. If the creditors of the corporation are not injured, and the stockholders consent to the purchase, and the law does not prohibit it, the limitation does not apply, and the corporation will not be sustained in an attempt to evade performance of its contracts of purchase, under a plea of ultra vires. *Burnes v. Burnes* (C. C.) 132 Fed. 485; *In re Castle Braid Co.* (D. C.) 145 Fed. 224; *State Life Ins. Co. v. Nelson*, 46 Ind. App. 137, 92 N. E. 2. In the federal case last cited, in order to restore peace in the management of the affairs of the corporation and to get rid of vexatious litigation among the directors and officers, certain stock of the corporation was bought by it, which makes it very similar in its facts to this case. The federal District Court held the purchase legal, the corporation being solvent and no creditor objecting. In this connection we call attention to the note to *Commercial Bank v. Burch*, 141 Ill. 519, 31 N. E. 420, as reported in 33 Am. St. Rep. 331, where there is a review of the authorities on the subject.

[3] There was evidence that justified a finding that the corporation was solvent and the stock at par when it purchased the stock. Appellee testified: "When I sold out I was under the impression that, instead of a loss, the books showed the book value of this stock was worth 100 cents on the dollar. That is what I am testifying to. I think when we took that \$12,000, the time before we sold it, when we sold out the stock was worth more at that time, that \$12,000 was worth more, is my recollection, I think at the

time I sold out that \$12,000 was worth dollar for dollar. * * * My impression is that at the time when we sold out the stock the stock was worth 100 cents on the dollar." That statement was contradicted by Jeffers, the president of the corporation, but afterwards he testified that, a short time before the corporation bought the stock, he had bought stock at par, and that Spencer had, about the time of the corporation's purchase, bought stock from Birkhead and Brownlee, and it was shown that such stock was sold at par. It is true that Jeffers swore that there had been an actual loss in the business, but he made statements showing that the corporation had ample means to pay all of its debts when the stock was bought.

[4] Failure to pay debts and insolvency are different matters, for, however much a person may owe, if he has means or property sufficient to pay his debts, he is not "insolvent," as the term is ordinarily used. The term may have a more restricted meaning in certain instances in bankruptcy proceedings (*Toof v. Martin*, 80 U. S. 40, 20 L. Ed. 481), but in this connection it must be used in the general sense of the insufficiency of the entire property and assets to pay the debts of the corporation. There was no testimony tending to show that appellant ever contemplated being unable to pay its debts in the ordinary course of business. Internal dissension seemed to be affecting the financial condition of the corporation more than a lack of means, and to remove that dissension and strife the purchase of the stock was made. The record does not show that the debts existing when the purchase was made had not been extinguished.

The case of *Reagan Bale Co. v. Heuermann*, 149 S. W. 228, decided by this court, and in which a writ of error has been refused by the Supreme Court, is cited as sustaining the position taken by appellant. If the case were similar to this in other respects, the fact that the corporation in that case was insolvent would be sufficient to differentiate it from this case. There can be no conflict in holding that a corporation, without authority to do so, could not issue preferred stock so as to make the rights of the owners superior to the rights of creditors, and in holding that a solvent corporation will be held bound by the purchase of its stock when the contract has been fully executed by the seller. Cook on Corporations is cited to sustain, and does fully sustain, the first proposition, and that author as fully sustains the proposition that subject to certain conditions, hereinbefore mentioned, complaint against the purchase of its own stock by a corporation cannot be sustained. Sections 311, 312, and authorities cited in 6th Ed. As said in the case of *Lindsay v. Arlington*, 186 Mass. 371, 71 N. E. 797, cited by Cook: "The power of a corporation to purchase its own capital stock is settled,

as also is its power to agree with a stockholder that his shares shall be transferred to the corporation under certain circumstances."

In *Reese on Ultra Vires*, § 120, it is stated that some states in the Union hold that a corporation may, in the absence of statutory provisions to the contrary, if it acts in good faith, buy its own stock. A number of authorities are cited, among the number *Clapp v. Peterson*, 104 Ill. 26, and the following was quoted from that decision as the true rule: "Corporations may purchase their own stock in exchange for money or other property, and hold, reissue, or retire the same, provided such act is had in entire good faith, in an exchange of equal value, and is free from all fraud, actual or constructive; this implying that the corporation is neither insolvent nor in process of dissolution, and that the rights of creditors are not thereby injuriously affected." The facts of this case bring it strictly within the terms and spirit of the rule as stated by the Illinois case.

In the case of *Barron v. McKinnon* (C. C. A.) 196 Fed. 933, cited by appellant, it was held that where national banks have loaned money on their shares of stock, or purchased such shares in violation of section 5201, Rev. Stats. U. S. (U. S. Comp. St. 1901, p. 3494), that the bank's title to such stock is good, and the cases of *First National Bank of Xenia v. Stewart*, 107 U. S. 676, 2 Sup. Ct. 778, 27 L. Ed. 502, and *Lantry v. Wallace*, 182 U. S. 536, 21 Sup. Ct. 878, 45 L. Ed. 1218, are cited. In the first case cited it was held: "While this section in terms prohibits a banking association from making a loan upon the security of shares of its own stock, it imposes no penalty, either upon the bank or borrower, if a loan upon such security be made. If therefore the prohibition can be urged against the validity of the transaction by any one except the government, it can only be done before the contract is executed, and while the security is still in the hands of the bank." In the other case, *Lantry v. Wallace*, after reviewing certain cases, the Supreme Court of the United States held: "In view of these decisions it cannot be held that the purchase by the bank of its own shares of stock was void. It was, of course, a matter of which the government by its officers could take cognizance, and it may be that it was a matter of which stockholders having an interest in the proper administration of the affairs of the bank could complain in a proceeding instituted by them to restrain the bank from violating the statute." Those authorities fail to sustain the contentions of appellant in this case.

The case of *Gaston & Ayres v. Campbell* (Tex. Sup.) 140 S. W. 770, does not sustain the contention of appellant in regard to estoppel, although there are expressions by this court on the question of estoppel in the same case which might be construed to sustain it. The Supreme Court, however, did not agree

with the conclusions of this court, but it was held that, "while such a corporation retains the benefits of such a contract, it silently affirms, and must not be permitted to deny, its validity."

We conclude in the language of a recent decision by the Supreme Court of Michigan: "This contract, under the circumstances alleged in complainant's bill, is not ultra vires by reason of defendant purchasing shares of its own stock. A corporation acting in good faith, without objection from stockholders and without prejudice to creditors, may purchase shares of its stock, regardless of the purpose for which it was organized, unless forbidden by statute." *Cole v. Realty Co.*, 169 Mich. 347, 135 N. W. 329. And if that proposition were not sustained by the great weight of authority, appellee having fully performed his part of the contract, no creditor complaining of the purchase of the stock, the corporation having been solvent at the time of the contract, appellant is estopped from denying its liability. If appellant paid more than the market value for the stock, its improvidence would not invalidate the contract, for it obtained appellee's property, and if it did not realize on it appellee should not be held liable for its failure or neglect to realize from the property. The creditors have not complained, and the stockholders actively acquiesced in the purchase.

The corporation in this case was not chartered under the provisions of the act of 1907 (Gen. Laws 1907, p. 309), but under a prior law, and while section 3 of the act may apply to corporations existing at that time, as well as those created thereafter, the facts of this case do not bring it within the purview of that section, because there was no attempt to decrease the capital stock of the corporation, and if there had been it could have no application because no creditor was prejudiced by the purchase of the stock, and the statute does not contain any penalty for its violation. The stock was not retired, but bought for the express purpose of placing it on the market again; the object of the purchase being to rid the corporation of individuals, personæ non grata with the president.

We recognize the fact, forcibly shown by the excellent brief filed by appellant, that there is strong, well-considered authority for the propositions advanced by appellant, but undoubtedly the weight of authority is to the contrary, and we believe that the numerous decisions, by which our opinion in this case is sustained, are more logical and should be followed.

The case of *Maryland Trust Co. v. National Mechanics' Bank*, 102 Md. 608, 63 Atl. 70, is a strong and well-considered one, and in a case where the shareholders, if not the creditors, are concerned, it would carry weight. In that case, however, not only the corporation but the stockholders were resisting a contract made by the board of directors

by which the stock of the Maryland Trust Company was exchanged for the stock of another corporation. In order to carry out that contract, it had been deemed necessary for the trust company to buy its own stock, and that purchase was attacked by the stockholders and the corporation. That fact differentiates that case from this. Much of the Maryland opinion is devoted to a discussion of the rights of the stockholders, which could have no pertinency nor force in a case where every stockholder had agreed to the purchase. No one is complaining in this case except a corporation which is seeking to evade the performance of a contract which has been fully executed by the other contracting party.

The judgment is affirmed.

On Motion for Rehearing.

FLY, C. J. [5] That part of the act of 1907 relating to private corporations, known as article 1152, Revised Civil Statutes of 1911, which authorizes a decrease of the capital stock of any corporation, does not apply to a case like the present. The purchase of the stock by the corporation was not intended to decrease the capital stock, and the shares were not retired, but held with the intent to again sell them. If the corporation had, by the purchase, intended to decrease its capital, it would not have succeeded because there was no compliance with the article, and it might have been compelled to again sell the stock. That statute certainly does not prohibit the purchase of its stock by a corporation, and if it did it does not authorize the corporation to seek to evade its obligations in a case where the party contracting with it has fully performed all he agreed to do, by a plea that it violated the law in making the contract. In *Herman on Estoppel*, § 1179, it is said: "When a contract has in good faith been fully performed, and nothing remains to be done by the party seeking relief, and all the shareholders have acquiesced in its performance, the plea of ultra vires or mere want of power is not available by the corporation in an action brought against it for not performing its portion of the contract." That language was approved in *Railway v. Gentry*, 69 Tex. 625, 8 S. W. 98, and in the case of *Bond v. Terrell Mfg. Co.*, 82 Tex. 309, 18 S. W. 691, the *Gentry* Case is approved. So in 5 *Thompson on Corporations*, § 6016, it is said: "The great mass of judicial authority seems to be to the effect that where a private corporation has entered into a contract in excess of its granted powers, and has received the fruits or benefits of the contract, and an action is brought against it to enforce the obligation on its part, it is estopped from setting up the defense that it had no power to make it." The text is supported by ample authority, as shown by the cases cited in the footnote. To the same effect are *Logan v. Association*, 8 Tex. Civ. App. 490, 28 S. W. 141, and *Nat. Bank v. Oil*

Co., 24 Tex. Civ. App. 645, 60 S. W. 828; *Chapman v. Iron Clad Co.*, 62 N. J. Law, 497, 41 Atl. 690.

In the National Bank Act it is provided that no bank "shall make any loan or discount on the security of the shares of its own capital stock nor be the purchaser or holder of any such shares," except under circumstances named, for its own protection, and in the case of *Lantry v. Wallace*, 182 U. S. 536, 21 Sup. Ct. 878, 45 L. Ed. 1218, where shares were purchased in open defiance of the law, the highest judicial tribunal in this country held: "In view of these decisions it cannot be held that the purchase by the bank of its own shares of stock was void. It was, of course, a matter of which the government by its officers could take cognizance; and it may be that it was a matter of which stockholders, having an interest in the proper administration of the bank, could complain in a proceeding instituted by them to restrain the bank from violating the statute."

In the case of *Crandall v. Lincoln*, 52 Conn. 73, 52 Am. Rep. 560, where it was held that the officers of a corporation must restore funds for shares of stock sold by them to a corporation, it was said: "We do not intend to say that under no circumstances can a corporation legally become the owner of its own stock. * * * Nor do we intend to say that a direct purchase would be declared illegal at the instance of a party to the transaction."

Again, in an English case—and English cases usually hold that a corporation cannot purchase its shares of stock—it was held that, where differences had arisen between the company and one of its directors, the company had the authority to purchase the shares. In another English case, *Re Balgooley Distillery Co.*, it was held, it is said with reluctance, that the company did not act ultra vires in selling a quantity of whiskey to one of its shareholders and taking in part payment therefor shares of its stock. Both of the decisions were placed on the ground of the necessity of the corporation. The cases are quoted from in notes under *Hall v. Henderson*, 61 L. R. A. 621. Those cases have peculiar application to the facts of this case where the shares of stock were bought in order to prevent "great and irreparable loss, if not insolvency" of the corporation. The shares were not "retired or merged," but it was provided in the resolution authorizing their purchase that they should be "resold and reissued under the direction of the board of directors."

In the case of *Blalock v. Mfg. Co.*, 110 N. C. 99, 14 S. E. 501, it was held: "The shares of the capital stock of the defendant corporation were the lawful subject of purchase and sale, might be bought and sold in the market, and, in the absence of statutory provision to the contrary, it might buy such shares for its own benefit from owners of

them, upon such terms as might be agreed upon subject to the rights of its creditors in proper cases to resort to its capital stock, paid and unpaid, as a trust fund out of which they may be entitled to have their debts paid. It is bound by its agreements with persons from whom it may purchase such shares of stock, and they may enforce the same by proper legal remedies, just as they might do in case of like agreements in respect to any other species of property. Hence if it made its promissory note to one of its stockholders for the price, or any part of it, that it agreed to pay him for his shares of stock, he would have his remedy, so far as it is concerned, just as any other creditor would, certainly subject to the possible rights of other creditors against him as a stockholder in some cases wherein he might be liable. If he were not liable to other creditors in some way as a stockholder, he would be on the same footing as such creditors. There is no just reason why he should not be. The defendant corporation is therefore bound to pay the stockholders, respectively, whose shares of stock it bought, the several sums of money it agreed to pay for the same." We think the quotation states the law applicable to the facts of this case, and it is upheld and supported by the weight of American authority. *Fremont Carriage Co. v. Thomsen*, 65 Neb. 370, 91 N. W. 376; *Dock v. Schlichter*, 167 Pa. 370, 31 Atl. 656; *Farmers' Bank v. Champlain Trans. Co.*, 18 Vt. 131; *Lowe v. Pioneer Threshing Co.* (C. C.) 70 Fed. 646; *Crandall v. Lincoln*, 52 Conn. 73, 52 Am. Rep. 560; *New England Trust Co. v. Abbott*, 162 Mass. 148, 38 N. E. 432, 27 L. R. A. 271; *Marvin v. Anderson*, 111 Wis. 387, 87 N. W. 226; *Calteaux v. Mueller*, 102 Wis. 525, 78 N. W. 1032.

Again, we hold that article 1152 could not affect the contract in this case because appellee was informed by the resolution of the board of directors that there was no intention to decrease the capital stock, but that the shares should be sold, and provision was made for the use of the funds arising therefrom. Up to the time of the consummation of the contract of purchase there was no decrease in the capital stock of the corporation, and appellee had no notice whatever that it was contemplated to decrease the capital stock, if such was in contemplation. But there is nothing that tends to show that any decrease was in contemplation; the sole object apparent being the preservation of the existence of the corporation. Not only American, but English, decisions recognize that such a condition of affairs creates a necessity that would justify a purchase of the shares of stock. While in the light of subsequent events it appears that another person than the one chosen should have been removed from the corporation for its good, still the plan was adopted, and appellee in good faith, with no notice of any design, if such existed, to decrease

the capital stock of the corporation, fulfilled his part of the contract, and then had his claim for payment of his promissory note denied him only because of the ill will of the president of the corporation. After bad management, strife, and dissension had lowered the value of his shares, he is met with the demand to pay back what he had already obtained on his shares, and informed that when that is done his worthless shares of stock will be returned. That kind of a proposition has no ring of upright dealing and equity about it.

[8] If there had been no resolution to the effect that the shares of stock should not be merged by the purchase, it is well-settled law that they would not. "When a corporation buys shares of its own capital stock, the capital stock is not reduced by that amount, nor is the stock merged." *Cook on Corp.* § 314; *Vail v. Hamilton*, 85 N. Y. 453; *Jefferson v. Burford* (Ky.) 17 S. W. 855; *Commonwealth v. Railroad*, 142 Mass. 146, 7 N. E. 716; *Ralston v. Bank*, 112 Cal. 208, 44 Pac. 476. It follows that the purchase of the shares of stock by appellant did not reduce or decrease its capital stock and the transaction could not be brought within the purview of article 1152.

Speaking on the effect the purchase of its own stock has on the corporation, *Clark & Marshall in Private Corporations*, § 411, state: "It has been held that a corporation cannot purchase its own shares for the purpose of holding them, on the ground that the purchase by a corporation of its own shares in effect reduces its capital stock to that extent until the shares are reissued. Strictly speaking, however, this is not in any sense a reduction of the capital stock." The same authors state: "When a corporation purchases shares or its own stock, as it may lawfully do under some circumstances, and as it may also do unlawfully, the shares are not thereby merged or extinguished unless such is the intention. If it does not intend to retire the shares, they merely remain in suspension as it were and may be at any time reissued." See, also, section 199.

Machen, in his work on *Corporations*, while attempting to uphold a contrary doctrine, says: "It must be conceded that a somewhat larger number of the American courts have taken the view that a corporation may, without express statutory authority, purchase its own shares, provided the purchase is entered into bona fide and does not endanger the claims of creditors." Section 628, and long list of authorities in note. The author, however, indorses the English view of the question because it "is supported by the weight of Mr. Morawetz's opinion." This court, however, feels disposed to follow the opinions of a majority of American courts, rather than those of English courts, even though the latter have received the

sanction of the writer of a text-book. Yet this author admits that when shares of a corporation are purchased they are only temporarily merged or extinguished. *Machen, Corp.* § 633.

Even Morawetz, who arrays his opinion against that of a majority of American courts, including that of the Supreme Court of the United States, says: "If shares in a corporation are purchased by the company, they may, unless the contrary be provided, be issued at a subsequent time. Under these circumstances, it is said, the shares do not become merged, but remain temporarily in abeyance and may be sold again by the corporation." In spite of that he contends that "it would be an absurdity to say that a corporation can really hold shares in itself."

In the case of *Knickerbocker Co. v. State Board*, 74 N. J. Law, 583, 65 Atl. 913, 7 L. R. A. (N. S.) 885, it was held that shares of stock once issued remain outstanding until retired in the legal manner, and therefore, when a corporation bought its stock, it was not retired or merged.

In the case of *Pabst v. Goodrich*, 133 Wis. 43, 113 N. W. 398, 14 Ann. Cas. 824, it was held a solvent corporation has the right to purchase and hold its stock, and that such purchase does not amount to a cancellation of such stock. It says further: "A corporation clearly has the right to purchase its stock, keep it alive, and treat it as assets."

[7] Where the owner of stock transfers it directly to the corporation itself, without the intervention of a trustee, the transferee is not released from his liability on the stock, but remains as fully chargeable as though no transfer had been attempted. *Cook on Corp.* § 251; *Machen, Corp.* § 631; *In re Reciprocity Bank*, 22 N. Y. 9; *Chrisman v. Independence Mfg. Co.*, 168 Mo. 634, 68 S. W. 1026; *Walters v. Porter*, 3 Ga. App. 73, 59 S. E. 452. We cannot see where any question of public policy could arise; no one can be injured by the transfer of the shares of stock.

The motion for rehearing is overruled.

THOMPSON BROS. LUMBER CO. v. TOLER.

(Court of Civil Appeals of Texas. Galveston. Nov. 21, 1912.)

1. PUBLIC LANDS (§ 175*)—LOCATION UNDER CERTIFICATE—OPERATION AND EFFECT.

In 1838 a conditional certificate for 640 acres of land was issued to K., and located by him in R. county. An unconditional certificate was afterwards issued to him and located in P. county subsequent to the passage of the act of August 30, 1856 (Laws 1856, c. 145, § 2; Rev. St. 1895, art. 4134). The field notes of the surveys for both locations were duly returned to and filed in the Land Office. Subsequently

a duplicate certificate was issued, reciting the loss of the unconditional certificate, and under this certificate the land in controversy was located. There was no evidence of any abandonment of the location in R. county. *Held*, that the first location exhausted the right of the holder to appropriate public land, and the subsequent locations were void.

[Ed. Note.—For other cases, see *Public Lands*, Cent. Dig. §§ 555-570; Dec. Dig. § 175.*]

2. PUBLIC LANDS (§ 175*)—LOCATION UNDER CERTIFICATE—OPERATION AND EFFECT.

The issuance of such unconditional and duplicate certificates was not a judicial determination of the abandonment of the original location and of the holder's right to make a new location; the right to the unconditional and duplicate certificates not being dependent on the abandonment of the original location.

[Ed. Note.—For other cases, see *Public Lands*, Cent. Dig. §§ 555-570; Dec. Dig. § 175.*]

3. PUBLIC LANDS (§ 175*)—LOCATION UNDER CERTIFICATE—OPERATION AND EFFECT.

Even if the location under the original certificate was abandoned, the location under the duplicate certificate was void, since, that made under the unconditional certificate in P. county being valid, the act of 1856 (Laws 1856, c. 145, § 2; Rev. St. 1895, art. 4134) expressly prohibited the lifting or floating of the certificate and its subsequent location upon other land.

[Ed. Note.—For other cases, see *Public Lands*, Cent. Dig. §§ 555-570; Dec. Dig. § 175.*]

4. PUBLIC LANDS (§ 175*)—LOCATION UNDER CERTIFICATE—OPERATION AND EFFECT.

A location under a land certificate by the administrator of the original holder who had transferred it was not void, but inured to the benefit of the transferee.

[Ed. Note.—For other cases, see *Public Lands*, Cent. Dig. §§ 555-570; Dec. Dig. § 175.*]

Appeal from District Court, Tyler County; W. B. Powell, Judge.

Trespass to try title by the Thompson Bros. Lumber Company against W. C. Toler. Judgment for defendant, and plaintiff appeals. Affirmed.

J. A. Mooney and J. J. Goodwin, both of Woodville, for appellant. Joe W. Thomas, of Woodville, for appellee.

PLEASANTS, C. J. This is an action of trespass to try title brought by appellants against appellee to recover a tract of 141.5 acres of land in Tyler county, located by virtue of a duplicate certificate issued to George Kisner on February 5, 1861. The defendants answered by general demurrer, general denial, plea of not guilty, and plea of limitation of three years.

The record shows that on August 3, 1838, a conditional certificate for 640 acres of land was issued by the republic of Texas to George Kisner. This certificate was No. 821, and designated class 2. It was returned to the Land Office on August 27, 1851. George Kisner by written transfer of date March 20, 1837, conveyed this certificate and all his rights thereunder to John Bone. This transfer is on file in the General Land Office. On July 31, 1839, the certificate was located on 640 acres of land in Robertson county, and the field notes of the survey, duly certified

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

by the surveyor on August 24, 1839, and by the county surveyor of Robertson county on April 2, 1840, were thereafter returned to the Land Office. An unconditional certificate for 640 acres was issued to George Kisner on December 2, 1850. The administrator of the estate of George Kisner, deceased, located this unconditional certificate on 640 acres of land in Palo Pinto county on May 17, 1857. The field notes of this survey were certified by the surveyor on June 5, 1851, and were returned to and filed in the Land Office on September 12, 1857. The following duplicate certificate issued by Francis M. White, Commissioner, with the indorsements thereon is on file in the General Land Office:

"The Conditional No. 821 Harris Co. Duplicate Certificate. No. 14/97. Class 2nd. Quantity 640 acres. General Land Office. Austin, February 5th, 1861. This is to certify that satisfactory evidence having been produced of the loss of unconditional headright certificate No. 973, class second, issued by the Board of Land Commissioners of Harris County to George Kisner for 640 acres of land, dated the 2nd day of December, 1850. This duplicate therefore will entitle the said George Kisner to all the benefits granted in said Unconditional Headright Certificate. In testimony whereof I hereunto set my hand and affix the impress of the seal of said office the date first above written. Francis M. White, Commissioner. [Seal.]"

(1) "Filed 117 Liberty 2nd Class. 320 acres located in Hardin county. Dup. Uncondi. Cert. 640. Wm. Word, Surveyor of Hardin county. George Kisner. Filed Sept. 5/62."

In March, 1862, the unlocated balance of this duplicate certificate was located on the 141.5 acres of land in controversy. The field notes of this survey were certified by the surveyor on March 4, 1862, and were filed in the Land Office on September 5, 1862. Appellants claim title under John Bone by virtue of this location. It is not shown that a patent was issued upon any of these locations. On May 22, 1907, the land in controversy was sold by the state and patented to Joe W. Thomas. Appellee holds the Thomas title. Upon this state of the evidence the trial court instructed the jury to find a verdict for the defendant, and upon the return of such verdict judgment was rendered in accordance therewith.

Upon this evidence we think the trial court was correct in holding that the location upon the land in controversy under the duplicate certificate did not show title in appellants for the reason that the prior locations under this certificate had exhausted the right of the holder of said duplicate certificate to appropriate public land thereunder.

[1] Prior to the act of August 30, 1856 (Laws 1856, c. 145, § 2; art. 4134 of the Re-

vised Statutes 1895), the right of the holder of a certificate to "lift" or "float" it after it had once been located, and relocate it on other land, seems to have been recognized by our Supreme Court, but that act expressly prohibits the floating of a certificate after location except in cases in which the location was in conflict with a prior survey. After the passage of this act, the owner of a valid land certificate which had been located on unappropriated public domain, the land properly surveyed, and the field notes and certificate returned to and filed in the General Land Office had no right to appropriate other land under that certificate. In such case the owner of the certificate could not abandon the land first located, and acquire other land under the same certificate. *Adams v. Railway Co.*, 70 Tex. 252, 7 S. W. 729. There is nothing in the evidence in this case to show the abandonment of the original location in Robertson county. The original certificate under which this location was made and the field notes of the survey were returned to the Land Office as required by law and said certificate, so far as the record shows, has remained in the Land Office continuously since it was returned there in 1851, and it cannot be presumed, in the absence of any evidence of that fact, that the certificate was withdrawn from the Land Office and lifted or floated prior to the passage of the act before mentioned.

[2] Appellants' contention that the issuance of the unconditional certificate in 1850 and of the duplicate certificate in 1861 was a judicial determination of the abandonment of the original location and of the right of the holder of the duplicate certificate to locate the same upon any unappropriated public domain is without merit. Neither the right to the unconditional certificate nor the right to a duplicate thereof, the original being lost, in any way depended upon whether or not the original conditional certificate had been lifted and the location thereunder abandoned, and therefore the finding of the commissioner that the unconditional certificate and the duplicate thereof should issue was not an adjudication of the right of the holder of said certificate to appropriate other land thereunder in lieu of that located under the original certificate.

[3] If the evidence was sufficient to show that the original certificate was lifted and the location made thereunder in Robertson county abandoned, the location in Palo Pinto county made after the passage of the act of 1856 appears to have been made in accordance with law and proper returns made to the Land Office. Such being the case, that location exhausted the right of the holder of the certificate to appropriate other public land thereunder, and the subsequent location upon the land in controversy under the duplicate certificate was void.

[4] The fact that the location in Palo Pinto county was made by the administrator of the estate of Klsner when the certificate had been sold by Klsner and the estate had no title thereto did not render the location void, but such location would inure to the benefit of the owner of the certificate, and there is no evidence tending to show that the owner of the certificate did not acquire title to said land under that location.

What we have said disposes of all of the questions presented by appellants' brief. We have not discussed the various assignments of error in detail, but each of them has been duly considered, and none in our opinion should be sustained.

We think the judgment of the court below should be affirmed, and it has been so ordered.

Affirmed.

SMITH v. PIERSON.

(Court of Civil Appeals of Texas. Ft. Worth. Nov. 2, 1912. Rehearing Denied Nov. 30, 1912.)

1. MALICIOUS PROSECUTION (§ 16*)—PROBABLE CAUSE—MALICE.

One having probable cause for instigating a criminal prosecution is not liable for malicious prosecution, though malice actuated him.

[Ed. Note.—For other cases, see Malicious Prosecution, Cent. Dig. §§ 19-22; Dec. Dig. § 16.*]

2. MALICIOUS PROSECUTION (§ 18*)—PROBABLE CAUSE.

Where a constable attempted to execute a warrant after the return day thereof and dismissal of the prosecution, and took accused into custody under the warrant, probable cause existed for the prosecution of the constable for false imprisonment; and one instigating such a prosecution was not liable for malicious prosecution.

[Ed. Note.—For other cases, see Malicious Prosecution, Cent. Dig. §§ 23, 24, 29-38; Dec. Dig. § 18.*]

Appeal from District Court, Johnson County; O. L. Lockett, Judge.

Action by T. E. Smith against Jacob Pierson. From a judgment for defendant, plaintiff appeals. Affirmed.

Phillips & Bledsoe, of Cleburne, for appellant. W. H. Featherstone, of Ft. Worth, and Walker & Baker, of Cleburne, for appellee.

SPEER, J. T. E. Smith instituted this suit against Jacob Pierson to recover damages for malicious prosecution. Upon the trial the court instructed a verdict for the defendant, and the plaintiff has appealed.

[1, 2] The following statement of the facts will be sufficient for the disposition we have made of the case: Appellant was constable of precinct No. 5, Johnson county, and on February 9, 1911, he filed before the justice of the peace of precinct No. 2, in Hill county, a complaint, charging one Irvin Bridges with an offense. The justice of the peace is-

sued a warrant of arrest, directed to the sheriff or any constable of Johnson county, commanding the arrest of Bridges, which warrant was returnable, on its face, to the justice's court on February 17, 1911. The accused appears not to have been arrested prior to the return day of the warrant, and on that day the justice of the peace entered an order dismissing the prosecution. On the 4th day of March thereafter Smith attempted to execute the warrant, and took the accused, Bridges, into custody. Bridges made complaint and caused the arrest of Constable Smith upon the charge of false imprisonment, and this suit was instituted against Pierson upon the allegation that he had maliciously instigated and caused such arrest. The above facts appear to be undisputed, and, in our judgment, are conclusive in favor of the instruction given. It is immaterial whether appellee was responsible for appellant's arrest or not, and, if so responsible, whether or not he was actuated with malice, if he had probable cause for the institution of such prosecution. There can be no doubt in our minds that probable cause did exist, where the arrest was made after the return day of the warrant, and after the cause in which the warrant issued had been regularly dismissed. The instruction to find for the defendant was therefore proper.

The judgment is affirmed.

TEXAS CENT. R. CO. et al. v. SCOTT & ROBERTSON.

(Court of Civil Appeals of Texas. Ft. Worth. Oct. 24, 1908.)

CARRIERS (§ 228*)—CARRIAGE OF LIVE STOCK—ACTION FOR DAMAGES—PRESUMPTION.

The presumption of negligence against the last carrier, who receives live stock in good condition and subsequently delivers it in a damaged condition, cannot arise where there is affirmative proof that the initial carrier was guilty of negligence sufficient to cause the injury.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 957-960; Dec. Dig. § 228.*]

Appeal from Eastland County Court.

Action by Scott & Robertson against the Texas Central Railroad Company and the Ft. Worth & Rio Grande Railway Company. Judgment for plaintiff, and defendants appeal. Judgment affirmed as to the Texas Central Railroad Company, and reversed and rendered as to the Ft. Worth & Rio Grande Railway Company.

See, also, 127 S. W. 849.

Earl Conner and Scott & Breilsford, all of Eastland, and C. H. Yoakum, of Ft. Worth, for appellants. Ed J. Hamner, of Sweetwater, for appellee.

SPEER, J. The judgment of the county court is affirmed as to the appellant Texas Central Railroad Company, since its principal

proposition, to the effect that the evidence fails to show negligence upon its line, is not supported by the record. In truth, the only evidence of negligence contained in the entire record, as we read it, is that of this appellant's delay in transporting the cattle from Hico to Dublin.

As to appellant the Ft. Worth & Rio Grande Railway Company, the judgment is reversed, upon the assignment that the court erred in not giving a summary instruction to the jury to return a verdict in its favor. We have carefully read the entire record, and find no evidence whatever of any negligence on the part of this appellant, and in such a state of case it was entitled to demand, as it did, an instruction in its favor. The principle of law that where goods are received for transportation in good condition, and subsequently delivered in a damaged condition, a presumption of negligence arises as against the last carrier, cannot possibly help appellee's case for two reasons: First, a presumption can only be indulged in the absence of testimony accounting for the injury; and, second, when such presumption is indulged, it is against the last carrier. In this case there is no dearth of testimony accounting for the damage, because the proof shows affirmatively that the initial carrier was guilty of negligence sufficient to cause the injury, and it furthermore shows, what we would otherwise judicially know, that Ft. Worth was the terminus of the shipment so far as this appellant is concerned, and that the cattle were delivered in a damaged condition in East St. Louis, Ill. There being proof, then, as to the damages, there cannot arise a presumption of other negligence growing out of the delivery of the cattle in a damaged condition, or, in other words, at a time too late for the proper market.

Affirmed in part, and reversed and rendered in part.

BIGGS v. BLOUNT et al.

(Court of Civil Appeals of Texas. Galveston. Dec. 6, 1912.)

APPEAL AND ERROR (§ 753*)—TRANSCRIPT—ASSIGNMENT OF ERRORS.

Where the transcript does not contain a copy of an assignment of errors required by statute and court rules to be filed below, the Court of Civil Appeals will only consider errors of law apparent upon the record, if the judgment could under any circumstances have been legally rendered, and will affirm if there be no such errors.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3086-3089; Dec. Dig. § 753.*]

Appeal from District Court, Nacogdoches County; James I. Perkins, Judge.

Action between S. V. Biggs and E. A. Blount and others. From the judgment, the first-named party appeals. Affirmed.

Ingraham & Hodges and V. E. Middlebrook, all of Nacogdoches, for appellant. Blount & Strong, of Nacogdoches, for appellees.

McMEANS, J. The transcript in this case does not contain a copy of an assignment of errors required by the statute and rules to be filed in the court below, and it does not appear that an assignment of errors was filed in the trial court. In the absence of such assignment, this court will not consider any error but one of law that may be apparent upon the record, if the judgment is one that could have been legally rendered in the district court. As there is no fundamental error apparent of record in the proceedings, and as the judgment was one that could legally have been rendered in the district court, it is our duty to affirm the judgment, and it is so ordered. Harris v. Petty, 66 Tex. 516, 1 S. W. 525; Bopp v. Ganzer, 26 S. W. 244; Lewis v. Steiner, 84 Tex. 384, 19 S. W. 516; Durham v. Garrett, 121 S. W. 1141.

Affirmed.

GILLASPIE v. CITY OF HUNTSVILLE.

(Court of Civil Appeals of Texas. Galveston. Nov. 22, 1912. Rehearing Denied Dec. 12, 1912.)

1. JUDGMENT (§ 106*)—ANSWER—DEFAULT.

The filing of a plea alleging only that the premises sued for were part of the homestead of defendant and his wife, and praying that she be made a party, was not the filing of such answer as would prevent the entry of a judgment by default under Rev. Civ. St. 1911, art. 1936.

[Ed. Note.—For other cases, see Judgment. Cent. Dig. §§ 160, 162, 180-197; Dec. Dig. § 106.*]

2. JUDGMENT (§ 106*)—DEFAULT—PLEADING.

An answer filed, but not called to the attention of the court, will not render the entry of a judgment by default error.

[Ed. Note.—For other cases, see Judgment. Cent. Dig. §§ 160, 162, 180-197; Dec. Dig. § 106.*]

3. HOMESTEAD (§ 212*)—PROTECTION—ACTION—PARTIES.

In trespass to try title by a municipal corporation to recover premises alleged to be a portion of a street and claimed by defendant as part of his homestead, the wife is not a necessary party.

[Ed. Note.—For other cases, see Homestead. Cent. Dig. § 393; Dec. Dig. § 212.*]

4. JUDGMENT (§§ 145, 162*)—SETTING ASIDE—PLEADING—MERITORIOUS DEFENSE.

Where on the day following the rendition of a judgment by default defendant filed a motion to set aside and at the same time an answer to the merits, the court should have looked to the allegations of the answer to determine whether defendant had a meritorious defense, but could not hear proof to determine their truth.

[Ed. Note.—For other cases, see Judgment. Cent. Dig. §§ 271, 292-295, 319-322; Dec. Dig. §§ 145, 162.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

5. JUDGMENT (§ 143*)—SETTING ASIDE—PLEADING—EXCUSE.

A defendant who, on appearance day, filed a suggestion that his wife was a necessary party, and left the courtroom without answering to the merits, expecting the court to take cognizance of the pleading filed, and to have him called when the case should be reached, saying that such expectations were based upon the immemorial custom of the court, no such custom being proved, did not present a valid excuse for failing to answer in time, which is necessary to justify setting aside a default judgment.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 269, 270, 272-291; Dec. Dig. § 143.*]

6. JUDGMENT (§ 139*)—SETTING ASIDE—DISCRETION.

An application to set aside a judgment entered by default is addressed to the sound discretion of the court.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 265-268; Dec. Dig. § 139.*]

7. APPEAL AND ERROR (§ 1074*)—REVIEW—HARMLESS ERROR—SETTING ASIDE DEFAULT.

Although on motion to open a default judgment many errors were committed in the trial of issues to determine whether defendant had a valid defense, they are harmless, where no valid excuse is shown for not filing the answer in time.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4248-4252; Dec. Dig. § 1074.*]

Appeal from District Court, Walker County; S. W. Dean, Judge.

Trespass to try title by the City of Huntsville against W. O. B. Gillaspie. Judgment for plaintiff, and defendant appeals. Affirmed.

W. O. B. Gillaspie, of Huntsville, in pro. per. Dean, Humphrey & Powell, of Huntsville, for appellee.

McMEANS, J. This is an action of trespass to try title, brought by the city of Huntsville against W. O. B. Gillaspie, to recover the title and possession of certain premises alleged to be a portion of a public street in said city. The defendant was duly served with citation, but, on the appearance day of the next succeeding term of the court, failed to file any answer to the merits, but did file a pleading alleging that the premises in controversy constituted a part of the homestead of himself and his wife, Orine Wynne Gillaspie, and praying that she be made a party defendant. On the call of the appearance docket judgment by default was rendered in favor of plaintiff and against defendant for the land in controversy. On the day following the defendant filed a motion to vacate the default judgment, and at the same time filed his answer setting up many matters of defense to plaintiff's suit. To the motion of appellant to vacate the appellee filed a contest. Upon the issues thus joined the court heard evidence, and upon its conclusion overruled appellant's motion to set aside the judgment by default, on the ground that appellant had not shown

a good excuse for his failure to file an answer to the merits in time, and on the further ground that the evidence introduced by appellant did not show that he had a meritorious defense to the suit. From the judgment overruling the motion to set aside the judgment by default appellant has duly prosecuted this appeal.

Upon request of the appellant the trial judge filed his findings of fact, which are as follows:

"(1) Upon the call of the appearance docket on Tuesday, September 26, 1911, no answer or other plea having been filed by the defendant, as required by law, judgment by default was rendered by the court in favor of the plaintiff and against the defendant for the premises described in plaintiff's original petition.

"(2) On September 27, 1911, the defendant filed his motion in writing to set aside the judgment by default rendered herein on September 26, 1911, and also filed his original answer on the said 27th day of September, 1911.

"(3) On September 29th plaintiff filed its contest in opposition to said motion to set aside said default judgment, and on said last-named day the court heard evidence upon said motion and contest, and postponed the argument of counsel and further consideration thereon until October 10, 1911, when the matter at issue again came on for further consideration.

"(4) I find from the evidence offered upon said hearing that no legal excuse was shown by the defendant for having failed to appear and plead herein on appearance day, and before the call of the appearance docket and before the rendition of said judgment by default.

"(5) I further find that the defendant has no meritorious defense to the plaintiff's cause of action herein.

"(6) I further find that the defendant has no legal defense to the plaintiff's suit, but that the defendant claims title to the lands in controversy herein solely under the statutes of limitations, and that the defendant is unable to sustain said plea.

"(7) I further find that the defendant has no deed to the land in controversy and no title thereto, unless it be a limitation title, and I find that the defendant has not had, by himself and those under whom he claims, sufficient adverse possession of the premises in controversy to perfect his title thereto under the statutes of limitations.

"(8) I further find that the land in controversy is a part of Burton street, one of the streets of the city of Huntsville, which said street was duly dedicated by the original grantee, P. Gray, and that dedication was accepted by the plaintiff and had been used as a street for many years before the defendant went into possession of the part thereof in controversy herein."

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

These findings appear to be amply sustained by the facts appearing in the record.

Appellant by his first assignment of error complains that the court erred in rendering judgment against him by default because the defendant then had a plea before the court requesting that Mrs. Gillaspie be made a party defendant, and that the judgment by default should not have been rendered without first considering and acting upon this plea. Appellant contends under this assignment that "a plea to make additional parties is an appearance in the suit, and a judgment by default will not lie until such plea has been disposed of."

[1] The contention of appellant that his plea to make additional parties had been filed prior to the rendition of the judgment by default is in conflict with the first fact finding of the court above set out, but, in the view we take, this conflict is wholly immaterial, and we will not pause to settle it. We think there can be no question that the filing of the plea was not the filing of an answer such as would prevent the entry of a judgment by default. Revised Statutes, art. 1836.

[2] But, however this may be, it is indubitably shown by the record that the plea, even if it was filed before the judgment by default was rendered, was not called to the attention of the court when the case was reached on the call of the appearance docket, and for that reason it was not error to render the judgment by default. It has been so held where an answer to the merits has been filed, but not called to the attention of the court. *London Assurance Corp. v. Lee*, 66 Tex. 247, 18 S. W. 508; *Hopkins v. Donaho*, 4 Tex. 336; *Peirson v. Burney*, 15 Tex. 272; *Lytle v. Custead*, 4 Tex. Civ. App. 490, 23 S. W. 451.

[3] Even had the appellant filed the plea in question before the judgment by default was rendered, and even though he had called the attention of the court to it, we think the court could have legally rendered the default judgment, because the plea was not an answer to plaintiff's suit, and the appellant's wife, who the plea suggested should be made a party defendant, was not a necessary party to the suit. *Jergens v. Schiele*, 61 Tex. 255; *City of San Antonio v. Berry*, 92 Tex. 327, 48 S. W. 496. The assignment is overruled.

[4] As before shown, the appellant on the day following the rendition of the judgment by default filed a motion to set the judgment aside, and at the same time filed an answer to the merits. We think the court in determining whether appellant had a meritorious defense should have looked to the allegations of the answer, and that it was not proper, upon issue joined by appellee's contest, to hear proof to determine whether the allegations of the answer were true, and

in that way judge of the merits of the defense set up in the answer, and appellant's assignments raising the point are sustained.

[5] An application to set aside a default judgment must show a valid excuse for failure to plead in time (*Foster v. Martin*, 20 Tex. 118; *Dowell v. Winters*, 20 Tex. 793; *Clute v. Ewing*, 21 Tex. 679; *Coffee v. Ball*, 49 Tex. 16; *Ames Iron Works v. Chinn*, 20 Tex. Civ. App. 382, 49 S. W. 665; *Nevins v. McKee*, 61 Tex. 413; *Freeman v. Neyland*, 23 Tex. 530; *Harn v. Phelps*, 65 Tex. 596); and relief against such a judgment will be denied unless the defendant can show not only a valid defense, but some ground of accident, mistake, trust, or fraud which prevented his making such defense. *Coffee v. Ball*, 49 Tex. 16. It appears that on appearance day the appellant filed a suggestion that his wife was a necessary party to the suit, and then left the courtroom without filing an answer to the merits, expecting that the court would take cognizance of the pleading filed, and would have him called when the case should be reached on the call of the appearance docket, and that no judgment by default would be rendered or other action taken in the case until his plea to make additional parties had been acted on. He says in his brief that these expectations were based upon the immemorial custom of the court, but no such custom was proved. We do not think that the excuse offered was a valid excuse for his failure to answer in time.

[6] The application to reinstate the case was addressed to the sound discretion of the court, and there is nothing in the record indicating that that discretion was abused by the court's refusal to set aside the judgment by default.

[7] Appellant claims that many errors were committed in the trial of the issues to determine whether he had a valid defense to plaintiff's suit, but as these errors, if they were such, could not, in the absence of the failure of appellant to show a valid excuse for not filing his answer in time, result in a reversal they are harmless.

The record discloses no reversible error, and judgment is affirmed.

Affirmed.

CHICAGO, R. I. & G. RY. CO. v. CARROLL

(Court of Civil Appeals of Texas. Amarillo.
Nov. 9, 1912. Rehearing Denied
Dec. 14, 1912.)

1. CARRIERS (§ 373*)—EJECTION OF PASSENGER—CONNECTING CARRIERS.

A railroad company selling a ticket to a passenger for passage over its own line and that of a connecting carrier is not liable for the ejection of the passenger by the connecting carrier on the ground that the ticket was not good on the particular train taken by the passenger, where the agent selling the ticket had no knowledge of a rule of the connecting

carrier limiting the train in question to passengers holding a particular form of ticket.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. § 1461; Dec. Dig. § 373.*]

2. CARRIERS (§ 381*)—CARRIAGE OF PASSENGERS—ACTIONS FOR BREACH.

In an action against two railroad companies for damages for ejecting plaintiff's wife from a certain train, evidence held to show that the employees of the first railroad company, who sold plaintiff a ticket, had no knowledge of the second railroad company's rule that it was not good on that train, and hence to authorize peremptory instruction for that company.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1473-1482; Dec. Dig. § 381.*]

3. CARRIERS (§ 383*)—INSTRUCTIONS—PROVINCE OF COURT.

In an action against a railroad company for damages for ejecting plaintiff's wife from a certain train, where the ticket upon which she attempted to ride, as well as the rules of the railroad company which sold the ticket, were in evidence, it was for the court to declare the legal effect of such written testimony, and whether she was entitled to ride on that given train.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1492-1496; Dec. Dig. § 383.*]

4. CARRIERS (§ 270*)—ACTS OF AGENT—BINDING EFFECT ON PRINCIPAL.

As a principal is bound by the act and contract of his agent made within the scope of his authority, one railroad company which allowed another company to sell tickets over its line is bound to honor a ticket sold by the first company over its line, where the purchaser had no notice of the limitation on the first company's authority.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1064-1066; Dec. Dig. § 270.*]

5. CARRIERS (§ 382*)—MEASURE OF DAMAGES—PERSONAL INJURIES.

In an action by a husband for damages for the wrongful ejecting of his wife from defendant's train, where it appeared that she was alone, save for three small children, and was forced to alight from the train at an early hour in a desolate spot, and was caused inconvenience, humiliation, and annoyance, a verdict of \$1,500 was not so large as to indicate passion and prejudice.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1478, 1483-1491; Dec. Dig. § 382.*]

Appeal from District Court, Donley County; Jas. N. Browning, Judge.

Action by T. W. Carroll against the Chicago, Rock Island & Gulf Railway Company and another. From a judgment for plaintiff, defendant named appeals. Affirmed.

Gustavus, Bowman & Jackson, of Amarillo, N. H. Lassiter and Robt. Harrison, both of Ft. Worth, for appellant. A. T. Cole and H. B. White, both of Clarendon, and D. W. Odell, of Ft. Worth, for appellee.

PRESLER, J. This suit was brought by T. W. Carroll against the Ft. Worth & Denver City Railway Company and the Chicago, Rock Island & Gulf Railway Company to recover damages, alleging in substance that appellee on January 23, 1910, called on the agent of the Ft. Worth & Denver City Railway Company at Clarendon,

and requested a first-class ticket for his wife from Clarendon to San Francisco, by way of the Ft. Worth & Denver City Railway Company to Dalhart, and thence by way of the Chicago, Rock Island & Gulf Railway Company to the city of El Paso; that he stated to the agent that he wanted his wife to travel from Dalhart on the Rock Island train known as the "Golden State Limited," and wished the said transportation for use on that train, and that said agent led appellee to believe and informed him that the ticket was good for passage on that train; that appellee then arranged for Pullman car reservation from Dalhart to San Francisco on this Golden State Limited train, due to leave Dalhart at 3:20 a. m., January 24th, and on January 23d he and his wife and three small children boarded the Ft. Worth & Denver train at Clarendon, and proceeded to Dalhart, where he purchased the Pullman accommodations already reserved to San Francisco, and that about 3:20 a. m. he placed his wife and children on the Pullman car of the Golden State Limited, and left them; that a few minutes later the conductor of the train notified his wife that her ticket was not good for passage on that train, and that she would have to leave it at the town of Tucumcari, and required her to do so at about 5:30 in the morning, where she was detained until the arrival of the next train, which caused her great inconvenience and worry and additional expense in the sum of \$20, over her protest that she had a first-class ticket, and was entitled to ride in that train to her journey's end, and notwithstanding she offered to pay him in cash the full amount of the fare to the city of El Paso, and that she was wrongfully compelled by said conductor to leave said car and train at the town of Tucumcari with her children; that said conductor was the agent and servant of said defendant, the Chicago, Rock Island & Gulf Railway Company, and by said company placed in full charge of said train; that appellee's said wife was not escorted by any gentleman; that she was not experienced in traveling alone, and that by nature she is and was nervous and was unacquainted in the town of Tucumcari; that she was greatly frightened for herself and in behalf of her children by being told that she would have to get off of said train, and after refusal of the conductor to accept cash fare, at being put off the train in a strange place and in the nighttime, it being 5:30 o'clock of the morning; that she is a woman of refinement, and that she suffered great humiliation and shame and mental anguish by being thus wrongfully ejected from said train, and was greatly alarmed, humiliated, and distressed, all of which acts by said conductor were alleged to have occurred while appellee's said wife was on said train on the said Chicago, Rock Island & Gulf Railway Company, and that said statements to her and the said re-

fusal of the tender made by her occurred while said train was being operated on said line by the agents, servants, and employés of appellant, and that the same train in every particular, together with same employés and operatives, continued to operate said train and remain in full charge, control, and direction thereof until plaintiff was finally ejected therefrom by being told and directed to depart from and leave the same at Tucumcari; that she was a frail, delicate woman, accompanied by three babies, and wholly unable to resist or refrain from doing as she was directed to do, and believed that the commands of said conductor and employés would be enforced by force, if necessary, to secure their execution, and that all of said acts complained of were caused to be done and put in motion by this appellant, the said Chicago, Rock Island & Gulf Railway Company, its conductors, agents, servants, and employés, and that the same took place on the train on which the appellee's said wife was a passenger, as she had a right to be by virtue of and as the result of the contract alleged to have been made for her transportation on said train; that there was no other available passenger train passing over said railroad in the direction of her journey for about 12 hours; that it became necessary for appellee's wife to seek a hotel; that the morning was cold and dark, and the town of Tucumcari was unlighted, and that appellee's said wife suffered great physical inconvenience, worry, and distress of mind before she reached a hotel and procured rooms; that she was then compelled to board a local train and travel in a day coach without the facilities of travel afforded by Pullman cars, as far as El Paso, and that she was delayed in her journey 48 hours; that she traveled on said Rock Island trains from Tucumcari to El Paso on her said ticket purchased by appellee at Clarendon; that said agent at Clarendon of the Ft. Worth & Denver City Railway Company represented himself to be the agent of the appellant, Chicago, Rock Island & Gulf Company, for the purpose of selling said ticket over its line, and did sell the same to appellee, and that said agent was the agent of appellant for the purpose of selling tickets, and had the right and authority so to do, and that said Ft. Worth & Denver City Railway Company is the authorized agent of appellant for the sale of tickets over its lines and responsible for any breach of contract by said appellant and its connecting lines; that in the sale of said ticket the said appellant and the said Rock Island Company were the agents of the Ft. Worth & Denver City Railway Company, and each was the agent of the other, and prayed for damages in the sum of \$2,520 because of the premises.

The Ft. Worth & Denver City Railway Company answered that plaintiff applied to its agent for tourist or excursion rates to

San Francisco, and was advised by its agent that a ticket known as a "summer excursion" ticket could be had, which ticket entitled the owner to first-class passage en route, and he sold such a ticket to the appellee; that this ticket was the usual and ordinary ticket, entitling the holder to first-class transportation, and was the only class or character of ticket that its codefendant had authorized the Ft. Worth & Denver City Company to sell over its line of road, except a through passage ticket which did not entitle the holder to return transportation; that if the appellant the Chicago, Rock Island & Gulf Railway Company, or its connecting carriers, had made or formulated any special rule or regulation regarding transportation on certain trains or which excluded the holder of the ticket sold appellee from riding on the train known as the "Golden State Limited," no information of such rule or regulation had been given to the Ft. Worth & Denver City Railway Company, and that it was in no wise responsible for the damages claimed.

The Chicago, Rock Island & Gulf Railway Company, appellants herein, answered by exception that the injury complained of appeared to have taken place within the territory of New Mexico, and upon a line of railway owned and operated by the Chicago, Rock Island & Pacific Railway Company, and not in any wise by the appellant, and denied any consolidation or connection with the Chicago, Rock Island & Pacific Railway Company, except that they were connecting carriers, and specially answered that the ticket sold had printed on it in bold type, the following: "Special excursion to Pacific Coast and reduced rate ticket, good subject to conditions printed below, for one first-class passage to destination," and that it contained, among other provisions, the following: "This ticket is subject to the rules and regulations of each line over which it reads and may be exchanged in whole or in part for a ticket or check in conformity therewith," and another as follows: "In consideration of the reduced rate at which this ticket is sold, I, the original purchaser, hereby agree to accept and be governed by all of the conditions of this contract;" that the Golden State Limited was a limited train, operated out of Chicago to the Pacific Coast, via a number of lines of railway which are connecting carriers, it being handled by this appellant over its line of railway from the state line between Texas and Oklahoma, at Texhoma, to the state line between Texas and New Mexico, at Bravo, and that it carried only special equipment, and was operated exclusively for the commodious and rapid transportation of through passengers; that the different lines operating it had prescribed and had in force at the time of the occurrence alleged in appellee's petition reasonable regulations covering the operation

of this train and the character of the tickets that would be honored on it, and that among those regulations was this rule: "The following class of transportation will not be honored on this train: Passes of all kinds (except division superintendents on their respective divisions), tickets of any class endorsed, punched or printed 'Special rate,' 'Special,' 'Employee' (except as allowed in Rule 7), 'Charity,' 'Advertising,' 'D. V. S.' or 'Clergy' (except as authorized in Rule 7), 'Homeseekers' Tickets,' 'Emigrant Ticket,' 'Drovers' Tickets,' 'Stock Contracts,' 'Editorial Mileage,' and all tickets endorsed 'Not good on Golden State Limited,' or 'Not good on limited trains,' second-class tickets (except in Tourist Sleeper as permitted by Rule 7)." Appellant further pleaded that the ticket held by appellee's wife was one for special excursion, and a reduced rate ticket, and could not on account of the above regulation and rule be honored on this train. It was averred that the defendant operated over its line of railway sufficient passenger trains other than the Golden State Limited for the accommodation of passengers, there being in service at that time two local trains per day each way, and that the rules and regulations applying to the Golden State Limited train were just and reasonable.

The allegations in appellee's petition to the effect that the line of railway extending from the Texas state line to Tucumcari was a mere continuation of, and was virtually the same line of railway as that owned and operated by the appellant in Texas, were specially denied, and it was specially averred that the defendant was the owner of a line of railway running from Texhoma to Bravo, within the state of Texas, and that the line from Bravo to Tucumcari in New Mexico was owned and operated by the Chicago, Rock Island & El Paso Railway Company which was incorporated under the laws of the territory of New Mexico, and this appellant was only a connecting carrier with that company, and was not a partner with it or with any other railway company as to the transportation of the appellee's wife; and it was specially denied that the conductor in charge of the train after it left this appellant's line of road was an employé of this appellant, but it was averred, on the contrary, that he was at that time an employé of the next connecting line, and acting for it, and not for this defendant. It was further pleaded that if it should be found that the Ft. Worth & Denver City Railway Company was the agent of the Chicago, Rock Island & Gulf Railway Company in selling the ticket, and that there was fault or negligence in selling such a ticket in the way it was sold, and without giving the plaintiff proper advice as to whether it would be good on the Golden State Limited, this was the fault or negligence of the Ft. Worth & Denver City Railway Company, and this appellant was en-

titled to a judgment over against it for whatever, if any, amount was recovered by the appellee against this appellant.

On trial before a jury a verdict was had in favor of appellee against the Chicago, Rock Island & Gulf Railway Company for the sum of \$1,500 and also in favor of the Ft. Worth & Denver Company, the latter under peremptory instruction from the court, on which verdict judgment was accordingly entered, and appellant, the Chicago, Rock Island & Gulf Railway Company, has duly appealed to this court, and asks to have said judgment reversed because of errors assigned.

Appellant's first four assignments complain of the admission of certain evidence as prejudicial to appellant and improperly admitted. Upon due consideration of the same we are of the opinion that no reversible error is presented under said assignments, and the same are disallowed.

[1, 2] Under its fifth assignment, appellant complains of the action of the court in giving peremptory instruction to the jury to return a verdict for the defendant, the Ft. Worth & Denver City Railway Company, contending that it was error on the part of the court to so instruct a verdict because this appellant contended and proved that the ticket was not good for passage on the Golden State Limited, and that, if a verdict could be found against appellant at all, it could be only on the theory that the Ft. Worth & Denver City Company was its agent, and was negligent in issuing the ticket in question and representing it to be good for passage on the Golden State Limited, and that, in such event, appellant would have a right of recovery over against the Ft. Worth & Denver City Company. We are of the opinion that the instruction was properly given, it appearing from the undisputed evidence that appellant's said agent, the Ft. Worth & Denver Company, at the time of the sale of said ticket and the contract made with appellee, had no notice of any rule by appellant or any of its connecting carriers, restricting said ticket to any particular train, and it would in our opinion be unreasonable to hold the said agent, the Ft. Worth & Denver City Company, charged with notice of said private rules and regulations promulgated by and between appellant and its connecting carriers in the operation of their special trains, when no knowledge of the same had been conveyed to such agent. On the issue of the Ft. Worth & Denver Company's agency and its want of notice of the rules and restrictions applying to this particular train, W. H. Card, chief rate clerk of the passenger department for the Ft. Worth & Denver City Railway Company, testified as follows: "I reside in Ft. Worth, Texas, and am chief rate clerk of the passenger department for the Ft. Worth & Denver City Railway Company. I have been engaged in that department since 1888, a good part of

the time as rate clerk. The ticket submitted to me is known as an 'all year tourist ticket.' It is a first-class ticket. There was a tariff arrangement existing between the Denver and the Rock Island as well as all other roads for sale of tickets which is embraced in the joint tariff of all Texas lines. This tariff is printed and distributed to the agents, and has been in force for six years. I have here a printed copy of the tariff. It is filed with the Interstate Commerce Commission, is furnished to all agents, and constitutes an agreement between them for the sale of coupon tickets over connecting lines. We had no notice of any rule by the Rock Island Road restricting this ticket to any particular train. We have never been advised of any restriction. The passenger department of the Denver has received no notice of any restriction. If any notice had been given, it would have been to the passenger department. This is the department I represent. If this department had had any notice, I would certainly have known of it."

C. H. Wisdom, station agent for the said Ft. Worth & Denver City Railway Company at Clarendon, testified as follows: "I live at Clarendon, and am station agent for the Ft. Worth & Denver, and was last year. I remember the circumstance of selling Dr. Carroll a ticket for his wife to California. That was in January, 1910. The conversation with him in reference to the purchase of the ticket was that Dr. Carroll asked for a rate to California and return, and also for the time of the train, and when it left Clarendon and Dalhart, and when they arrived at Los Angeles and San Francisco. I told him the rate would be \$87.25 for the round trip. I don't know that the name of the ticket was discussed, and I don't think he asked about the class of the ticket. The only rate we had was \$87.25 which I got from the tariff. It was for the all-year tourist, and we had authority from the tariff to sell that ticket over the Rock Island. He said he wanted the ticket, and something was said about his wife going on a particular train. He said that he wanted her to take the Golden State Limited out of Dalhart, and I sold him the ticket, and he had no advice that it was not good on that train, and there was nothing in the tariff to show that it was not good. The Rock Island was a party to the tariff, and it shows routing over that line. No, sir; there was no class of tickets that I could sell at that time other than this ticket, except a straight rate ticket for the round trip. There was no summer rate ticket on sale at that time. I never had any notice of any rule or regulation restricting transportation over the Golden State Limited up to that time."

The witness W. H. Card also testified that: "The summer tourist rate goes into effect June 1st, and lasts until September 30th. There is a difference between summer tourist rate and the all-year rate. The all-year

rate is a higher rate. The tariff shows that the amount charged for the ticket in this case was greater than for a summer tourist ticket. The contracts for an all-year tourist ticket and a summer tourist ticket read practically alike. The rate has nothing to do with the grade of the contract, both are first-class tickets—the all-year being more expensive on account of the limit." He further testified: "Well, there is some difference between the contracts. Possibly more clauses in the all-year contract than in the summer contract, but no difference as to how they shall be honored. Yes; I have here one of the forms for the all-year tourist tickets which we desire our agents to sell. The form used by the agent in this case was not that form, an A. Y. C. form. He used a summer tourist ticket and marked it 'all year tourist,' but the form practically had no bearing on the ticket. The all-year tourist form states that it is a first-class ticket without referring to any conditions whatever. I do not know that the all-year tourist form has any indorsement on it that it is a special or reduced rate. This is a Pacific Coast, nine months tourist ticket. It contains no statement that it is a special or reduced rate ticket more than the word 'tourist,' which would indicate that it was sold at a reduced rate; the word 'tourist' being the only thing indicating this."

It fully appears from the evidence that appellee applied to appellant's agent at Clarendon for a ticket affording his wife transportation from Clarendon to California over appellant's line of railway, and on a train known as the "Golden State Limited"; that said agent of appellant sold him the highest priced round-trip ticket over said route that he had, with the assurance that it would secure him transportation on the train desired; and that said agent did this without notice as to any rule or restriction in force prohibiting appellee's use and passage on said Golden State Limited, or any restriction as to what trains he should use at all, and it appears to us that appellant was in default and neglected its duty to its said agent, the Ft. Worth & Denver City Railway Company, in not informing it of the promulgation and enforcement of said rule, which appears to have been promulgated on January 2d, and the sale of the ticket in question made on January 23, 1910. Therefore, if it be conceded that the trouble resulting in appellee's wife being required to leave the train and subjected to the injuries complained of was caused by a mistake of said agent in selling appellee the wrong ticket, as stated above, it fully appears that said mistake was caused by appellant's negligence in not giving to its said agent, the Ft. Worth & Denver City Railway Company, due notice and necessary information to govern it in the sale of tickets over appellant's route and trains. We therefore conclude, as above indicated, that the assignment in question is without merit, and

that the trial court properly gave the peremptory instruction complained of.

[3, 4] Appellant, under its sixth assignment of error, contends that it was error for the court to instruct the jury that the ticket entitled the plaintiff's wife to travel on the Golden State Limited train, because this depended on whether or not the railway companies had in force a reasonable rule prohibiting passengers holding such a ticket from riding on that train, and that this was a question of fact, to be determined by the jury. The second paragraph of the court's charge thus objected to reads as follows: "The law makes it the duty and province of the court to construe, and inform the jury in its charge, the legal effect of the contract, rules, and any other written evidence bearing thereon, introduced as evidence in the case. I therefore charge you that the railroad ticket offered in evidence before you was such an one as entitled the plaintiff's wife to travel as a passenger over the Chicago, Rock Island & Gulf Railway Company's line and its connecting lines on the train known as the 'Golden State Limited' to the end of her journey as indicated by the ticket. Now, if you believe from a preponderance of the testimony that, while a passenger on said Chicago, Rock Island & Gulf Railway Company's line of road at the time alleged by plaintiff, the conductor in charge thereof informed plaintiff's wife that she could not ride thereon, and would be required to leave the same at Tucumcari, N. M., and by his words and acts knowingly and intentionally caused her to believe that she would be compelled to leave said train, and by such means did cause her to leave and abandon such train, and was damaged thereby, as alleged by plaintiff, you will find for the plaintiff against said Chicago, Rock Island & Gulf Railway Company, and assess the damages as hereinafter directed." We are of the opinion that there is no error in the charge complained of, that the law made it the duty of the court to construe and inform the jury in its charge as to the legal effect of the contract, rules, and other written evidence bearing thereon, introduced in evidence, and that the ticket offered, together with the evidence as to the facts attending its sale, warranted the instruction given by the court to the effect that the ticket entitled appellee's wife to travel as a passenger over the Chicago, Rock Island & Gulf Railway Company and its connecting lines on the train known as the Golden State Limited, to the end of her journey, as indicated by the ticket. It is a fundamental principle of the law of principal and agent that the principal is bound by the act and contract of the agent made within the scope of his apparent authority. In this case it appears from the uncontroverted testimony that the Ft. Worth & Denver City Railway Company was the agent of appellant for the sale of tickets for transportation over appellant's lines of railway,

and as such agent sold appellee the ticket to pass appellee's wife over appellant's said lines of railway on what was known as the Golden State Limited train. It was the duty of the court to charge the jury as shown in the paragraph complained of. In the case of *Gulf, Colorado & Santa Fé Ry. Co. v. Moore*, 98 Tex. 302, 83 S. W. 362, 4 Ann. Cas. 770, the Supreme Court of this state held that: "When at the time plaintiff bought his ticket there was an express agreement between him and defendant's agent that he might travel to Venus on the train which he took, action will lie for his being put off before arriving at Venus on the ground that the train did not stop at that station." In that suit plaintiff alleged that at the time he bought the ticket from defendant's agent at Berwyn, Okl., for Venus, Tex., that the agent contracted with him to carry him on defendant's first train to Cleburne, Tex., and from Cleburne to Venus, on the first train of defendant after plaintiff reached Cleburne, and the evidence showed that plaintiff reached Cleburne on defendant's train and took passage on the first train that left Cleburne for Venus. Defendant's conductor put plaintiff off at Alvarado, a station between Cleburne and Venus. Defendant pleaded that the train was a through train, and did not stop at Venus, and that two accommodation trains ran from Cleburne to Dallas via Venus on defendant's line each day. In the case before us it may be conceded that had appellee known that appellant's agent, the Ft. Worth & Denver City Railway Company, had no authority to make the contract made with him for the transportation of his wife, over appellant's line of railway on the Golden State Limited train, that appellant and its connecting lines of railway would not have been bound by said contract, but it fully appears from the evidence that, when appellant's agent at Clarendon sold appellee the ticket, he had no knowledge that said agent was without authority to make such a contract. The assignments are therefore overruled. *H. & T. C. Ry. Co. v. Hill*, 63 Tex. 384, 51 Am. Rep. 642; *G. & S. F. Ry. Co. v. Moore*, 98 Tex. 302, 83 S. W. 362; 4 Ann. Cas. 770. Appellant, under a number of assignments, complains of the action of the court in refusing to give certain special charges requested by appellant. We are of the opinion that as said special charges either submitted instructions which were inconsistent with and contradictory of the instructions contained in paragraph 1 and 2 of the court's general charge, hereinbefore considered, or submitted incorrect propositions of law as applied to the facts in this case, that said special charges were correctly refused.

[5] The only question presented under appellant's remaining assignments that we deem necessary to be here discussed is the contention made under its nineteenth assignment, that the verdict rendered was excessive. In

view of the evidence of appellee's wife as to the delays, annoyance, and distress to which she was subjected by appellant, we do not think the amount of the verdict excessive. As stated by the Court of Civil Appeals in the case of *Houston & T. C. Railway Co. v. Berling*, 14 Tex. Civ. App. 544, 37 S. W. 1086: "That the verdict may be large may be conceded, but we are unable to say under decisions heretofore rendered and approved by this and the Supreme Court that the verdict is excessive. * * * Large discretion is confided the jury in fixing the amount of damages, and unless the amount be so great, considered in reference to the evidence, as to make it probable at least that the verdict was the result of passion, it should not be disturbed." It appears to us that compensation for the character of injuries complained of in this case, such as alarm, uneasiness of mind, and humiliation, growing out of the treatment to which appellee's wife was subjected and arising from the situation and conditions in which she was placed, fall more properly within the province of the jury than of this court, and, as stated in the opinion quoted from, unless we were afforded some evidence tending to show that the finding of the jury as to the amount awarded was the result of passion or prejudice, we do not feel warranted in disturbing said verdict, which in this case was rendered for \$1,500.

Finding no reversible error assigned under either of appellant's assignments, we conclude that the same should be overruled and the judgment appealed from in all respects affirmed, and it is accordingly so ordered.

SPAULDING MFG. CO. v. KUYKENDALL et al.

(Court of Civil Appeals of Texas. Dallas.
Nov. 23, 1912. Rehearing Denied
Dec. 21, 1912.)

1. JUDGMENT (§ 419*)—DEFAULT JUDGMENT— VALIDITY.

A default judgment based on the allegation that defendant was a corporation when in fact it was a copartnership, none of its members being parties, and service having been had on a certain person as agent of the alleged corporation, did not bind the partnership and enforcement of the judgment was properly enjoined on the theory that it was a nullity.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 794; Dec. Dig. § 419.*]

2. SET-OFF AND COUNTERCLAIM (§ 13*)—SUIT TO ENJOIN ENFORCEMENT—CROSS-ACTION.

In an action by a partnership to enjoin collection of a default judgment taken against it as a corporation, defendant could file a cross-action for any debt owing by the partnership.

[Ed. Note.—For other cases, see Set-Off and Counterclaim, Cent. Dig. §§ 15, 21, 22; Dec. Dig. § 13.*]

Appeal from Van Zandt County Court; C. L. Stanford, Judge.

Action by the Spaulding Manufacturing Company against B. H. Kuykendall and others. Judgment for defendants, and plain-

tiff appeals. Partly reversed and rendered, and partly reversed and remanded.

L. Davidson, of Canton, for appellant. T. B. Yantis, of Canton, for appellees.

RAINEY, C. J. [1] In 1911 a judgment was rendered by the county court of Van Zandt county in cause No. 1638 in favor of B. H. Kuykendall against the Spaulding Manufacturing Company. The petition alleged said company to be a foreign corporation and sought a recovery for a personal debt. The citation in said suit commanded the summons of said company, or its agent, J. E. Bayer, at Texarkana, Tex. No appearance was made, and judgment by default was rendered against said company for \$243 and costs, and reciting regular service in conformity with law. An execution was issued by virtue of said judgment and levied upon property of appellant, the Spaulding Manufacturing Company, a copartnership, the members of which reside in the state of Iowa. On January 30, 1912, appellant instituted in the county court of said county this injunction proceeding to restrain the enforcement of said judgment in cause No. 1638, alleging, in effect, that it is not a corporation and never has been, the want of proper service on which to base a judgment by default, etc. Defendant answered by pleas as to the validity of the judgment in cause No. 1638, and further set up and sought a recovery for an indebtedness due him by appellant. The court dissolved the temporary injunction theretofore granted, and rendered judgment against appellant and the sureties on the injunction bond for the amount of appellee's claim.

The appellant was never a corporation, and was, at the time the judgment in suit No. 1638 was rendered, a copartnership living and doing business as such in the state of Iowa. In said suit No. 1638, the members constituting said copartnership were not made parties, nor was there service of citation upon either of its members, and there was no waiver nor appearance by either of them in said suit. Service of citation was made on J. E. Bayer as agent.

The judgment in cause No. 1638 being based on the allegation that appellant was a corporation, when in fact it was a copartnership, none of its members being parties, service on J. E. Bayer, an agent, was not sufficient to bind appellant, and said judgment was a nullity and of no binding force on appellant whatever. The county court of Van Zandt county acquired no jurisdiction of appellant, and the judgment in cause No. 1638 was null and void. The court erred in dissolving the temporary injunction, but said injunction should have been perpetuated. *Scott v. Streepy*, 73 Tex. 547, 11 S. W. 532; *Graham v. Land Co.*, 50 S. W. 579; *Railway Co. v. Rawlins*, 80 Tex. 579, 16 S. W. 430; *Railway Co. v. Skeeter Bros.*

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Index

44 Tex. Civ. App. 105, 98 S. W. 1064. Other authorities could be cited to sustain our position, but we think it is too well settled for it to be necessary. It was improper for the court to render judgment against the sureties on appellant's injunction bond, as the injunction should have been perpetuated and therefore there was, under the facts, no liability on the bond.

[2] The appellee had the right to file a cross-action for his debt, if any existed, against appellant. The appellee did file such cross-action, but it seems the court did not base his judgment on said cross-action, but upon the judgment in cause No. 1638, which was sought to be enjoined, which was error.

The judgment will be reversed and here rendered for appellant and sureties perpetuating said injunction, and reversed and remanded for a new trial on appellee's cross-action for debt.

Reversed and rendered in part, and reversed and remanded in part.

McMAHAN v. MORGAN.

(Court of Civil Appeals of Texas. Dallas. Nov. 30, 1912. Rehearing Denied Dec. 21, 1912.)

1. TAXATION (§ 611*)—SUIT TO RESTRAIN TAX COLLECTION—BURDEN OF PROOF.

In an action to restrain the collection of taxes, the burden is on plaintiff to show that the taxes are not due and owing by him.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1242, 1245-1257; Dec. Dig. § 611.*]

2. TAXATION (§ 608*)—SUIT TO ENJOIN TAX COLLECTION.

On suit to restrain the collection of taxes, the fact that excessive property was levied on is not available to plaintiff.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1230-1241; Dec. Dig. § 608.*]

3. TAXATION (§ 610*)—INJUNCTION AGAINST COLLECTION—PREREQUISITES.

A property owner who has not paid taxes assessed against him, nor offered to pay them, cannot sue to enjoin an excessive levy.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1244; Dec. Dig. § 610.*]

Appeal from District Court, Rains County; R. L. Porter, Judge.

Action by B. M. McMahan against G. A. Morgan. Judgment dissolving a temporary injunction, and plaintiff appeals. Affirmed.

J. S. Sherrill, of Greenville, for appellant. Carter & Hunt, of Emory, for appellee.

RAINEY, C. J. This is an appeal from a judgment of the district court dissolving a temporary injunction which was granted to restrain the collection of certain state and county taxes assessed against appellant, and the sale of certain personal property of appellant valued at \$4,500, levied on to pay said taxes.

[1] There was no proof that said taxes

were not due and owing by the appellant. It was incumbent upon plaintiff to establish this fact in order to recover.

[2] The fact that the property levied on was excessive will not avail appellant.

[3] It is a familiar legal maxim that he who seeks equity must do equity. As appellant had not paid the taxes nor offered to pay them, he was in no position to seek equity from a court of justice.

The judgment is affirmed.

NATIONAL BANK OF DENISON v. COLEMAN et al.

(Court of Civil Appeals of Texas. Dallas. Nov. 23, 1912. Rehearing Denied Dec. 21, 1912.)

1. HIGHWAYS (§ 113*)—CONSTRUCTION—CONTRACTORS—ASSIGNMENT—INSTRUMENTS.

A contractor for the construction of roads for a county, who executed an instrument directing the payment to a bank of moneys due, or to become due, under the contract, and directing the issuance of warrants direct to the bank until the assignment is canceled by notice from the bank, and declaring that the estimates and moneys due thereunder are assigned as collateral to an existing debt, or any debts that may be subsequently incurred, thereby assigned to the bank all the funds due him to the extent of the bank's claim, subject to any legal claim of the county.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 348-350, 355; Dec. Dig. § 113.*]

2. HIGHWAYS (§ 113*)—CONTRACTORS—ASSIGNMENT OF FUNDS DUE OR TO BECOME DUE—EFFECT.

A contract for the construction of roads for a county bound the contractor to pay materialmen and laborers and provided that, on his failure to do so, the county could retain from subsequent estimates and pay the materialmen and laborers such sums of money as might from time to time be due, and apply the percentage retained by the county out of the estimates to their payment. The contractor assigned to a bank the money due or to become due under the contract and directed the issuance of warrants direct to the bank. The commissioners' court permitted the assignment to be filed by the clerk and indorsed by the county auditor without objection or intimating that the court would exercise its option to pay the claims of materialmen and laborers. Held, that the county was estopped from exercising the option, and the bank was entitled to the funds due the contractor.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 348-350, 355; Dec. Dig. § 113.*]

3. HIGHWAYS (§ 113*)—CONSTRUCTION CONTRACTS—RIGHTS OF MATERIALMEN AND LABORERS.

Laborers and materialmen of a contractor under contract to construct a road could not compel performance of the stipulation that the contractor should pay the materialmen and laborers, and on his failure to do so the county could retain from subsequent estimates and pay the materialmen and laborers money due them from time to time, and could apply to the payment of such claims the percentages retained out of monthly estimates due the contractor; the county being under no obligation to them.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 348-350, 355; Dec. Dig. § 113.*]

4. MECHANICS' LIENS (§ 13*)—PUBLIC WORK—RIGHT TO LIEN.

The construction of roads is a public work, and laborers and materialmen have no lien for labor and material furnished.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. §§ 14, 15; Dec. Dig. § 13.*]

Appeal from District Court, Grayson County; B. L. Jones, Judge.

Suit by F. G. Coleman against the Commissioners' Court and County Auditor of Grayson County, in which the National Bank of Denison intervened, and the parties in interest were made parties to the suit. From an adverse judgment, the National Bank of Denison appeals. Reversed and rendered.

J. H. Wood, of Sherman, and Jas. P. Haven, of Denison, for appellant. Head, Smith, Hare & Head, McReynolds & Hay, and Abney & Hassell, all of Sherman, and J. T. Suggs, J. H. Randell, and Decker & Finley, all of Denison, for appellees.

RAINEY, C. J. In August, 1910, Grayson county entered into a contract with Dennis McNerney for the construction of certain roads for the building of which "Good Road District No. 1," in which Denison is situated, had voted bonds. Among the provisions of said contract, and there are many, the following only is pertinent to this controversy, viz.: "The contractor shall promptly pay all materialmen, laborers and other employes, and in the event of his failure at any time so to do, the county may retain from all subsequent estimates and pay over to said materialmen, laborers, and all other persons engaged upon the work, such sums of money as may from time to time be due to them, and receipts for moneys so paid shall be accepted by the contractor, as cash payment to himself by the county. * * * The percentages retained by the county out of monthly estimates due the contractor from the county may be used and applied by the county to the payment of subcontractors, materialmen, laborers, and all other persons employed upon the work or who may be entitled to liens against the property of the county as security for payment of their claims."

McNerney began the construction of said roads in accordance with his contract. On October 10, 1910, in order to finance same, he executed his note to the National Bank of Denison for \$2,500, payable on demand, for money borrowed, and on same day, to secure the payment of his said note and other moneys that might be advanced by said bank, he executed to said bank a written assignment of all money that might be due him by said county on said contract. Said assignment is as follows:

"Denison, Texas, October 10th, 1910. Julian C. Feild, Esqr., Engineer, Road District No. 1, Denison, Tex.—Dear Sir: You are hereby authorized and directed to pay

over to the National Bank of Denison, Texas, any and all moneys now due or to hereafter become due me as contractor for the construction of the roads in Road District No. 1, said estimates and moneys due thereunder being this day assigned to the said bank as collateral security to our existing indebtedness, or any indebtedness that may hereafter be incurred by me to the said bank, and you are further authorized and instructed to issue warrants direct to the said National Bank of Denison, Denison, Texas, in payment of any and all of such estimates until this assignment is cancelled by written notice from said bank. Witness my hand this day and date above written. Executed in triplicate. Dennis McNerney.

"Witness: A. J. Wells. P. J. McNerney."

Said assignment was delivered to Julian C. Feild, who was at said time the civil engineer in the employ of the county for the supervision of the work. On the 11th of October, said Julian C. Feild presented said assignment to the commissioners' court of Grayson county, who were then assembled in session, all members of the same being present. The county judge and all members of the court read the assignment, asked Mr. Feild if the appellant was going to finance Mr. McNerney in the building of the roads, and, being answered in the affirmative, said assignment was handed to the county clerk who put his file mark thereon, and it was then presented to H. R. Wallace, the county auditor, and he indorsed thereon the following memorandum: "Order for Dennis McNerney money to be paid to the National Bank of Denison, Texas." Said assignment was then placed by the county auditor with the other papers relating to said road contract. At the time of the filing of the assignment, the commissioners' court, with the approval of the county auditor, had already issued a warrant to said Dennis McNerney for work done on said roads on an estimate of said engineer for September, 1910, in the sum of \$705.92. This warrant was by said county auditor delivered to Mr. Feild after the filing of said assignment, and by Mr. Feild delivered to appellant, and the said amount was by appellant credited on the note then due it by Dennis McNerney on October 12, 1910. On October 25, 1910, Dennis McNerney executed to appellant another note in the sum of \$2,500 of like terms and conditions as the one executed on October 10, 1910. The amounts received on said notes were by the said Dennis McNerney put on deposit to his credit in the appellant bank, and the same, together with \$237 additional as an overdraft, were checked out by the said Dennis McNerney for labor and material on the roads prior to the time he abandoned the contract and left the state. On November 8, 1910, McNerney abandoned the contract and left the state largely indebted. On the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

14th of November, 1910, R. S. Legate, cashier of the appellant bank, appeared before the commissioners' court in open session, made oral demand of the commissioners' court for the payment of the funds due by Grayson county to Dennis McNerney to appellant by virtue of its assignment of the fund, and also on said date filed a written request with H. R. Wallace, auditor of the county, demanding payment of its indebtedness of the funds due Dennis McNerney by Grayson county by virtue of said assignment. About the 16th of November, 1910, McNerney came into Grayson county and met the members of the commissioners' court, and thereafter, on November 19, 1910, it entered the following order: "McNerney Labor Scrip. It is hereby ordered by the court that warrants be drawn out of Road District No. 1 fund to McNerney laborers, as furnished in name and amount by their engineer Wells." The clerk of the commissioners' court began the issuance of warrants by virtue of said order, and on November 21, 1910, F. G. Coleman, claiming the right to be paid out of said fund as a materialman, sued out and had served an injunction restraining the commissioners' court and the county auditor from paying out said funds until his claim could be adjudicated. On November 22, 1910, the commissioners' court entered an order countermanding the order entered on November 19, 1910, for the payment of the warrants to the laborers. The county filed its answer in the Coleman suit, claiming only to be a stakeholder of the fund, and asked the court to direct to whom it should be paid.

Appellant intervened in the suit, claiming its prior right to be paid out of the fund, and making all laborers and materialmen and other persons within its knowledge parties to the suit. All parties interested, as far as known, were before the court. The only issues submitted to the jury were those arising between the respective claims of the appellant bank and the laborers and materialmen. The court peremptorily instructed the jury to find for the laborers as against the appellant bank and the materialmen, and submitted the issue between the appellant bank and materialmen, in substance, that, if the commissioners' court accepted the assignment executed by McNerney to the bank, the appellant's debt should have priority over the materialmen, but otherwise that the materialmen should be paid in preference to appellant. The jury found in behalf of the materialmen. The county having answered that it was only a stakeholder of the fund and making no claim of right to pay the fund in settlement of the claims of laborers and materialmen, the controlling question for our decision is, Was the appellant's right to have its indebtedness paid out of the fund inferior to that of the laborers and materialmen?

[1] The instrument executed by McNerney to appellant bank constituted an assignment of all the funds due him by the county for constructing the road to the extent of the bank's claim, subject, of course, to any legal claim the county might have. *Harris Co. v. Campbell*, 68 Tex. 22, 3 S. W. 243, 2 Am. St. Rep. 467; *Clark v. Gillespie*, 70 Tex. 513, 8 S. W. 121; *McBride v. Am. R. & L. Co.*, 127 S. W. 233; *Beilharz v. Illingsworth*, 132 S. W. 106; *Lumber Co. v. Smith*, recent opinion by this court, yet unpublished.

[2] By the terms of the contract made between the county and McNerney, the county had the right to pay off and discharge the claims of laborers and materialmen had it seen proper to exercise its option so to do. But it failed to exercise this option until after it was notified of the assignment of the fund to the bank. The commissioners' court in open session, all members being present when said assignment was presented, permitted it to be filed by the clerk and indorsed by the county auditor, as heretofore stated. There was no objection made at that time to the assignment, nor any intimation from any member of the court that it would exercise its option under the contract to pay the claims of the laborers and materialmen. Under these circumstances, we think the county is estopped from claiming said option, even if it were attempting in this suit to exercise it.

[3] It is not claiming such a right; but the claim, as we understand it, is made by the laborers and materialmen that they have the right, under said provision of the contract, to enforce said contract in their behalf. They were not parties to the contract between McNerney and the county. Under it they had no right of action to compel its performance to protect their interest for labor performed and material furnished. The county, by the terms of the contract, was under no obligation to them.

[4] The construction of the roads was public work, and they had no lien for their labor and material furnished (*Atascosa Co. v. Angus*, 83 Tex. 202, 18 S. W. 563, 29 Am. St. Rep. 637; *City of Dallas v. Loonie*, 83 Tex. 291, 18 S. W. 726), and no way is prescribed by law to fix any liability on the county for the payment of their claims, nor was any attempted.

Many assignments of error and cross-assignments are presented, but, under our view of the case, they do not affect the right of appellant to recover, as shown by the evidence, and the judgment as to it will be reversed and here rendered for it, and after the payment of its claim, if there remains any of the funds, it will be apportioned to the other claimants according to priority of their claims as fixed by the judgment of the lower court.

POLK v. STATE MUT. FIRE INS. CO.
(Court of Civil Appeals of Texas. Dallas.
Nov. 23, 1912. Rehearing Denied Dec.
21, 1912.)

1. INSURANCE (§ 219*)—CANCELLATION OR RESCISSION OF POLICY—NONPAYMENT OF PREMIUM.

Where a policy of fire insurance was never accepted by the insured or by any one for him, and no premium was paid or agreed to be paid thereon prior to the loss, an assignee, with knowledge that the delivery of the policy was unauthorized and that on failure to pay premiums it was automatically canceled, was not entitled to recover.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 488, 489, 494-496; Dec. Dig. § 219.*]

2. APPEAL AND ERROR (§ 1011*)—REVIEW—CONCLUSIVENESS OF FINDINGS.

Where the evidence is conflicting, the findings of the court will not be reviewed, though the appellate court might have reached a different conclusion.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983-3989; Dec. Dig. § 1011.*]

Appeal from District Court, Dallas County; Kenneth Foree, Judge.

Action by W. A. Polk against the State Mutual Fire Insurance Company. Judgment for defendant, and plaintiff appeals. Affirmed.

George Sargeant and Cecil L. Simpson, of Dallas, for appellant. W. S. Terrell, of Dallas, and T. F. Mangum and R. F. Townsend, both of San Antonio, for appellee.

RASBURY, J. The appellant sued appellee in the district court of Dallas county upon a policy of fire insurance for \$2,000 issued by appellee October 24, 1911, and written upon a stock of staple and fancy groceries contained in the storehouse of H. F. Davis situated at No. 1612 North Second avenue in the city of Dallas, Tex. Appellant alleged that the stock of merchandise covered by said policy was totally destroyed by fire October 30, 1911, and at the time of the fire was of the value of \$2,000; that subsequent to the fire the policy and all rights thereunder were assigned to appellant, who thereafter performed all the conditions of the policy preliminary to his right to demand payment of the loss thereunder; and that payment after demand was refused. Omitting formal parts, appellee, by its answer, charged, among other defenses, that it was not liable upon the policy because same was never accepted by the appellant as written, nor the premium therefor paid or agreed to be paid by appellant, nor was any other consideration paid to or received by the appellee for the same, notwithstanding the by-laws provided that all premiums should be paid upon issuance of policy, and further that said policy as issued was refused by said Davis and those acting for him, none of whom consented to pay the premium or other

consideration for the same prior to the loss. As suggested, there were other matters of defense urged by the appellee, but from our view of the case a recitation of same are unnecessary. A jury was waived and the case submitted to the court. Judgment was rendered for the appellee, and the case is here on conclusions of fact and law by the trial court accompanied by statement of facts.

From the evidence adduced the trial judge concluded as facts and law as follows, to wit: "That H. F. Davis, the owner of the stock of goods in question, requested W. A. Polk, plaintiff, to obtain the insurance, and that Polk requested J. G. Bennett to obtain insurance upon the stock of goods in question, and that in pursuance of such request said Bennett did obtain from R. T. Malone, the local agent of defendant company at Dallas, Tex., the policy sued on in this case. That the policy was issued by Malone on the 24th day of October, 1911, and came into the hands of J. G. Bennett either by mail or personal delivery; the evidence not disclosing by which of these two agencies the policy was delivered. That at the time said policy was delivered to or came into possession of said Bennett, there was no agreement as to what time premium for the same should be paid, and that no mention was made of the time when the premium would become due. That no notice of acceptance of the policy in question was ever communicated to defendant or its agent prior to the loss by fire. That prior to the loss by fire Bennett communicated to defendant through its agent that W. A. Polk considered the rate excessive, and requested the defendant's agent to see if he could get the rate reduced, but that no further communication was had between defendant or its agent, and Polk and Bennett, prior to the loss by fire. That the premium for said policy was not paid or tendered to defendant or its agents until about three weeks after the fire. That on the 3d of November, 1911, plaintiff paid to J. G. Bennett Co. \$50, the premium called for in said policy. That about three weeks before the issuance of the policy in question M. G. Ranney, general agent for defendant, told J. G. Bennett that the defendant company did not want any of its policies delivered unless some part of the premium was paid at the time of delivery. That on the 12th day of October, 1911, W. H. Patrick, president of defendant company, by letter instructed R. T. Malone, local agent at Dallas, that all policies should be paid for on delivery of same, and that this instruction remains in full force to this time. That J. G. Bennett was the agent for the insured in effecting the policy, and in everything that had to be done in consequence of it, and that the knowledge of J. G. Bennett, imparted to him by M. G. Ranney, that the policies of the defendant company should not be delivered

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Index

without a part of the premium paid at the time, was the knowledge of the insured, and that insured knew that, if no money was paid at the time of the delivery of the policy, the delivery of the policy was unauthorized and beyond the scope of the authority of the person delivering same. That the premium of the policy became due in a reasonable time, and the same was not paid within a reasonable time, and by the terms of the by-laws of said company said policy was automatically canceled. That the policy was never accepted by the insured or any one for him prior to the loss, and that the insured, nor any one for him, made any contract, binding them, or either of them, to pay the premium to defendant, prior to the loss."

[1] Thus it will be seen that the trial judge unequivocally finds as matter of fact that the policy of insurance issued by appellee was never accepted by Davis, the insured, or by any one for him, prior to the fire; nor did Davis, or any one for him, ever agree to pay the premium due on the policy before the fire. It will be further seen from the court's finding that he also finds as matter of fact that appellant and those acting for him never paid the premium on said insurance policy, and that appellant knew that the delivery of the policy was unauthorized and beyond the scope of the authority of the person delivering same, and that, having failed to pay the same, said policy by its terms was automatically canceled. It will not be disputed, of course, that upon the basis of the related facts the judgment as entered by the trial court is correct.

[2] Appellant, however, challenges both the conclusions of fact and law of the court on these matters, and, while we fail to find in the record that the claimed error was set out in a motion for a new trial in order that the trial court might have opportunity to correct same, we have nevertheless read the evidence contained in the statement of facts bearing upon the facts resolved by the trial court favorably to the appellee, and we think the most that can be said from the appellant's standpoint is that the evidence is conflicting, and in such cases the appellate court has no discretion, since the findings of the court upon the facts are entitled to as much consideration as the verdict of the jury, and it has been repeatedly held in such cases that the findings of the trial court will not be reviewed where there is evidence to support them, even though the appellate court may have reached a different conclusion from the the evidence. The rule is well put in *Wells v. Yarbrough*, 84 Tex. 664, 19 S. W. 867, where it is said: "We treat such findings like we do the verdict of a jury, and the question with us is not whether they are supported by a preponderance of the evidence, but it is whether or not there is any evidence to support them."

So it will be seen on the threshold of this

appeal we are compelled to affirm same upon the facts as found by the trial court, and for that reason we do not pass upon the other questions assigned in the brief, since whether they constitute error or not is immaterial under the finding of the trial court that the policy of insurance had never been delivered by appellee or accepted by appellant.

The judgment of the lower court is affirmed.

HENGY v. HENGY.

(Court of Civil Appeals of Texas. San Antonio. Dec. 11, 1912.)

1. PARTNERSHIP (§ 68*)—REAL PROPERTY—MISAPPROPRIATION OF FIRM FUNDS.

Where a partner incurs a debt to secure money to buy land, and subsequently pays such debt out of partnership funds, the partnership does not thereby acquire any claim on the land.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 101-111; Dec. Dig. § 68.*]

2. TRUSTS (§ 41*)—ESTABLISHMENT—EVIDENCE—BURDEN OF PROOF.

A party seeking to establish a trust in his favor in land the legal title to which is in another has the burden of proving the facts necessary to constitute a trust.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 60; Dec. Dig. § 41.*]

3. PARTNERSHIP (§ 329*)—ACCOUNTING—TRIAL—INSTRUCTIONS.

Plaintiff suing for a partnership settlement alleged that certain land was purchased by the partnership, it having been agreed that he should pay one half of the purchase money out of his individual funds, and that defendant should pay the other half, that he did pay one half out of his individual funds, and that defendant paid the other half at first through a loan and later out of partnership proceeds without plaintiff's knowledge. He alleged in one place that he was the owner of three-fourths of the lot, and at another that it became partnership assets. Defendant denied that the land was so purchased and claimed it as his individual property. Plaintiff testified that each paid one-half of the purchase price, and that the partnership afterwards paid each of them back. The court charged to find for defendant unless the jury believed plaintiff paid one-half of the purchase money individually, in which case they should find that he was the owner of an undivided one-half interest, to which plaintiff excepted on the ground that the real issue was whether the property was bought for the partnership. *Held*, that plaintiff having made the specific issue and testified that he paid half the purchase money individually, and the allegations of the petition being contradictory, the court properly submitted the question whether he did so pay one-half individually as being the most specific claim asserted.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 782-786; Dec. Dig. § 329.*]

4. PARTNERSHIP (§ 67*)—FIRM PROPERTY—WHAT CONSTITUTES.

Where a partner withdraws money from the business with the knowledge and consent of his copartner, property purchased therewith is not partnership property, such partner being merely charged with the money so withdrawn on the settlement of the partnership accounts;

but, where the money is withdrawn in bad faith and without the knowledge and consent of the other partner, the property purchased therewith is firm property, especially where such partner credits the firm with rents, and charges it with taxes and insurance on such property.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 95-100; Dec. Dig. § 67.*]

5. TRIAL (§ 256*)—INSTRUCTIONS—ERROR NOT CURED.

An erroneous charge to find for defendant, unless certain facts existed, was affirmatively erroneous, since a special charge to find for plaintiff upon other facts would have been contradictory thereof.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 628-641; Dec. Dig. § 256.*]

6. TRIAL (§ 244*)—INSTRUCTIONS—UNDUE PROMINENCE OF SUBJECT.

On a partnership accounting, an instruction that if plaintiff knew of proceedings to condemn land claimed by him to have been partnership property, and had an opportunity to set up and claim his rights therein and did not, these facts might be considered in determining whether the land was partnership property, was improper; there being no claim that these facts estopped plaintiff, since the court should not single out a portion of the evidence and tell the jury to consider it.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 577-581; Dec. Dig. § 244.*]

7. FORCIBLE ENTRY AND DETAINER (§ 6*)—TRIAL OF TITLE AND RIGHT OF POSSESSION—RENTS.

On a partnership accounting, an instruction that no rents of lands claimed to be partnership property could be awarded because certain judgments in forcible entry and detainer cases had established defendant's right thereto was erroneous, since under Sayles' Ann. Civ. St. 1897, art. 2529, providing that the only issue in such cases shall be as to the right to actual possession, and article 2542, providing that such proceedings shall not bar an action for trespass, damages, waste, rent, or mesne profits, a judgment in forcible entry and detainer merely disposes of the right of possession and determines nothing concerning the rents.

[Ed. Note.—For other cases, see Forcible Entry and Detainer, Cent. Dig. §§ 29-33; Dec. Dig. § 6.*]

8. PARTNERSHIP (§ 336*)—ACCOUNTING—TRIAL—EVIDENCE.

On a partnership accounting, where plaintiff claimed that land, the legal title to which was in defendant, was partnership property, while defendant claimed that he purchased it out of his personal funds, and that part of such funds had previously been deposited by him in a bank, the exclusion of his bank account, offered for the purpose of showing that he made no such deposit, was erroneous.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 797; Dec. Dig. § 336.*]

9. PARTNERSHIP (§ 336*)—ACCOUNTING—TRIAL—EVIDENCE.

On a partnership accounting between a father and son, a letter written to the son by the father while in another state, giving a list of his properties in that state, with their values, was irrelevant, not being relevant, as claimed, to show what money he took with him to that state or what had been sent him.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 797; Dec. Dig. § 336.*]

10. PARTNERSHIP (§ 336*)—ACCOUNTING—TRIAL—EVIDENCE.

The admission of such letter was prejudicial error, being calculated to impress the jury with the idea that the father, having considerable property in the other state, could well afford to be generous to the son.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 797; Dec. Dig. § 336.*]

11. TRIAL (§ 256*)—INSTRUCTIONS—NECESSITY OF REQUEST FOR MORE SPECIFIC INSTRUCTIONS.

On a partnership accounting, plaintiff claimed that he bought defendant's interest June 30, 1902, and formed a new partnership with him February 14, 1903, and that the business between those dates and money withdrawn by him belonged to him. The court charged that the partnership existing June 30, 1902, was presumed to exist and continue unless the jury believed from the evidence that it was dissolved. *Held*, that the instruction was correct as far as it went, and the court's failure to submit the questions whether plaintiff bought out defendant and afterwards formed a new partnership, and to instruct the jury if they so found to credit each partner with the amount paid in on the formation of the new partnership, to credit plaintiff with the profits during the time intervening between the dissolution and the formation of the new partnership, and to credit defendant with wages during that period, was not reversible error, in the absence of a request for the submission of special charges.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 628-641; Dec. Dig. § 256.*]

12. TRIAL (§ 348*)—SPECIAL INTERROGATORIES—POWER AND DUTY OF COURT.

Under Sayles' Ann. Civ. St. 1897, art. 1323, providing that verdicts are either general or special, and article 1333, providing that the jury shall render a general or special verdict as directed by the court at the request of a party and the verdict shall comprehend the whole issue or all of the issues submitted, the court should not so submit the case as that the verdict may be part general and part special, and hence, where it had decided not to submit the case on special issues, the refusal to submit two special issues requested by plaintiff was not error.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 822; Dec. Dig. § 348.*]

13. APPEAL AND ERROR (§ 1064*)—HARMLESS ERROR—GENERAL AND SPECIAL INSTRUCTIONS.

The trial court in its charge recited that it submitted the case upon special charges presented to it, but did not recite which side presented them, and then instructed the jury in a general charge embracing the issue presumably covered by the special charge. *Held*, that plaintiff could not have been injured by the recital that the case was submitted on special charges, although such special charges were presented by defendant.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4219, 4221-4224; Dec. Dig. § 1064.*]

14. TRIAL (§ 256*)—INSTRUCTIONS—OMISSIONS.

The failure of the trial court in its charge to apply all of the law applicable to the case should have been cured by offering special charges.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 628-641; Dec. Dig. § 256.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

15. TRIAL (§ 349*)—SPECIAL INTERROGATORIES—SUBMISSION—DISCRETION.

Under *Sayles' Ann. Civ. St.* 1897, art. 1333, as amended by Acts 26th Leg. c. 111, providing that the jury shall render a general or special verdict as directed by the court, which shall comprehend the whole issue or all the issues submitted to them, and that a case shall not be submitted on special issues unless one or all parties request such submission, the submission of the case on special issues is in the discretion of the trial court.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 823-827; Dec. Dig. § 349.*]

16. PARTNERSHIP (§ 342*)—ACCOUNTING—REFERENCE—REPORT.

On a partnership accounting, where there was a dispute as to the date when the partnership commenced, an auditor, having no power to pass upon this question, properly reported the amount due each of the partners on each of the different theories concerning such date.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 810, 812; Dec. Dig. § 342.*]

Appeal from District Court, Dallas County; E. B. Muse, Judge.

Action by F. J. Hengy against Louis Hengy. From the judgment, plaintiff appeals. Reversed and remanded.

Charles F. Clint, Chilton & Chilton, and Plowman & Plowman, all of Dallas, for appellant. Jeff Word, of Dallas, for appellee.

MOURSUND, J. On June 9, 1906, F. J. Hengy sued his son, Louis Hengy, for the settlement of a partnership in the junk business, which he alleged had been formed between them on February 14, 1903. Among other matters, he alleged that a lot, known as the Bessard lot, was purchased by the partnership of F. J. Hengy & Son for \$2,000, it having been agreed that plaintiff, out of his individual funds, should pay one half of the purchase money, and that the defendant should pay the other half; that plaintiff paid his half (\$1,000) out of his individual funds, and defendant paid for the remaining half, first through a loan, and finally out of partnership proceeds, of which latter fact plaintiff remained in ignorance until long after the payment by defendant of his half of said purchase money; that defendant fraudulently, without plaintiff's knowledge, took the deed in his own name; that the lot was used as partnership property, and it was agreed that same should be bought for the partnership. It was further alleged that plaintiff left for Idaho shortly after the formation of the partnership and remained there, with short intervals, until shortly before the bringing of this suit; that about March 22, 1905, while plaintiff was absent in Idaho, defendant also purchased with the proceeds and money of the partnership business a lot known as the Becker lot, for \$2,350.25 cash, but, without plaintiff's knowledge and with intent to defraud him, took the title in his own name, of which fact plaintiff remained in ignorance until just before the institution of this suit; that defendant acknowledged said

lot to be partnership property. It was further alleged that defendant appropriated to his own use \$2,500 paid for portions of said lots in a condemnation proceeding, also other moneys and effects amounting to \$9,045, and collected \$1,587.97 on account of the partnership, which he did not account for, also \$1,350 rent for part of the Bessard lot and \$1,441 rent for part of the Becker lot. He further alleged that there was on hand a stock of junk worth \$750 and a deposit in the National Bank of Commerce of \$5,275.94. Plaintiff set out the sums claimed by him, prayed for settlement of the partnership's affairs, that he recover judgment for the sums sued for, and that his partnership interest in the two lots be awarded him.

Defendant denied the partnership as set up in plaintiff's petition, alleging that he was by his father associated with him in the junk business in July, 1895, without any agreement as to terms of the partnership, and about May 1, 1899, they agreed on the terms of the partnership which terms were set out, but are not necessary to be mentioned here; that on August 27, 1900, plaintiff's wife sued for divorce and partition of community property, making defendant a party to the suit; that about March, 1902, plaintiff caused an accounting to be had in said suit between himself and defendant in regard to the firm property, in which it was determined that the assets consisted of \$2,471.62, of which plaintiff was entitled to \$836.16, and defendant to \$1,635.46; that said judgment determined the existence of a partnership between them. He further alleged the various amounts paid in, profits made, amounts paid out, etc., and claimed the two lots as his exclusive property, alleging they were paid for with his own money.

Plaintiff filed supplemental petition, in which, after denying the partnership as alleged by defendant, and other allegations, he pleaded that the judgment in the divorce suit was an accommodation judgment; that, at the solicitation of defendant and in pursuance of his advice to the effect that it was necessary in order to keep the business from being destroyed by reason of Mrs. Hengy's suit, he agreed that defendant should claim to be a partner; that in order to clear up said judgment in the divorce suit he paid defendant \$500 about October, 1902, in full and final settlement of the supposed partnership, interest, and judgment.

The trial resulted in a verdict and judgment awarding defendant the two lots and \$836.39 of the money in the National Bank of Commerce, and plaintiff \$3,699.55 of said money.

The first assignment of error is as follows: "The court erred, at the instance of appellee, in charging the jury, in relation to the Bessard lot, as follows: 'You will find by your verdict that this lot is the property of the defendant, unless you believe from the evi-

dence that the plaintiff paid with his individual money one half of the purchase money, in which event you will find by your verdict that plaintiff owns an undivided one half interest of said lot, and the defendant the other half—in that, as disclosed by the evidence, plaintiff did not contend that he paid out of his individual funds one-half of the purchase money of said lot, but that said lot was bought with the partnership funds of F. J. Hengy & Son, for partnership purposes, and was necessary to be used by said partnership in the conduct of its business, and was so used, and in that although appellant did contend that he paid out, out of his individual funds, one-half of the purchase money of said lot, and the jury may have believed to the contrary, yet, if appellant's one-half of the purchase money of said lot or appellee's one-half thereof, or the whole thereof, was paid out of the partnership funds, and said lot bought and used for partnership purposes, as the great preponderance of the testimony in this case shows, still, under said charge, the jury would nevertheless be bound to find that said lot belonged to the appellee, as will more fully appear from the court's charge and the pleading and evidence in this case." The proposition made under the assignment is as follows: "The court erred in instructing the jury that they will find that the Bessard lot (lot 5) is the property of defendant, unless they believe from the evidence that the plaintiff paid with his individual money one-half the purchase money."

In the treatment of this assignment we are not favored with any clear statement of what appellant thinks should have been charged by the court. The issues made by the pleadings, if supported by evidence, should be submitted. In this case plaintiff's allegations are rather contradictory in so far as they relate to the Bessard lot. He alleges that said lot was purchased by F. J. Hengy & Son, "it having been agreed that plaintiff, out of his individual funds, should pay one half the purchase money for said lot, and that defendant, by loan or otherwise, should pay for the other half of said lot, and plaintiff paid his one half thereof, or \$1,000, out of his individual funds, and the defendant paid for the remaining half thereof, \$1,000, first through a loan, and finally out of the proceeds of said partnership and money belonging to said partnership." He further alleged that he remained in ignorance of the latter fact until long after defendant paid his half of the purchase money, and also of the fact that defendant took the deed in his own name instead of that of F. J. Hengy & Son, or to plaintiff and defendant, as it was agreed it should be, and that said act was fraudulent. He further alleged that it was agreed that said lot should become partnership property and be used as such, and that it was in fact treated as partnership property by defendant until just before the filing of the suit. At one place he al-

leged he was the owner of 'three-fourths of the lot, and at another that it became partnership assets. Defendant denied that the lot was purchased with the money of F. J. Hengy or the firm of F. J. Hengy & Son, or for the partnership, and claimed same as his individual property. Plaintiff testified positively that each paid his half of the purchase price of the lot, and that the partnership afterwards paid each of them back. The deed to the lot was delivered and recorded on January 17, 1903. Plaintiff alleged and testified that no partnership existed at that time, but that same was formed on February 14, 1903.

[1] The fact that defendant used firm funds to pay a debt incurred by him to secure money to pay for half the lot would not give the partnership any claim upon the lot, and under plaintiff's pleading the court was correct in assuming that under any theory which might be advanced defendant was at least entitled to a half interest in the lot.

[2] Now, as to the other half, each of the parties claimed he paid for it out of his individual means. The legal title being in defendant, the court was correct in placing the burden of proof on plaintiff to ingraft a trust upon such title. *Baylor v. Hopf*, 81 Tex. 641, 17 S. W. 230.

The charge precluded plaintiff from recovering unless the jury found he had paid half of the purchase money individually. Appellant argues that the allegation that plaintiff paid half of the purchase money out of his individual property was an unnecessary allegation, and that the real issue was whether the property was bought for the partnership, and whether the deed was to be taken in the partnership name and the property used for partnership purposes, and that whatever money defendant invested he would be entitled to recover from the firm upon an accounting.

[3] Plaintiff having made the specific issue and testified that he paid half the purchase money individually, we fail to see how the court could ignore such issue without subjecting the charge to just criticism. Had he instructed the jury to find for defendant unless they found that an agreement had been made to buy the property for the partnership, etc., he would have had to instruct the jury that half was paid out of defendant's individual property, and to require a finding whether plaintiff paid for the other half out of his individual property or whether such half was paid for by defendant out of his individual property. Unless the jury determined this question, they would not know how to arrive at a settlement between the partners. However, for the court to even submit the question of the other half being paid for with individual funds of defendant would have constituted an intimation that the court considered it doubtful whether the evidence sustained plaintiff's positive allegation that he paid such half out of his in-

dividual funds. Under the contradictory allegations of the petition, we conclude the court had the right to submit the allegation that plaintiff paid half out of his individual means as being the most specific claim asserted, and that plaintiff cannot be heard to complain of this portion of the charge.

[4] The second assignment reads as follows: "The court erred, at the instance of appellee, in charging the jury in relation to the ownership of the Becker lot, as follows: 'You will therefore find by your verdict that this lot is the individual property of the defendant, Louis Hengy, unless you believe from the evidence that at the time of the purchase of said lot by defendant he bought it for the partnership of F. J. Hengy & Son.' And also as follows: 'You are charged that, as between partners, when one partner draws money out of the firm for his individual use, then the property purchased with said partnership money is not the property of the firm, but that it is the property of the individual partner so purchasing it, and he should be charged with said money so drawn out in a settlement of the partnership business or accounts'—in that, as a matter of law, if said lot was bought with partnership funds for F. J. Hengy & Son, said partnership would have a resulting trust interest therein, and the dominant or superior title thereto and said lot would therefore belong to said partnership. And the great preponderance of evidence in this case shows that said lot was bought and paid for out of the partnership funds of said firm, without the knowledge or consent of appellant; that is to say, appellee, in the absence of appellant from the state, from time to time drew out of the partnership funds \$2,817, and placed the same to his personal credit in the National Bank of Commerce, and with \$2,530 of said money paid for said lot. Said latter charge is erroneous in that the appellant during practically the three years of the existence of said partnership, and at the time of the purchase of said lot, was absent from the state of Texas, and appellee had exclusive management and control of the business, and said purchase of said lot having been made with the partnership funds, and the rents and expenses thereof having been paid in and charged to the fund belonging to it, and in that said charges precluded the jury from rendering any other verdict than that the Bessard and Becker lots belonged to defendant, and in that, assuming that said lot belonged to appellee and was purchased by borrowed money from the firm, said charge is defective in omitting to charge appellee with interest on said money from the date he borrowed same, as will more fully appear from the court's charge and the pleading and evidence in this case."

Appellant contends that the charge is affirmatively erroneous in precluding plaintiff from any share in the Becker lot unless the

same was bought for the partnership. This contention is correct. The charge announces the correct rule if a partner purchases property for himself with partnership funds with the knowledge and consent of his partner, but a different rule applies where he acts in bad faith and uses the firm money without the knowledge and consent of his partner.

The following rule is quoted in Cyc. vol. 30, p. 429, note 28, as announced in *Hunt v. Benson*, 2 *Humph. (Tenn.)* 459: "Where a partner withdraws the funds of the firm, and applies them to the purchase of realty, taking title in his own name, and for his own benefit, without the consent of his copartners, such realty will be deemed in equity partnership property for the payment of the debts of the partnership." We have been unable to procure this case, but the above doctrine meets our approval. "The partners owe to each other the most scrupulous good faith." *Bates on Partnership*, vol. 1, § 303. We are of the opinion that when a partner has purchased real estate with partnership assets, but in his own name, without the knowledge or consent of his copartner, and reports it to his copartner as firm property directly, or indirectly, by crediting the firm with rents and charging it with taxes and insurance, he cannot afterwards be heard to deny that the property purchased is in fact partnership property; nor would it be necessary that the property so purchased be used for partnership purposes.

[5] As the charge required a finding for defendant unless they found certain facts to exist, a special charge providing for a finding for plaintiff upon other facts would have been contradictory of the charge complained of. The charge therefore was affirmatively erroneous. *Gibson & Cunningham v. Purifoy*, 56 *Tex. Civ. App.* 379, 120 *S. W.* 1047; *Eppstein v. Thomas*, 16 *Tex. Civ. App.* 619, 44 *S. W.* 893; *Chamblee v. Tarbox*, 27 *Tex.* 147, 84 *Am. Dec.* 614; *Boettler v. Tumlinson*, 77 *S. W.* 826; *Johnston v. Johnston*, 67 *S. W.* 123; *Thompson v. Railway*, 48 *Tex. Civ. App.* 284, 106 *S. W.* 913; *Building Co. v. Jones*, 94 *Tex.* 500, 62 *S. W.* 741; *Scott v. Railway Co.*, 93 *Tex.* 621, 57 *S. W.* 801; *Sauer v. Veltmann*, 149 *S. W.* 706. The assignment is therefore sustained.

[6] The third assignment complains of the following portion of the court's charge: "The court erred, at the instance of the appellee, in charging the jury as follows: 'If you find from the evidence that plaintiff knew of the condemnation proceedings by the Missouri, Kansas & Texas Railway Company against the defendant and his wife for a part of the Bessard lot and a part of the Becker lot, and plaintiff had an opportunity to set up and claim his rights and interest in said lots, which he now claims in this suit, and he did not set up and claim any right or interest in said lots, in said condemnation proceedings, then these facts are circumstances

which the jury may consider in determining whether said lots are partnership property or not—in that said charge was applicable to no issue of fact, and in that said charge is upon the weight of the evidence, and in that said charge gave undue prominence to the fact therein referred to, even if true, by singling out from amongst all other facts in this case that one fact and charging the jury and placed undue stress thereupon, and in that it appears from the evidence the suit referred to in said charge was by the Missouri, Kansas & Texas Railway Company dismissed and another suit brought by said company not only against appellee and his wife, but also against appellant, alleging all of them to be the owners of said lots, and in that said charge, as a matter of law, is erroneous as appellant was not called upon, although he may have had an opportunity so to do to set up and claim his rights and interest in said lots in said condemnation proceedings as the tribunal in which the same pended had no jurisdiction to determine the respective rights of appellant and appellee to the title to said lots, or either of them, and in that the mere silence or inactivity of a person, unless called upon to speak or act with reference to his property rights, are not per se any evidence whatever as to whether said property belonged to him or not, or to said partnership or not, as charged by the court, and in that said charge strongly tended to induce and persuade the jury in passing upon other issues in this case, especially as to the title to said lots, and the \$2,500 damages awarded against the railroad company, and to ignore all of the evidence as to the partnership ownership thereof, and to award the same to appellee, and to otherwise discredit all of the evidence and all other contentions of appellant in this case, as will more fully appear from the court's charge and the pleading and evidence."

No contention is made that the facts mentioned in the charge, if found to exist, would estop plaintiff from setting up his claim to the lots, nor does the court so charge, but instructs the jury to consider such evidence. It is improper for the court to single out a portion of the evidence and instruct the jury to consider same, because it gives undue prominence thereto, and is calculated to lead the jury to believe that the court considers it of special weight. *Dupree & McCutchan v. Railway Co.*, 96 S. W. 647; *Western Union Tel. Co. v. Campbell*, 41 Tex. Civ. App. 204, 91 S. W. 316; *Western Union Co. v. Burgess*, 56 S. W. 237; *Mitchell v. Mitchell*, 80 Tex. 101, 15 S. W. 705; *Railway v. Kutac*, 76 Tex. 478, 13 S. W. 327; *Louisiana & Texas Lumber Co. v. Stewart*, 148 S. W. 1193. The assignment is sustained.

[7] The fourth assignment complains of the following charge, given at the request of appellee: "The court erred, at the instance of appellee, in charging the jury as follows:

'You are instructed that, if the judgments of the justice court and the (county) court of Dallas county, in evidence before you, have established the right of the defendant, Louis Hengy, to the possession of the lots known as the Bessard lot and the Becker lot, no verdict for any rents against him can be rendered by you'—in that judgments in a justice court involving the mere question of possession of lots, the question of title, and rent incident thereto, could not and were not involved, nor were said judgments ~~in~~ evidence as to who owned the same, and did not and could not operate to prevent the party having title to said lots from suing for the recovery of said lots, and in connection therewith, as a matter of course, the rents due thereon; it appearing from the undisputed evidence that the appellee had collected and appropriated to his own use and benefit, in the way of rents from said lots, over \$2,000, which, under the above charge, the jury was absolutely precluded from considering and awarding to said partnership in the event it found from the evidence that said lots or either of them belonged to said partnership, and in that said cases in the justice court did not involve the rights of F. J. Hengy & Son, but were between Louis Hengy on the one side and F. J. Hengy on the other, as individuals, and could not in any wise preclude said partnership of any of its rights either to said lots or the rent thereof, as will more fully appear from the court's charge and the pleading and evidence in this case."

It appears that appellee sued appellant for \$76.90 rent for Becker lot for several months, and recovered judgment for the amount. Said judgment was conclusive between the parties as to the rents for the period covered by the suit. The other cases were all forcible entry and detainer cases, in which character of cases a judgment does not settle anything concerning rents. It merely disposes of the right of possession, and the peaceable possession is sufficient basis for recovery; but it does not preclude the other party from going into the district court and litigating the title and in connection therewith suing for rents or mesne profits. *Articles 2529 and 2542, Anno Civ. Statutes (Sayles)*; *House v. Reavis*, 89 Tex. 634, 35 S. W. 1063. The only exception permitting a suit for rents in connection with one for forcible entry and detainer was made by the Thirty-Second Legislature in favor of landlords as against their tenants, where the rents claimed are in such amount as the justice court would have jurisdiction of. See chapter 21, Acts 32d Leg. The assignment is sustained.

[8] The fifth assignment is as follows: "The court erred in refusing to admit in evidence the personal bank account of the appellee for the years 1899 and 1900, down to June 30, 1902, in that appellee had testified that he paid out of his personal funds \$1,000 as purchase money on the Bessard lot, and that part of said \$1,000 was money he

brought from Denison in 1899, and then deposited in the American National Bank of Dallas, to his personal credit; but his bank account, offered in evidence as aforesaid, showed that he made no such deposit during the year 1899, and made none until May, 1900, and then only in the sum of \$15. The court's only reason for rejecting said evidence was that the judgment of June 30, 1902, precluded any investigation into the appellee's or appellant's or partnership account anterior thereto, whereas in law said judgment related alone to a settlement and the status of said partnership down to June 30, 1902, and had absolutely nothing to do with and in no wise interfered with an inquiry into where and when and how the appellee got the \$1,000 which he claimed to have paid out of his personal money on the purchase price of said Bessard lot. Appellant denies that appellee paid any part of the purchase money on said lot out of his personal funds and contended that all of the purchase money came out of the partnership funds."

This assignment is sustained. This testimony was clearly admissible for the purpose for which offered.

[9, 10] The sixth assignment complains of the admission, over appellant's objection, of a letter from him to appellee, dated March 24, 1905, in which he gave a list of his properties in Idaho, with their values, showing that he had \$26,675 worth of property in Idaho.

We fail to see the relevancy of this evidence. It certainly is not relevant for the purpose of showing (as contended by appellee) what money F. J. Hengy took with him to Idaho, or what had been sent him. It could only show that appellant had considerable property at the time the letter was written, and was prejudicial, in that it was calculated to impress the jury with the idea that appellant could well afford to be generous to his son and let him have what he claimed. *M., K. & T. Ry. v. Hannig*, 91 Tex. 347, 43 S. W. 508; *Railway v. Levy*, 59 Tex. 542, 46 Am. Rep. 269; 13 Cyc. 211. We sustain the assignment.

[11] The seventh assignment is as follows: "The court erred in refusing to submit appellant's special issues 1 and 2, relating to how many partnerships existed between appellant and appellee and the date of the beginning and end of the same, and in refusing and failing to submit in its general charge the law applicable to the formation and dissolution of the partnership, in that the evidence discloses, and appellant contended, that the first partnership was dissolved by operation of law and by agreement on June 30, 1902, and the second partnership was formed on February 14, 1903, and that between June 30, 1902, and February 14, 1903, the business of said concern belonged to appellant, and that the \$3,000 or \$4,000 drawn by appellant out of said business during said time belonged personally to him, and not, as

claimed by appellee, to both of them jointly."

The only allusion in the charge to the matter of dissolution of the partnership formed June 30, 1902, is the following: "The jury is instructed that the partnership adjudged to exist between plaintiff and defendant by the judgments of June 30, 1902, and July 31, 1902, is presumed to exist and continue until the dissolution which took place in February, 1906, unless the jury believe from the evidence that the same was dissolved by the parties, after the rendition of said judgments, and before the dissolution in February, 1906."

[12] The court having decided not to submit the case on special issues, no error was committed in refusing to submit the two special issues requested by appellant. Appellant should have requested the submission of special charges. The trial court should not undertake to present a case to the jury so that their verdict might be part general and part special. Articles 1328 and 1333 (Sayles' Statutes); *Southerland v. Railway Co.*, 40 S. W. 193. However, it is earnestly contended that the failure to instruct the jury on the issue made by the pleadings with regard to whether the old partnership was dissolved and a new one formed on February 14, 1903, was an error so intense that the court should reverse without a special instruction being asked; appellant's theory being that the charge does not fairly cover the substantial issues in the case. The auditor's report embraces two findings, varying greatly in amount; one based on the theory that the accounting began June 30, 1902, and the other on the theory that it began February 14, 1903. It was therefore important for the jury to determine when the partnership began, and the instruction given by the court was inadequate in not submitting the specific issue made by the pleading and evidence, namely, whether plaintiff paid defendant \$500 for his interest in the partnership; if so, then to find when the new partnership was formed, and to credit each partner with the amount paid in by him in property or money when the new partnership was begun, and also to credit plaintiff with the profits of the business during the time intervening between such dissolution and the formation of the new partnership, and credit defendant with the amount of his wages. However, we think the charge was correct as far as it went, and think that plaintiff, if desirous of having a more specific submission of the issue, should have requested the submission of special charges.

The assignment is overruled.

The eighth assignment reads as follows: "The court erred, after having refused, at the instance of appellant, to submit this case on special issues, in submitting it on special charges, at the instance of the appellee, in that the trial of the cause consumed about 14 days, and in that the special charges upon the law as submitted failed to

apply all of the law applicable to the case, as, for instance, the statutes of limitation, what constituted a partnership purchase of land, in whole or in part, what constituted a loan from a partnership, and when the money borrowed by a partner bore interest and from what time, what operated as a dissolution of the partnership, what constituted a partnership, what constituted capital stock of the partnership and to whom it belonged, what constituted fraudulent appropriation by one partner of funds of a partnership, and other law applicable to other issues rising under the pleading and evidence in this case, as more fully appears from the charge of the court submitted to the jury, and from the evidence adduced on the trial of this case."

[13, 14] The charge recites that the court submits the case upon some special charges presented to him, but does not recite which side presented same, and proceeds to instruct the jury in a general charge embracing the issues covered, presumably, by the special charge. This recital could not possibly injure appellant. The omissions complained of by appellant should have been cured by offering special charges. The assignment is overruled.

[15] The ninth assignment complains of the refusal of appellant's request to submit the case on special issues. This is a matter left to the discretion of the trial court. Acts 1899, c. 111; *Railway v. Jackson*, 93 Tex. 262, 54 S. W. 1023; *Edmondson v. Coughran*, 138 S. W. 435; *Jones v. Creech*, 108 S. W. 975; *Kampmann v. Rothwell*, 107 S. W. 120.

[16] The tenth assignment complains of the overruling of exceptions to the auditor's report and the overruling of the motion to strike same out. The assignment is not submitted as a proposition, and for that matter involves quite a number of propositions, so we will consider the only proposition submitted under the same, viz., that the auditor's report, merely submitting three different theories under which the partners would be entitled to different amounts, is not a report within the contemplation of law. The pleadings raised the issues of different dates upon which the partnership began. The amounts with which the partners should be credited and charged depended upon when the partnership began. As the auditor had no right to pass upon the question of when the partnership began, it was proper for him to make findings based upon each date. The assignment is overruled.

In view of another trial, assignments 11 and 12 will not be considered, as they relate to the sufficiency of the evidence to sustain the verdict.

On account of the errors mentioned, the judgment is reversed, and the cause remanded.

KNOX et al. v. ROBBINS.

(Court of Civil Appeals of Texas. Galveston.
Nov. 19, 1912. Rehearing Denied
Dec. 19, 1912.)

1. CARRIERS (§ 318*)—MASTER AND SERVANT (§§ 276, 280, 281*)—LOGGING RAILROADS—INJURY TO EMPLOYÉ—EVIDENCE—SUFFICIENCY.

In an action for injury to a lumber company's employé while riding on a logging train to his work in the woods, evidence held to warrant findings that he was rightfully on the train; that the accident was proximately caused by the railway company's negligence in allowing an obstruction to be and remain on the track, and the lumber company's concurrent negligence in failing to keep a proper lookout to discover the obstruction; and that plaintiff did not assume the risk, and was not guilty of contributory negligence.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1270, 1307-1314; Dec. Dig. § 318;* *Master and Servant*, Cent. Dig. §§ 950-952, 954, 959, 970, 976, 981-986; Dec. Dig. §§ 276, 280, 281.*]

2. DAMAGES (§ 132*)—PERSONAL INJURY—EXCESSIVENESS.

Seven thousand five hundred dollars is not excessive recovery for injuries to a logging employé in derailment of a logging train, where he became insane as a result thereof.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 372-385, 396; Dec. Dig. § 132.*]

3. EVIDENCE (§ 127*)—DECLARATION BY INJURED PERSON—ADMISSIBILITY.

In a personal injury action, it was not error to admit testimony of complaints of existing pain made by plaintiff to witnesses, though he was then insane, especially where there was evidence tending to show that his insanity was limited to one delusion.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 377, 382; Dec. Dig. § 127.*]

4. APPEAL AND ERROR (§ 742*)—REVIEW—OBJECTIONS NOT ASSIGNED.

A proposition under an assignment of error presenting an objection to testimony not raised by the assignment cannot be considered.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 3000; Dec. Dig. § 742.*]

5. TRIAL (§ 89*)—EVIDENCE—STRIKING OUT.

In a personal injury action, it was not error to strike testimony that plaintiff stated to witness that a certain scar was produced by a stab received in a difficulty several years before, on plaintiff's counsel's objection that such statement was made while plaintiff was insane, where there was no claim that the particular wound was produced in the accident sued on.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 228-234; Dec. Dig. § 89.*]

6. EVIDENCE (§ 317*)—HEARSAY TESTIMONY.

In an action for injury to an employé in the derailment of a logging train, testimony that plaintiff's coemployé told witness after the wreck that they had orders not to ride on the train was properly excluded as being hearsay.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 1174-1192; Dec. Dig. § 317.*]

7. EVIDENCE (§ 322*)—HEARSAY TESTIMONY—SANITY OF PARTY.

In an action for personal injury to plaintiff claimed to have rendered him insane, it was proper to exclude testimony offered by defendant that "everybody talked about" plaintiff's insanity "more or less," where witness testified to his own opinion, acquired while plaintiff worked with him, and where witness in referring to "everybody" meant the persons

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

who worked at the same place with plaintiff and witness.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1203-1213; Dec. Dig. § 322.*]

8. APPEAL AND ERROR (§ 742*)—REVIEW—ASSIGNMENT OF ERROR—SUFFICIENCY.

So far as the propositions under an assignment of error to the giving of an instruction state objections not embraced in the assignment of error, they will not be considered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3000; Dec. Dig. § 742.*]

9. MASTER AND SERVANT (§ 295*)—LOGGING RAILROADS—INJURY TO EMPLOYE—INSTRUCTIONS.

In an action for injury to an employé while riding on a logging train, caused by the derailment thereof, it was proper to instruct that, if plaintiff "took up a position more dangerous than some other parts of the train where he was permitted to ride, he should be held to have assumed the risk of the more dangerous position, yet he did not assume thereby any risk of danger resulting from and proximately caused by the negligence of defendants," etc.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1168-1179; Dec. Dig. § 295.*]

10. CARRIERS (§ 321*)—INJURIES—INSTRUCTIONS.

In an action for injury to a lumber company's employé while riding on a logging train, which was derailed, it was not error to instruct that, if the defendant railway company contracted with defendant lumber company to transport plaintiff with others on the train for a consideration paid by the lumber company, plaintiff was a passenger and entitled to exercise of that degree of care required in the carriage of passengers in the kind of vehicle used, etc.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1247, 1326-1337, 1343; Dec. Dig. § 321.*]

11. DAMAGES (§ 216*)—PERSONAL INJURY—INSTRUCTIONS—DOUBLE DAMAGES.

In a personal injury action, an instruction that the jury might consider any time lost by plaintiff as well as any loss of time which he would suffer in the future, and that, if the jury found that plaintiff was insane as the proximate result of such injuries, in estimating his damages the jury should consider the fact of the insanity so far as it affects his earning power, was not erroneous as authorizing double damages.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 548-555; Dec. Dig. § 216.*]

12. APPEAL AND ERROR (§ 759*)—ASSIGNMENTS OF ERROR—SUFFICIENCY OF PRESENTATION.

It is a valid objection to the consideration of an assignment of error that only part of it is copied in the brief.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3004; Dec. Dig. § 759.*]

13. MASTER AND SERVANT (§ 276*)—INJURY TO EMPLOYE—EVIDENCE—SUFFICIENCY.

In an action for injury to a lumber company's employé while riding on a logging train, which was derailed, evidence held to warrant a finding that the accident proximately caused his insanity.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 950-952, 954, 959, 970, 976; Dec. Dig. § 276.*]

14. APPEAL AND ERROR (§ 742*)—ASSIGNMENTS OF ERROR—SUFFICIENCY OF PRESENTATION.

Assignments of error cannot be considered when the only statement under them is,

"See statement under 15th assignment of error," if that statement refers to a question in no way relating to the questions presented by the particular assignments.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3000; Dec. Dig. § 742.*]

15. MASTER AND SERVANT (§ 289*)—LOGGING RAILROADS—INJURY TO EMPLOYE—CONTRIBUTORY NEGLIGENCE—JURY QUESTION.

In an action for injury to a lumber company's employé while riding on a logging train, which was derailed, held, under the evidence, a jury question whether plaintiff was guilty of contributory negligence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1089-1132; Dec. Dig. § 289.*]

Appeal from District Court, Polk County; L. B. Hightower, Judge.

Action by T. E. Robbins against W. H. Knox and others. Judgment for plaintiff, and defendants appeal. Affirmed.

F. Campbell, J. Holshousen, and J. L. Manry, all of Livingston, Mantooth & Collins, of Lufkin, and A. L. Jackson, of Houston, for appellants. Dean, Humphrey & Powell, of Huntsville, and J. C. Feagin, of Livingston, for appellee.

REESE, J. This suit was originally instituted by T. E. Robbins against the Livingston & Southeastern Railway Company and the partnership firm of W. H. Knox and Hiram Knox, doing a sawmilling business under the firm name of the Knox Lumber Company. The plaintiff Robbins having been adjudged a lunatic, Frank McCall was allowed to come in and prosecute the suit as next friend of said Robbins. A trial with a jury resulted in a verdict and judgment in favor of the plaintiff for \$7,500 against both defendants, from which they prosecute this appeal. In substance the allegations of the petition are as follows:

On and prior to July 21, 1909, the defendant Lumber Company owned and operated a sawmill and planing mill located at the station of Knox, or Soda, in Polk county, Tex., about seven miles from the town of Livingston, a station on the railroad of the defendant Livingston & Southeastern Railway Company, and the Lumber Company owned large bodies of timber in Polk county, some of which was located at a great distance from its mill, and away from the track of the defendant Railway Company. The defendant Railway Company was a private railroad corporation, and it owned and operated a line of railroad extending from the town of Livingston to the station of Knox, or Soda, at which the mill was situated. The defendants W. H. Knox and Hiram Knox, being the constituent members of the partnership under the name of the Knox Lumber Company, also owned the majority of the stock in the defendant Railway Company. That the defendant Lumber Company, for the purposes of facilitating it in the trans-

portation of its timber from its distant tracts, had built a tram railroad, constructed according to the standard of the ordinary railroad, and which extended from the junction with the defendant Railway Company's tracks a considerable distance to the timber lands of the Lumber Company. That on and prior to July 21, 1909, the defendants, for their mutual benefit and advantage, had some sort of a contract, the terms of which were unknown to plaintiff, under which the defendant Lumber Company cut its timbers and transported same over its tram railroad to the junction of the defendant Railway Company's track, and that thence the defendants transported said timbers to the Lumber Company's sawmill at the town of Knox by means of logging cars. That it was understood between plaintiff and the defendant Lumber Company at the time of his employment that one or both of the defendant companies would transport him upon cars over the railroad of defendant Railway Company, and over the tram railway between the place of his residence at or near said mill and the place of his work. That while thus in the employment of the defendant Lumber Company, and under contract with it to saw logs in the woods for said company, the plaintiff and other employes, in accordance with the said agreement, and with the consent and acquiescence of defendant, boarded a logging train at the station of Knox, which was made up of "an engine, tender, and three logging cars, described as aforesaid, and which left said mill for the purpose of carrying the plaintiff and the other employes of the defendant Lumber Company to the woods, where they were to resume their service for defendant Lumber Company," etc., and that plaintiff thereby became a passenger on said cars, and that "if the plaintiff is mistaken in his averment that when riding on said logging train in going to and returning from his work he was a passenger thereon, and if he is mistaken in his averment that the defendants, and each of them, owed to him the highest degree of care to safely transport him to and from his work while on said cars, the defendants, and each of them, nevertheless, owed plaintiff the duty to transport him in safety while on said car, both going to and returning from his place of work," etc. That the said train consisted of an engine and tender in front of which were three logging cars which were pushed out in front of the engine. That the relations between the defendants were of such a character that plaintiff did not know and could not ascertain whether the trainmen in charge of said logging car and of the train of which they were a part were in the employ of the defendant Railway Company or of the defendant Lumber Company, nor could he ascertain whether the train and cars belonged to the one or the other of the defendants, but he alleged

that such trainmen were in the employ of both and each of said defendants, and that the cars and train were being operated for the mutual benefit of both of the defendants. That plaintiff, in taking passage on said train, took his seat on one of the couplings of the frame of the logging car that was attached to the tender, and that while the train was going at a rapid rate of speed at a point on the track of the defendant Railway Company some of the cars encountered an obstruction on the track and became derailed, and the plaintiff, in order to avoid apparent danger, jumped from the car that he was sitting on, and was seriously and permanently injured, alleging that such injury resulted from negligence on the part of the defendants in the following particulars, substantially: (1) That defendants had caused or permitted some obstruction to be placed and left on the railroad track; (2) that defendants had failed to properly inspect the track to discover and remove the obstruction; (3) that the track and roadbed at the point of the occurrence were in an unsafe condition; (4) that the defendants had failed to have the engine and train properly equipped with air brakes, so as to stop the train quickly upon discovery of the obstruction; (5) that the rate of speed at which the train was running was excessive; (6) that the defendants failed to keep a proper lookout for obstructions.

Among other injuries alleged to have been suffered by the said Robbins, it is alleged that as a result of said injuries he has become insane.

Defendants answered by (1) general denial; (2) special denials of various allegations in the petition; (3) a special plea that plaintiff was not authorized to ride on the logging car occupied by him, but that plaintiff and others were strictly precluded by rule of the defendant Lumber Company from riding in such position, and were not permitted to ride except on the caboose or tender provided for that purpose; (4) special plea that in riding upon the logging car plaintiff was a trespasser, assuming the risk of the danger, and that defendants owed him no affirmative duty, except to avoid intentional injury, and that plaintiff was guilty of contributory negligence in occupying such position; (5) that plaintiff was guilty of contributory negligence, in that he unnecessarily and carelessly jumped from his position on the car, whereas, if he had remained thereon, he would have received no injury; (6) special plea that the plaintiff had full knowledge that riding on the logging car involved more danger than riding on the tender, and had been so admonished, notwithstanding which he voluntarily occupied the more dangerous position, and thereby assumed the risk, and thereby also was guilty of negligence precluding recovery; (7) special denial that plaintiff's alleged insanity re-

sulted from the injuries complained of, and averring that such insanity was due to venereal diseases, and was hereditary.

The facts are substantially as follows: At the time of the accident, which occurred July 21, 1909, the appellee Robbins was in the employment of the Knox Lumber Company, engaged in getting out timber for its sawmill, which was located at the station of Knox (or Soda) on the line of the Livingston & Southeastern Railway about seven miles from the town of Livingston, one of the termini of said railroad. The Railway Company owned and operated a line of railway running from Livingston to Knox. W. H. Knox and Hiram Knox, operating as a partnership under the firm name of the Knox Lumber Company, owned and operated the sawmill at the town of Knox. The Lumber Company, for the purpose of reaching its timber in the woods, had constructed a tram road from a junction with the said railroad out into the woods. W. H. Knox and his son, Hiram Knox, owned about nine-tenths of the stock of the Railway Company and W. H. Knox was its president. There was a contract between the Lumber Company and the Railway Company by the terms of which the Railway Company were to transport the logs from the woods to the Lumber Company's mill at \$1 per thousand feet, and for this compensation the Railway Company was also to carry the employees of the Lumber Company who worked in the woods to and from their place of work. For this purpose the Railway Company had for use a caboose attached to the engine or logging cars, but some month or more before the accident in question this caboose had been out of use, having become unfit for use on account of a wreck, and during this time the men had to ride either on the logging cars or the engine or tender. The evidence was conflicting as to the number of men who had to be carried from their work at the time of the accident in question. Some of the witnesses place the number as high as 40 or 50; and it was in evidence that this number could not be accommodated on the engine and tender, which also had to carry wood for the engine, and had no accommodations for seats for the men. At the time of the accident the engine was pushing ahead of it three empty logging cars (skeleton cars without floor, but having only bolsters for holding the logs). Appellee Robbins was riding on one of the logging cars. The train was running anywhere from 18 to 25 miles an hour when the trucks of the forward car struck the end of a loose railroad rail, lying on or by the side of the track, derailing the car and wrecking the train. Robbins jumped when the accident occurred, and was caught under one of the cars, and sustained substantially the injuries alleged in the petition. About a year after the accident, he became insane, and was at the time of the

trial confined in the State Asylum at Austin as a lunatic. The evidence authorizes the conclusion that the insanity was proximately caused by the injuries received by him as aforesaid. There was evidence which tended to show that the insanity was of date anterior to the accident, and was brought on by other causes or was hereditary, but the jury evidently found otherwise, and their finding is sufficiently supported by the evidence.

A much contested issue was as to whether the men engaged in the operation of the train at the time were in the employ of the Railway Company or the Lumber Company. These men were the engineer, fireman, and brakeman. Without stating such evidence here, we find that the finding of the jury, such finding being necessary to support the verdict against the Lumber Company under the charge of the court, that these men were acting at the time in the employment and were the servants either of the Lumber Company alone, or in the employment of both the Lumber Company and the Railway Company in operating the engine and cars, is sufficiently supported by the evidence and we accordingly so find.

[1, 2] Another much contested issue was whether appellee was acting in violation of a rule or order of the Railway Company in riding on the logging car, instead of on the engine or tender. We find that, if there was such rule generally, it was, especially after the company ceased to use the caboose, habitually disregarded, and that it was impracticable to obey it, as the accommodations on the engine and tender were insufficient for the transportation of all the employees who were required to be so carried, and that this was or must have been known to the officers of the Railway Company. We find that appellee was rightfully upon the logging car and was riding thereon upon the contract between the Lumber Company and the Railway Company heretofore referred to, and under an implied contract between the Lumber Company and appellee that he should be thus carried. The accident referred to was proximately caused by the negligence of the Railway Company in allowing the obstruction to be and remain upon the track, combined with the negligence of the servants of the Lumber Company, or of the Lumber Company and the Railway Company jointly, in failing to keep a proper lookout to discover such obstruction in time to prevent the accident, and in running the train at too great speed under the circumstances. We find that appellee was not guilty of contributory negligence in any of the particulars charged in the answer, nor did he assume the risk of the accident. The injuries received by appellee proximately caused by the accident fully justify the amount awarded him by the verdict and judgment.

[3] The first four assignments of error

present substantially the same question. The court admitted, over the objection of appellants, the testimony of certain witnesses that upon certain occasions appellee Robbins complained of pain in his back and head. As we understand the testimony, it was that the complaints were of present pain and suffering, and not, as the objection states, a statement of past suffering. These complaints were made some time after the injury. The real idea intended to be conveyed by the testimony is that what was said by appellee was an expression of present pain and suffering then existing at the time the complaint was made. Such testimony was admissible. *Railway Co. v. Barron*, 78 Tex. 421, 14 S. W. 698; *Wheeler v. Railway Co.*, 91 Tex. 358, 43 S. W. 876. The further objection was made that appellee was at the time insane. We do not think that this rendered these voluntary exclamations or expressions of present suffering inadmissible, especially in view of the testimony of the witnesses who testified as to appellee's insanity while in the asylum that he talked very intelligently, except upon one subject, that he imagined he had been resurrected at the time of the accident, as stated by one medical witness who examined appellee at the instance of appellants, otherwise he talked entirely rationally. We think expressions of present pain by such a person would fall under the general rule stated by the authorities cited.

[4] What we have said is sufficient to dispose also of the fifth assignment of error, presenting objections to certain testimony. The additional objection to such testimony set out in the second proposition under this assignment, that the expressions of pain were made after this suit was brought, was not made to the testimony as set out in the assignment, and cannot be considered. The proposition is supported by a dictum in *Railway Co. v. Kuehn*, 2 Tex. Civ. App. 210, 21 S. W. 58, the soundness of which we doubt as applicable to this testimony. *Jackson v. M., K. & T. Ry. Co.*, 23 Tex. Civ. App. 319, 55 S. W. 876. But it is not necessary to decide the question, as it is not presented by the assignment.

[5] Dr. Harlan Trask examined appellee while in the asylum at Austin at the request of appellants. Testifying about the result of this examination, he said that he found a scar on his back on or near his shoulder blade which was made by a cut with a sharp instrument. The witness further testified that appellee stated to him that this scar was produced by a stab inflicted upon him "in a racket" three or four years before. Upon objection by appellee's counsel that this latter statement was made while he was insane, it was stricken out, to which appellants objected, and the ruling is made the basis of the sixth assignment of error. As showing the materiality of this testi-

mony, it is contended that appellee by his pleadings and by the evidence of his wife, Mintie Robbins, claimed that this scar was the result of an injury received by him in the wreck referred to. This is entirely erroneous. Mintie Robbins, on the contrary, testified particularly with reference to this scar that it was the result of a stab wound inflicted by one Elisha Lewis, her cousin, several years before this accident and injury. None of the testimony for appellee indicates that this wound was produced by, or at the time of, the accident referred to, and the testimony of Dr. Trask which was stricken out by the court was utterly immaterial. The record, in fact, leaves us at a loss to understand why appellee's counsel objected to it. The statement is made in appellants' brief that appellee stated to Dr. Trask that this scar "and enlargement in the region of the spine" had resulted from a stabbing in a personal difficulty. The words quoted are an enlargement upon the testimony of the witness not justified by the record. The assignment is overruled.

[6] There was no error in sustaining the objection of appellee to the testimony sought to be elicited from the witness Moye, as set out in the seventh assignment of error. that the employees of appellant told him after the wreck that they had orders not to ride on the logging cars. The objection that the testimony was hearsay was properly sustained. The contention stated in the proposition and brief that the testimony was admissible on cross-examination by way of impeachment or to test and analyze the testimony of the witness is not embraced in the assignment, but could not be sustained if it had been.

[7] There was no error in striking out the answer of the witness Saxon, speaking with reference to the insanity of appellee before the accident and injury in question, that "everybody talked about it more or less." The witness was testifying to his own opinion acquired while appellee worked at a saw-mill at Bedford, and referred by "everybody" to the persons working at said mill. The testimony was objected to as hearsay. It seems to be settled by the authorities that general reputation is inadmissible to establish insanity. 2 Wigmore, § 1621; *Ellis v. State*, 33 Tex. Cr. R. 86, 24 S. W. 894; 7 Encyc. Ev. 477. None of these persons comprising "everybody" at this mill, unless experts in such matters as insanity, would have been allowed to give his opinion as to appellee's insanity, except in connection with a statement of the facts and circumstances upon which such opinion was based. *Brown v. Mitchell*, 88 Tex. 363, 31 S. W. 621, 36 L. R. A. 64. This testimony, if admissible, brings before the jury the opinion of all these persons that appellee was at the time referred to insane without inquiry as to their means of knowledge or evidence as to the facts and

circumstances upon which such opinion is based. We do not think this would be proper.

By the ninth assignment of error appellants complain of the refusal of the court to give to the jury a special charge requested by them that there was no evidence to authorize a verdict against the Knox Lumber Company, or W. H. and Hiram Knox, and that they should only consider the evidence as to the Livingston Southeastern Railway Company. Under this assignment, the following proposition is stated: "There being no evidence that the railroad at the point of derailment belonged to or was controlled by the Lumber Company, or that those operating the locomotive and cars were the servants of the Lumber Company, performing its immediate service, or that the plaintiff was injured as a result of failure on the part of the Lumber Company to perform any substantive duty to him incident to the relation of master and servant, no liability was shown on the part of the Lumber Company or W. H. Knox or Hiram Knox, as members of that partnership, and these defendants were entitled to the peremptory instruction." The accident occurred on the line of railway of the defendant Railway Company. The engine and cars also belonged to the Railway Company. The contract between the Railway Company and the Lumber Company required the Railway Company to carry the men to and from their homes to their places of work in the woods over the Railway Company's line to the junction with the tram of the Lumber Company, and thence over the tram to the front. It thus entered into and became a part of appellee's contract of employment that he was thus to be carried to and from his work daily as was being done at the time he was hurt. The train was a logging train purely, and was engaged solely in the business. The train crew consisted of Alexander, the engineer, Pete Bailey, the brakeman, and Tom Stutts, the fireman. Alexander testified: "I was running the engine for the Knox Lumber Company. Yes, sir; I suppose they own the business at Knox or Soda. I ran the mill engine there about two weeks, something like that, and ran the locomotive. It was a logging train. I went under Mr. Winger's order when I was in the woods (Winger was the woods foreman of the Lumber Company), and, when I was at the mill, I went under orders of Mr. Knox. Mr. Winger was on the car at the time of the wreck. Yes, sir; I was in the employment of the Knox Lumber Company. I am working for the Knox Lumber Company now." Pete Bailey testified. "I am working for the Knox Lumber Company as conductor on his train since February 7th last. Before that I was braking on the logging train. I was braking on the logging train in 1909, when Tim Robbins got hurt. Before that, I worked on the loading crew there

sometimes, but most of the time on the train. Alexander and Stutts were the engineer and fireman, and I was brakeman." Tom Stutts testified: "I lived at Knox or Soda on July 21, 1909, and was firing a locomotive steam engine for the Knox Lumber Company at that place at that time." This was the day of the wreck.

The evidence does indeed disclose that the Railway Company and the Lumber Company were so closely and intimately connected in ownership and management as to be, so far as the operation of their business was concerned, practically one concern. Still they were distinct individuals, and neither could legally be made liable for the negligent act solely attributable to the other. We may admit that the Lumber Company would not be liable in this case if the train was being operated over the line of the Railway Company, by its own agents and servants, carrying appellee to or from his work, under the terms of its contract with the Lumber Company. But, whatever the terms of that contract may be, there was evidence, which we have quoted, sufficient, if true, to show that the engine and cars were being operated by the servants of the Lumber Company and under the direction of its woods foreman, one Winger. Every member of the crew, engineer, fireman, and brakeman, so testified. If these men did not mean to so state, if in fact the relationship of the two companies was so close that they might have been mistaken about this, or did not know, some attempt should have been made to have them explain. But the testimony is in the record as quoted, without qualification, and we cannot assume that the witnesses did not mean what they have so clearly stated. If it be true that the train crew were operating the engine and cars as employees of the Lumber Company, which might very well have been the case, considering the character of the service in which they were engaged, then the evidence is sufficient to authorize the finding that the accident was the proximate result of the combined negligence of the Railway Company in allowing the obstruction to be and remain on the track, and of those engaged in operating the engine and cars in running at a dangerous rate of speed, and in failing to keep a proper lookout to discover the obstruction on the tracks in time to avoid the accident. The train was being operated with the cars in front, and one witness testified that the speed was 30 miles an hour. We think the evidence as to the liability of the Lumber Company was sufficient to raise an issue for the jury, and the court did not err in refusing the requested charge.

Appellant in the tenth assignment complains of the fifth paragraph of the court's charge. This paragraph contains substantially the entire charge of the court upon the question of the liability of both defend-

ants, and covers two entire pages of appellants' brief. Six separate propositions are stated under the assignment. The assignment itself states the following grounds of objections to the charge: "Said charge is erroneous, in that it assumes that defendants consented to and acquiesced in the act of the plaintiff in riding upon the logging cars, because 'there was not a particle of testimony going to show that the defendants ever acquiesced in or consented to the employes riding upon the logging cars; on the contrary, the proof on that point was entirely one sided, and showed that the defendants oft-times made the employes get off the logging cars; in fact, they did make them get off every time the employes were discovered on the logging cars, and told them it was dangerous to ride on the cars; and the uncontradicted proof shows that the employes operating the train were told by the defendants not to allow any of the employes to ride on the logging cars.' And because said charge was upon the weight of the evidence, and assumed conditions and facts not testified to. And because said charge is argumentative in behalf of the plaintiff, and does not charge the law on issues raised by the pleadings and evidence. And because said paragraph requires the jury to find for the plaintiff, unless they further found that the plaintiff himself was guilty of contributory negligence in being upon the train at the place where he had taken his position thereon, or in attempting to jump therefrom, if he did so. Under paragraph 2 of the court's charge, the jury is instructed that, in order for the plaintiff to have been guilty of contributory negligence, he would have had to contribute towards producing the wreck, and without which the wreck would not have happened."

[8] In so far as the propositions seek to enlarge upon these objections and to state other objections not embraced in the assignment of error, they will not be considered. Addressing ourselves then to the several objections to the charge set out above, the charge is not subject to the criticism that it assumes that the defendants consented to or acquiesced in the act of the plaintiff in riding upon the logging cars. The language of the charge referred to clearly submits this as an issue to be found by the jury. So the specific objection made must fail. If, however, appellants intended to base their objections upon the ground that there was no evidence to raise this issue, the undisputed evidence negating such consent or acquiescence, as stated in the proposition, we cannot agree to this conclusion. The evidence is very conflicting upon this issue, and the preponderance of it perhaps shows that the act of riding on the logging cars was against the orders of the Railway Company, nevertheless, looking to the entire evidence,

we cannot say that there was no evidence to support appellee's contention on this point, and to require the submission of the issue. It is of some significance on this issue that there was evidence that there were between 40 and 50 men to be carried, that outside these logging cars no place was provided for them to ride except the engine and tender, which also had to carry wood for firing the engine, and that these places were not sufficient for that purpose. There was also testimony that the men habitually rode on the logging cars, especially since the cabooses had been out of use.

The second objection is that the charge was upon the weight of the evidence and assumed conditions and facts not testified to. We have examined the charge carefully, and (if we are required to consider an objection so general) can find nothing to justify this criticism.

The third objection, that the charge is argumentative, etc., is too general, but appears to us to be groundless.

The fourth objection is groundless. There is nothing in the charge that could afford ground for the criticism, that it requires the jury to find for the plaintiff, unless they find that he was guilty of contributory negligence. The liability of defendants on any ground is clearly submitted as an issue to be determined by the jury. We have examined the paragraph of the charge carefully in view of the objections urged, and can find nothing to support any of them. The assignment and the several propositions thereunder are overruled.

[9] There was no error in instructing the jury, as set out in the twelfth assignment of error, that, if appellee "took up a position more dangerous than some other parts of the train when he was permitted to ride, he should be held to have assumed the risk of the more dangerous position, yet he did not assume thereby any risk of danger resulting from and proximately caused by the negligence of defendants, their agents and servants." This was a correct statement of the law.

[10] The court did not err in that portion of the charge in which the jury was instructed with regard to the degree of care required of the Railway Company. If the Railway Company had contracted with the Lumber Company to transport appellee with others on this train for a consideration paid by the Lumber Company, appellee was a passenger, and entitled to the exercise of that degree of care required in the carriage of passengers in the kind of vehicle used always taking into consideration the character of the conveyance and the obviously greater danger in riding on a logging car than in an ordinary passenger car. This was in substance the principle stated in the charge. *Railway Co. v. Wilson*, 79 Tex.

375, 15 S. W. 280, 11 L. R. A. 486, 23 Am. St. Rep. 345; *Railway Co. v. Lauricella*, 87 Tex. 277, 28 S. W. 277, 47 Am. St. Rep. 103; *Railway Co. v. Fenwick*, 34 Tex. Civ. App. 222, 78 S. W. 551.

[11] The charge on the measure of damages, set out in the thirteenth and fourteenth assignments of error, was that the jury "might take into consideration the loss of time, if any, which plaintiff has already suffered, as well as the loss of time, if any, which you may find he will suffer in the future," etc., also that if the jury finds that plaintiff is insane, and that such insanity was proximately caused by his injuries, and the jury should find in his favor, then in estimating his damages the jury should take into consideration the fact of the insanity, so far as it affects his earning power. This was a proper charge under the pleadings and evidence. It is not subject to the objection that it authorized the recovery of double damages. Damages for loss of earning capacity, or of time, produced by insanity would be recoverable in the same way and to the same extent as for such effects produced by a broken leg, or any other injury. It would be an extraordinary conclusion that because appellee was incapacitated from labor while insane he could not recover for such loss of earning power, if the insanity was proximately caused by the injuries for the proximate consequences of which defendants were otherwise liable.

[12] Objection is made by appellee to the consideration of the fifteenth assignment of error on the ground that only a part of the assignment is copied in the brief. This we find to be true, and the objection is well taken. Other exceptions are taken to the assignment on the ground that it presents several distinct grounds of error, that it is too general on the question of the excessiveness of the verdict, and that the statement following the assignment is insufficient. We are inclined to think that all of these exceptions are well taken. As stated, it is difficult to understand what is undertaken to be presented by the assignment. The proposition under the assignments is as follows: "The court having authorized the jury to award damages on account of plaintiff's alleged insanity, without evidence to justify a finding that such insanity was a proximate result of the alleged derailment and injury, and having authorized double damages therefor, and the verdict in the sum of \$7,500, being general in form, will be presumed to embrace allowance of the items so improperly authorized by the charge on the ground of insanity."

[13] What we have said is sufficient to dispose of the questions presented. The evidence was sufficient to support the finding that the insanity was the proximate result of the injuries received in the wreck. Sev-

eral witnesses testified that there was never any indication of insanity prior thereto, and there was testimony both that the insanity might have resulted entirely from these injuries, and also that, if appellee was predisposed to insanity, these injuries might have brought on the insane condition. The charge of the court, as we have seen, did not authorize the recovery of double damages.

There is no merit in the sixteenth assignment of error. The court submitted to the jury the issue of contributory negligence on the part of appellee either "in being upon said train at the place where he had taken his position thereon, or in attempting to jump therefrom," and the charge precluded recovery if the jury found that he was guilty of contributory negligence in either particular. We doubt if any enlargement or elaboration of these points would have been of material assistance to the jury.

[14] The seventeenth, eighteenth, and nineteenth assignments of error cannot be considered. The only statement under either is, "See statement under fifteenth assignment of error." Referring to the statement under the fifteenth assignment of error, we find that it refers to a question in no way relating to the questions presented by either of these assignments. These assignments relate to the issues of contributory negligence and to the refusal of special charges on that issue. The statement under the fifteenth assignment refers solely to the issue of insanity as proximately caused by the injuries and the evidence relied upon to support appellants' contention on this issue.

[15] Appellants requested the court to charge the jury, in substance, that if the train was provided with a tender upon which appellee could have ridden with reasonable safety, and it was sufficiently commodious to accommodate him and the other hands, and that appellee voluntarily placed himself upon one of the logging cars, and that this position was more dangerous and he would not have been injured if he had been on the tender, he could not recover. This was, in effect, an instruction that the act of appellee in thus taking position on the logging cars in the circumstances stated was contributory negligence precluding recovery as matter of law. There was no error in refusing the charge. It was an issue for the jury whether in the circumstances stated in the requested charge appellee acted as a person of ordinary prudence would have acted, taking into consideration all of the circumstances disclosed by the record. *Bonner v. Glenn*, 79 Tex. 531, 15 S. W. 572; *Railway Co. v. Welch*, 24 S. W. 854.

We have examined each of the assignments (except the seventeenth, eighteenth, and nineteenth, which for the reasons stated cannot be considered) and the several propositions

thereunder, and our conclusion is that none of them presents sufficient grounds for reversing the judgment, and it is therefore affirmed.

Affirmed.

WALKER et al. v. METROPOLITAN ST. RY. CO.

(Court of Civil Appeals of Texas. Dallas. Dec. 14, 1912.)

1. APPEAL AND ERROR (§ 253*)—RECORD—QUESTIONS PRESENTED FOR REVIEW.

Where the record fails to show any exception to plaintiff's petition, the question of the propriety of sustaining an exception thereto cannot be considered on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1485, 1488, 1491-1493; Dec. Dig. § 253.*]

2. APPEAL AND ERROR (§ 548*)—BILL OF EXCEPTIONS—NECESSITY.

Where there is no bill of exceptions showing that testimony mentioned in an assignment of error was excluded, the court's action cannot be reviewed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2433-2440; Dec. Dig. § 548.*]

3. CARRIERS (§ 295*)—PASSENGERS—NEGLIGENCE—VIOLATION OF MUNICIPAL ORDINANCE.

Municipal ordinances fixing the rate of speed at which street cars may be operated are for the benefit of persons lawfully crossing the track and not for passengers, and a violation of such ordinances does not raise an imputation of negligence per se in favor of an injured passenger.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1191-1197, 1199, 1213-1215, 1219, 1220; Dec. Dig. § 295.*]

4. TRIAL (§ 251*)—INSTRUCTIONS—APPLICABILITY TO PLEADINGS.

A requested instruction, which authorizes a recovery for negligence not counted on in the petition, is properly refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 587-596; Dec. Dig. § 251.*]

5. APPEAL AND ERROR (§ 750*)—ASSIGNMENT OF ERROR—NECESSITY AND SCOPE.

Where it is contended that plaintiff's request for an improper instruction was sufficient to direct the court's attention to the failure of the general charge to submit the issue desired, and that it should have prepared and given a correct charge on the subject, that complaint must be raised and presented by separate assignment of error, and, if only incidentally presented in the assignment complaining of the refusal of the request, it cannot be considered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3074-3083; Dec. Dig. § 750.*]

6. APPEAL AND ERROR (§ 719*)—ASSIGNMENTS OF ERROR—NECESSITY.

Under rule 24 for the Courts of Civil Appeals (142 S. W. 2d), providing that the assignment of error must distinctly specify the grounds, and be distinctly set forth in the motion for new trial, objections to an instruction on the degree of care due from defendant carrier to plaintiff cannot be reviewed, where not raised in the motion for new trial; such error not being fundamental.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2968-2982; Dec. Dig. § 719.*]

7. APPEAL AND ERROR (§ 1064*)—REVERSIBLE ERROR.

In an action against a street railway for injuries suffered by plaintiff, a passenger, an instruction that it was the duty of defendant and its servants, engaged in the operation of a car on which plaintiff was passenger, to exercise that high degree of care that would have been usually exercised by very cautious, competent, and prudent persons under similar circumstances, while erroneous in the use of the word "usually," does not constitute reversible error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4219, 4221-4224; Dec. Dig. § 1064.*]

8. TRIAL (§ 194*)—INSTRUCTIONS—WEIGHT OF TESTIMONY.

Where the answer pleaded three issues of contributory negligence on the part of plaintiff passenger, and these issues were substantiated by testimony, separate charges thereon were not on the weight of the evidence because giving undue prominence to the issue of contributory negligence.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 413, 439-441, 446-454, 456-466; Dec. Dig. § 194.*]

Appeal from District Court, Dallas County; Kenneth Foree, Judge.

Action by Minnie Walker and others against the Metropolitan Street Railway Company. From a judgment for defendant, plaintiffs appeal. Affirmed.

Dwight Lewelling and Wilson, Williamson & Simmons, all of Dallas, for appellants. Baker, Botts, Parker & Garwood, of Houston, and Spence, Knight, Baker & Harris, of Dallas, for appellee.

TALBOT, J. This suit was brought to recover damages alleged to have been sustained on account of personal injuries charged to have been inflicted upon appellant, Mrs. Minnie Walker, through the negligence of appellee in causing her to be thrown from one of its cars. The petition alleges, in substance, that plaintiff, Mrs. Minnie Walker, was a passenger on one of defendant's "North Belt" cars in the city of Dallas, and desired to alight at Haskell avenue; that she signaled the conductor in charge of the car to stop the car at Haskell avenue, but the signal was disregarded; that the next street after passing Haskell avenue was Peak street, into which the street railway tracks entered and turned north, making a sharp curve; that in approaching this curve the car upon which plaintiff was riding was being negligently operated and run at a dangerous rate of speed, to wit, at about 30 miles per hour, and struck the curve at Peak street with great force, by reason of which negligence plaintiff was thrown from the car to the ground and seriously injured. The petition further alleges, as a ground of negligence on the part of defendant, that the rate of speed at which the car was being operated was in violation of a city ordinance of the city of Dallas, making it unlawful to "drive or move a street car" at a greater rate of

speed than 12 miles per hour in that part of the territory of the city where the accident to plaintiff occurred. The defendant answered by general and special demurrers, a general denial, and specially that Mrs. Walker, on the occasion of the accident complained of, was guilty of contributory negligence in the following particulars, namely: "(a) She left her place of safety upon the defendant's car while the same was in motion, and proceeded to the running board thereof; (b) she alighted from one of defendant's cars while the same was in motion, and before it had stopped for passengers to alight therefrom; (c) that in alighting from said car she failed to follow the motion thereof, alighting therefrom in a negligent and careless manner." Defendant further says that, if the accident happened in the manner complained of, plaintiff's wife, Minnie Walker, occupied a seat in the car, and while she was so occupying same she was in a place of safety; that she voluntarily left her seat and place of safety in the car while the car was in motion and while it was approaching a curve in the defendant's track at the intersection of Main and Peak streets; that she then stood upon the floor of the car and stepped down upon the running board thereof; that any jerk or movement of the car around the curve was only such as was necessarily and ordinarily incident to the operation of the car; and that plaintiff's wife assumed the risk of any injury she may have sustained as the result of such operation, having full knowledge of the fact that said car was approaching the curve. A jury trial resulted in a verdict and judgment for the defendant, and the plaintiffs appeal.

The evidence shows that Mrs. Walker was a passenger on defendant's car, as alleged by her, and there is testimony to the effect that the car at the time of the accident was probably moving at a greater rate of speed than 12 miles per hour, and that Mrs. Walker by reason of the movement of the car, as it was making the curve at Peak street, fell or was thrown from it and seriously injured, but that the defendant was not guilty of actionable negligence, and that Mrs. Walker attempted to alight from a moving car, and simply in doing so, or in the manner she attempted to alight, was guilty of negligence, proximately causing her injuries, seems to be very clearly established by a preponderance of the evidence. That the evidence was, at all events, amply sufficient to authorize and sustain the verdict rendered in defendant's favor, is not denied; nor do we think it could be reasonably denied.

[1, 2] The first assignment of error is that "the court erred in sustaining the defendant's exception to that part of the plaintiff's petition wherein plaintiffs show that the defendant company, through its agents, failed and refused to stop said car, although prop-

erly signaled to do so, at Haskell avenue, said signal having been given in time for said car to stop," and charging that the defendant's conduct in that behalf was negligent and was one of the causes that precipitated the plaintiff's injury. The court also erred in sustaining the objection of the defendant to the admission of plaintiff's testimony to the effect that she "did signal for said car to stop at said Haskell avenue, and made efforts to have same stopped, but that it did not stop pursuant to her proper request." The record sent to this court does not show that any such exception as that mentioned in the assignment was presented to and acted upon by the trial court; nor does the record show by bill of exception or otherwise that the trial court sustained objections of the defendant to the admission of testimony offered by the plaintiffs to the effect that Mrs. Walker signaled for the car in which she was riding to stop at Haskell avenue. In the absence of a record entry showing that the exception referred to was sustained, the ruling of the court cannot be reviewed. Likewise, without a bill of exception showing that the testimony mentioned in the assignment of error was excluded, the court's action in reference thereto cannot be considered and reviewed by this court.

[3] The third and fourth assignments of error are grouped. The third is as follows: "The court erred in not submitting to the jury in its main charge the issue as to the speed of the car and the law regulating the speed of running street cars within the corporate limits of the city of Dallas, and only submitting to them the common-law duties imposed upon the defendant, the ordinances and state law regulating the speed of cars and fixing the speed limits ought to have been submitted to the jury in the main charge, and the court erred in failing so to do." The fourth is: "The court erred in refusing the special charge requested on behalf of the plaintiff charging the jury as touching the effect of the law as written in articles 487 and 486, the same being valid ordinances of the city of Dallas. If the said special charge was erroneous in itself, it was sufficient to direct the court's attention to the law upon the issues of fact that the plaintiffs desired submitted to the jury, and the court erred in failing to give a correct charge in that particular."

It would seem that under the decisions in this state the ordinance in question has no application to the facts of this case. In *Railway Co. v. Highnote*, 99 Tex. 23, 86 S. W. 923, the object and scope of a city ordinance forbidding the running of railway trains or cars within the limits of the city at a speed in excess of six miles per hour was under discussion, and the Supreme Court said: "The purpose of the ordinance was to protect persons who might be lawfully upon or cross-

ing the track, but it has no reference to passengers upon moving trains who might wish to get off while in motion. Therefore there was no duty on the part of the defendant railway company to the plaintiff to run its train at a speed less than six miles per hour, and negligence in the violation of that ordinance cannot be imputed in favor of the plaintiff to give him a right of action for the injury received in leaving the train in that instance." Following that decision, this court held, in the case of *Railway Co. v. Schuttee*, 91 S. W. 806, that such an ordinance had no application to one attempting to board a moving train at a station.

[4] Again, the special charge refused was incorrect in an important particular. It not only instructed the jury that if the defendant's car, upon the occasion of the accident, was operated at a greater rate of speed than 12 miles per hour, etc., they should find for the plaintiff, but the jury were further told that the defendant would be responsible in law for any act of negligence in the operation of its car on said occasion, regardless of the rate of speed at which said car was going, etc. The charge therefore did not limit the liability of the defendant to acts of negligence charged in the plaintiff's petition, but permitted the jury to hold the defendant responsible and liable in damages for the injuries received by Mrs. Walker, if they believed such injuries were the result of any character of carelessness or negligence on the part of operatives of the car, whether such negligence was alleged as a basis of recovery or not.

[5] But appellant insists, as shown by the fourth assignment of error, copied above, that, if the special charge was erroneous, it was sufficient to direct the court's attention to the failure of the general charge to submit the issue desired, and the court should have prepared and given a correct charge on the subject. The answer to this contention is that, if the appellants desired this complaint considered on appeal, they should have raised and presented it by an assignment of error, asserting that the court should, in view of the requested charge, have given another and proper charge. *Equitable Life Assur. Soc. v. Maverick*, 78 S. W. 560; *El Paso Elec. Ry. Co. v. Harry*, 37 Tex. Civ. App. 90, 83 S. W. 735; *Metcalfe v. Lowenstein*, 35 Tex. Civ. App. 619, 81 S. W. 362; *Bank v. Moor*, 34 Tex. Civ. App. 476, 79 S. W. 53.

[6] In the first paragraph of the court's charge the jury was instructed as follows: "It was the duty of the defendant, its servants and employes engaged in the operation of the car upon which the plaintiff was a passenger, upon the occasion referred to in the plaintiff's petition, to exercise that high degree of care for her safety that would have been usually exercised by very cautious, competent, and prudent persons under the same

or similar circumstances, and the failure, if any, to exercise such care, is negligence on the part of defendant." The use of the word "usually" in this charge is objected to, and the objection urged in appellant's fifth assignment of error. The appellee objects to a consideration of the assignment, because no complaint was made by appellants, in their amended motion for a new trial filed in the district court, of the correctness of the charge in defining the degree of care owed by defendant to Mrs. Walker. This objection is well taken and will be sustained. Rule 24 (142 S. W. xli), as recently amended by the Supreme Court, relating to assignments of error for the government of the Courts of Civil Appeals of this state, is as follows: "The assignment of error must distinctly specify the grounds of error relied on and distinctly set forth in the motion for a new trial in the cause, and a ground of error not distinctly set forth in a motion for a new trial in the cause and not distinctly specified in reference to that which is shown in the record, or not specified at all, shall be considered as waived, unless it be so fundamental that the court would act upon it without an assignment of error as mentioned in rule 23." Under this rule, as we construe it, a ground of error not "distinctly set forth in the motion for a new trial" filed in the lower court should not be considered on appeal, unless such error is fundamental. Such is not the character of the supposed error complained of. Appellants' amended motion for a new trial was filed in the court below about two months after amended rule 24, above quoted, became effective, and in it appellants seem to have understood and appreciated its demands. They complain in said motion at considerable length and with much particularity of numerous alleged errors committed by the trial court, but nowhere complained that the court's charge upon the degree of care which the appellee owed Mrs. Walker was incorrect.

[7] If, however, the matter was properly presented to this court for review, we are not prepared to say there was error in the charge. *Railway Co. v. Miller*, 79 Tex. 78, 15 S. W. 264, 11 L. R. A. 396, 23 Am. St. Rep. 308; *Railway Co. v. Harrison*, 32 Tex. Civ. App. 368, 73 S. W. 38; *Dallas Consolidated Traction Co. v. Randolph*, 8 Tex. Civ. App. 213, 27 S. W. 925; *Railway Co. v. Davidson*, 3 Tex. Civ. App. 542, 21 S. W. 68; *Railway Co. v. Morrow*, 93 S. W. 162. It probably would have been more in conformity to the charge usually given upon the subject had the word "usually" been omitted; but its use does not, in any event, constitute reversible or material error.

[8] The remaining assignments of error complained, respectively, of the giving of appellee's special charges Nos. 1, 2, and 3. Charge No. 1 instructed the jury, in effect, "that if they believed that the plaintiff, Mrs.

Walker, left her seat in the car, and that the same was a place of safety, and that she voluntarily proceeded to the edge of the car or to the running board thereof, and while there she was thrown from the car, and that an ordinarily prudent person would not have done so, and that such acts contributed to her injury, then she was guilty of negligence and could not recover." By charge No. 2, they were told, in substance, that if they believed Mrs. Walker alighted from defendant's car while the same was in motion, and that an ordinarily prudent person would not have so acted under the same circumstances, that such act proximately contributed to her injuries, and that in the event they so believed to find for defendant. Charge No. 3 is to the effect that if the jury believed that Mrs. Walker alighted from defendant's car while the same was in motion, and should further find that in alighting from said car she failed to follow the motion thereof, but alighted therefrom without facing the direction in which the car was moving and without following the motion thereof, and should further find that an ordinarily prudent person would not so have acted under the same circumstances, and that such conduct upon her part contributed to the accident complained of herein, then Mrs. Walker was guilty of contributory negligence which would preclude a recovery.

The only proposition advanced under these assignments is to the effect that the giving of the three special charges had the purpose and effect of giving undue prominence to the issue of contributory negligence, and therefore on the weight of the evidence. Confining ourselves to the objection urged by the proposition propounded, we hold there was no error in giving the charges. Three separate and distinct issues of contributory negligence on the part of Mrs. Walker were tendered by defendant's answer, and the evidence offered in support thereof was amply sufficient to establish each and all of them. These were the issues submitted in the charges complained of, and it occurs to us that the court would have erred had it refused to give either of said charges. The separate issues of contributory negligence having been raised by the pleadings and the evidence, it became the duty of the court, especially in view of the request therefor, to charge the jury the law arising upon the facts with reference to each of such issues. The charges were not, therefore, objectionable for the reason urged.

A careful review of the record has convinced us that the proper verdict has been rendered in this case, that appellants' assignments of error disclose no reversible error, and that the judgment of the district court should be affirmed. It is therefore, accordingly, so ordered.

WILKIN et al. v. SIMMONS et al.

(Court of Civil Appeals of Texas. Amarillo.
Nov. 16, 1912. Rehearing Denied
Dec. 14, 1912.)

1. EXECUTORS AND ADMINISTRATORS (§ 883*)—
SALE OF LAND—COLLATERAL ATTACK.

A sale of land upon an administrator's application for its sale on the ground of the necessity for the support of minor heirs, and that it is for the best interest of the estate, is merely erroneous, and not absolutely void so as to allow collateral attack on the ground that it was for an unauthorized purpose.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 1554; Dec. Dig. § 883.*]

2. EXECUTORS AND ADMINISTRATORS (§ 849*)—
SALE—JURISDICTION OF PROBATE COURT.

If the probate court acquires jurisdiction of the property of an estate and of the persons interested therein, it has complete jurisdiction so that its order of sale can only be tested in direct proceedings and not on collateral attack.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1446, 1449-1455; Dec. Dig. § 849.*]

3. JUDGMENT (§ 495*)—COLLATERAL ATTACK.

Every presumption is in favor of the jurisdiction of a court of general jurisdiction in a collateral attack on its judgment.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 933, 934; Dec. Dig. § 495.*]

4. EXECUTORS AND ADMINISTRATORS (§ 326*)—
SALE OF LAND — PURPOSE — SUPPORT OF
MINOR CHILDREN.

If the probate court had fixed the allowance for the support of a widow and minor children of decedent, and there was a necessity for providing funds for a year's support of the children, it was authorized to order a sale of land of the estate, on the administrator's application, for the support of such heirs.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 1343; Dec. Dig. § 326.*]

5. EXECUTORS AND ADMINISTRATORS (§ 326*)—
ADMINISTRATOR'S SALE—JURISDICTION.

The existence of orders by the probate court fixing the allowance for the year's support of minor children and the amount of the allowance in lieu of exempt property would not be necessary to give the court jurisdiction to order the sale of land of the estate for the support of such children as heirs.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 1343; Dec. Dig. § 326.*]

6. EXECUTORS AND ADMINISTRATORS (§ 349*)—
SALE—VALIDITY.

The question whether a sale of the land was necessary for the support of minor heirs, on an administrator's application for a sale for that purpose, was for the determination of the probate court, and its judgment thereon cannot be collaterally attacked.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1446, 1449-1455; Dec. Dig. § 349.*]

7. EXECUTORS AND ADMINISTRATORS (§ 349*)—
SALE OF LAND—DESCRIPTION.

The land sold on an administrator's application for its sale for the support of minor heirs was described in the patent to decedent L. as, the "L. pre-emption survey of 160 acres in H. county, known as survey No. 2, block M. & L." etc., giving field notes. L. and others laid out the town of P. and dedicated the streets,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

etc., "of said town of P. in said county of H., as shown by the accompanying map of said town"; the north part of the town being the south half of the L. pre-emption. The administrator's application for an order of sale described the property as "a certain tract of realty belonging to the estate of L., and said real estate is here described as all those lots yet unsold belonging, situated in the county of H., and better known as the north half of the town of P., patented to L. by virtue of the pre-emption laws." *Held*, that the land sold was sufficiently described so as to make the order of sale valid on collateral attack.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 1446, 1449-1455; Dec. Dig. § 349.*]

8. EXECUTORS AND ADMINISTRATORS (§ 388*)—ADMINISTRATOR'S SALE — NECESSITY OF DEED.

An order of sale of the land of an estate, report thereof, and confirmation, are sufficient to give the purchaser title without the execution of a deed, so that it is immaterial that a deed was made before the order of confirmation.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 1573-1582; Dec. Dig. § 388.*]

9. EXECUTORS AND ADMINISTRATORS (§ 31*)—OUSTER—APPOINTMENT OF GUARDIAN.

The appointment of a guardian of minor heirs did not ipso facto oust the administrator of decedent's estate, in view of Rev. Civ. St. 1911, art. 3235, providing that upon a death intestate decedent's property shall vest in his heirs at law, but all of his estate shall pass to the administrator for distribution pursuant to law; the appointment of the guardian, who was an aunt of the heirs, being advisable so that they could reside with her at the homestead.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 186-190; Dec. Dig. § 31.*]

Appeal from District Court, Hale County; F. P. Greever, Special Judge.

Suit by R. H. Wilkin against A. W. Simmons and another, impleaded, in which one McCormick intervened. From a judgment against plaintiff and intervener, they both appeal. Affirmed.

J. L. Penry, of Amarillo, L. C. Penry, and Randolph & Randolph, all of Plainview, for appellants. Madden, Trulove & Kimbrough, of Amarillo, for appellees.

PRESLER, J. This is a suit by appellant R. H. Wilkin in the form of trespass to try title to lots Nos. 27 and 28 in block No. 31, in the town of Plainview, Hale county, Tex., in which the appellant McCormick intervened, seeking to recover a half interest in the same property. The appellee (L. B. Simmons) answered by general demurrer, plea of not guilty, general denial, and a special answer, setting up the statute of limitation; also by special answer impleading his warrantor, J. C. Pipkin. The original defendants other than the appellee having been dismissed, the case proceeded to trial before the court without a jury and resulted in a judgment in favor of appellee (L. B. Simmons) and against the plaintiff and the intervener, and also in favor of the warrantor, J. C. Pipkin. From this judgment

both appellants duly appeal to this court and here seek to have said cause reversed and rendered in their favor upon errors assigned.

In our opinion, it is apparent from the record that the entire case as presented by the appeal turns upon the question of the validity of the sale by C. H. Gilbert, administrator of the estate of E. L. Lowe, to J. C. Pipkin, which included the two lots sued for and three other lots in the same block in the town of Plainview; the deed reciting a consideration of \$177.50. The validity of this sale, as shown under appellant's tenth assignment of error, is attacked upon the ground that the orders of the probate court of Hale county, Tex., supporting this sale, are invalid and subject to collateral attack because it is claimed that the probate court was without jurisdiction to enter the orders and that such lack of jurisdiction appears upon the face of the record, in that the application and the order of sale are not authorized by law. It appears from the evidence that E. L. Lowe died in Hale county, Tex., in 1889, and that C. H. Gilbert was duly appointed and qualified as administrator of said Lowe's estate; that said Lowe left a will not naming an executor, bequeathing \$1,280 to said Gilbert in trust, to be used by him and interest to be paid to the two children which the deceased left surviving him, and leaving the remainder of his property to be distributed according to law; that deceased at the time of his death was a widower and left as his only heirs at law two little girls, one named Janie, about five years of age, and one named Mattie, who was also a minor; that Mattie first married a man by the name of Davis, from whom she was afterwards divorced, and then married a man by the name of Paulson, with whom she still lives; that Janie married a man by the name of Quillen; that the lots in controversy were not a part of the homestead of deceased; that deceased's family at the time of his death consisted of himself, the two little girls, and M. A. Lowe, an aunt of their deceased mother, a sister of C. H. Gilbert, the widow of deceased's brother; that Gilbert also lived at deceased's home when in town; that some time after the appointment and qualification of said C. H. Gilbert as administrator of the estate of deceased, the said M. A. Lowe was appointed guardian of the two children; that the said guardian and Gilbert, the uncle and aunt of the two children, continued to keep house as Lowe had done and took care of the children, using the proceeds of the sale of the property belonging to the estate for that purpose; that Gilbert got the orders of the court shown in the record and with the knowledge and consent of his sister, guardian of the children, sold the lands and used the proceeds for paying the expenses incurred by her in tak-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

ing care of the two children; that he did this because the children had no other means of support; that as administrator of the estate he had a settlement with Mrs. Lowe, the guardian, and accounted to her for all the proceeds that he got from the sale of the land; that the children got the benefit of these proceeds through their guardian for food, clothing, and education; that the money received from Pipkin for the two lots in controversy was used for the support of said children. Gilbert testified that he did not use the money for any other purpose than for the children.

From the inventory and list of claims filed by the administrator, it further appears that the estate consisted largely of real estate, and that there were debts owing by the estate in addition to the legacy of \$1,280 bequeathed to the said Gilbert. There was also an insurance policy of \$2,000; but whether this was a part of the estate or not, or who were the beneficiaries, does not conclusively appear further than it appears to have been collected by the administrator of the estate and turned over to the guardian of the minors upon her receipt therefor. It does not appear how this money was used by said guardian. The foregoing appearing to be the condition of the estate at the May term, 1890, the administrator made the following application to the county court: "Estate of E. L. Lowe, deceased, In the County Court of Hale County, Texas, May Term, 1890, Sitting in Probate. To the Honorable J. C. Burch, Judge of Said Court, Presiding: Your petitioner, C. H. Gilbert, administrator of the estate of E. L. Lowe, deceased, respectfully represents to said court that there is a certain tract of real estate belonging to the said estate of E. L. Lowe and said real estate is here described as all those lots yet unsold belonging, being situated in the county of Hale and state of Texas, and better known as the north half of the town of Plainview, patented to E. L. Lowe, by virtue of the pre-emption laws of the state of Texas. Your petitioner further represents that it is necessary for the support and maintenance of the heirs and for the best interest of said estate that said property hereinbefore described be sold at private sale for cash or on such terms as you may think best for said estate. [Signed] C. H. Gilbert"—and sworn to.

The order granting the application and directing the property to be sold is as follows: "The estate of E. L. Lowe, May 6, 1890. Now comes on to be heard the application of C. H. Gilbert, administrator of the estate of E. L. Lowe, deceased, asking that an order of court be granted to sell at private sale certain lots in the town of Plainview, Tex., and it appearing to the court that it is necessary for the support and maintenance of the heirs that said property be sold, it is therefore ordered and adjudged by the

court that C. H. Gilbert, administrator of the estate of E. L. Lowe, deceased, be granted full power to sell so much of the real estate belonging to said estate, situated in the town of Plainview, as is necessary for the support and maintenance of said heirs, and that said sales be made in private and for cash or on a credit as may be in the mind of said administrator for the best interest of said estate." The notation on the judge's docket is as follows: "May 6, 1890. Application to sell real estate approved." So much of the administrator's report of sale as relates to the lots in question is as follows: "To the Honorable County Court of Hale County, Sitting in Probate at the Regular Term of Said Court of Hale County, Sitting at its Regular November Term, A. D. 1890, J. C. Burch, County Judge, Presiding: I beg to represent that pursuant to an order of your court, passed at the May term, 1890, I, C. H. Gilbert, administrator of the estate of E. L. Lowe, deceased, have since that time made the following sales of real estate belonging to said estate: * * * To J. C. Pipkin, lots 27, 28, 29, 30 and 31, block 31, consideration \$177.50, cash, July 12, 1890. I, C. H. Gilbert, administrator, * * * of the estate of E. L. Lowe, deceased, do solemnly swear that the above and foregoing is a true and correct list of all of the sales made by me under the order of court passed at the regular May term of your court, providing for the sale of certain real estate belonging to the estate of E. L. Lowe, and respectfully ask that said sales be confirmed. C. H. Gilbert, Administrator. Sworn to and subscribed before me this the 7th day of November, 1890"—the place for the signature of the officer being blank. The order of the court, approving the sale, is as follows: "Estate of E. L. Lowe, deceased, November 7, 1890. Now at this time came on to be heard the above and foregoing report of C. H. Gilbert, administrator of the estate of E. L. Lowe, deceased, as to the real estate sold by him belonging to said estate, and the court, after hearing said report read and duly considering the matter, is of the opinion that said sale should be in all things confirmed and said report approved. It is therefore ordered and decreed by the court that said report be and the same is hereby in all things approved and the sales mentioned therein confirmed, and that C. H. Gilbert, administrator as aforesaid, is hereby authorized to make good and sufficient conveyance in law to the several purchasers of the real estate mentioned in the above report."

The administrator's deed to J. C. Pipkin appears to have preceded the confirmation order, having been executed on the 17th day of July, 1890, and, together with the acknowledgment and certificate of registration thereof, is as follows:

"The State of Texas, County of Hale. Know all men by these presents, that I, C.

H. Gilbert, administrator of the estate of E. L. Lowe, deceased, and of the county of Hale and state aforesaid, for and in consideration of the sum of one hundred and seventy-seven and 50-100 dollars to me in hand paid by J. C. Pipkin, have granted, sold and conveyed and by these presents do grant, sell and convey unto the said J. C. Pipkin, of the county of Hale and state of Texas, all those certain tracts and lots of land situated in Plainview, Texas, known and described as lots numbers 27, 28, 29, 30 and 31, in block 31, as shown by the town plat of Plainview, which is of record in the clerk's office of Hale county, Texas. To have and to hold the above-described premises together with all and singular the rights and appurtenances thereto in any wise belonging unto the said J. C. Pipkin, his heirs and assigns, forever, and I do hereby bind myself, my heirs and successors, in office to warrant and forever defend all and singular the said premises unto the said J. C. Pipkin, his heirs and assigns, against every person whomsoever lawfully claiming or to claim the same or any part thereof. Witness my hand at Plainview, this 17th day of July, A. D., 1890. C. H. Gilbert, Administrator. Signed and delivered in the presence of ———.

"The State of Texas, County of Hale. Before me, S. P. Strong, clerk of the county court in and for Hale county, Texas, on this day personally appeared C. H. Gilbert, administrator of the estate of E. L. Lowe, deceased, known to me to be the person whose name is subscribed to the foregoing instrument, and acknowledged to me that he executed the same for the purposes and consideration therein expressed and in the capacity therein set forth. Given under my hand and seal of office, this 17th day of July, A. D. 1890. S. P. Strong, Clerk.

"Filed for record July 18th, 1890, at 8 o'clock p. m.; recorded July 19th, 1890, at 8 o'clock a. m. S. P. Strong, County Clerk."

[1] Appellants, under their first assignment of error, complain of the action of the court in admitting in evidence the list of claims as shown by the claim register of Hale county probate record in this estate, upon the ground that the same was not based upon an application, order of sale, and order confirming the sale for the purpose of paying debts of the estate, and that in this case, the various orders subsequent showing a different purpose than the payment of debts, such evidence was immaterial and, under their second, third, fourth, and fifth assignments of error, object to the admission in evidence of the application to sell the real estate belonging to the estate of deceased, and to the order of sale granted, the report of the administrator of the sale of the property sold, and the order confirming the sale, upon substantially the same grounds; that is, that the purpose of the sale was one not authorized by law, and that there was no sufficient

description of the property ordered sold and none of the property sold. The question thus presented as to the authority of the court to grant the orders referred to is decisive of this case, and we are of the opinion that the testimony objected to was admissible for the purpose of showing an order of sale by a court of competent jurisdiction not subject to collateral attack, supporting the deed of C. H. Gilbert, administrator, to J. C. Pipkin, conveying the property in controversy. Upon the evidence, the county court of Hale county unquestionably had jurisdiction of the estate of E. L. Lowe, and had authority to order any or all of his property to be sold. The purposes for which the court having authority of jurisdiction may direct a sale of property are not jurisdictional. In our opinion, such questions go to the propriety or even the validity of the court's order when tested in a direct proceeding; but, when a court having jurisdiction of the subject-matter and the parties makes an order of sale for a purpose not authorized by law, we think such order is simply erroneous, but not void, and to correct the same the law provides specific and ample remedies; but if these remedies be neglected, and the parties interested do not choose to pursue them, the order stands as the order of a court of competent jurisdiction and is valid and binding against every collateral attack.

In *Poor v. Boyce*, 12 Tex. 440, the petition or application of the administrator for the sale of the property recited that there had come to the hands of the administratrix certain improvements rightfully belonging to the estate, but "about which there will be a great deal of litigation and expense to the petitioner to obtain the land." For this reason, she asked for an order to sell the land. Accordingly, an order was made for the sale of the improvements, and exception was reserved to the introduction of this application and order, and the court in an opinion by Judge Wheeler, said: "The subsequent sale by order of the probate court divested the title of the heirs. The petition of the administratrix gave the court jurisdiction. *Finch v. Edmonson*, 9 Tex. 504. All other questions, in the absence of fraud, are concluded by the judgment. In the case of *Lynch v. Baxter*, 4 Tex. 431 [51 Am. Dec. 735], it was determined that it was not essential to the title of the purchaser of property at administrator's sale that the record should show a necessity for the sale. The order of sale is conclusive of that question until it be set aside by a proceeding having that object directly in view, and the purchaser, in the absence of fraud, will be protected."

In *Weems v. Masterson*, 80 Tex. 45, 15 S. W. 590, the application for an order of sale by a guardian of minors represented that they owned a certain tract of land which

was "constantly depreciating in value on account of depredations that are constantly being made by parties unlawfully entering upon said land and carrying off the wood and timber; * * * that it is their belief that it would be for the interest of said minors to sell the land and invest the proceeds in some other way." The court ordered the sale to be made. The title of the purchaser was attacked upon the ground that the statute did not authorize the court to order a sale of the ward's land by the guardian for the purposes expressed in the application. The opinion of the court was delivered by Chief Justice Stayton. He reviewed the decisions in Texas, from *Lynch v. Baxter*, down, and held that the county courts, in all matters relating to the administration of estates of deceased persons and minors, are courts of general jurisdiction, and that all presumptions will be indulged in favor of the jurisdiction of such courts when exercised over a subject-matter confided to them by law that would be indulged in favor of the jurisdiction of any other court of general jurisdiction, and that their judgments and decrees cannot be collaterally attacked unless the record shows the want of jurisdiction; that the county court of Harris county, which made the order, did have power to order and confirm the sale of lands belonging to a minor's estate; that its jurisdiction had attached to the estate of minors then being administered; that although the application for the order to sell did not state that it was necessary for the support and education of the minors or for the payment of debts, yet, if absolutely necessary to confer jurisdiction on the court, it ought to be presumed that another application had been filed before the order was made, and that the order of the court, directing the sale to be made and confirming the sale, would not be void and subject to collateral attack, although no application to sell other than that found in the record was ever made; that to hold the order of sale and the sale void, because the application set up a purpose not specified in the statute, would be like holding that a judgment of the district court could be collaterally attacked because the pleadings were defective. That in that case the proceedings of the probate court should have been held to be conclusive of the validity of the sale of the lands; that the case of *McNally v. Haynes*, 59 Tex. 585, in which it was suggested that, if the application for the order to sell lands of an estate should disclose the fact that the purpose or object of the sale was not such as to authorize the court to make the order, the purchaser could not rely upon it, should be disapproved; that the fact that the application may be defective cannot deprive an order of its conclusive effect in all collateral proceedings.

This is one of the great judgments ren-

dered by Judge Stayton. It was intended to review the whole law of the subject, clarifying the principles involved, and establishing the law upon the firm basis that, the probate court having potential jurisdiction of the estates of deceased persons and minors, that jurisdiction attached to the estate by the commencement of administration proceedings on such estate in that court, and when an application was made by the administrator or guardian for the sale of lands belonging to the ward or deceased, and this application was followed by an order directing the guardian or administrator to sell the lands, it becomes immaterial, on collateral attack, whether the application was perfect or defective, whether it asks for the sale for a purpose authorized by law, or not authorized by law; that these questions went, not to the jurisdiction of the court, but to the correctness of its orders; and that the question of correctness could only be reviewed in a direct proceeding and could not be called in question in a collateral proceeding.

In *Taffinder v. Merrell*, 95 Tex. 95, 65 S. W. 177, 93 Am. St. Rep. 814, the application of the guardian for an order to sell his ward's land stated that: "It would be greatly to the interest of his said ward for said property to be sold, because said property is unimproved and cannot be rented for anything, and the taxes will soon consume the entire amount." No other reason was given for asking for the order of sale. The order of court likewise ordered the sale to be made at public or private sale for cash or on credit, simply reciting that it appeared to the satisfaction of the court that "it is for the best interest of the minors that said real estate be sold." Here the application and the order of sale both showed that the order was asked for and was made simply upon the ground that it would be for the best interest of the minors. But the statutes neither then, nor at any other time, have ever authorized the probate court to make a sale of land belonging to minors simply upon the ground that the court and guardian might deem it to their best interest, and certainly never did authorize the sale of land belonging to a minor simply to be relieved of the burden of paying taxes on the land. Judge Williams delivered opinion of the court, saying: "The first objection to the guardian's sale above stated (that is, that it appears from the record of the probate proceedings that said sale was made for a purpose for which a sale was not authorized by law [95 Tex. at page 100, 65 S. W. at page 178, 93 Am. St. Rep. 814]) is likewise answered by the opinion of this court in the case of *Weems v. Masterson*, 80 Tex. 45 [15 S. W. 590]. Under the rules laid down in that case, the jurisdiction of the county court did not depend upon the showing in the application of one of the statutory causes for

such sales. The absence of such a showing, or the statement of a reason which would not authorize the sale, might make the order of a sale erroneous; but it does not follow that it was not within the power of the court to make such order. In the language of the opinion referred to, the application for the sale was sufficient to invoke the exercise of the jurisdiction the court possessed over the subject-matter; those interested must be conclusively presumed to have had notice of the application such as the law prescribes; and the decrees of the probate court in this collateral proceeding must be deemed conclusive of the fact that the sale was made for a lawful purpose and in a lawful manner, in the absence of some evidence in the record showing to the contrary, other than that the application was defective."

[2] In other words, the doctrine of our Supreme Court is settled to this effect: That the death of a resident of a county, leaving an estate in the county, gives the probate court of that county a potential jurisdiction over all the estate of the deceased resident; that, when the administration proceedings upon said estate are instituted in said court, its active jurisdiction over that estate attaches; that when in the course of the administration of that estate the administrator files an application to have lands belonging to the estate sold, since the statutes require that notice of the application for such sale be presumed on collateral attack that they did have notice, and that thereby the court acquired jurisdiction over the persons of all persons interested in the property. The court then being a court of general jurisdiction in probate matters and having acquired jurisdiction of the subject-matter (that is, of all the property belonging to the estate) and of the person (that is, of all persons interested in the estate), it had complete and perfect power (that is, complete and perfect jurisdiction, which means jurisdiction over the subject-matter and over the person), and no difference how faulty or defective or improper the order of sale may be, these are matters which can be tested only on direct proceedings, and which cannot be raised on collateral attack, but, as to all such objections on collateral attack, the judgment of the court is conclusive and binding. Tested by this rule, which we conclude to be the law of Texas, there can be no doubt but that in this suit the order of sale made by the probate court of Hale county upon the application of C. H. Gilbert, administrator of the estate of E. L. Lowe, the sale by the administrator under that order, the confirmation of such sale upon being reported by the administrator, and the administrator's deed in favor of J. C. Pipkin, must be treated as having conferred complete title upon Pipkin to the land in controversy.

This is precisely upon the same principle in the case of *Pelham v. Murray*, 64 Tex. 477, 482, where a probate court had adjudged certain property exempt and not subject to sale and directed the administrator to surrender it to the widow, reciting that she was the only remaining constituent of the family, and that she was willing to accept the same in lieu of the balance due her on exemption, that the order was held not void and subject to collateral attack, although the decree was erroneous, and the property was not in fact exempt property. Judge Stayton delivered the opinion in that case also, and he says: "We are of the opinion that while the judgment was erroneous, and therefore might have been avoided by proper proceedings, it was not void and is conclusive of the question so long as it was not set aside by some direct proceedings having that end in view."

In the case of *Martin v. Robinson*, 67 Tex. 379, 3 S. W. 555, the Supreme Court said: "When in a collateral attack it is said that an administration was a nullity, unless some fact be then shown the words 'null and void' are used in the sense of voidable, for if there then be a fact or facts, proof of which would make the administration valid, it cannot be void, and the legal presumption is that the very fact which would give validity was proved before the court which granted the administration. The rule suggested in this respect in some cases would be the rule in a proceeding appellate in character if the cause be tried *de novo*; but it seems to us that no such rule can exist when the validity of an administration granted by a decree of a court of record having general jurisdiction is sought to be attacked or held for naught in a collateral proceeding, for, if it would be possible to prove facts sufficient to sustain the administration, it must be presumed on such attack that these very facts were proved before the administration was granted. We understand the rule to be, when the judgment or decree of such court is collaterally called in question, that it must be deemed valid unless it appears that no facts could have been shown which would render it so."

[3] This opinion is but another statement of the rule recognized in numerous other decisions, both in Texas and in other jurisdictions, that if a court of general jurisdiction has made an order, judgment, or decree, every presumption will be indulged in favor of the jurisdiction of the court when such order, judgment, or decree is collaterally attacked. The rule appears to be applicable in this case because it appears that there were debts existing against the estate of E. L. Lowe at the time application for the sale of property, including the property in question, was made.

[4] It appears that there was a necessity existing, at the time the application for or

der of sale was made, to provide funds for the year's support of the minor children of deceased, and the statute makes it the duty of the court upon his own motion, apparently at the first regular term of the court after the grant of letters testamentary or of administration, to fix the amount of allowance for the support of the widow and minor children of the deceased, and, as soon as the inventory, appraisement, and list of claims are returned, to order a sale of the estate, or so much thereof as will be sufficient to raise the allowance. We think the situation was such as to authorize the probate court to make a sale of the property belonging to E. L. Lowe's estate for the support of the heirs. The order authorizing the sale directed that so much of the property should be sold as might be necessary for the support of the heirs.

[5] While there does not appear in the record any order by the court fixing the allowance for the year's support of the minor children, nor any order fixing the amount of the allowance for them, in lieu of exempt property, but such orders may have existed, and whether they did or not would not be a jurisdictional question. The court having jurisdiction to order the sale (provided the allowance had been made), a purchaser could rely on the order of sale and need not look for the order making the allowance. We think it sufficiently appears, from the evidence in support of the orders in question and of the judgment of the district court, that there was a necessity for raising an allowance for the year's support of the heirs or minor children, and that there was a necessity for raising the funds to which they were entitled in lieu of exempt property. There was also a legacy under the terms of the will of \$1,280 to be raised. One of the purposes for which facts existed which would have authorized the court to make the sale, the support of the minor children, is made a ground of the application and is mentioned in the order of sale.

[6] We also think that the question as to whether the condition of the estate as it existed at the time the order of sale was granted as to the necessity of selling the lands was a question for the determination of the court in the exercise of its jurisdiction conferred by law, and that its judgment thereon is not subject to collateral attack.

[7] We are further of the opinion that the lands in controversy were sufficiently described. The patent to Lowe described the land as the E. L. Lowe pre-emption survey, of 160 acres in Hale county, known as survey No. 2, block M. & L., etc., giving field notes. E. L. Lowe and others laid out the town of Plainview and dedicated to the public the streets, alleys, and public square "of said town of Plainview in said county of

Hale, state aforesaid, as shown by the accompanying map of the said town of Plainview." It was admitted in the record that the north part of the town of Plainview was the south half of the Lowe pre-emption. There were no homestead rights in the property in controversy because Lowe with his children and M. A. Lowe, the aunt of his deceased wife, was at the time of his death residing, to use the language of Judge Kinder, "in a little old house over here about three-quarters of a mile northeast of town." The appraisers included in their appraisal 368 lots in Plainview. The administrator, in his application for authority to sell, described the property as "a certain tract of real estate belonging to the said estate of E. L. Lowe, and said real estate is here described as all those lots yet unsold belonging, situated in the county of Hale, state of Texas, and better known as the north half of the town of Plainview, patented to E. L. Lowe by virtue of the pre-emption laws of the state of Texas." The order of sale authorized C. H. Gilbert, the administrator of the estate of E. L. Lowe, deceased, "to sell so much of the real estate belonging to said estate, situated in the town of Plainview, as is necessary," etc. The administrator reported that he had made "the following sales of real estate belonging to said estate: * * * To J. C. Pipkin, lots 27, 28, 29, 30, 31, block 31, consideration \$177.50, cash, July 12, 1890." The order of confirmation refers to "the above and foregoing report of C. H. Gilbert, administrator of the estate of E. L. Lowe, deceased, as to real estate sold by him belonging to said estate, and orders that said report be and the same is hereby in all things approved, and the sales mentioned therein confirmed," and Gilbert, as administrator, is authorized to make good and sufficient conveyance to several purchasers. The administrator's annual report charges him with receipts of sales of real estate during the year amounting to \$2,027.50. The deed of Gilbert, administrator, to Pipkin, conveys lots 27, 28, 29, 30, and 31, in block 31, as shown by the town plat of Plainview, Hale county, Tex. *Taffinder v. Merrell*, 95 Tex. 95, 65 S. W. 177, 93 Am. St. Rep. 814; *Hermann v. Likens*, 90 Tex. 448, 39 S. W. 282; *Wells v. Polk*, 36 Tex. 126; *Robertson v. Johnson*, 57 Tex. 64; *Macmanus v. Orkney*, 91 Tex. 30, 40 S. W. 715. We therefore conclude that the order of sale must be held valid as against this collateral attack. R. S. 1895, art. 2037, 2038, 2043, 2046, 2047, 2052; *Martin v. Robinson*, 67 Tex. 374, 3 S. W. 550; *Endel v. Norris*, 93 Tex. 540, 57 S. W. 25; *Lynch v. Baxter*, 4 Tex. 441, 445, 446, 51 Am. Dec. 735.

[8] Nor do we think that the objection that the deed bears date before the sale of the land was reported and before the order of confirmation is of any merit, it being well established that the order of sale, report of sale, and

confirmation of sale give the purchaser title, and no deed is necessary; nor is it material that the deed was made before the order of confirmation. *City of El Paso v. National Bank*, 96 Tex. 501, 502, 74 S. W. 21; *Rock v. Heald*, 27 Tex. 527; *Sypert v. McCowen*, 28 Tex. 638; *McBee v. Johnson*, 45 Tex. 634.

[9] Appellants, under their fifteenth assignment, contend that the subsequent appointment of Mrs. M. A. Lowe, as guardian of the minor children ipso facto, superseded and ousted the administrator from his appointment, and impliedly at least terminated the administration and rendered void the orders involved in this case. In our opinion, the authorities cited by appellants do not support this contention, and we have been unable to find any that do. We do not regard the *South Carolina case* (*McLaurin v. Thompson*, Dud. 335) cited by appellant, and holding that, where it appears that in the course of administration of an estate a second administrator has been appointed, his appointment will supersede that of the former administrator, as decisive of the question raised by appellants, or even persuasive to that effect; that is, that the appointment of a guardian for minor heirs will nullify the appointment of an administrator of a deceased person's estate. Our statutes provide that, upon the death of any person intestate, his property shall vest in his heirs at law, but that all of his estate, except such as may be exempt by law from the payment of debts, shall pass to the possession of the administrator to be disposed of in accordance with law (R. S. 1911, art. 3235), and upon the appointment of Gilbert, the administrator, he became entitled to the possession and disposition of all of Lowe's estate except the exempt property. Express provision is also made by our Constitution and laws for the guardian of minor children of deceased persons to reside upon the homestead with the wards. In this case the homestead was no part of the property in controversy, but consisted of other and different property, and it appears to have been considered desirable that the minor children should continue to reside at this home with their aunt as they had previously resided there with her and their father. It appears therefore that there was sufficient reason for her appointment as guardian, in order to enable her legally to occupy with the minors the homestead which their father had left them. We think the intention also evidently was that Mrs. Lowe should occupy and use the homestead and other exempt property with the minor children, thereby lessening the expense of their rearing and maintenance, while her brother Gilbert took out letters of administration for the purpose of handling the other property belonging to Lowe's estate, in accordance with law, and that there was no necessary conflict be-

tween the jurisdiction of Mrs. Lowe as guardian and Gilbert as administrator of the estate. Neither does it appear from the record that upon the appointment of said guardian any order was made and entered of record terminating said administration and discharging the administrator; but it appears from the record that the court recognized the necessity of the existence of both the guardianship and the administration within their respective spheres, and in this we cannot say there was error.

Having carefully examined appellants' remaining assignments not hereinbefore specifically discussed, and finding no reversible error raised under any or either of them, we conclude that the judgment appealed from should be in all things affirmed, and it is, accordingly, so ordered.

AMERICAN CENT. INS. CO. v. HARDIN et al.

(Court of Civil Appeals of Texas. Dallas. Nov. 23, 1912. Rehearing Denied Dec. 21, 1912.)

1. APPEAL AND ERROR (§ 1040*)—HARMLESS ERROR—OVERRULING SPECIAL DEMURRERS.

In an action on a fire insurance policy, error, if any, in overruling special demurrers to those parts of plaintiff's petition relating to what the insurer's agent told him about taking an inventory, and to the taking of additional insurance, was harmless, in view of evidence showing that there was a substantial compliance with the iron-safe clause of the policy, and that the agent authorized the taking of additional insurance or knew thereof before the loss, and had made no objection.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4089-4105; Dec. Dig. § 1040.*]

2. INSURANCE (§ 335*)—FORFEITURE—CONDITIONS SUBSEQUENT—KEEPING BOOKS AND INVENTORY.

Where insured had kept all the invoices of merchandise purchased by him and a book of entry in which he entered all sales on credit and all cash receipts from sales, from which the amount of goods on hand at the time of loss could be approximately established, in substantial compliance with the iron-safe clause, he was entitled to recover.

[Ed. Note.—For other cases, see *Insurance*, Cent. Dig. § 853; Dec. Dig. § 335.*]

3. INSURANCE (§ 384*)—ESTOPPEL—DELIVERY OF POLICY—CONDITION AGAINST OTHER INSURANCE.

An insurer whose agent consented in advance to the taking out of additional insurance and issued a slip showing such agreement was estopped from setting up such additional insurance as a forfeiture of the policy; and, in view of the agent's knowledge, the fact that such slip was not attached to the policy until after the loss was immaterial.

[Ed. Note.—For other cases, see *Insurance*, Cent. Dig. § 1019; Dec. Dig. § 384.*]

Appeal from District Court, Rockwall County; F. L. Hawkins, Judge.

Action by A. P. Hardin and others against the American Central Insurance Company.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

in which Sanger Bros. filed a plea of intervention. Judgment for plaintiffs, and defendant appeals. Affirmed.

E. G. Senter, of Dallas, for appellant. T. B. Ridgell, of Rockwall, for appellees.

RAINEY, C. J. Appellee sued appellant to recover upon a policy of fire insurance for the sum of \$1,000, covering \$150 on store and office furniture and fixtures and \$850 on a stock of merchandise contained in plaintiff's store at Fate, Tex. The policy was attached to the petition, and made a part thereof. It contained the usual warranty clauses, among which was the "iron-safe" clause, and also a clause against coinsurance, unless agreed to in writing and attached to the policy. The petition, among other things, alleged: "That at the time the policy was issued plaintiff had just purchased the stock of goods, and had the original invoices of purchase, and that the agent of defendant, Murphy, agreed within a few days after the policy was issued and before ten days after its date that the said invoices would suffice and be accepted in lieu of an inventory, and, though the policies provide that an inventory should be taken in thirty days, that such invoice should not be required, and was not necessary, and that plaintiff need not take any further inventory than to keep and preserve his invoices of purchase which he then had and which the plaintiff knew; that it was contracted and agreed after the policy was issued and at divers times, and within not less than five or ten days from the date of the policy, that such invoices of purchase would be accepted by the defendant, and no further inventory would be required within thirty days; that plaintiff has invoices, books, and records showing cash and credit sales, and showing his entire business transactions and has same in an iron safe, and that, immediately after the fire, he exhibited the same to the defendant's agent and adjuster, and same was accepted as an inventory and proof of loss by defendant; that, after the issuance of the policy, the plaintiff took out other insurance on his stock of goods with the St. Paul Fire & Marine Insurance Company, which additional insurance was with the consent of the defendant; that plaintiff thereafter took out a policy on his goods in the National Underwriters, with the consent and knowledge of the defendant, and, after having obtained permission of the defendant to do so, in the amount of \$1,250 on said stock and \$250 on said building; that plaintiff and defendant's agent had several conversations in plaintiff's store and in a bank during August, September, and up to October 9, 1911, in reference to plaintiff needing additional insurance, and that Murphy, the agent of defendant, agreed that plaintiff should take out \$1,500 insurance on his goods and \$250 on

his building; that about October 9, 1911, plaintiff told Murphy, the agent of defendant, that he was going to take out a policy of insurance in the National Underwriters, and that he was to take out \$1,250 insurance on the stock of goods and \$250 on his building, and the defendant, through said agent, agreed that plaintiff was entitled to same and could take out the same, and plaintiff, acting under said agreement, did take out said policy with the National Underwriters, and at the time informed said Murphy that he had taken out same, and said agent agreed and acquiesced in the same, and defendant thereafter, with said knowledge and agreement, permitted the policy to remain in force; that defendant after said policy of the National Underwriters was delivered and taken out knew of the policy, in that defendant knew that plaintiff had paid the premium for same with two checks, the defendant's agent seeing the checks and knowing their purpose, and that they still permitted the policy to remain in force; that defendant's said agent agreed in writing to said insurance, and prepared what is known as a binder to be attached to the policy, which binder agreed to the additional insurance; that said binder was prepared on October 16, 1911, and was not attached to the policy until thereafter, as the result of mistake and oversight."

Defendant answered by special demurrers, general denial and specially, that Murphy, the local agent, was without authority to make any contract for additional insurance or other than to issue its contracts of insurance upon the forms provided therefor, as shown in the policy sued on; (2) that plaintiff had failed to comply with the "iron-safe" clause; (3) that other or additional insurance on said property had been procured by plaintiff, which avoided the contract; (4) that plaintiff was insolvent and the taking of other insurance with Murphy's consent was done in fraud of defendant's rights for the benefit of the First State Bank of Fate, for which Murphy was the cashier and manager, and to which plaintiff was indebted. This plea was duly verified by affidavit. Plaintiff filed a supplemental petition, alleging an estoppel and waiver as to the additional insurance and failure to make an inventory, because Murphy had consented thereto, and had executed a written "binder" to be attached to said policy authorizing said additional insurance, which binder was so attached, and that defendant allowed said policy to remain in force. Sanger Bros. filed a plea of intervention, alleging that, after the fire, the plaintiff had assigned the policy to them to secure his indebtedness to them, etc.

The trial court overruled all exceptions of defendant, and, after hearing the evidence, submitted the case to the jury on special issues, and upon the return of the jury's an-

swers thereto rendered judgment for the plaintiff, and the defendant appeals.

Conclusions of Fact.

We conclude that T. C. Murphy was the agent of appellant at Fate, Tex., with authority to solicit insurance, countersign and issue policies, and as such agent issued to appellee the policy sued on herein, and which policy contains the terms and stipulations as shown by the petition of plaintiff and answer of defendant. No inventory of the merchandise insured was taken by plaintiff, but he had on hand the original invoices of the merchandise purchased by him, and no inventory was taken for the reason that Murphy, the agent of defendant, told him it was not necessary to do so, as the invoices would answer every purpose. Plaintiff kept a book in which he recorded his cash and credit sales. From this book and the invoices on hand could be substantially ascertained the amount of goods plaintiff had on hand at the time of the fire, which amount the jury found to be \$4,103.98. With the consent of T. C. Murphy plaintiff secured additional insurance on the merchandise. Murphy knew of the taking of said additional insurance, and gave plaintiff a written slip authorizing such insurance, which slip was to be placed on the policy, but said slip was not attached to the policy until after the fire.

Conclusions of Law.

[1] (1) The overruling of defendant's special demurrer to that portion of plaintiff's petition relating to what Murphy told him about taking an inventory, if error, becomes harmless in view of the testimony which shows that there was a substantial compliance with the "iron-safe" clause of the policy of insurance.

(2) The overruling of defendant's special demurrer to that portion of plaintiff's petition relating to the taking of additional insurance by plaintiff also becomes immaterial as the evidence shows that Murphy, defendant's agent, authorized the taking thereof, or knew thereof, before the fire, and made no objection.

[2] (3) Appellee had been in business less than 12 months, and the jury found that he had kept all the invoices of the merchandise purchased and a book of entry in which was entered all sales made on a credit and an entry of all the cash taken in on sales of merchandise. These invoices and this book of entry were produced by appellee, and from which the amount of goods on hand at the date of the fire could be approximately established. The jury also found that the keeping of such invoices and book of entry was a substantial compliance with the terms of the policy relative to the "iron-safe" clause. The evidence warranted this finding of the jury, and the rendering of the

judgment of the court. *Fire Ass'n v. Masterson*, 83 S. W. 49, and authorities cited; *Insurance Co. v. Andrews*, 40 Tex. Civ. App. 184, 89 S. W. 419.

[3] (4) The appellant is estopped from setting up as a forfeit of the policy the taking out of additional insurance on said merchandise, for T. C. Murphy, its agent, consented to and knew of the taking out of said additional insurance by plaintiff before it was done, and, as provided by the policy, agreed to same, and issued a slip showing such agreement. That such slip was not attached to the policy until after the fire becomes immaterial in view of the knowledge of Murphy, appellant's agent. *Insurance Co. v. Smith*, 135 S. W. 688.

(5) We find no material error in the record, and the judgment is affirmed.

CHILDS et al. v. BROWN.

(Court of Civil Appeals of Texas. Ft. Worth. Oct. 26, 1912.)

COURTS (§ 122*)—JURISDICTION—AMOUNT IN CONTROVERSY—ALLEGATIONS IN PETITION.

A petition for the dissolution of a firm and the appointment of a receiver thereof, which contains no allegation of the value of the firm business as a whole or of the value of plaintiff's interest therein, fails to show that the subject-matter in controversy is of value sufficient to confer jurisdiction on the district court.

[Ed. Note.—For other cases, see *Courts*, Cent. Dig. § 427; *Dec. Dig.* § 122.*]

Appeal from District Court, Archer County.

Action by W. J. Brown against W. T. Childs and another. From an order appointing a receiver, defendants appeal. Reversed and remanded.

J. T. Montgomery, of Wichita Falls, and W. E. Forgy, of Archer, for appellants. Carigan & Householder, of Wichita Falls, for appellee.

CONNER, C. J. This is an appeal from an order of the honorable district court of Archer county appointing a receiver upon the application of appellee, W. J. Brown. The order was granted upon an amended petition of appellee wherein he complained of the Bank of Holliday, W. T. Childs, as the managing officer of the bank, and others. It was alleged that the parties complained of were conducting a banking business as partners and the plaintiff had an interest therein; that its said managing partner, W. T. Childs, was conducting the business for his own benefit appropriating its proceeds to his own use; and that he had excluded the plaintiff, Brown, from all information as to the assets of the bank or as to the conduct of the business, and he prayed for the appointment of a receiver.

We are of opinion that the judgment must be reversed for want of a showing of juris-

diction in the court which granted the order. Construing the petition most liberally in favor of appellee, it may possibly be said that the plaintiff sought a dissolution of the partnership, though this is not very clear. It is clear, however, that the petition contains no allegation of the value of the partnership business as a whole, nor of the value of the interest of appellee therein. It therefore fails to show that the subject-matter in controversy was of value sufficient to confer jurisdiction upon the district court. See *Moore v. Snell*, 88 S. W. 270.

Judgment reversed, and cause remanded.

PERRY v. CARLISLE et al.

(Court of Civil Appeals of Texas. Amarillo. Nov. 23, 1912.)

1. WEIGHTS AND MEASURES (§ 8*)—PUBLIC WAIVES—ACTIONS TO ENJOIN OTHERS—PETITION.

Where plaintiff's petition to enjoin an unauthorized weigher alleged that plaintiff was duly elected public weigher for the precinct of the county in which the town was located, and that he duly qualified and received his commission, it was not subject to general demurrer for failure to allege that the office of public weigher was created by the commissioners' court of the county, and that necessary steps to the creation of said office had been taken by the voters in the precinct.

[Ed. Note.—For other cases, see *Weights and Measures*, Cent. Dig. § 10; Dec. Dig. § 8*.]

2. WEIGHTS AND MEASURES (§ 8*)—PUBLIC WEIGHERS — SUIT FOR INJUNCTION — PETITION.

Under Rev. Civ. St. 1911, art. 7828, which supplanted Sayles' Ann. Civ. St. 1897, art. 4308, providing for the appointment of public weighers of produce offered for sale in towns, and omitted the provision of the former act that nothing shall be construed so as to prevent any other person from weighing the articles mentioned when requested by the owners thereof, and in view of Pen. Code 1911, art. 996, providing that no one except the regularly appointed weigher or his deputy shall weigh any cotton, wools, sugar, or hides required to be weighed, sold, or offered for sale in any city having a public weigher, the petition of a public weigher seeking to enjoin an unauthorized weigher need not allege that the weighing was not done at the request of the owner in order to entitle him to a preliminary injunction, the criminal statutes showing that it was the policy of the law to protect the public weigher, and the fees of his office and the last pronouncement of the Legislature having omitted that qualification.

[Ed. Note.—For other cases, see *Weights and Measures*, Cent. Dig. § 10; Dec. Dig. § 8*.]

3. WEIGHTS AND MEASURES (§ 8*)—PUBLIC WEIGHERS—PETITION—"TOWN."

The petition of a public weigher who sought to enjoin an unauthorized weigher from weighing produce which alleged that the plaintiff was the public weigher for the town of S. is not deficient for failing to allege that S. was a city; the word "town" being a generic word which includes cities, boroughs, and villages.

[Ed. Note.—For other cases, see *Weights and Measures*, Cent. Dig. § 10; Dec. Dig. § 8*.]

For other definitions, see *Words and Phrases*, vol. 8, pp. 7019-7029.]

4. WEIGHTS AND MEASURES (§ 8*)—PUBLIC WEIGHER—RIGHT TO INJUNCTION.

Under Pen. Code 1911, art. 996, providing that it shall be unlawful for any person except a regularly appointed weigher or his deputy to weigh any cotton, wool, sugar, or hides required to be weighed, sold, or offered for sale in any city having a public weigher, the public weigher of a municipality is entitled to enjoin an unauthorized weigher who set up his establishment just outside the municipality, so as to weigh property bought and offered for sale therein.

[Ed. Note.—For other cases, see *Weights and Measures*, Cent. Dig. § 10; Dec. Dig. § 8*.]

Appeal from District Court, Dickens County; Jo A. P. Dickson, Judge.

Action by C. H. Perry against J. W. Carlisle and the Farmers' Union Cotton Yard. From an order dissolving a preliminary injunction, plaintiff appeals. Reversed and remanded.

See, also, 151 S. W. 1158.

Dalton & Russell, of Plainview, and R. S. Holman, of Spur, for appellant. B. D. Glasgow, of Spur, for appellees.

PRESLER, J. This is a suit for injunction brought by appellant (plaintiff in the court below) on the 19th day of September, 1912, seeking to restrain appellees from weighing cotton, wool, sugar, or hides for the public, sold or offered for sale, and from weighing cotton, wool, sugar, or hides for other persons in the town of Spur, in precinct No. 3, Dickens county, Tex. Appellant in his original petition, among other things, alleged that on the 8th day of November, A. D. 1910, the day of the last general election for state, county, and precinct offices in Texas, he was duly elected public weigher for precinct No. 3, in Dickens county, Tex.; that the town of Spur is situated in said precinct; that he duly qualified and received his commission as such public weigher on or about the 21st day of November, A. D. 1910, and that he has continuously been and now is such public weigher, acting as such, and has been continuously and is well equipped and prepared to receive, store, and weigh all cotton and produce presented to him for weighing; that he had and has scales and a cotton yard conveniently located in the town of Spur, and was and is capable of weighing, and offering to weigh, all cotton and storing all cotton and other produce offered to him for storing and weighing at convenient places of easy access to the public, and that he charged and charges ten cents per bale for weighing and five cents per bale for marking cotton; that at the time he was elected and so qualified the appellees had opened up a yard in the town of Spur, Tex., and commenced to weigh cotton and all other produce offered to them, and solicited such weighing and weighed all cotton and produce they they could weigh for farmers, merchants, and other persons, and have continued and now are so doing and carrying

on the business of weighing in the town of Spur, and holding themselves out to the public as such, and charging a compensation of ten cents per bale for weighing cotton; that appellees are not and never were public weighers or deputy public weighers for Spur, Tex., or Dickens county, or any part thereof; that appellees have weighed enough cotton to amount to about \$400 in fees that appellant would have earned but for appellees, who have received, stored, and weighed cotton at their yard all along and are doing so now, and threatening to continue so to do indefinitely, and will so do unless restrained, to appellant's irreparable injury and damage, which injury is a continuous one, and that he has no adequate remedy at law; that there are about 5,000 bales of cotton alone weighed at Spur each cotton season from September 1st to April 1st, and to recover the legal penalties would require a multiplicity of suits, and, owing to the manner of handling the cotton, it is impossible to get the names of the owners weighing and sue them, and that the right of action against persons who employ appellees as weighers was and is inadequate; that appellees are depriving appellant of the fees of his office, and admit weighing cotton, and that they intend to continue to and are persisting in the same and charging for such weighing, and that, unless appellees are restrained, the damage to appellant will be irreparable, and that appellees are unable to respond in damages; that the cotton and produce weighed by appellees and threatened and solicited to be weighed was not that authorized by written instructions from owners shipping it to Spur, authorizing their commission merchant, factor, or agent to have said cotton and produce weighed by private weighers, and that appellees were not and are not intended to be the owners of the cotton and the produce that they have weighed and threatened and intend to weigh, said petition being duly verified by affidavit of appellant.

[1] Upon ex parte hearing of said petition the court in vacation granted the injunction as prayed for, and, appellant having filed bond as required by the order of the court on the same date, a writ of injunction was issued and served on appellees, commanding them to "desist and refrain from weighing cotton, wool, sugar, or hides, sold or offered for sale in the town of Spur, Tex. and in precinct No. 3, Dickens county, Tex., for others than yourselves, until further order of said court"; the writ being made returnable to the ensuing term of the district court on the 25th day of November, 1912. From the order granting said writ of injunction appellees herein duly prosecuted their appeal to this court, which cause is here docketed as No. 357. Appellees at the same time, to wit, on the 23d day of September, 1912, filed their verified answer, and also a motion to

dissolve the writ of injunction in the court below. Thereafter, to wit, on the 5th day of October, 1912, appellant by leave of the court filed his first amended original petition, pleading therein substantially as in his original petition, except that in his first amended original petition appellees are alleged to have "opened up a yard in the city of Spur, Tex., or just outside of the present incorporated limits, on south side of railroad track, but still in the town of Spur proper, the city being incorporated about April, 1911," stating, also, that he charges 10 cents per bale for weighing cotton. Appellant also on the same date (5th of October, 1912) filed his answer to appellees' answer and motion to dissolve, excepting to appellees' said answer, and specially answering that appellees are not, and never were, warehousemen, and did not act in that way, but as public weighers, as alleged, and that they did the weighing as alleged in appellant's petition, and that appellees are still going ahead weighing cotton, and that it would not injure them if the injunction granted was continued until final hearing, but that to dissolve the same would greatly damage appellant, and in support of said answer attached and made a part of the same the affidavit of T. J. Harkey, together with the exhibits thereto attached and made a part thereof. On the same day (5th of October, 1912) appellees filed their answer and counter affidavits of J. W. Carlisle and Will Taylor by way of replication to appellant's answer, controverting the facts alleged in appellant's said answer. Thereafter, on the 11th day of October, 1912, upon due notice of said hearing, the court proceeded to hear the motion of appellees to dissolve the temporary injunction theretofore granted on September 19, 1912, stating that he heard the same upon plaintiff's first amended original petition, the answer of appellees, and upon the pleadings and affidavits as hereinbefore stated, and that said affidavits were all the evidence introduced on the hearing, and proceeded to grant an order dissolving said injunction and carrying the main case over until the next regular term of the district court of Dickens county, Tex., for final hearing, at the request of appellant, and awarding the costs of said motion to dissolve in favor of appellees. From this order dissolving said temporary injunction appellant herein duly appeals in the present case. At a former day of this term motions were presented, both in this cause and in cause No. 357, heretofore referred to, signed and joined in by all parties to this controversy, asking that said cases be set for hearing on the same date and considered together, for the reason that the two are practically the same case between the same parties and involving the same questions, which motions have been granted. Said cause No. 357, styled J. W. Carlisle et al., Appellants, v. C. H. Perry, Appellee, 151 S. W. 1158, is here considered

with the present case, and we find the decisive questions necessary to be considered, both in the disposition of this case and of cause No. 357, concisely presented in appellees' brief herein. And the first contention as therein stated, to the effect that the original petition of appellant upon which said writ of injunction was granted, is insufficient, in that the same does not allege that the office of public weigher for precinct No. 3 in Dickens county, Tex., was ever created by the commissioners' court of said county, or that any necessary steps to the creation of said office had ever been taken by the voters of said precinct. We think the allegations contained, both in said original and in plaintiff's first amended original petition, sufficient on general demurrer to show that the office of public weigher for precinct No. 3 in Dickens county existed, and that appellant was the legal incumbent of said office on the dates alleged in his petition, and that it was not necessary for the purposes of this petition to allege compliance with the statutory proceedings under and by virtue of which such office is created; the allegations of the petition to which this contention relate being as follows: "That on the 8th day of November, A. D. 1910, the day of the last general election for state, county, and precinct offices in Texas, plaintiff was duly elected public weigher for precinct No. 3 in Dickens county, Tex., and in which precinct the town of Spur is situated; that he duly qualified as such and received his commission as such officer on or about the 21st day of November, A. D. 1910, and he has continuously since been and is now such public weigher."

[2] Appellees' second contention is that both appellant's original and first amended petition are deficient and subject to general demurrer in not alleging that the weighing of which appellant complains was not done at the instance or request of the owner or owners of the cotton weighed, and that said owners were not present and supervising said weighing, contending that the owner had the right to have his cotton weighed by any weigher he chose, and in support of this contention cites us to the cases of *Hedgpeth v. Hamilton Warehouse Company* (Sup.) 140 S. W. 1084; *Whitfield v. Terrell Compress Co.*, 26 Tex. Civ. App. 235, 62 S. W. 116; *Galt v. Holder*, 32 Tex. Civ. App. 504, 75 S. W. 508; *Watts & Wedenmyer v. Jowers*, 61 Tex. 184; *Ex parte Hunter*, 34 Tex. Cr. R. 114, 29 S. W. 482; *Martin v. Johnson*, 11 Tex. Civ. App. 628, 33 S. W. 306; *Gray v. Eleazer*, 43 Tex. Civ. App. 417, 94 S. W. 911. This contention of appellees' is no doubt based upon the proviso contained in title 90, art. 4308, *Sayles' Texas Civil Statutes* (General Acts of 1883, p. 83), as follows: "Provided nothing herein contained shall be construed so as to prevent any other person from weighing cotton, wool or hides when requested so to do by the owners thereof." As this proviso, which in part gives support to some of the opinions cited

by appellees, was subsequently repealed and was omitted from the statutes before the filing of this suit (see General Acts 1899, p. 264; Revised Statutes of Texas 1911, art. 7828), we conclude that it was not incumbent upon appellant to allege in his said petition that the weighing complained of was not done at the request of the owners of said cotton, and upon a review of the entire law relating to public weighers, as prescribed by the statutes, in force at this time, and at the date of the matters complained of in appellant's petition, the same being contained in title 132, Revised Civil Statutes of Texas 1911, and chapter 8, tit. 14, Revised Criminal Statutes of Texas 1911, we are of the opinion that both the original and the first amended original petition of appellant (the latter considered in connection with the affidavits and exhibits shown by the record in support thereof) were sufficient in all respects to authorize the issuance and continuance of the temporary writ of injunction granted, and that the court below erred in dissolving the same; it being evidently the purpose of article 906, Revised Criminal Statutes 1911 (577 former Code), to protect the public weigher or deputy in the fees of his office by making it unlawful for any other person to weigh any cotton, wool, sugar, or hides required to be weighed, sold, or offered for sale in any city having a public weigher duly qualified, and to follow the Supreme Court in the case of *Hudspeth v. Hamilton Warehouse Company*, above cited, and the Court of Civil Appeals in *Whitfield v. Terrell Compress Co.*, and other cases cited by appellant, we would have to ignore the existence and application of this article of the Penal Code to the facts of this case, which we do not feel constrained to do. We think that both the original petition, upon which the temporary writ was granted, as well as the first amended petition, negatives any ground allowed by the statute upon which the weighing done by appellees and complained of by appellant could be legally authorized, and asked only that appellees be restrained in such weighing for the public and for other persons as is in our opinion clearly under the statute illegal, and that such acts on the part of appellees constituted an invasion of appellant's legal rights and an injury to his rights of property, such as authorized the issuance of the writ as originally granted and a continuance of the writ upon the showing made on hearing of appellees' motion to dissolve. *Davidson v. Sadler*, 23 Tex. Civ. App. 600, 57 S. W. 54; title 132, Revised Civil Statutes of Texas 1911; article 906 (577), Revised Criminal Statutes of Texas 1911.

[3] Nor do we think there is any merit in appellees' various contentions to the effect that the city of Spur is referred to in appellant's original petition as "the town of Spur," and that it is not alleged in said petition to be a city by incorporation or otherwise. The word "town" is a generic word. Of this

genus cities and boroughs are species. *N. Y. L. B. R. Co. v. Drummond*, 46 N. J. Law, 644-646. Mr. Tomlin in his law dictionary says: "Under the name 'town' or 'village' boroughs and cities are contained; for every borough or city is a town." *State ex rel. Rice v. Simmons*, 35 Mo. App. 374-380.

[4] It further appears from the amended original petition, answer, and affidavits attached filed by appellant with leave of the court, in reply to appellees' answer and motion to dissolve, together with the supporting affidavits filed by appellees, that the town of Spur was a city incorporated in April, 1911, and that the cotton yard of appellees was not situated within the corporate limits of said city, but was located across and near the south line of the same, and upon this appellees base the contention that the weighing complained of was not done in the town or city of Spur, and does not fall within the inhibition of article 996, Revised Criminal Statutes of Texas 1911, which statute, however, in our opinion, does not make the contemplated offense consist of the weighing being done in the city, but in the weighing of any cotton to be weighed, sold, or offered for sale in the city having a public weigher duly qualified. That is, in other words, the location of the yards where the weighing was done is immaterial as to whether it is in the city or not if the cotton in question was required to be weighed for the purpose of being sold or offered for sale in any city having a public weigher duly qualified. In this instance the uncontroverted evidence, as shown by the affidavits referred to, shows that appellees' cotton yard was situated in close proximity, but outside of the incorporated limits of the city and operated for the purpose of weighing cotton sold and intended to be sold in said city, located, adjoining, and close by, which it is also to be noticed was located in the precinct of which appellant was the duly qualified public weigher. Nor do we think that the injunction granted against appellees restrains them from the weighing of any cotton or other specified produce which they have the right under the law to weigh as private weighers. By the terms of said writ of injunction, appellees are commanded to refrain from weighing cotton, wool, sugar, or hides sold or offered for sale in the town of Spur, Tex., and in precinct No. 3, Dickens county, Tex., for others than for themselves. We therefore conclude that the writ in question was properly and legally granted upon the petition upon which the court acted, and that upon the showing made on the hearing of the motion to dissolve that the court erred in sustaining said motion, and that the same should have been continued in effect until the final hearing in term time, and upon a like showing at such final hearing the writ should be perpetuated.

It is therefore ordered that said judgment

of dissolution be and the same is hereby reversed, and the writ heretofore granted is ordered continued in force as above stated, and that the costs in this court and in the court below be taxed against appellees, and that this cause be reversed and remanded for further proceedings in accordance with this opinion, and it is so ordered.

CARLISLE et al. v. PERRY.

(Court of Civil Appeals of Texas. Amarillo. Sept. 28, 1912.)

Appeal from District Court, Dickens County; Jo A. P. Dickson, Judge.

Action by C. H. Perry against J. W. Carlisle and others. From an interlocutory injunction, defendants appeal. Affirmed.

See, also, 151 S. W. 1155.

B. D. Glasgow, of Spur, for appellants. Dalton & Russell, of Plainview, and R. S. Holman, of Spur, for appellee.

PRESLER, J. This is a companion case to cause No. 371, styled *C. H. Perry v. J. W. Carlisle et al.*, 151 S. W. 1155. The appeals in both cases being from interlocutory orders of the court in the same case below, on motions heretofore granted, signed and joined in by all parties interested in both cases, stating that said two appeals were between the same parties in the same case, involving the same subject-matter and questions, and asking that both cases be considered together and said appeals have been here so considered, this case we conclude should be affirmed for reasons and upon conclusions stated in the opinion of this date, filed in cause No. 371, styled *C. H. Perry v. J. W. Carlisle et al.*

Affirmed.

GULF, C. & S. F. RY. CO. v. PATTEN MFG. CO.

(Court of Civil Appeals of Texas. Galveston. Dec. 6, 1912.)

1. CARRIERS (§ 197*)—SALE OF UNCLAIMED FREIGHT—STATUTORY RIGHT.

Sayles' Ann. Civ. St. 1897, art. 324, authorizing a carrier using due diligence to notify the consignee at destination to store the goods not taken by the consignee, and thereafter become liable only as warehousemen, does not authorize a sale by a carrier of unclaimed freight.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 891-900; Dec. Dig. § 197.*]

2. CARRIERS (§ 197*)—SALE OF UNCLAIMED FREIGHT—STATUTORY RIGHT.

Sayles' Ann. Civ. St. 1897, arts. 327, 328, authorizing a carrier to sell freight remaining unclaimed for three months on giving thirty days' notice, and article 324, authorizing a carrier using due diligence to notify the consignee to store freight not taken by the consignee and thereafter become liable only as warehousemen, are not in pari materia because they are enacted for different purposes and are independent of each other, and the right to sell unclaimed freight does not depend on whether the carrier used due diligence to notify the consignee of the arrival of the freight, but, though it be assumed that the statutes must be construed together, a consignor shipping freight to itself must put itself in position to receive notice of the arrival of the freight at destination, and where it fails to do so, the carrier need not

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

seek the consignee of the freight elsewhere to notify it of the arrival of the freight before making a sale of the freight remaining unclaimed for three months.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 891-900; Dec. Dig. § 197.*]

3. CARRIERS (§ 197*)—SALE OF UNCLAIMED FREIGHT—STATUTORY RIGHT.

Under Sayles' Ann. Civ. St. 1897, art. 327, authorizing a carrier to sell freight remaining unclaimed for three months and the owner, known or unknown, fails within that time to claim or pay the proper charges, a carrier may sell freight remaining unclaimed for three months, regardless of whether any charges are due thereon, and the owner of the freight cannot by payment of charges compel the carrier to keep the freight longer than three months.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 891-900; Dec. Dig. § 197.*]

4. CARRIERS (§ 197*)—SALE OF UNCLAIMED FREIGHT—STATUTORY RIGHT.

The statute does not direct the place of sale, and a sale may be had at a point other than the point of destination and an owner to avoid a sale at a place other than the point of destination must show that the place selected for the sale was unreasonable, and that he was probably injured by the sale being made there.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 891-900; Dec. Dig. § 197.*]

5. CARRIERS (§ 197*)—UNCLAIMED FREIGHT—RIGHT TO STORAGE CHARGES—STATUTORY PROVISIONS.

A carrier failing to comply with Sayles' Ann. Civ. St. 1897, art. 4520, providing that carriers shall not be allowed storage charges on freight unless notice is given, is not entitled to charges for storage of freight remaining unclaimed for three months, and then sold.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 891-900; Dec. Dig. § 197.*]

Appeal from Jefferson County Court; R. W. Wilson, Judge.

Action by the Patten Manufacturing Company against the Gulf, Colorado & Santa Fé Railway Company. From a judgment for plaintiff, defendant appeals. Reformed and affirmed.

Crook, Lord, Lawhon & Ney, of Beaumont, for appellant. Terry, Cavin & Mills, of Galveston, and F. J. & C. T. Duff, of Beaumont, for appellee.

PLEASANTS, O. J. This suit was brought by the appellee against the appellant to recover damages for the alleged conversion by appellant of freight shipped over its line by the Truxal-Painter Manufacturing Company, which company had assigned its claim to appellee.

Plaintiff's petition alleges that plaintiff is a corporation incorporated under the laws of the state of Tennessee, having its domicile at Chattanooga, Tenn.; that the defendant is a railroad corporation, owning and operating its lines of railway into and through the state of Texas; that on or about February 21, 1907, the Truxal-Painter Manufacturing Company shipped from Chattanooga, Tenn., one electric hoisting machine and outfit; that said machine and outfit was consigned to the Truxal-Painter Manufacturing Company at

Beaumont, Tex.; that the defendant, Gulf, Colorado & Santa Fé Railway Company, received said shipment of freight and transported same to Beaumont, Tex., and that on or about September 1, 1907, while the freight was in its possession, and still the property of the Truxal-Painter Manufacturing Company, the defendant railroad negligently and unlawfully converted said property to its own use; that at the time of the conversion of said property it was of a reasonable market value of \$550; that the Truxal-Painter Manufacturing Company had sold and assigned all of its claims, rights, and interests in this cause of action to the plaintiff the Patten Manufacturing Company. Plaintiff prayed for damages in the sum of \$550, with interest at the rate of 6 per cent. per annum from September 1, 1907. The defendant, Gulf, Colorado & Santa Fé Railway Company, answered first by general demurrer and second by general denial. A jury being waived, the cause was tried on an agreed statement of facts before the court, and on the 30th day of September, 1911, judgment was rendered in favor of plaintiff and against the defendant in the sum of \$518.55, with interest at the rate of 6 per cent. per annum from the 14th day of October, 1907, making a total of \$637.55, with interest from date of judgment.

The agreed statement of facts upon which the case was tried in the court below, after stating that the machinery described in plaintiff's petition was shipped from Chattanooga, Tenn., by the Truxal-Painter Manufacturing Company on February 21, 1907, freight prepaid, and consigned to the Truxal-Painter Manufacturing Company at Beaumont, Tex., and was received by appellant from its connecting carriers and transported by it to Beaumont, contains the following: "That said shipment of freight reached Beaumont, Tex., on the 14th day of March, 1907, and remained unclaimed by shipper and consignee at Beaumont, Tex., until June 29, 1907, when the same was shipped by defendant company to Galveston, Tex., and was sold at Galveston, Tex., on October 14, 1907, for the sum of \$30.24. That at the time of the sale the defendant company held a claim for storage on said goods for the sum of \$20.33; that said goods were shipped from Beaumont, Tex., to Galveston, Tex., and were sold by the defendant without the authority of the shipper and consignee, and without notice to it except as hereinafter stated. It is agreed that the Gulf, Colorado & Santa Fé Railway Company and its agents, upon the arrival of said shipment at Beaumont, Tex., endeavored to find and locate the Truxal-Painter Manufacturing Company in Beaumont, Tex., in order to give it notice of the arrival of said freight, but could not locate any such concern or agent of such company in Beaumont, Tex.; that said railway com-

pany and its agents thought that possibly the name of the consignee was given wrong, and that its proper name was Texas Painter Manufacturing Company, and endeavored to locate some company or its agent by that name in Beaumont, Tex., but failing to locate in Beaumont, Tex., any such concern by that name, that said defendant railway company did not, before that sale, notify the shipper, Truxal-Painter Manufacturing Company, at Chattanooga, Tenn., that it held said freight at Beaumont, Tex., nor did it notify said Truxal-Painter Manufacturing Company that it intended to remove said property to Galveston, Tex., and sell same for charges, and the said Truxal-Painter Manufacturing Company did not learn of the sale of said shipment for charges until after the sale had been made. It is further agreed that before making the sale of said shipment that the defendant gave thirty days' notice of the time and place of sale, and a descriptive list of the package sold, with names and numbers or marks found thereon, which notice was given by posting same in three public places in Galveston county, Tex., and by posting a notice of said sale for thirty days prior thereto on the door of the depot or warehouse in Galveston, Tex., where the goods were sold, and that the defendant also gave at least thirty days' notice of said sale by making publication thereof in at least one newspaper in Galveston county, Tex., and that, in addition thereto, the defendant posted a notice of said sale for at least thirty days before same was made on the depot or warehouse door in Beaumont, Jefferson county, Tex., and that the defendant company has at all times since said sale held the sum of \$9.91 subject to the order of the shipper or owner of said goods. It is further agreed that there was no market value for this machine and outfit in Beaumont, Tex., or Galveston, Tex., at the time of its receipt in Beaumont, Tex., and at the time of its removal and sale at Galveston, Tex., but that its actual or intrinsic value at said times and places was the sum of \$490, the price it would cost in Chattanooga, Tenn., plus freight charges in transporting the same from Chattanooga, Tenn., to Beaumont, Tex., which was the sum of \$26.50; that its market value at the times hereinbefore mentioned in Chattanooga, Tenn., was \$490, and that Chattanooga, Tenn., was the nearest market for said machine and outfit. It is further agreed that since said shipment of goods was made that the Patten Manufacturing Company, plaintiff herein, purchased and took over from the Truxal-Painter Manufacturing Company all of its property and assets, including the claim of the value of the goods hereinbefore mentioned, against the Gulf, Colorado & Santa Fé Railway Company, and that the said Patten Manufacturing Company is now the legal owner and holder of said claim. It is agreed that all unclaimed

freight and packages after being held for the statutory length of time at the various depots of the Gulf, Colorado & Santa Fé Railway Company is usually and customarily shipped to Galveston, and there offered for public sale at what is commonly termed 'The Old Hoss Sale'; that these goods were so shipped to Galveston, and there sold at public sale, after the giving of notices as hereinbefore set forth."

We shall not discuss the several assignments of error presented in appellant's brief in detail. The questions hereinafter discussed and decided are raised by appropriate assignments.

[1] We agree with appellant that article 324 of Sayles' Civil Statutes has no bearing upon the right of a railway company to sell unclaimed freight under the provisions of article 327 of said statutes. The article first mentioned is as follows: "If the carrier at the point of destination shall use due diligence to notify the consignee, and the goods are not taken by the consignee, and have in consequence to be stored in the depots or warehouses of the common carriers, they shall thereafter only be liable as warehousemen."

[2] The article authorizing the sale of unclaimed freight by a common carrier is as follows: "When any freight or baggage has been conveyed by a common carrier to any point in this state, and shall remain unclaimed for the space of three months at the office or depot nearest or most convenient to destination, and the owner, whether known or unknown, fails within that time to claim such freight or baggage, or to pay the proper charges if any there be against it, then it shall be lawful for such common carrier to sell such freight or baggage at public auction, offering each box, bale, trunk, valise or other article separately as consigned or checked." We do not think the two articles should be considered in *pari materia*, and construed together. They were enacted for different purposes, and are wholly independent of each other. The right given under article 327 to sell unclaimed freight is not made to depend upon whether the carrier has used due diligence to notify the consignee of the arrival of the freight, and the only notice required to authorize the sale is the 30 days' notice of the sale provided for in article 328, which it is agreed was strictly complied with by the appellant. If, however, the two articles be construed together and the right of appellant to sell the unclaimed freight depended upon whether it had used due diligence to notify the consignee of its arrival, the facts show that it used such diligence to find and notify the consignee at Beaumont, and only failed because the consignee was not there to receive the notice. From the identity of names it appears from the bill of lading that the consignor and consignee were the same, but appellant could not know

from this fact that the residence or domicile of the consignee was at Chattanooga, Tenn., and, if it had been charged with such notice, we do not think due diligence would have required it, in order to relieve itself of liability as a carrier, to notify the consignee at that place. It was the duty of the consignor who shipped the freight from Chattanooga, Tenn., to itself at Beaumont, Tex., to put itself in position to receive notice of the arrival of the freight at Beaumont, Tex., and, having failed to do this, appellant was under no obligation to seek the consignee elsewhere in order to notify it of the arrival of the freight at Beaumont. *Railway Co. v. Townes*, 93 Ark. 430, 124 S. W. 1036, 26 L. R. A. (N. S.) 572.

[3] By the terms of article 327, before quoted, the carrier is given the right to sell freight when the owner fails to claim or pay the proper charges thereon within three months after it reaches its destination or the depot of the carrier nearest or most convenient to the place of destination. We think it clear from this article that, when freight is unclaimed for the space of three months, the carrier has the right to sell, regardless of whether any charges are due upon the freight. The owner of the freight cannot by payment of the freight and storage charges, if any are due, compel the carrier to keep the freight longer than three months, and, if at the expiration of that time the freight is unclaimed or not taken by the owner, the carrier is authorized to sell it.

[4] The statute does not direct where the sale shall be made, and there is no reason for requiring such sales to be made at the point of destination. Such requirement would often be to the disadvantage of the owner of the goods. It is to the interest of the carrier, as well as the owner, that the sale should be made at the place where the property would bring the best price, and in many cases this would not be at the point of destination. In any event, in order for the owner to avoid a sale made at a place other than the point of destination, it must be shown that the place selected for the sale was unreasonable, and the owner was probably injured by the sale being made at such place. No such contention is made in this case, and there is nothing in the facts from which it can be inferred that any injury resulted to appellee by reason of the sale having been made at Galveston instead of Beaumont. In the case of *Slayden-Kirksey Woolen Mills v. Railway Co.*, 132 S. W. 77, the Court of Civil Appeals for the Third District holds that the carrier is not required under this statute to sell the property at the place of destination. We concur in the views expressed in that opinion.

It follows from these conclusions that there was no conversion of the property by

appellant, and the trial court erred in holding that the appellee was entitled to recover the value of the property.

[5] The appellant was not entitled, however, to charge appellee for storage of the goods, because it did not comply with the provisions of article 4520 of the statute. This article is as follows: "Railroad companies shall in no case be allowed to charge storage upon freight received by them for delivery unless the owner or consignee thereof neglect to remove it from the depot of the company within three days after notice of its reception, which notice may be given by posting the same on the depot door, and after the expiration of such time the company may remove and store said freight at the expense of the owner or consignee and said freight shall be held liable for the freight and charges due thereon." The appellant having failed to post the notice required by this statute was not entitled to make any charge for the storage of the freight, and appellee was entitled to recover the entire amount realized from the sale of its property.

We think the judgment of the court below should be reformed so as to restrict appellee's recovery to the amount realized by appellant from the sale of the property, and as so reformed should be affirmed, and it has been so ordered.

Reformed and affirmed.

SOUTHERN PAC. CO. v. HIGGINS OIL & FUEL CO.

(Court of Civil Appeals of Texas. Galveston. Dec. 5, 1912.)

APPEAL AND ERROR (§ 807*)—DISMISSAL—REINSTATEMENT.

Where a long-standing practice of the court permitted a cause to be continued without a docket order or minute entry or request of the parties to the court, and the parties had agreed that the case should be continued from term to term until both parties were ready to try it, it was within the court's discretion, after having dismissed the suit of his own motion, to reinstate the suit.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3177-3188; Dec. Dig. § 807.*]

Error from District Court, Jefferson County; W. H. Pope, Judge.

Suit by the Higgins Oil & Fuel Company against the Southern Pacific Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Baker, Botts, Parker & Garwood, of Houston, and Orgain & Butler, of Beaumont, for plaintiff in error. Greer & Minor, of Beaumont, for defendant in error.

PLEASANTS, C. J. This suit was brought by defendant in error, Higgins Oil & Fuel Company, against the plaintiff in error,

Southern Pacific Company, to set aside a judgment of dismissal rendered in a former suit brought by defendant in error against plaintiff in error and to reinstate said suit upon the docket of the court and recover upon the cause of action therein alleged. The petition, which was filed in the court below on May 11, 1910, after alleging the cause of action upon which the original suit, filed August 29, 1902, was based, the sufficiency of which is not questioned by plaintiff in error, contains the following allegations:

"That said petition prayed for satisfaction against said defendant and for judgment for its damages aforesaid, with interest, costs of suit, and for general relief. That thereafter, after due service, said defendant, the Southern Pacific Company, by its attorneys, on September 16, 1902, filed its original answer in said cause, consisting of a general demurrer and a general denial, and on the same date, as shown by the minutes of this court, the defendant demanded a jury; but, as plaintiff is informed and believes, and therefore avers, did not pay the jury fee, and said cause continued thereafter on the nonjury docket of this court, and was thereafter by consent of both parties continued from time to time and from term to term. That, after the filing of said suit, various suggestions and negotiations looking to the compromise and settlement of said cause were carried on between the plaintiff and the defendant, or their respective representatives, and on April 24, 1905, as appears from the minutes of this court, said cause was continued for settlement; but said negotiations for the settlement thereof were never consummated, and said cause as theretofore was continued by consent from term to term.

"Your petitioner alleges it to be the fact, upon information and belief: That there was a general understanding between its counsel and the counsel for the defendant that said cause should be continued from term to term or from time to time, and that the same would not be tried without the giving of due notice by each to the other. That in accordance with said general understanding, since the filing of said suit on August 29, 1902, up to the 17th day of May, 1909, the minutes of this court in which said suit has been pending have, as your petitioner alleges upon information and belief, no entries concerning said cause save the following, to wit: That on September 16, 1902, plaintiff and defendant were granted leave to amend and a jury was demanded by the defendant. That on April 24, 1905, the following entry appears on said minutes: 'This cause is continued for settlement.' That on September 15, 1905, the following entry appears on said minutes: 'This cause is continued by consent.' That from the filing of said suit up to the 17th day of May,

1909, the docket of said court, your petitioner alleges upon information and belief, shows no entries save those mentioned above as contained in the minutes, and the following addition thereto: That said cause was set for trial on November 24, 1902, and that the same was continued, but without any order of continuance on the docket or on the minutes. That said cause was set for trial on December 16, 1903, and was continued, but without any order of continuance on the docket or on the minutes. That on September 23, 1904, said cause was set for November 1, 1904, but was continued without any order on the docket or on the minutes. That it was set for September 15, 1905, and on that date, as shown by the docket, continued by consent. That it was set for April 8, 1907, and, as shown by the docket, was on that date continued by agreement. That it was set for January 23, 1908, but was continued without any order on the docket or on the minutes.

"Your petitioner is informed and believes, and therefore avers: That in pursuance of or in accordance with the general understanding between its counsel and counsel for defendant to the effect, in substance, for a considerable period prior and subsequent to the 24th of April, 1905 (when said cause was continued for settlement), that said cause should be continued for the purpose of a settlement by compromise, if terms of compromise could be agreed upon, and afterwards, under the general agreement between said counsel that said cause would not be tried until said counsel respectively were notified by one or the other that a trial was desired, said cause was continued and passed over from term to term and from year to year, and that accordingly no order of any sort was made in said cause either on the docket or the minutes of this court at the March term, 1903, the May term of 1903, the September term, 1903, the March term, 1904, the May term, 1904, the December term, 1904, the December term, 1905, the March term, 1905, the May term, 1905, the December term, 1906, the March term, 1906, the May term, 1906, the September term, 1906, the May term, 1907, the September term, 1907, the March term, 1908, the May term, 1908, the December term, 1908, the March term, 1909. That, as heretofore shown, whenever said cause was set for trial it was continued either without any formal order of continuance on the docket or on the minutes, or else by an entry duly made on the docket and on the minutes showing that said cause was continued by agreement. Your petitioner is further informed and believes, and therefore alleges, that at the term of this honorable court beginning on the first Monday in May, 1909, there was, prior to May 17, 1909, no setting of the nonjury docket upon which this case was pending, and your petitioner

did not know, and it is informed and believes, and therefore alleges the fact to be, that its attorney in this case did not know that the nonjury docket of said court would be called on May 17, 1909, for trial or dismissal, and as plaintiff is informed and believes, and therefore avers, its counsel relied in good faith on the general understanding so long existing between him and counsel for defendant that this cause would be given no other course save to continue it until it was mutually convenient to them to set it down for trial.

"Your petitioner further alleges upon information and belief: That on May 7, 1909, counsel for defendant were both away from Beaumont engaged in the trial, or the preparation for trial, of a case in an adjoining county. That on May 17, 1909, said cause was dismissed by the court for want of prosecution. That on May 4, 1910, as your petitioner is informed and believes, and therefore avers, their attorney of record, F. D. Minor, who has been their attorney in charge of this case since its institution, intending to endeavor to try said cause at this term, and not remembering definitely whether the case was on the jury docket or the nonjury docket, inquired of a deputy clerk of the court on which docket it was, and then learned for the first time that said cause had been dismissed for want of prosecution on May 17, 1909. That until then your petitioner did not know, and it alleges upon information and belief that its counsel did not know, that said cause had been dismissed, but both believed in good faith that said cause was still pending on the docket of this court. Your petitioner alleges upon information and belief that, immediately upon learning that said cause had been dismissed, its counsel on the same day, to wit, May 4, 1910, went to see the attorneys for the defendant in said cause, and was informed by them that they had never heard of the dismissal of said cause and did not know that it had been dismissed.

"Your petitioner is informed and believes, and therefore alleges, that the honorable judge of this court, not knowing of the understanding between counsel for plaintiff and for defendant as to the continuance of said cause, and said counsel for both sides not apprehending that said cause would be dismissed, and counsel for petitioner relying upon the continuance of said cause, as it had been for many years before continued, and not being advised or informed that the nonjury docket of this court would be called and that said cause was likely to be dismissed, the dismissal of the said cause for want of prosecution was due to a mistake and to an accident. Your petitioner further alleges that if it or its counsel had known or had been advised that said cause was liable to be dismissed at said May term, 1909, said counsel would have been present in

said court and would have caused the continuance of said cause to be entered, and that if counsel for defendant had been advised or informed that said cause was to be dismissed, they would have notified counsel for your petitioner, so that he might have obtained the continuance of said cause, or else they would have informed the court that said cause was to be continued. That your petitioner further alleges the fact to be that if it had known, or if its counsel had known, during the May term, 1909, that said cause had been dismissed for want of prosecution, the proper steps would immediately have been taken at that term to reinstate the same upon the docket. And petitioner alleges upon information and belief: That counsel for defendant would during that term have readily agreed to such reinstatement of the cause. That this proceeding was not instituted sooner because it was not until May 4, 1910, that your petitioner or its counsel had any information whatever that said cause had been dismissed for want of prosecution on May 17, 1909. Your petitioner alleges that it is advised and informed by its counsel that it has a good and meritorious cause of action against said defendant as set forth in its petition in said cause numbered 3,472 and as hereinbefore repeated and alleged. Premises considered, and inasmuch as your petitioner has no remedy save in a court of equity, it prays that the defendant may be duly served; that on the hearing said suit be reinstated on the docket with like effect in all respects as though the same had never been dismissed, and for such other and further relief in the premises as it may be entitled to, both legal and equitable, general and special, and for costs."

This petition was verified by the affidavits of L. L. Donnelly, secretary of defendant in error, and F. D. Minor, its attorney.

The answer of defendant in the court below contains a general demurrer and the following special exceptions: (1) A special exception to the petition "that it appears from the allegations in plaintiff's petition contained that the plaintiff is not in position to invoke the aid of a court of equity to secure the relief prayed for, because it appears from the allegations in plaintiff's petition that the plaintiff was guilty of negligence and laches, and shows an entire want of diligence upon the part of plaintiff to prevent the judgment sought to be set aside." (2) A special exception "to that part of plaintiff's petition wherein it prays that the former judgment of dismissal in suit No. 3,472 on the docket of this court, styled Higgins Oil & Fuel Company v. Southern Pacific Company, be set aside, and said suit be reinstated upon the docket of this court, because it does not appear that the plaintiff had a good cause of action of which it has been deprived by fraud, accident, or mistake,

or the acts of the opposite party wholly unmixed with fraud and negligence upon its part." (3) A special exception "to that part of plaintiff's petition praying that a certain judgment of dismissal in cause No. 3,472, styled Higgins Oil & Fuel Company v. Southern Pacific Company, on the docket of this court, be set aside, and said suit be reinstated on the docket of this court as though it had never been dismissed, because it appears from the allegations therein contained that the plaintiff was guilty of negligence in using no diligence to prevent the entry of such judgment, and that said judgment was not caused or contributed to by any fraudulent act of the Southern Pacific Company or its counsel, and that said judgment was not the result of any fraud, accident, or mistake, but was the result of an entire lack and want of diligence upon the part of the plaintiff."

In addition to these exceptions, defendant filed a general denial and plea of limitation of four years.

On January 7, 1911, upon a hearing before the court, the demurrers and special exceptions of the defendant in error to the plaintiff's petition were heard by the court and overruled, and on the same day, upon the pleadings, the evidence and argument of counsel, the court ordered cause No. 3,472, which had been dismissed for want of prosecution on May 17, 1909, reinstated upon the docket and consolidated with cause No. 7,856, "and that said cause so consolidated with this proceeding stand in the same position as it was when said judgment of dismissal was rendered." No assignment of error challenges the order of the court reinstating the case. Thereafter, on June 12, 1911, the cause was tried with a jury, and a verdict and judgment rendered in favor of plaintiff for the sum of \$2,221.85.

The only assignments of error presented in the brief of plaintiff in error complain of the ruling of the trial court in not sustaining the general demurrer and the special exceptions to the petition before set out. Under these assignments plaintiff in error contends that the allegations of the petition were insufficient to entitle plaintiff to have the cause reinstated, because said allegations show that the dismissal of the cause was not an accident, but resulted from plaintiff's inattention and negligence, and plaintiff not being free from fault and negligence, even if the dismissal was the result of accident, plaintiff was not entitled to a reinstatement under the well-established rule that, in order to entitle a party to set aside a judgment at a term of court subsequent to that at which the judgment was rendered, he must show that he has a good cause of action or defense "of which he has been deprived by fraud, accident, or the act of the

opposing party, wholly unmixed with any fault or negligence on his own part."

It is clear from the allegations of the petition that both parties were under the mistaken belief that the court would not upon its own motion dismiss the suit without notice to plaintiff, and the judge by reinstating the cause confirmed the allegations of the petition that he would not have dismissed the suit if he had known of the agreement between the parties. The right of the judge to have dismissed the same without notice to the plaintiff, when he was not informed of the agreement between them that it should be continued from term to term until both parties were ready to try it, cannot be doubted, and we think his right to reinstate after he was informed of the agreement is equally clear. It was a matter within his discretion, and defendant cannot complain that he exercised that discretion by upholding the agreement it had made with plaintiff. Both parties evidently relied upon the practice of the court to permit the cause to be continued without any request by the parties or order on the docket or in the minutes of the court granting the continuance. Relying upon this practice and the agreement between them, neither party knew of the dismissal until shortly before the suit to reinstate was filed. This method of conducting the business of the court may not have been conducive of expedition in the dispatch of business; but, it having been the method pursued by the court for a number of years, we cannot say that plaintiff was, as a matter of law, guilty of negligence in relying thereon. We are not prepared to say that the judge would have abused his discretion if he had refused to reinstate the cause; but, having decided that the ends of justice would be best subserved by granting the petition to reinstate, we think he was authorized, upon the facts alleged, to make the order of reinstatement.

We are of opinion that the exceptions to the petition were properly overruled, and that the judgment of the court below should be affirmed.

Affirmed.

JOHNSON et al. v. OSWALD.

(Court of Civil Appeals of Texas. Dallas.
Dec. 7, 1912.)

1. CHATTEL MORTGAGES (§ 177*)—CONVERSION OF MORTGAGED CHATTELS—LIABILITY.

One converting to his own use mortgaged chattels is only liable to the mortgagee for the market value of the chattels at the time and place of conversion, and, where the value exceeds the debt, then only to the extent of the debt.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 336, 340-357, 477; Dec. Dig. § 177.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

2. CHATTEL MORTGAGES (§ 177*)—PETITION—SUFFICIENCY.

The petition, in an action by a mortgagee for the conversion of mortgaged chattels, should specifically allege the time and place of conversion and the value of the chattels converted.

[Ed. Note.—For other cases, see *Chattel Mortgages*, Cent. Dig. §§ 336, 340-357, 477; Dec. Dig. § 177.*]

3. CHATTEL MORTGAGES (§ 177*)—VALUE OF PROPERTY CONVERTED—EVIDENCE.

The testimony of a witness, in an action for the conversion of mortgaged chattels, that the mortgagor sold the chattels to a defendant who moved them to another place and resold them to codefendant; that the largest part of the property was by the carrier broken into scrap iron in moving; that defendant sued the carrier for the loss occasioned thereby and recovered a judgment for several hundred dollars; that the remainder of the property was in the possession of codefendant under his contract of sale; that defendant and codefendant by their conversion destroyed the mortgage lien and prevented the mortgagee from enforcing his lien on all but a fractional part of the property in possession of codefendant—did not show the value of the property when defendant bought and took possession of it, nor the time or place of his taking possession of it, and a judgment against defendant and codefendant was unsustainable.

[Ed. Note.—For other cases, see *Chattel Mortgages*, Cent. Dig. §§ 336, 340-357, 477; Dec. Dig. § 177.*]

4. APPEAL AND ERROR (§ 1140*)—CORRECTION OF ERROR BY REMITTITUR.

The error in the amount of a judgment, resulting from an error in calculation so as to make the judgment too large, does not require a reversal, where it can be cured by a remittitur.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4462-4478; Dec. Dig. § 1140.*]

Appeal from Dallas County Court; W. F. Whitehurst, Judge.

Action by E. E. Oswald against Marsene Johnson and another. From a judgment for plaintiff, defendants appeal. Reversed and remanded.

Fannin & Underwood, of Dallas, for appellants. George Sargeant and Cecil L. Simpson, both of Dallas, for appellee.

TALBOT, J. This suit was instituted by the appellee, Oswald, in the county court of Dallas county at law, against R. E. L. Giles, American Type Founders' Company, and the appellants Marsene Johnson and W. C. Lessing. The plaintiff sued to recover of the defendants Giles and the American Type Founders' Company the amount of two promissory notes, with interest and attorney's fees, as provided for in said notes, and to foreclose a chattel mortgage given to secure the payment of said notes, and of the defendants Johnson and Lessing damages alleged to have been sustained by reason of the conversion by them of the property upon which the plaintiff claimed a lien by reason of the chattel mortgage. On the 2d day of January, A. D. 1912, which was appearance day of the term, the case was called, and the de-

fendants Johnson and Lessing not appearing either in person or by attorney, and neither having filed an answer, the plaintiff took a default judgment against them for \$481.69, having in the meantime dismissed his case against the defendants Giles and American Type Founders' Company. The judgment recites the waiver of a jury, and that the court, after hearing the pleadings, the evidence, and argument of counsel, "is of the opinion that all material allegations in plaintiff's cause of action are true, that the defendants W. C. Lessing and Marsene Johnson are indebted to the plaintiff in the sum of \$481.69, with legal interest, and that the law is for the plaintiff." The judgment then proceeds in the usual form to decree that the plaintiff recover of the defendants Johnson and Lessing the sum of \$481.69, with interest thereon from the date of the judgment at 6 per cent. per annum, together with all costs of suit. The appellants, Johnson and Lessing, in due time, filed a motion to set aside the judgment and for a new trial, which being overruled, they appealed.

There are several assignments of error, but they need not be considered and discussed in detail. The contention that the judgment is a personal one against the appellants on the notes sued on is probably not sustained by the record. At least, we are inclined to think it is subject to the construction that it is based upon the allegations in appellee's petition, attempting to charge a conversion of the property upon which he held a lien by the appellants and the proof offered in support thereof. The judgment, however, is clearly not as explicit as it should be in this respect.

[1, 2] It is assigned that the plaintiff's petition shows no cause of action whatever against the appellants, and therefore insufficient to support a judgment by default on appeal. If, as contended, the petition shows no cause of action against the appellants, then, as to them, it was subject to a general demurrer and insufficient to sustain the judgment rendered against them. It is clear the petition shows no liability on the part of the appellants for the payment of the notes sued on, and whether its allegations sufficiently charge a conversion of property upon which appellee had a lien to authorize a judgment against appellants for its value may be gravely doubted. The existence of the lien is sufficiently stated; but we find no direct or specific allegation that appellants at a certain time and place named converted the property, nor do we find any specific allegation of the value of the property. The allegations are: "That, at a date subsequent to February 4, 1910, or thereabouts, the defendants Marsene Johnson and W. C. Lessing began setting up some fictitious claim to said property in defiance of the rights of the American Type Founders' Company."

ders' Company, which adverse claim the American Type Founders' Company and this plaintiff had no knowledge of until about May, 1911, at which time the said American Type Founders' Company and this plaintiff were advised that said defendants, Marsene Johnson and W. C. Lessing, had taken possession of said property and had converted the same to their own use to the damage of the American Type Founders' Company in the sum of \$500." The appellants are not liable on the notes described in the petition, and, if they converted to their own use property upon which appellee had a valid lien, they could only be held liable for the market value of the property at the time and place of conversion; and, if the value of the property exceeded the amount of the debt for which the lien was given to secure, then only to the extent of such debt. The allegations of conversion, of the time and place of conversion, and of the value of the property converted, should be specific.

[3] It is further contended that there was no evidence, or insufficient evidence, of the value of the property claimed to have been converted, and that for this reason the judgment should be reversed. In this contention we concur. The only evidence found in the record that remotely bears upon the question of the value of the property was given by the witness George Sergeant, and, as shown by the agreed statement of facts, is as follows: "R. E. L. Giles, the maker of these notes and mortgage, sold this mortgaged property to Marsene Johnson, who moved the property to Houston and resold it to W. C. Lessing. The largest part of the property was broken into scrap iron in moving by the railroad company. Marsene Johnson sued the railroad company for the loss and recovered a judgment for several hundred dollars damage. The remainder of the property is now in the possession of W. C. Lessing under his contract of sale with Marsene Johnson. Principal, interest, and attorney's fees due plaintiff on the notes and mortgages sued on amount to \$481.69. Marsene Johnson and W. C. Lessing, by their conversion of this property, caused its destruction, and thereby prevented plaintiff from enforcing its lien on all but a fractional portion of property now in W. C. Lessing's hands, so that the damage sustained by plaintiff aggregates \$481.69. No part of this has been paid." This testimony utterly fails to show the value of the property at the time Johnson bought and took possession of it, and so does it fail, too, to show either the time when he took possession of it, or the place where it was situated when he took it. Without proof of the value of the property at the time and place of its conversion, if converted, there was no basis in the evidence for a judgment against Johnson and Lessing upon the theory that they

had converted it. It requires both allegations and proof to authorize and sustain a judgment. The absence of either is fatal. This proposition is so well established that the citation of authority in support of it is unnecessary.

[4] It is further contended that, in any event, the judgment rendered is too large. In this contention we also concur. If there had been evidence showing that the value of the property involved in the litigation, at the time and place of its conversion, was of value equal to or in excess of the debt sued on, a judgment for \$481.69 against appellants would be excessive, for the reasons that said amount exceeds by \$11.76, according to the calculation we have made, the principal, interest, and attorney's fees shown by the notes upon which the suit against Giles and the American Type Founders' Company was based, and to secure the payment of which the mortgage lien set up was given. Both of the notes are dated June 4, 1909. One of them is for \$200, payable January 1, 1910, and the other is for the sum of \$148, payable June 10, 1910. Both bear interest at the rate of 6 per cent. per annum from date until maturity, and from maturity until paid at the rate of 10 per cent. per annum, and provide for 10 per cent. additional as attorney's fees, if placed in the hands of an attorney for collection, etc. The error in the amount of the judgment would not, of itself, require a reversal of the case, as it could be cured by a remittitur; but, as a reversal is required for other reasons indicated, we call attention to it that a similar error may not occur upon another trial.

The judgment is reversed, and the cause remanded.

CROWDER et al. v. McLEOD.

(Court of Civil Appeals of Texas. Ft. Worth. April 20, 1912. Writ of Error Dismissed Oct. 16, 1912.)

1. HUSBAND AND WIFE (§ 268*)—LIABILITY OF WIFE—ABANDONMENT—DEBTS OF COMMUNITY.

A wife who has been abandoned by her husband may act as a feme sole, pay community debts, and convey community property, either for that purpose or to secure necessities for herself and family, as the survivor of the connubial partnership, and is authorized to bind herself by a note executed to secure an extension of the community debt.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 953-967; Dec. Dig. § 268.*]

2. BILLS AND NOTES (§ 92*)—CONSIDERATION—EXTENSION OF TIME.

Extension of time secured by a wife who had been abandoned by her husband by the execution of her sole note for the payment of a community debt constituted a sufficient consideration for the note.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 166-173, 175-212; Dec. Dig. § 92.*]

Appeal from Stonewall County Court.

Action by A. J. McLeod against Mrs. Nannie Crowder and others. Judgment for plaintiff, and defendants appeal. Affirmed.

N. R. Morgan, of Spur, for appellants. Ernest Herring, of Groesbeck, J. M. Carter, of Aspermont, and Theodore Mack, of Ft. Worth, for appellee.

CONNER, C. J. It seems undisputed in the record that appellee was the payee of a subsisting valid community obligation of one R. P. Fowler, who later permanently abandoned his wife, Nannie Fowler, leaving in her possession community property of the two; that, in order to obtain an extension and to avoid the immediate institution of a suit upon the said obligation of R. P. Fowler, Nannie Fowler during the continuance of said abandonment executed the obligation sued upon, and the principal question made on this appeal is whether said Nannie Fowler, who has since intermarried with W. S. Crowder, joined herein pro forma, could legally execute the obligation sued upon, and, if so, whether it was upon a sufficient consideration. Both of these questions in our judgment must be determined in the affirmative.

[1] While ordinarily under our statute a wife may not make contracts binding her separate property or the community property of herself and husband, save in certain cases not here pertinent, yet where, as here shown, she has been abandoned, she, in the nature of the situation, may act as a feme sole and pay community debts and convey community property either for that purpose or for the purpose of securing necessities for herself and family. When so abandoned, we think her powers with reference to and in preservation of the community property and in the settlement of connubial partnership business is analogous to the powers of a surviving partner generally. See *Fermier v. Brannan*, 21 Tex. Civ. App. 543, 53 S. W. 699; *Neighbors v. Anderson*, 94 Tex. 487, 61 S. W. 145, 32 S. W. 417; *Wetzel v. Simon & Co.*, 87 Tex. 404, 28 S. W. 274, 942; *Proetzel v. Rabel*, 21 Tex. Civ. App. 559, 54 S. W. 373; *Speer on Law of Married Women*, §§ 105, 116.

[2] It follows that the extension of time granted constituted a sufficient consideration, and that the judgment must be affirmed.

GUEDRY v. KEITH et al.

Court of Civil Appeals of Texas. Galveston. Nov. 4, 1912. Rehearing Denied Dec. 5, 1912.)

1. PUBLIC LANDS (§ 175*)—PROCEEDINGS—FILING OF CERTIFICATE—EFFECT OF FAILURE.

Acts 12th Leg. (2d Sess.) c. 57, provides that in all locations and surveys of land heretofore made under any certificate as is specified in the first section of this act, which included a headright certificate, and in which the field notes have been returned to the General Land Office, and the certificate is not on file in that office or has been withdrawn for location of

unlocated balance, such certificate shall be returned to and filed in the General Land Office within eight months from the passage of the act, or the location and survey made thereunder shall be void. *Held* that, where a headright certificate was never returned to and filed in the General Land Office, a location and survey made by virtue thereof was void.

[Ed. Note.—For other cases, see *Public Lands*, Cent. Dig. §§ 555-570; Dec. Dig. § 175.*]

2. PUBLIC LANDS (§ 174*)—STATUTORY REGULATIONS—VALIDITY.

Acts 12th Leg. (2d Sess.) c. 57, relating to filing of headright certificates in the General Land Office is constitutional.

[Ed. Note.—For other cases, see *Public Lands*, Cent. Dig. §§ 552-554; Dec. Dig. § 174.*]

Appeal from District Court, Hardin County; L. B. Hightower, Judge.

Action by J. F. Keith and another against Gustan Guedry. From a Judgment for plaintiffs, defendant appeals. Affirmed.

J. W. Lockett, of Houston, Greers & Nall, of Beaumont, and John L. Little, of Kountze, for appellant. Geo. D. Anderson, of Beaumont, and Singleton & Nall, of Kountze, for appellees.

McMEANS, J. J. F. Keith and the Keith Lumber Company brought this suit against Gustan Guedry for the recovery of 1,238½ acres of land in Hardin county, patented to the assignees of John M. Bowyer. They also sued John H. Kirby and Charles D. Bragg on their covenants of warranty. The suit against Bragg was dismissed, and, as the plaintiffs recovered against defendant, Guedry, there was no recovery against Kirby on his warranty. The defendant Guedry disclaimed as to all the land sued for except 640 acres, John P. Wilds survey, which was in conflict with the Bowyer, and as to said 640 acres he pleaded not guilty and the statute of limitations of three, five, and ten years. A trial before the court without a jury resulted in a judgment for plaintiffs, and from this judgment the defendant has appealed.

This case has been tried twice, and this is the second appeal. On the first trial a judgment was rendered on the verdict of a jury in favor of defendant for the 640 acres John P. Wilds survey, and on appeal said judgment was affirmed by the Court of Civil Appeals of the Fourth District, 114 S. W. 392. Afterwards the Supreme Court granted a writ of error and reversed the judgment of the Court of Civil Appeals and of the district court and remanded the case for a new trial. 103 Tex. 160, 122 S. W. 17, 125 S. W. 5.

The trial court filed its finding of facts, which, on account of its great length, we will not undertake to set out in this opinion. We think, however, that the evidence in the record justifies the following fact findings: The appellees claim the John M.

Bowyer survey of 1,238½ acres which was surveyed March 30, 1881, by virtue of duplicate certificate No. 35/137 issued January 24, 1879, in lieu of certificate No. 1,062, issued by the board of land commissioners of Harris county on August 9, 1851, to John M. Bowyer. The field notes of the survey were filed in the General Land Office April 12, 1881, and on October 25, 1881, were indorsed as being in conflict with the John P. Wilds survey, and on November 9, 1883, were indorsed corrected. On July 2, 1886, patent was issued for the land described by the field notes to Levi Ketchum and James D. Rhea as assignees of John M. Bowyer, which was recorded in Hardin county. It is conceded by the appellant that appellees connected themselves by a complete chain of title with the patentees. The appellee claims the John P. Wilds unpatented survey of 640 acres made on April 30, 1856, and which is entirely covered by the Bowyer survey. John P. Wilds immigrated to Texas in 1838, and was the head of a family, and on July 4, 1839, he obtained from the board of land commissioners of Jefferson county a conditional headright certificate No. 46 for 640 acres, took the oath, and made the proof of witnesses as required by law. The clerk of said board reported to the General Land Office, on July 18, 1839, that said certificate had been issued. The board appointed to investigate the records of the board of land commissioners east of the Brazos river reported May 24, 1841, recommending this certificate as genuine and legally issued. On November 4, 1845, John P. Wilds obtained from the board of land commissioners of Jefferson county his unconditional headright certificate No. 46 for 640 acres, and the issuance of this certificate was by the clerk of said board of land commissioners reported to the General Land Office. John P. Wilds located upon the 640 acres in controversy in 1839 or 1840, and resided thereon with his family until he sold it to Ursin Guedry in 1856, and said Guedry moved on the place immediately, and resided thereon with his family until his death in 1861, and his family continued to reside thereon substantially all the time until the fall of 1881.

The 640 acres in question were surveyed April 30, 1856, by A. H. Redding, surveyor of Jefferson county, which then included what is now Hardin county. The field notes of the survey recite that the survey was made by virtue of headright certificate No. 46, and they were recorded in the surveyor's office April 30, 1856, and were, with the map thereto attached, filed in the General Land Office on July 14, 1856. It is conceded by the appellees, and we find, that the appellant, Gustan Guedry, has the title which was acquired by the location of the John P. Wilds survey. The trial court found, and the evidence warrants the finding by us, that

neither the conditional nor the unconditional certificate issued to John P. Wilds was ever returned to or filed in the General Land Office. No patent was ever issued by the Commissioner of the General Land Office to John P. Wilds, or any other person, for the land surveyed by virtue of the John P. Wilds headright certificate. The court concluded as a matter of law, based upon findings substantially as above, that the John P. Wilds 640-acre survey became forfeited for failure to return to or file in the General Land Office the certificate by virtue of which said survey was made, and that the land thereby became vacant and subject to appropriation, and that the John M. Bowyer survey was validly located, surveyed, and patented over the said John P. Wilds forfeited survey. This conclusion is attacked by appellant by several assignments of error, which we will not discuss in detail. We are of opinion that all of said assignments must be overruled.

[1] As before stated, the certificate upon which the John P. Wilds survey was made (and whether it was made by virtue of the conditional or unconditional does not clearly appear and it is not material upon which) was never returned to or filed in the General Land Office. On the 29th day of November, 1871, the Legislature of this state enacted that: "In all locations and surveys of land heretofore made by virtue of any such certificate as is specified in the first section of this act, and in which the field notes have been returned to the General Land Office, and the certificate by virtue of which the survey was made is not on file in the General Land Office, nor has been withdrawn for location of unlocated balance, as is provided in the first section of this act, such certificate shall be returned to, and filed in the General Land Office within eight months from the passage of this act, or the location and survey made by virtue thereof, shall be null and void." Laws 2d Session 1871, p. 45, c. 57. The John P. Wilds certificate being a headright, was embraced in the terms of the first section of that act, therefore included in the part of the second section copied above. As said by our Supreme Court in this case on the former appeal (103 Tex. at page 166, 122 S. W. at page 19): "It follows that by the unmistakable language of the law the survey made under that certificate became void, and on March 30, 1881, the land was subject to location and appropriation by the certificate of John M. Bowyer, then located thereon, unless it shall appear that the unconditional certificate was at some time prior to July 29, 1872, on file in the General Land Office." We have before stated that the evidence shows that neither of said certificates was ever returned to and filed in the General Land Office, and, this being

true, it follows, of course, that the unconditional certificate was not returned to or filed therein prior to July 29, 1872.

[2] The contention of appellant that the act of November 29, 1871, is unconstitutional was decided against him by the Supreme Court in the opinion referred to. But appellant by his seventh assignment complains that the court erred in not holding that the John M. Bowyer survey and patent are void, because made on the same land formerly covered by the John P. Wilds survey, and without giving 90 days' notice of the forfeiture of the John P. Wilds survey. He contends by his proposition under this assignment, in substance, that the owner of a certificate by which a forfeited survey was located has a vested right in the land and has 90 days after he shall have been notified of the forfeiture within which to relocate on the same land, and during that time the land is reserved from location, survey, and patent by another, and any location, survey, or patent made before the expiration of 90 days, or without notice of the forfeiture being given, is void and is not validated by any subsequent lapse of time or by failure of the owner of the forfeited survey to relocate on same. This contention is based on the act of June 2, 1873, which provides: "When a survey has become forfeited and void from any cause, as soon as such forfeiture is discovered the Commissioner shall notify the party interested in such survey or location, in writing by mail, directed to such party at his post office address, if known, and if not known, directed to him at the county seat of the county in which the land is situated, of such forfeiture; and no new file or location shall be made on the land covered by such forfeited survey or location, except by the owner of such forfeited survey or location for a period of ninety days after the mailing of such notice." Revised Statutes 1879, art. 3812. This act was amended by the act of February 11, 1881, which went into effect July 1, 1881, and is brought forward in Revised Statutes of 1895 as article 4057, by adding thereto the following: "And the Commissioner shall keep a record of the date said notice was mailed and the name of the party to whom the notice was mailed, and the name of the post office to which said notice was addressed; and the record of such entries shall be prima facie evidence of the facts therein stated, and the absence of such entries shall be prima facie evidence that the notice required above had not been given."

As this last amendment was made after the location of the Bowyer certificate, it may be that no presumption would arise from the fact that the records of the Land Office were silent on the question that the notice of forfeiture was not in fact given. The court

in its fact findings found that there was no evidence that notice of the forfeiture of the John P. Wilds survey was given to said Wilds, Ursin Guedry, or his heirs, among whom the survey was partitioned. The court made additional findings of fact after the expiration of the time provided by law for filing its findings, in which it is specifically found that no notice of the forfeiture was ever given.

We think the assignment must be overruled, for, regardless of the conclusion this court might otherwise reach, we think the question is, in effect, concluded by the decision of the Supreme Court on the former appeal. It is clear from the opinion that the Supreme Court held that the failure to file the Wilds certificate in the General Land Office before the 29th day of July, 1872, rendered the location and survey void. If void, then the land was subject to location under any other valid certificate. This view of the Supreme Court is emphasized by the concluding portion of its opinion wherein this language is used: "In remanding the cause we think it proper to say that, the state having issued a patent upon the location made under the Bowyer certificate, it will devolve upon the defendant below (Guedry) to prove that the unconditional certificate issued to J. P. Wilds was located and the field notes and certificate returned to and deposited in the General Land Office at some time prior to the 29th day of July, 1872. Such proof in our opinion would show a vested right which would be superior to the right upon which the patent was issued, unless the plaintiffs shall prove that, after the Wilds certificate had been deposited in the Land Office, it was withdrawn therefrom by the owner of the certificate, or by some person authorized by him to do so. *Snider v. Methvin*, 60 Tex. 490. If such proof should be made by plaintiffs, then the survey made by the Wilds certificate must be held to have been forfeited under the act of November 29, 1871, and plaintiffs would be entitled to recover the land in controversy."

Appellant's eleventh assignment of error complains of the action of the court in refusing to render judgment in his favor on the issue of limitation under the three, five, and ten years' statutes.

The court found that appellant had failed to establish title by limitation in himself, or through those under whom he claims, to the land in controversy. We have carefully examined the evidence set out in the briefs of the parties on this issue, and, while it is conflicting, we find that there was testimony which justified the court's conclusion. The assignment is overruled.

There are many other assignments presented by appellant in his brief, all of which we have carefully considered, and have

reached the conclusion that none of them point out error which requires a reversal of the trial court's judgment. The judgment of the court below is affirmed.

Affirmed.

GENERAL ACCIDENT, FIRE & LIFE ASSUR. CORPORATION v. LACY et al.

(Court of Civil Appeals of Texas. Dallas. Nov. 2, 1912. On Motion for Rehearing, Dec. 21, 1912.)

1. JUDGMENT (§ 163*)—DEFAULT JUDGMENT—PROCEEDING TO VACATE—MERITS OF DEFENSE.

The court, on motion to open a default judgment, may not as a general rule pass on the merits of the defense in support of the motion.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 323; Dec. Dig. § 163.*]

2. JUDGMENT (§ 143*)—DEFAULT JUDGMENT—VACATION—GROUNDS.

A defendant who, more than a month before the end of the term at which the default judgment was taken, filed his application to vacate the judgment, and pleaded as an excuse for the default a compromise and settlement of the claim sued on and a promise by plaintiff to dismiss the action, showed a reasonable excuse for defaulting and a meritorious defense, necessitating the vacating of the judgment.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 269, 270, 272-291; Dec. Dig. § 143.*]

3. INSURANCE (§ 602*)—FAILURE TO PAY LOSS—DAMAGES—ATTORNEY'S FEES.

Acts 31st Leg. c. 108, § 35, making an insurer, failing to pay a loss within 30 days after demand, liable to pay the loss with damages and attorney's fees for the collection of the loss, requires a specific allegation in the petition of demand and refusal to pay within the time prescribed, and a petition merely alleging that, though often requested, insurer has refused to pay the policy or any part thereof, is not sufficient to justify the recovery of the damages and attorney's fees.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1498; Dec. Dig. § 602.*]

On Motion for Rehearing.

4. APPEAL AND ERROR (§ 835*)—OBJECTIONS—TIME TO MAKE.

Under Court Rule 22 (142 S. W. xii), providing that parties will be expected before submission to see that the transcript of the record is properly prepared and inaccuracies will not be admitted after submission as a reason for correcting the record or obtaining a rehearing, a defendant in error on rehearing may not maintain a motion to amend or strike out the transcript because of inaccuracies therein.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3241-3246; Dec. Dig. § 835.*]

5. JUDGMENT (§ 162*)—VACATING DEFAULT JUDGMENT—MERITORIOUS DEFENSE—EVIDENCE.

The court, on hearing a motion to open a default judgment, may take the testimony on the merits of the defense interposed, where no objection is made to a trial of the issue in that way.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 319-322; Dec. Dig. § 162.*]

Error from Wood County Court; B. M. Smith, Judge.

Action by Henrietta Lacy and another against the General Accident, Fire & Life Assurance Corporation. There was a judgment for plaintiffs, and defendant brings error. Reversed and remanded.

G. W. Keeling, of Pittsburg, and Israel Dreeben, of Dallas, for plaintiff in error. Jones & Jones, of Mineola and Winnsboro, for defendants in error.

TALBOT, J. This suit was filed by Henrietta Lacy, joined by her husband, Jerry Lacy, on the 6th day of September, 1910, against the General Accident, Fire & Life Assurance Corporation, Limited, of Perth, Scotland, in the county court of Wood county, Tex., upon an accident insurance policy alleged to have been issued by plaintiff in error, to one David C. Lacy, the son of the plaintiffs in the said suit. Citation was issued to the defendant assurance corporation by the clerk of the county court of Wood county, directed to the sheriff of Camp county; plaintiff having alleged that defendant corporation had no agent in Wood county, which said citation was served by the sheriff of Camp county, Tex., and his return showing that he served the citation, but not showing service of a certified copy of plaintiffs' petition. The defendant did not appear and plead, nor waive or accept service. On the 18th day of January, 1911, same being a day of the January term of said court, a judgment was rendered by default in favor of plaintiffs against the defendant, for the amount sued for, to wit, \$400 principal, \$48 penalty, and \$100 attorney's fees. At the same term of the court at which said judgment was rendered and on February 8, 1911, plaintiff in error filed a motion to vacate and set aside said judgment, which was by the court overruled. On February 23, 1911, the defendant in error filed a motion to have the sheriff of Camp county amend his return on the citation so as to show service of a certified copy of the petition upon the plaintiff in error. This motion was by the court sustained and the amendment directed to be made. Defendant in the court below, being dissatisfied with the rulings of that court, has brought the case to this court by writ of error.

At the last term of the court we affirmed the judgment of the lower court without a written opinion, but, upon a further consideration of the case on motion for a rehearing, have concluded the judgment should be reversed and the cause remanded. In its motion to have the default judgment set aside and a new trial awarded, the plaintiff in error pleaded a compromise and settlement of the claim sued on for the sum of \$100 prior to the rendition of said judgment; that said sum was paid to defendant in er-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

ror in full satisfaction and discharge of any and all claims defendant in error had by reason of the policy sued on; and that in consideration thereof defendant in error agreed and promised to dismiss this suit. Attached to the motion to have the judgment by default vacated and set aside was a written release, dated December 19, 1910, purporting to have been signed by the defendant in error and witnessed by J. O. Lacy and A. M. Lacy. This release recites the receipt of \$100 by the defendant in error in compromise and full settlement of any claim which may have arisen by reason of the policy issued to David Lacy and made the basis of the suit. There is no statement of facts in the record; but the judgment overruling the motion to vacate the default judgment contains the following recitation, namely: "The court further finds that the purported release which was executed by Henrietta Lacy is null and void, for the reason that same was procured by the defendant through fraud and deceit, and the court further finds that there was no consideration given for said release." This judgment also recites that the "court, after hearing all of the testimony upon said motion, is of the opinion that the same is not well taken and that the same should be in all things overruled." We have been unable, however, to find any pleading in the record filed by the defendant in error contesting plaintiff in error's motion to set aside the judgment or otherwise raising an issue as to the truth of the matters set up in said motion.

[1] But whether any such pleading was filed or not, we think the court in hearing evidence, if any was heard, in opposition to the motion and in determining on the motion to vacate the default judgment that the compromise and release pleaded by the plaintiff in error had been effected and procured by fraud and deceit, and therefore such compromise and release were null and void, erred. That the compromise and release pleaded by the plaintiff in error in its sworn application to set aside the default presented a defense prima facie meritorious is not and cannot be denied, and, according to very high and doubtless the weight of authority, the trial court, in the hearing of the application, was not authorized to inquire into the truth of the defense thus asserted. It is said that when the application is by motion, and the applicant shows a reasonable excuse for having made default, and also shows by affidavit that he has a meritorious defense to the plaintiff's claim, the court must pass on the question of setting aside the default on the showing thus made. It cannot take testimony as to the truth of the facts of defense. To permit the taking of testimony as to the matters set out in the affidavit and a determination of the issue thus raised would, in effect, be to try the defense before the court had determined, by setting aside the default, that the defendant should be heard

to make a defense. The following are some of the cases so holding: *Worth v. Wetmore*, 87 Iowa, 62, 54 N. W. 56; *Joerns v. La Nicca*, 75 Iowa, 709, 38 N. W. 129; *Pratt v. Kells*, 28 Ala. 390; *Francis v. Cox*, 33 Cal. 323; *Gracier v. Weir*, 45 Cal. 53; *Douglass v. Todd*, 96 Cal. 655, 31 Pac. 623, 31 Am. St. Rep. 247; *Ruck v. Havens*, 40 Ind. 221.

[2] The record shows that the plaintiff in error, more than a month before the expiration of the term of court at which the judgment by default in this case was taken, filed its application to open and set aside said judgment, and pleaded, as an excuse for making default, a compromise and settlement of the claim sued on and a promise on the part of the defendant in error to dismiss this case. This was a reasonable excuse for not appearing and answering the suit, and, together with allegations of compromise and settlement, showed good grounds for vacating the judgment. 23 Cyc. p. 920, and cases cited in note.

[3] We are further of the opinion that the pleadings were insufficient to authorize a recovery for the penalty and attorney's fees, provided for in chapter 108, Acts of the Thirty-First Legislature. This statute, section 35, provides that in all cases where a loss occurs and the life or accident insurance company liable therefor shall fail to pay the same within 30 days after demand therefor, such company shall be liable to pay the holder of such policy, in addition to the amount of the loss, 12 per cent. damages on the amount of such loss, together with reasonable attorney's fees for the prosecution and collection of such loss. There is no specific allegation of demand and failure on the part of the plaintiff in error in this case to pay within 30 days after such demand, found in the petition. Such an allegation was, we think, essential to a recovery of the damages and attorney's fees allowed in the judgment. The general allegation "that, although often requested, the defendant has wholly refused and failed to pay said policy or any part thereof," is not in our opinion sufficient. Neither can the filing of the suit be regarded as the demand intended by the statute in question. This statute is penal in its nature and must be strictly construed. It requires, we think, a specific allegation of demand and refusal to pay within the time prescribed, and the petition of defendant in error, not containing such an allegation, was obnoxious, it would seem, to a general demurrer, and therefore not sufficient to support the judgment for the damages and attorney's fees awarded. That the specific allegation referred to must be made seems clearly inferable from the following decisions: *Northwestern Life Assur. Co. v. Sturdivant*, 24 Tex. Civ. App. 331, 59 S. W. 61; *Mutual Life Ins. Co. v. Ford*, 103 Tex. 522, 131 S. W. 406; *Security Co. v. Hallum*, 32 Tex. Civ. App. 134, 73 S. W. 554; *Penn*

Mutual Life Ins. Co. v. Maner, 101 Tex. 553, 109 S. W. 1084.

In view of another trial, it is proper to call attention to the condition of the policy sued on, as shown by the record sent to this court. It appears that the policy was made an exhibit to and a part of the plaintiff's petition in the court below, and, as copied into the transcript, bears date June 18, 1909, and recites that the deceased, David Lacy, is insured "from 12 o'clock noon, eastern standard time, of the day this contract is dated, until 12 o'clock noon, standard time, of the first day of July 1907," etc. Thus, upon the face of the policy it appears that the deceased was insured for a period of time antedating the issuance of the policy. The policy may be incorrectly copied into the transcript, or either the date of the policy or the period of time intended to be covered by the insurance was inaccurately stated, in drawing the policy. If an error in writing the policy was made, appropriate allegations in regard thereto should be made by an amendment of the pleadings.

The motion of the plaintiff in error for a rehearing is granted, and for the reason indicated the judgment of the court below is reversed, and the cause remanded.

On Motion for Rehearing.

[4] The motion of the defendant in error to strike out the transcript in this case, because of inaccuracies therein, or to make a certified copy of their contest of the plaintiff in error's motion filed in the county to set aside the judgment by default taken in that court, a part of the record in this court, cannot prevail. Rule 22 (142 S. W. xli), relating to the preparation of cases for submission in this court, as recently amended by the Supreme Court, provides: "All parties will be expected, before submission, to see that the transcript of the record is properly prepared, and the mere failure to observe omissions or inaccuracies therein will not be admitted, after submission, as a reason for correcting the record or obtaining a rehearing." Under this rule the motion to amend or strike out the transcript comes too late and must be overruled.

[6] In their motion for a rehearing the defendants in error contend that we erred in holding that the trial court should not have heard evidence in opposition to the plaintiff in error's motion to vacate the default judgment appealed from and determined therefrom that the compromise and release set up in said motion had been effected and procured by fraud and deceit. This contention is predicated, not upon the ground that we did not correctly state the general rule of law upon the subject, but upon the proposition that the record fails to disclose any objection on the part of the plaintiff in error to a trial of this issue in that way. In support of their proposition, defendants in

error cite the cases of **Sugg v. Thornton**, 73 Tex. 666, 9 S. W. 145, and **Pacific Mutual Life Ins. Co. v. Williams et al.**, 79 Tex. 633, 15 S. W. 478. These cases were not called to our attention before the written opinion heretofore filed in the case was handed down, and they were overlooked. The cases cited sustain the position now assumed by counsel for the defendant in error; but, for the other reasons given in our opinion, the cause must stand reversed and remanded for a new trial. As stated in our original written opinion, the pleadings of the plaintiffs below were insufficient to authorize the judgment by default for the penalty and attorney's fees therein awarded; nor were the pleadings, as they appear from the transcript sent to this court, sufficient to authorize and support the judgment for the amount of the policy sued on. This condition of the pleadings, as the case was being reversed on other grounds, was simply referred to in our original opinion with the suggestion that the difficulty disclosed by the policy which was attached to and made a part of the plaintiffs' petition might be and should be corrected by an amendment on another trial.

The motion for a rehearing is overruled.

FT. WORTH & D. C. RY. CO. v. WESTERN STOCKYARDS CO. et al.

(Court of Civil Appeals of Texas. Amarillo. Nov. 16, 1912. Rehearing Denied Dec. 7, 1912.)

1. PUBLIC LANDS (§ 172*)—GRANT OF RIGHT OF WAY—CONSTRUCTION.

The grant of a right of way 200 feet in width to the Ft. Worth & Denver City Railway Company by special act of the Legislature in 1873 (chapter 208) was a grant effective in present and subsequent grantees located their certificates, and their assigns took, subject to such legislative grant.

[Ed. Note.—For other cases, see **Public Lands**, Cent. Dig. §§ 523-543; Dec. Dig. § 172.*]

2. PUBLIC LANDS (§ 172*)—GRANT OF RIGHT OF WAY—REVOCATION.

Where a grant of land to a railroad for right of way rested upon a condition subsequent, failure to perform such condition did not operate to revoke the grant, but merely authorized the state to forfeit it by judicial proceedings or legislative act.

[Ed. Note.—For other cases, see **Public Lands**, Cent. Dig. §§ 523-543; Dec. Dig. § 172.*]

3. PUBLIC LANDS (§ 172*)—GRANT OF RIGHT OF WAY—ACCEPTANCE OF DEED—ESTOPPEL.

The fact that a railroad, after receiving from the state a grant of land 200 feet in width, accepted a deed from a subsequent settler to a strip of such grant 100 feet wide, did not estop it from suing for the full 200 feet.

[Ed. Note.—For other cases, see **Public Lands**, Cent. Dig. §§ 523-543; Dec. Dig. § 172.*]

4. PUBLIC LANDS (§ 172*)—ACCEPTANCE OF DEED—RAILROAD GRANT.

Where a railroad to which the Legislature had granted a strip of land contracted with the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

party claiming title to one-half the strip from a subsequent settler, relative to the building of stockyards upon such half, and such contract described the land belonging to the railroad company by a blue print and map which did not include such half, such contract, being an unequivocal admission that its claim of right of way did not include this part, estopped it from thereafter claiming same, especially where it appeared that the other contracting party and his assigns had incurred great expense in purchasing adjacent property and constructing valuable improvements.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 523-543; Dec. Dig. § 172.*]

5. ADVERSE POSSESSION (§ 41*)—ACQUISITION OF TITLE—RAILROAD GRANT.

Where a person and his assigns claiming title under a settler held adverse possession for 15 years of 100 feet of the 200 feet of land granted to a railroad for a right of way, they acquired title by adverse possession.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 184-206; Dec. Dig. § 41.*]

Appeal from District Court, Potter County; J. N. Browning, Judge.

Action by the Ft. Worth & Denver City Railway Company against the Western Stockyards Company and others. From a judgment for defendants on a directed verdict, plaintiff appeals. Affirmed.

Turner & Wharton, of Amarillo, and Spoons, Thompson & Barwise, of Ft. Worth, for appellant. Madden, Trulove & Kimbrough, and F. M. Ryburn, all of Amarillo, for appellees.

HALL, J. This suit was instituted by appellant railway company against the Western Stockyards Company and the Panhandle Packing Company to recover a strip of land 50 feet in width, being a portion of section 137, block 2, A. B. & M. surveys, Potter county, Tex. The strip of land in question, beginning 1,400 feet west of the eastern boundary line of said section at a point 50 feet north of the center of plaintiff's main track for the southeast corner, thence north 50 feet for the northeast corner, and said strip 50 feet in width extending in a westerly direction parallel with plaintiff's main track to a point 2,065 feet east of the west boundary line of said section. The petition is in the usual form of trespass to try title, and contains a second count, pleading plaintiff's title in detail. The substance of the second count is that plaintiff acquired the strip of land in question by virtue of its charter granted by special act of the Legislature in 1873 (Laws 1873, c. 208), section 8 of said act being as follows: "That the right of way to be to the extent of 200 feet wide is hereby granted to said railway company through the public lands of the state of Texas and also the right to take and use in the construction of said road any timber or other material used in the construction of railways found lying upon any part of the public lands of this state." The charter authorized the road to be con-

structed from a point at or near Ft. Worth, Tex., beginning at a junction with the Texas & Pacific Railway, and continuing in a north-westerly direction to the western boundary line of the state of Texas, in the direction of the city of Denver, Colo.; that plaintiff began the actual work of locating said line of road within one year after the date of its charter, and continued in accordance with the requirements of the law until the line was constructed, equipped, and in operation, which was in the month of April, 1888; that the road was constructed across the section in question in the year 1887; that at the time of the granting of its charter and until July 20, 1875, said land was known as section 137, and was vacant, unappropriated public domain, having been surveyed, located, and patented after July, 1875; that, by reason of the construction of its road, it became entitled to a strip of land 200 feet in width across said section; that the land in controversy is a part of the town of Amarillo, which town has since the construction of plaintiff's road become a large and important shipping point having about 10,000 population, with two other lines of railway intersecting plaintiff's line at said point, and it has become necessary for plaintiff to use and occupy the whole of said strip of land 200 feet in width across said section for tracks, switches, and other facilities for the proper operation and management of its said line of road. The petition further sets out the history and origin and establishment of Western Stockyards Company, and alleges that said company constructed certain stock pens and stockyards on plaintiff's line of road north of its main track, and was occupying the land in controversy, except that portion of it which had been conveyed by said Stockyards Company to the Panhandle Packing Company, a second corporation. Some of the questions presented for our consideration by this appeal have been considered by us in disposing of the case of Ft. Worth & Denver City Railway Co. v. Southern Kansas Railway Co. et al., 151 S. W. 850, by our opinion, dated November 2, 1912, and not yet officially reported. We see no reason for holding other than we did in that case that the language of the grant, when construed in connection with the presumption that the track would be built in the center of the right of way as granted, sufficiently designates the property granted.

[1] We also held in said case that the grant was effective in present, nor do we see any reason for changing our opinion upon that issue. In the case of St. J. & D. C. R. R. Co. v. Baldwin, 103 U. S. 426, 26 L. Ed. 578, there was a grant to the appellant railway company, the sixth section of which is as follows: "And be it further enacted that the right of way through the public lands be and the same is hereby granted to said St. Joseph & Denver City Railway Company, its

successors and assigns, for the construction of a railroad as proposed and the right is hereby given to said corporation to take from the public lands adjacent to the line of said road, material for the construction thereof. Said way is granted to said railroad to the extent to 100 feet in width on each side of said road, where it may pass through the public domain," etc. Mr. Justice Field, in delivering the opinion of the court, stated that the act of Congress in question made two distinct grants, one of which was of a right of way directly to the company itself, and uses this language: "But the grant of the right of way by the sixth section contains no reservations or exceptions. It is a present, absolute grant, subject to no conditions except those necessarily implied, such as that the road shall be constructed and used for the purposes designated, nor is there anything in the policy of the government with respect to the public lands which would call for any qualification of the terms. Those lands would not be the less valuable for settlement by a road running through them. On the contrary, their value would be greatly enhanced thereby. The right of way for the whole distance of the proposed route was a very important part of the aid given. If the company could be compelled to purchase its way over any section that might be occupied in advance of its location, very serious obstacles would be often imposed to the progress of the road. For any loss of lands by settlement or reservation, other lands are given, but for the loss of the right of way by these means no compensation is provided, or could any be given by the substitution of another route. The uncertainty as to the ultimate location of the line of road is recognized throughout the act, and, where any qualification is intended in the operation of the grant of lands from this circumstance, it is designated. Had a similar qualification upon the absolute grant of the right of way been intended, it can hardly be doubted that it would have been expressed. The fact that none is expressed is conclusive that none exists. We see no reason therefore for not giving to the words of present grant with respect to the right of way the same construction which we should be compelled to give according to our repeated decisions, to the grant of lands, had no limitation been expressed. We are of the opinion, therefore, that all persons acquiring any portion of the public lands after the passage of the act in question took the same subject to the right of way conferred by it for the proposed road." In this case the act of Congress reserved in that part of the special charter granting lands to the state of Kansas for the benefit of said road all lands that had been previously granted or which had been appropriated by pre-emption or homestead settlement, and the facts show that at the time of said grant the route of the road had not been fixed.

There is in the instant case an agreed statement of facts, a part of which is as follows: "That at the time said act was passed (May 26, 1873) all that portion of Northwestern Texas, within 100 miles of the land in controversy, and over which said corporation's line of railroad and telegraph lines were subsequently located and constructed, was uninhabited and a large portion thereof (all that portion being on what is called 'Staked Plains,' including where the land in controversy is located) was rarely visited or seen by man or beast, except that after the spring rain and green grass would come, usually in May or June, the buffalo and wild horse would roam there in large numbers to graze during the remainder of the spring and summer seasons, and bands of Indians would come and roam from their reservations to hunt. This condition of affairs in said territory continued for a year or more after said act was passed, so that during said time the land in controversy and a very large portion of Northwestern Texas over which said line of railroad has been subsequently located was what is known as 'frontier,' and subject to incursions, and depredations by hostile bands of Indians, such as history shows to have been the conditions in far out frontier counties, rendering an undertaking of a survey and location of said line at said time correspondingly dangerous to life and property as well as expensive." We presume that the above facts are shown in order to excuse appellant's failure to comply with the fifteenth section of the special act, requiring appellant to file with the Commissioner of the General Land Office within six months after the organization of the company plans and maps, showing the line upon which it intended to construct its road. These facts are unnecessary in our opinion, because the grant took effect in present. The case of *Railway Co. v. Baldwin*, supra, is only one of many cases decided by the Supreme Court of the United States, construing similar grants to railroads of a right of way across public lands, among which we cite *D. & B. G. Ry. Co. v. Alling*, 99 U. S. 475, 25 L. Ed. 443, in which it is said: "We do not doubt that the intention of Congress was to grant to the company a present beneficial easement in the particular way over which the designated routes lay, capable, however, of enjoyment only when the way granted was actually located, and in good faith appropriated for the purposes contemplated by the charter of the company and the act of Congress. When such location and appropriation took place, the title, which was previously imperfect, acquired precision, and by relation took effect as of the date of the grant. The settled doctrine of this court would seem to justify that conclusion." The grant to the Denver & Rio Grande Railway Company was almost identical with the language of the grant in this case. In construing the act of March 13, 1875, in *Noble v. U. R. L. Ry. Co.*, 147 U. S.

165, 13 Sup. Ct. 271, 37 L. Ed. 123, it is said: "The lands over which the right of way was granted were public lands, subject to the operation of the statute, and the question whether the plaintiff was entitled to the benefit of the grant was one which it was competent for the Secretary of the Interior to decide, and, when decided and his approval was noted upon the plots, the first section of the act vested the right of way in the railroad company. The language of that section is 'that the right of way over the public lands of the United States is hereby granted to any railroad company duly organized under the laws of any state or territory,' etc. The uniform rule of this court has been that such an act was a grant in present of lands to be thereafter identified. The railroad company became at once vested with a right of property in these lands of which they can only be deprived by a proceeding taken directly for that purpose. If it were made to appear that the right of way had been obtained by fraud, a bill would doubtless lie by the United States for the cancellation and annulment of an approval thus obtained." In *M., K. & T. Ry. Co. v. Cook*, 163 U. S. 495, 16 Sup. Ct. 1095, 41 L. Ed. 489, the grant was as follows: "That the right of way through the public lands be and the same is hereby granted to said Pacific Railway Company, Southern Branch, its successors, and assigns, for the construction of a railroad as proposed. Said way is granted to said railroad to the extent of 100 feet in width on each side of said road where it may pass through the public domain," etc. In construing said section, the court said: "The same conclusion necessarily followed in respect to the right of way. The grant of the lands and the grant of the right of way were alike grants in present, and stood on the same footing so that before the definite location all persons acquiring any portion of the public lands after the passage of the act took the same subject to the right of way for the proposed road. The easement and the lands were afloat until by definite location precision was given to the grant and they became permanently fixed." These and other decisions to the same effect seem to us to be conclusive, and, if we are correct in this, the original grantee, Adams, Beatty & Moulton, located their certificate subject to the provisions of this special charter, and their assignee, F. W. Levings, took no greater right, but acquired the land subject to the same burden, and conveyed no greater right than he had to H. B. Sanborn, who on the 29th day of June, 1905, conveyed the land to appellee Stockyards Company. We think we are sustained in our conclusions by *Olive v. Sabine & E. T. Ry. Co.*, 11 Tex. Civ. App. 208, 33 S. W. 139; *Texas Central Ry. Co. v. Bowman*, 97 Tex. 417, 79 S. W. 295; *McLucas v. St. J.*, etc., Ry., 67 Neb. 603, 93 N. W. 923, 97 N. W. 312, 2 Ann. Cas. 715; *Churchill v. Choctaw Ry.*, 4 Okl. 462, 46 Pac. 506; *Flint*,

etc., *P. M. Ry. v. Gordon*, 41 Mich. 420, 2 N. W. 648, and other cases cited therein.

[2] We believe the weight of authority to be that, if the grant rests upon a condition such as that contained in section 15 of appellant's charter, it is a condition subsequent, and that the failure to perform a condition subsequent does not operate as a revocation of the grant, but merely authorizes the state to take advantage of it and forfeit it by judicial proceedings or by some positive act of the Legislature, resuming title to the land. *Utah, etc., R. R. Co. v. Railroad Co.* (C. C.) 110 Fed. 879; *San Pedro v. S. P. Ry. Co.*, 101 Cal. 333, 35 Pac. 993; *C. P. Ry. Co. v. Dyer*, 1 Sawy. 641, Fed. Cas. No. 2,552; 32 Cyc. 989 (Ill.); 26 Am. & Eng. Encyc. of L. 436 et seq.

[3] Appellant's third assignment of error raises the question as to whether or not its acceptance of a deed from H. B. Sanborn in 1893, conveying to it a strip of land 100 feet wide out of section 137, creates an estoppel against its right to maintain this suit for the full 200 feet in width under its grant from the state. The case of *Bybee v. O. & C. Railway Co.*, 139 U. S. 663, 11 Sup. Ct. 641, 35 L. Ed. 305, is in point, and seems to us to be conclusive of this issue. There the grant to the railway company was for alternate sections to the amount of 20 sections per mile, but it also gave a right of way through public lands to the extent of 100 feet in width on each side of the road. The date of this grant was July 25, 1866, and its line of road was not completed until July 1, 1880. In the interim, the plaintiff, Bybee, under the act of Congress July 28, 1866, settled on the land over which the right of way in controversy was afterwards claimed, and acquired a legal claim under said act, the date of his occupation being 1879, and before the railroad company had located its right of way across his particular section or in any manner indicated an intention to build across it. When in the construction of the road his land was reached, the railway company paid him \$250 for right of way across it, and agreed that the road should not damage any of the ditches belonging to plaintiff on said land. After the construction of the road, Bybee filed suit to recover damages because of alleged injuries to one of his ditches, and the court held that the company was not only not estopped by taking the deed from Bybee, but that it obtained nothing by reason of such deed because it already had superior title to its right of way, and in disposing of the issue used this language: "With regard to the question of estoppel the complainant alleges that the defendant went into possession of that portion of the plaintiff's ditch across which its road was constructed, under a deed from plaintiff and his tenant in common for a consideration of \$250 paid, and assented to the condition therein contained against impairing or destroying said

ditch, the only right conveyed being a license 'to enter on said ditch and construct and operate its road over the same' upon such condition. The contention of the plaintiff is that in receiving this deed and entering into possession the relation of landlord and tenant was created between them, and not that of vendor and vendee, so far as the doctrine of estoppel is concerned. But as the deed was the conveyance of a perpetual right for a solid consideration therein expressed, and there was no covenant for the payment of any rent, nor for redelivery of possession, we think it should be regarded as creating the relation of grantor and grantee between the parties thereto. We have already found that the title of the company to its right of way upon the location of its route related back to the date of the act, and hence, when it took possession of the land in question, plaintiff had no title thereto which he could set up against the company. Had the defendant not accepted the deed from the plaintiff, it might, under our ruling upon the first point, have treated him as a trespasser. The real question then is whether the defendant is placed in a worse position by having accepted the deed from a party who had no title to the premises he assumed to convey; the defendant having taken the conveyance under a mistaken view of the law applicable to the case. It is conceded that as a general principle the grantee in deed of conveyance is not estopped to deny the title of his grantor, and, unless this case be an exception to this rule, it will necessitate an affirmance of this judgment. The rule was first applied by this court in the case of *Blight v. Rochester*, 20 U. S. (7 Wheat.) 535, 5 L. Ed. 516, in favor of the grantee, who was permitted to show that the person from whom he derived title was an alien, and, under the laws then existing, incapable of transmitting by inheritance the title to lands in this country. In *Merryman v. Bourne*, 76 U. S. (9 Wall.) 595, 19 L. Ed. 683, it was stated that the vendee 'holds adversely to all the world, and has the same right to deny the title of his vendor as the title of any other party,' and in *Robertson v. Pickrell*, 109 U. S. 608 [3 Sup. Ct. 407, 27 L. Ed. 1049], it was held in an elaborate opinion by Mr. Justice Field that defendants, who held under a deed of a life estate, were not estopped from setting up a superior title. Cases in the state courts to the same effect are *Comstock v. Smith*, 13 Pick. (Mass.) 116 [23 Am. Dec. 670], *Osterhout v. Shoemaker*, 3 Hill (N. Y.) 513, *Clee v. Seaman*, 21 Mich. 287, and *Sparrow v. Kingman*, 1 N. Y. 242." And again the court uses this language: "But the consequences of treating this case as an exception to the general rule are somewhat serious. If, as we hold, the defendant had the prior right to this land, it was under no obligation to treat with the plaintiff or pay him for the disturbance of his possession, which was un-

lawful as against the Company. Has it by this deed disqualified itself forever from asserting the right that it would have possessed had it not done this? We think not. Assuming, as some of the cases indicate, that, before disputing the title of his grantor, the grantee is bound to surrender his possession taken under the deed, such requirement is obviously inapplicable to a case like this, where the only possession consists in the disturbance of a water right or ditch claimed by the plaintiff by the construction of the road across such ditch. It could only be restored by the destruction of the road and the rebuilding of the ditch; in other words, by the surrender of possession under the deed, and a repudiation of the entire transaction, when it is admitted that the defendant could set up its prior title and proceed against the plaintiff as a trespasser. But this would be a useless and expensive formality; and we think the rule that forbids a tenant from disputing his landlord's title without first surrendering his possession has no application to a case like this. It may be said in general that the doctrine of estoppel exists only where there is an obligation to restore the possession of the land upon certain contingencies, such, for instance, as exist between landlord and tenant, or mortgagor and mortgagee. In such cases the occupant is considered to have pledged his faith to return the possession of the land which he occupies, and will not be permitted to do anything to impair the title of him from whom he has received it. 8 Washb. Real Property, 98; *Gardner v. Greene*, 5 R. I. 104; *Osterhout v. Shoemaker*, 3 Hill (N. Y.) 513. In this case the defendant not only did not agree to resurrender possession to the plaintiff, but it accepted the deed with this covenant or condition for which it received no consideration, and we do not consider it a breach of good faith upon the part of the defendant to set up this fact, nor ought it to be put in a worse position by having accepted this deed and paid \$250 therefor, than it would have occupied had it refused altogether to treat with the plaintiff. The deed was evidently delivered and received by these parties under a misapprehension of their legal rights, and it would be manifestly unjust to hold the defendant forever estopped from asserting the invalidity of the covenant into which it had inadvertently entered."

[4] What has been heretofore said in effect disposes of all of appellant's assignments of error necessary to be considered in deciding the case, except the questions of estoppel and adverse possession. About 15 years prior to the institution of this suit one Bolton, an employé of Sanborn, constructed a fence parallel with appellant's line of railway 50 feet north of the center of the track, which remained there from the time of its construction until the construction of the stock pens and stockyards. Oc-

June 29, 1905, Sanborn conveyed a part of section 137, including the land in controversy, to the Western Stockyards Company, naming as the southern boundary line appellant's right of way. On the 6th day of February, 1909, the Western Stockyards Company conveyed to the Panhandle Packing Company a strip of land 65 feet north of and parallel with the center line of appellant's road. On the 21st day of January, 1905, appellant, acting through its vice president and general manager, entered into a contract with O. H. Nelson for the construction of the stock pens now owned by the Western Stockyards Company. Section 1 of the contract provides that "Nelson, his successors and assigns, shall within ninety days from and after the execution and delivery of these presents, build and maintain a thoroughly up to date stockyard and pens, with necessary driveways and approaches, suitable and adapted for receiving, feeding, watering, transferring, loading, unloading and reloading cattle, horses and other live stock, located according to attached blue print, marked 'Exhibit A' and made a part of this contract." The contract was also executed by the Chicago, Rock Island & Gulf Railway Company, acting through S. B. Hovey, its vice president and general superintendent, the Southern Kansas Railway Company, and the Pecos & Northern Texas Railway Company, both acting through their vice president and general manager, Avery Turner; the purpose of the contract, as expressed, being to establish such improvements at Amarillo for the mutual benefit, convenience, and use of the parties thereto. Thereafter, on the 10th day of July, 1905, by agreement of all parties, the contract was assigned to the Western Stockyards Company by the said Nelson. Again, on the 24th day of March, 1906, by mutual agreement, the life of the original contract was extended from 10 to 20 years. Section 8 of the original contract is as follows: "Said party of the first part [O. H. Nelson] further agrees to furnish sufficient ground and right of way for construction of necessary tracks for delivering and taking stock from such stockyards and pens and for other purposes in connection with operating such stockyards, such grounds and right of way to be furnished without cost to said railway companies, and the title to said railway tracks shall remain with the said railway companies and at the expiration or termination of this contract, if they decide the tracks are no longer required, they may enter in on said right of way and remove said tracks and all material belonging to said railway companies." The blue print and map referred to above and designated as "Exhibit A," and by the terms of the contract made a part thereof shows appellant's right of way to have been 18 varas wide on each side of its track, and

does not include the land in controversy. The contract does not otherwise describe the land. The rule is that when a description of land, as part of a tract or survey, is general, it will be controlled by boundaries indicated on a plot or map. *Cullers v. Platt*, 81 Tex. 263, 16 S. W. 1003; *Bogges v. Allen*, 56 S. W. 195. While we do not agree with appellee that the act of appellant in accepting from Sanborn a deed to a right of way 100 feet in width across section 137 is an estoppel, the execution of this contract, with the provisions quoted above, in our opinion, is an unequivocal admission that its claim of right of way extended only 50 feet upon each side of the center of its track. A party is bound to have knowledge of its boundaries. The testimony further shows that in pursuance of the stockyards agreement Nelson and his assigns have at great expense purchased other property adjacent to the land in question, constructed extensive and expensive stockyards, packing house, constructed of brick, with its necessary machinery, all at an expense of many thousands of dollars. Sixteen feet of the packing house building is on the land in controversy, and, in addition, there are two tracks, the one entering into the property for loading and unloading produce of the packing company, together with another parallel, which have been paid for by appellees.

[5] These facts, together with the adverse possession for 15 years of Sanborn and appellees, in our opinion, make appellees' defense of estoppel in pais and limitation complete. The testimony upon these issues is practically undisputed, from which we conclude that the court did not err in peremptorily instructing a verdict for appellees. *Texas, etc., Railroad Co. v. Maynard*, 51 S. W. 255; *Northern Pacific Ry. Co. v. Ely*, 25 Wash. 384, 65 Pac. 555, 54 L. R. A. 526, 87 Am. St. Rep. 766.

The judgment is therefore affirmed.

SMITH v. JORDAN.

(Court of Civil Appeals of Texas. San Antonio. Dec. 11, 1912.)

APPEAL AND ERROR (§ 635*)—RECORD—DISMISSAL.

An appeal from the refusal of a motion to retax costs will be dismissed, where the record does not show the pleadings and final judgment, the amount involved, or where the case originated, and the transcript contains only the motion to retax, judgment on the motion, assignments of error, and appeal bond.

[Ed. Note.—For other cases, see Appeal and Error. Cent. Dig. §§ 2285, 2776-2782; Dec. Dig. § 635.*]

Appeal from Waller County Court; J. D. Harvey, Judge.

Action between Charley Smith and A. J. Jordan. From a refusal to retax costs, Smith appeals. Appeal dismissed.

W. J. Poole, of Hempstead, for appellant.

TALIAFERRO, J. This appeal arises upon the action of the trial court in refusing a motion to retax the costs. The record contains nothing to show that this court has jurisdiction to entertain the appeal. The pleadings and final judgment are not shown, and it cannot be ascertained from the record that this court would even have had jurisdiction of the original case. The transcript contains only the motion to retax, the judgment upon the motion, the assignments of error, and the appeal bond. None of the matters contained in the record show the amount involved in the litigation, nor whether the case originated in the county court or justice's court.

In this condition of the record, this court cannot assume jurisdiction, and the appeal is therefore dismissed.

McDOEL v. JORDAN et al.

(Court of Civil Appeals of Texas. Dallas.
Dec. 7, 1912.)

1. WILLS (§ 433*)—PROBATE—EFFECT—EVIDENCE OF TITLE.

Where title to land is claimed by a devise, evidence of the will of the alleged decedent and the proceeding of the county court admitting it to probate is admissible.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 924-936; Dec. Dig. § 433.*]

2. DEATH (§ 4*)—EVIDENCE—SUFFICIENCY—"WAR"—"REPORT."

In an action to recover land which plaintiff claimed by devise, where there was testimony that the witness knew the testator in 1862 and understood that he died during the war, such being the report, the word "war" must be understood as the war between the states, and "report" as meaning common rumor.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 5, 6; Dec. Dig. § 4.*]

For other definitions, see Words and Phrases, vol. 7, pp. 6106-6107; vol. 8, pp. 7387-7388.]

3. EVIDENCE (§ 314*)—HEARSAY.

After the lapse of a long period of time, death may be proven by hearsay.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1168-1173; Dec. Dig. § 314.*]

4. NAMES (§ 18*)—EVIDENCE—SUFFICIENCY.

Where the name of the grantee of a patent was identical with that of the signer of a will who was named in probate proceedings, the identity of names will, in the absence of other evidence, sufficiently establish the fact that the testator was the grantee named in the patent.

[Ed. Note.—For other cases, see Names, Cent. Dig. § 17; Dec. Dig. § 18.*]

5. APPEAL AND ERROR (§ 1051*)—REVIEW—HARMLESS ERROR.

Where there was sufficient competent evidence to support a finding of the trial court, the fact that incompetent evidence was introduced does not constitute reversible error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4153-4160, 4166; Dec. Dig. § 1051.*]

Appeal from District Court, Freestone County; H. B. Daviss, Judge.

Action by Ellen Jordan and others against

C. J. McDoel. From a judgment for plaintiffs, defendant appeals. Affirmed.

W. R. Boyd, of Teague, for appellant. W. W. Ballew, of Corsicana, and R. L. Williford and T. H. Bonner, both of Fairfield, for appellees.

RASBURY, J. Upon appropriate pleading in trespass to try title, appellees Ellen Jordan and her husband, Thomas A. Jordan, recovered judgment in the trial court against appellant, C. J. McDoel, for the title and possession of 480 acres of land out of the Thomas B. Wylie survey in Freestone county, Tex. Appellant McDoel recovered judgment against his grantor William H. Leuhrmann, who was a party to the suit, for \$2,551.20, the amount paid in good faith for the land. There is no appeal by Leuhrmann, nor does he file brief or other appearance.

Appellees in proof of their title introduced in evidence (1) certified copy of patent to the land in controversy from the state to A. M. Dunn, assignee of Thomas S. Wylie; (2) application of Thomas A. Jordan and E. C. Jordan (appellees) to the chief justice of Navarro county to probate the will of Alexander M. Dunn, alleging his death in 1863, and that he left a will with the county clerk of Navarro county; (3) the will of A. M. Dunn by which he devised all his estate to Miss Ellen Wilder, including "all lands and tenements, farms, etc., more fully described in patents, deeds, and bonds, now in my possession * * * and lying subject to my order in the General Land Office; (4) proof of the execution of the will made before the county court by Hugh Ingram, showing the execution of same by A. M. Dunn on April 3, 1862, in the manner and form provided by law; (5) the decree of the county court admitting the will to probate and appointing the applicants administrators of the estate with the will annexed, and appointing appraisers, etc.; (6) appellee Ellen Jordan, who testified that she was 67 years of age and the wife of Thomas A. Jordan, and that her maiden name was Wilder; that she lived from her birth in Alabama until 17 years of age, when she came to Texas and lived in Freestone county until she reached the age of 20 years, when she married and went to Henderson county, Tex.; after a residence of about six years in Henderson county she removed to Navarro county and resided there about seven years, when she and her husband left and have lived at various places since and now reside in Yuma, Ariz.; that she first learned that she had an interest in the land in controversy through her counsel by letter; that she claims title to the land through the will made by her uncle Alexander M. Dunn, who signed his name to the will as A. M. Dunn, and bequeathed her the same; that she has no deed to the land; (7) deposition of

Preston Owen who testified that he is 66 years old and has resided at Kerens, Navarro county, since 1852; that he was acquainted with A. M. Dunn, who formerly resided in Navarro county, Tex.; that he knew Dunn about 1862 and understood that he died during the war; that he (Dunn) was a grown man when he knew him; when asked on cross-examination, "Do you know, as a matter of fact, that A. M. Dunn is dead?" the witness answered that the report was that he died during the war; that he knew Miss Ellen Wilder, does not know where she lived, (but) she was with A. M. Dunn, and his understanding is she is Dunn's niece; that she married T. A. Jordan and several years after the war they lived near Kerens, but subsequently moved away. The foregoing is, in substance, all the testimony of the appellees shown by the record. The appellant offered, and there was admitted in testimony (1) general warranty deed to the land in controversy from R. W. Compton, T. R. Watson, J. B. Watson, and John Riley to Wm. H. Leuhrmann, dated November 14, 1904, and filed for record April 12, 1905, and properly recorded, the consideration being \$1,300; (2) deed from Leuhrmann et ux. to appellant for same land for consideration of \$1,920, properly acknowledged, filed, and recorded.

[1] Appellant by his first assignment of error contends that the court erred in overruling his demurrer to the sufficiency of the testimony offered by appellees and in refusing to render judgment for appellant. Under this assignment, the proposition is asserted that an application for and grant of administration is not evidence of death of alleged decedent in a collateral inquiry. In explanation of this proposition, it may be said that the assignment points out, in substance, all the evidence offered to prove the death of A. M. Dunn, under whose will appellees claim title, which consists in part of the proceedings had in the county court, by which the will of A. M. Dunn was admitted to probate. Conceding that the proposition states a correct principle of law, and waiving the point that there may be a marked difference in the admissibility of proceedings in administration to prove the death of a decedent, and those by which a last will and testament are admitted to probate to prove the same fact, it seems clear to us that the proceedings complained of were clearly admissible as muniments of appellees' title to the land. Wills, and the proceedings of the county court admitting them to probate, form necessary and important links in the chain of many land titles, and it cannot be successfully maintained that they are inadmissible for that purpose. *Whitman v. Haywood*, 77 Tex. 558, 14 S. W. 166. The case cited was a suit to establish boundary lines, and the plaintiff offered the will of Thomas Baren, through whom he claimed title to the land, with the order of the county court admitting

the same to probate, which was objected to in the trial court and assigned as error in the Supreme Court, which latter tribunal held that all that was necessary to make the same admissible for such purpose was to show that the order probating the will was made by a court having jurisdiction to do so. These proceedings were also admissible to prove appellees' title, because they were facts relevant to the issue to be determined. In no other way could title to the land be shown by appellees. Similarly one who seeks to deraign title through sale under execution may and must show that a judgment was rendered which authorized the execution under which he purchased to issue. *McCamant v. Roberts*, 66 Tex. 262, 1 S. W. 260. Hence we conclude that, for the reasons stated, the proceedings were clearly admissible, and that the court did not err in that respect.

[2, 3] But appellant, by sufficient assignment and appropriate proposition, asserts that, since the court could not look to the probate proceedings as establishing Dunn's death, the remaining evidence was insufficient because it did not show by a preponderance of competent testimony that A. M. Dunn, under whose will appellees claim title, was in fact dead. The evidence adduced to establish the death of Dunn consisted of the testimony of Preston Owen, who said he knew Dunn in 1862, when he resided in Navarro county, and that he understood that he died during the "war," and on cross-examination he said Dunn was a grown man when he knew him, and that the "report" was that he died during the "war." This was all the testimony adduced upon the trial relative to the death of Dunn, and as a consequence is a preponderance of the evidence. Appellant, however, says it is not competent. We do not think we improperly extend the rules of evidence and legal construction in concluding that Preston Owen meant the war between the states when he speaks of Dunn dying during the "war," especially since he puts his last knowledge of him at 1862. Those who participated in that stirring event, as well as those who have come since, or were too young to engage in its heroic contests, know that in everyday language it is described as "the war," and that common knowledge would lead us to understand that Preston Owen meant the war between the states when he adopted the term commonly used to describe same. Then if we can safely assume, as we are persuaded we may, that the witness intended to say that he died during that period, does the further statement that he "understood" that Dunn died and that the "report" was that he died during that period furnish sufficient evidence to support the conclusion of the trial judge that he is dead? "Report," applied to the testimony of Preston Owen, means "an account brought back; a tale carried; a story circulated; hence rumor or common fame"—

in short, hearsay. "Understood" means "implied, assumed, or apprehended." In other words, the effect of Preston Owen's testimony is that rumor and common fame, or "the account brought back" at that period, had it that Dunn died during the war between the states. The right to prove death by hearsay after the lapse of such a long period of time is well settled, and citation of authorities is unnecessary. Counsel does not deny the rule, but attacks the evidence adduced as not being even hearsay. We have indicated why we think the proof as made is sufficient and competent, particularly so when the record fails to show any evidence of a contrary nature.

[4] We think there is no merit in appellant's contention that the evidence is insufficient to support the judgment of the court that the A. M. Dunn named in the probate proceedings, and who signed the will, was the same A. M. Dunn named in the patent offered in evidence by appellees. The names are identical, and, in the absence of any other evidence, that fact is sufficient to support the conclusion of the trial court that they are the same person.

[5] Nor do we think that the fact that the trial court considered the probate proceedings as proof of the death of A. M. Dunn material, if there can be found in the record sufficient other facts to sustain his conclusions, and we have indicated at another place in this opinion that the evidence of Preston Owen would alone be sufficient to support such a finding.

Finding no reversible error in the record, the judgment of the trial court is affirmed.

CAMPBELL v. ELLIOTT.

(Court of Civil Appeals of Texas. Ft. Worth. Oct. 26, 1912. Rehearing Denied Nov. 23, 1912.)

1. APPEAL AND ERROR (§ 1097*)—LAW OF THE CASE.

The decision of the court on appeal conclusively settles the questions determined thereby, and they will not be considered on a subsequent appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4358-4368, 4427; Dec. Dig. § 1097.*]

2. PUBLIC LANDS (§ 177*)—ACQUISITION—FRAUD—PARTY ENTITLED TO COMPLAIN.

The state alone may take advantage of fraud in transactions for the acquisition of its lands, where the rights of an individual do not antedate such fraud.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 576-578; Dec. Dig. § 177.*]

3. CONTINUANCE (§ 26*)—ABSENCE OF WITNESSES—DILIGENCE.

A continuance on the ground of the absence of a witness is properly denied, where no diligence is shown to procure the testimony of the witness for the trial.

[Ed. Note.—For other cases, see Continuance, Cent. Dig. §§ 74-93; Dec. Dig. § 26.*]

Error from District Court, Nolan County; James L. Shepherd, Judge.

Action by J. A. Elliott against I. C. Morris, continued after the death of defendant by W. A. Campbell, administrator. There was a judgment for plaintiff, and defendant brings error. Affirmed.

J. M. Wagstaff, of Abilene, and J. F. Eldson, of Sweetwater, for plaintiff in error. Orrick & Terrell, of Ft. Worth, for defendant in error.

SPEER, J. This case has been twice before appealed to the Court of Civil Appeals; the reports of those appeals being found in 43 Tex. Civ. App. 482, 98 S. W. 221, and 49 Tex. Civ. App. 527, 121 S. W. 209, respectively. On the last trial the plaintiff, Elliott, recovered judgment for the land in controversy and W. A. Campbell, administrator of I. C. Morris, now deceased, has perfected this writ of error.

A preliminary question will be first disposed of, and the prayer of defendant in error to file a supplemental record will be granted, and the cost of such supplemental record will be taxed against defendant in error, under rule 11 (142 S. W. xi), for the government of the Courts of Civil Appeals.

[1] We decline to go into a consideration of the questions raised by the first, second, and third assignments concerning the validity of the deed under which defendant in error claims, since all these questions were determined by us on the first appeal.

[2] The principal contention on this appeal appears to be that there was a showing of fraud on the part of W. C. Logan at the time he filed on the land in controversy, in that he was not the owner of section 38, his parent section, at the time he swore he was, and that, Morris having in all respects complied with the law as to settlement, etc., his administrator should recover in this case; but it is now too well settled to admit of discussion that only the state can take advantage of fraud in transactions for the acquisition of land from it, where the rights of the complaining party do not antedate such fraud. Logan v. Curry, 95 Tex. 664, 69 S. W. 129.

The issue of estoppel by judgment in the case of Morris v. Logan was also decided against plaintiff in error on the last appeal by the Court of Civil Appeals for the Sixth District, and should not, for that reason, be again discussed. But besides the evidence is not, as plaintiff in error contends, undisputed that defendant in error employed counsel to represent Logan in that suit, or otherwise prosecuted the suit in the name of W. C. Logan. On the contrary, defendant in error testifies differently.

[3] The motion for continuance was not improperly overruled, since no diligence

whatever was shown in the effort to procure the testimony of W. C. Logan, although this case has been dragging its weary way through the courts for many years, and this witness, most of all persons, was calculated to know the facts helpful to plaintiff in error, if any existed. The change of counsel made necessary by the illness of plaintiff in error's leading counsel appears not to have been prejudicial to him, since the case was tried upon the previous record, and there is nothing to indicate that there has been left undone anything that would further the interest of plaintiff in error.

There is no error in the record, and the judgment is affirmed.

RIDER et al. v. RADFORD.

(Court of Civil Appeals of Texas. Ft. Worth. May 18, 1912. Writ of Error Denied by Supreme Court Oct. 16, 1912.)

1. TRESPASS TO TRY TITLE (§ 40*)—EVIDENCE OF PRIOR DEEDS.

Where plaintiff deraigned title through the W. Mercantile Company, he was entitled to introduce a deed from S. to B. & Co., and from the latter to the mercantile company in proof of his title.

[Ed. Note.—For other cases, see *Trespass to Try Title*, Cent. Dig. §§ 55-61; Dec. Dig. § 40.*]

2. TRESPASS TO TRY TITLE (§ 40*)—EVIDENCE.

Where plaintiff claimed title through a conveyance by a mercantile company to the R. Grocery Company, and it was undisputed that at the time of the conveyance defendant was a member of the mercantile company, and as such a party to the conveyance, the consideration for which was a credit of \$2,500 on the indebtedness of the mercantile company to the grantee, the fact that the credit was not entered on the books of the grantee until after defendant had ceased to be a member of the mercantile company was immaterial; the rights of the parties being measured by the facts as they existed at the time of the conveyance.

[Ed. Note.—For other cases, see *Trespass to Try Title*, Cent. Dig. §§ 55-61; Dec. Dig. § 40.*]

3. APPEAL AND ERROR (§ 842*)—FINDINGS—CONCLUSIONS OF LAW—CONSTRUCTION.

A finding that a conveyance of the land in controversy from a grantor company to a grocery company was a bona fide sale of the property and not mere security was one of fact, or a mixed question of law and fact, and not a conclusion of law.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3316-3330; Dec. Dig. § 342.*]

4. VENDOR AND PURCHASER (§ 308*)—PURCHASE-MONEY NOTES—ENFORCEMENT.

Where a conveyance of land by a grantor company to a grocery company, in consideration of a credit on an indebtedness to the grantee, was a bona fide sale, and full title passed by a conveyance by the grocery company to defendant, notes executed for a part of the consideration of the latter sale were enforceable, either by the grocery company or by plaintiff, without reference to whether he had notice of defendants' occupancy of the premises.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 877-899; Dec. Dig. § 308.*]

Appeal from District Court, Taylor County; Thos. L. Blanton, Judge.

Action by J. M. Radford against A. T. Rider and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Ben L. Cox, of Abilene, and A. K. Doss, of Winters, for appellants. Kirby & Davidson, of Abilene, and Theodore Mack, of Ft. Worth, for appellee.

CONNER, C. J. [1] Inasmuch as appellee deraigned title through the Winters Mercantile Company, we think he was properly permitted to introduce the deed from Mrs. Lizzie Stewart to Brashear & Co. and from the latter company to the Winters Mercantile Company. Indeed, it is only through these conveyances that appellants themselves could show any title whatever other than that of the mere possession of the land claimed by them as a homestead. Appellants' first and second assignments of error must therefore be overruled.

[2] If in truth the consideration for the conveyance from the Winters Mercantile Company to the J. M. Radford Grocery Company was a credit of \$2,500 on the indebtedness of the former company, the fact that the entry of such credit on the books of the latter company was after and not before appellant A. T. Rider had ceased to become a member of the Winters Mercantile Company is wholly immaterial. The rights of the parties are to be measured by the facts as they existed at the time of the conveyance to the J. M. Radford Grocery Company, and it is undisputed that appellant at this time was a member of the mercantile company and as such was a party to the conveyance under which appellee claims. If the conveyance was made upon the consideration stated, it must be held to be operative whether any credit was ever entered upon the books. Appellants' third assignment is therefore overruled.

[3] The court's fourth finding to the effect that the conveyance from the Winters Mercantile Company to the J. M. Radford Grocery Company was a bona fide sale of the property therein described, as contradistinguished from a mere security, is clearly a finding of fact rather than one of law, or at least a finding upon a mixed question of law and fact, and the appellants' fourth assignment of error is accordingly overruled. Nor do we think the appellants' fifth assignment can be sustained. While the several transactions involved in this controversy seem to have been closely contemporaneous, yet the witness Booth distinctly testified to the effect that the deed from the Winters Mercantile Company to the J. M. Radford Grocery Company represented an independent and distinct transaction from that of the other proceedings, and was intended as a bona fide sale of the property, and not as a method of obtaining security for the \$2,500 recited in the deed as the consideration. The witness who testified appeared to be disinterested at

the time of the trial, and the court having found in accordance with the testimony so stated, we cannot say that the finding is without evidence in its support. The fifth assignment must accordingly be overruled.

[4] The court's findings to the effect that the J. M. Radford Grocery Company was without knowledge of the occupancy of the premises in controversy are, in our view of the case, wholly immaterial. If the conveyance of the premises to the J. M. Radford Grocery Company was a bona fide sale, as the witness Booth testified it was and as the court finds, then full title passed, and the conveyance by the J. M. Radford Grocery Company to appellants was fully authorized, and, if so, the notes sued upon in this suit were enforceable either by the J. M. Radford Grocery Company or by appellee, irrespective of the question of whether appellee had or had not knowledge of appellants' occupancy of the premises. The seventh and eighth assignments are accordingly overruled.

The conclusions above noted render immaterial questions presented under other assignments. All will therefore be overruled, the court's findings of fact adopted, and the judgment affirmed.

MEMORANDUM DECISIONS

BALLEW v. STATE. (Court of Criminal Appeals of Texas. Dec. 4, 1912.) Appeal from Criminal District Court, Dallas County; Robt. B. Seay, Judge. S. L. Ballew was convicted of robbery, and he appeals. Affirmed. C. E. Lane, Asst. Atty. Gen., for the State.

HARPER, J. Appellant was indicted, prosecuted, and convicted of the offense of robbery, and his punishment assessed at 20 years' confinement in the state penitentiary. There is neither a statement of facts nor bills of exception accompanying the record, and, the record being in this condition, there is no ground in the motion for a new trial we can consider. The judgment is affirmed.

CLARK v. STATE. (Court of Criminal Appeals of Texas. Dec. 11, 1912.) Appeal from Criminal District Court, Dallas County; Barry Miller, Judge. Pinkney Clark was convicted of burglary, and appeals. Affirmed. C. E. Lane, Asst. Atty. Gen., for the State.

PRENDERGAST, J. The appellant, by proper indictment and correct charge, was convicted of burglary. There is neither statement of facts nor bills of exceptions. The matters attempted to be raised in the motion for new trial cannot be considered without a statement of facts. The judgment is therefore affirmed.

COLEMAN v. STATE. (Court of Criminal Appeals of Texas. Dec. 4, 1912.) Appeal from District Court, Galveston County; Robt. G. Street, Acting Judge. F. Coleman was convicted of robbery with firearms, and he appeals. Affirmed. C. E. Lane, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted of robbery with firearms, and given five years in the penitentiary. The record does not contain a statement of facts nor bills of exception. The indictment was attacked, but under recent decisions by this court it is sufficient. As the record is presented, there is no reversible error, and the judgment is affirmed.

DAVIS v. STATE. (Court of Criminal Appeals of Texas. Dec. 11, 1912.) Appeal from Criminal District Court, Dallas County; Barry Miller, Judge. Bob Davis was convicted, and appeals. Affirmed. C. E. Lane, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted of murder in the second degree; his punishment being assessed at 25 years' confinement in the penitentiary. The record is before us without a statement of facts or bills of exception. There are quite a number of grounds set out in the motion for new trial. None of these, in the absence of statement of facts and bills of exception, can be intelligently reviewed. We are unable to say that any error was committed, or that there is any merit in any of the contentions, in the absence of the statement of facts. The judgment is affirmed.

NOE v. STATE. (Court of Criminal Appeals of Texas. Dec. 11, 1912.) Appeal from Criminal District Court, Dallas County; Barry Miller, Judge. Claude Noe was convicted of burglary, and he appeals. Affirmed. C. E. Lane, Asst. Atty. Gen., for the State.

PRENDERGAST, J. The appellant was indicted by proper indictment for burglary, and under a correct charge was convicted. There are neither bills of exceptions nor statement of facts. The question attempted to be raised by the motion for new trial cannot be considered without a statement of facts. The judgment is therefore affirmed.

O'MALLAY v. State. (Court of Criminal Appeals of Texas. Dec. 11, 1912.) Appeal from Criminal District Court, Dallas County; Barry Miller, Judge. John O'Mallay was convicted of burglary, and appeals. Affirmed. C. E. Lane, Asst. Atty. Gen., for the State.

PRENDERGAST, J. Under a proper indictment and correct charge appellant was convicted of burglary. There are neither bills of exceptions nor statement of facts. No question is raised by the motion for new trial which can be considered by us without a statement of facts. The judgment is therefore affirmed.

WHITEN v. STATE. (Court of Criminal Appeals of Texas. Dec. 4, 1912.) Appeal from District Court, Harrison County; H. T. Lytleton, Judge. Willie Whiten was convicted of manslaughter, and he appeals. Reversed and dismissed. Beard & Davidson, of Marshall, for appellant. C. E. Lane, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted of manslaughter; his punishment being assessed at three years' confinement in the penitentiary. This record is in the same condition as that in the case of *Woolen v. State*, 150 S. W. 1165, and *Mayfield v. State*, 151 S. W. 30, recently decided. For the reasons for holding the indictment defective in those cases, the indictment herein will also be held unwarranted by law. Therefore, the judgment is reversed and the prosecution ordered dismissed.

HILL v. HILL. (Court of Appeals of Kentucky. Dec. 12, 1912.) Appeal from Circuit Court, Jefferson County, Chancery Branch, Second Division. Action by Bessie R. Hill against W. W. Hill. From a judgment denying relief, plaintiff appeals. Affirmed. Rowan Hardin, of Louisville, for appellant. W. A. McKay, of Louisville, for appellee.

HOBSON, C. J. Dr. W. W. Hill and Miss Bessie Riley were married in June, 1907. They lived together as man and wife until July, 1911, when she left her husband's home, and in a few days thereafter brought this suit against him for divorce on the ground that without fault on her part he had habitually behaved toward her for not less than six months in such a cruel and inhuman manner as to indicate a settled aversion to her and to destroy permanently her peace and happiness. An answer was filed, controverting the allegations of the petition. Voluminous proof was taken, and on final hearing the circuit court dismissed the petition, refusing either to give the wife a divorce or allow alimony. From this judgment she appeals. We have read the record with great care, and are satisfied we ought not to disturb the chancellor's judgment. Neither the husband nor the wife was without fault, and each should in good faith seek a reconciliation with the other. The proof shows they are both excellent people of fine character. He is a successful physician. She is a lady of refinement and culture. Each has the power to make the other happy. We are satisfied from the record that the wife loves her husband, and that he has been more absorbed in his business and less attentive to her than he should have been. They differ in temperament. The trouble between them seems to have grown largely out of the fact that each failed to comprehend the other. They owe it to themselves and to society to follow the teachings of the church to which each belongs, and re-establish the home in which they lived apparently happily when this disturbance arose. Judgment affirmed.

STATE v. CORDIA. (St. Louis Court of Appeals. Missouri. Nov. 12, 1912.) Appeal from Circuit Court, Washington County; Joseph J. Williams, Judge. Francis Cordia was convicted of unlawfully selling intoxicating liquor, and he appeals. Affirmed. M. E. Rhoades, of Potosi, and Byrns & Bean, of De Soto, for appellant. S. G. Nipper and W. A. Cooper, both of Potosi, for the State.

CAULFIELD, J. Defendant was indicted, tried, and on September 3, 1910, convicted for selling intoxicating liquor in less quantity than five gallons; he being a merchant, having a merchant's license, authorizing him to deal in goods, wares, and merchandise, but no dramshop license, and the prosecution being under section 11640 of the Revised Statutes of Missouri of 1909. He appeals to this court, but assigns no error, and does not file a brief in his cause. An examination of the record fails to disclose any error or insufficiency in the indictment or other proceedings or any error or irregularity in the trial justifying a reversal of the judgment. The evidence warrants the conviction, and the instructions fairly present the case to the jury. The judgment is therefore affirmed.

REYNOLDS, P. J., and NORTONI, J., concur.

STATE v. CORDIA. (St. Louis Court of Appeals. Missouri. Nov. 12, 1912.) Appeal from Circuit Court, Washington County; Joseph J. Williams, Judge. Francis Cordia was convicted of unlawfully selling intoxicating liquor, and he appeals. Affirmed. M. E. Rhoades, of Potosi, and Byrns & Bean, of De Soto, for appellant. W. A. Cooper and S. G. Nipper, both of Potosi, for the State.

CAULFIELD, J. Defendant was indicted, tried, and on September 7, 1910, convicted, under section 11640 of the Revised Statutes of Missouri of 1909, for selling intoxicating liquor in less quantity than five gallons; he being a merchant, having a merchant's license authorizing him to deal in goods, wares, and merchandise, but no dramshop license. He appeals to this court, but has assigned no error and filed no brief here. Having examined the record, we find no error, insufficiency, or irregularity in the indictment, trial, or other proceedings, justifying a reversal of the judgment, and find that the evidence warrants the conviction, and the instructions fairly present the case to the jury. The judgment is therefore affirmed.

REYNOLDS, P. J., and NORTONI, J., concur.

STRICKLIN et al. v. MOORE. (Supreme Court of Arkansas. Jan. 20, 1913.) On petition for rehearing. Denied.

For former opinion, see 151 S. W. 1009.

HART, J. In testing the allegations of the complaint on demurrer on the former appeal, the court said that the adverse possession of W. N. Stricklin as tenant by the curtesy, coupled with the adverse possession of his wife, would constitute an investiture of title in the heirs of Mary D. Stricklin, subject to the life tenancy of W. N. Stricklin. The reason is that the estate by curtesy is a mere continuation of the wife's estate, and is in the nature of an estate by descent rather than by purchase. According to the allegations of the complaint, W. N. Stricklin's possession was capable of being referred to a claim of right by curtesy, it having been alleged in the complaint that his wife died in the possession of the lands. It then became a question whether the character of her previous possession, which had not run for the statutory period, could be continued by him. We held, under the allegations of the complaint, that his adverse possession could be tacked to the previous possession of his wife, and that, if the possession was continued for the statutory period, it would create an investiture of title in her heirs, subject to the life estate of W. N. Stricklin.

It is well settled that adverse possession must be continuous, and its continuity must be in the same right. Therefore it was necessary for appellants in this case to show that Mrs. Stricklin was in possession of the land at the time of her death, as well as to show that the possession of W. N. Stricklin after her death was continued in her right. We did not hold, as counsel for appellants seem to think we did, that a husband cannot act as agent for his wife, and cannot take charge of and manage her real estate. We did hold, however, that there was no testimony in the case that would have warranted a jury in finding that W. L. Stricklin was in possession of the lands prior to the death of his wife as her agent, or that he was holding the land for her. On the contrary, we held that the undisputed evidence showed that W. N. Stricklin held possession of the land in his own right prior to the death of his wife, and that, therefore, there could be no previous possession of the wife, to which his possession after her death could be tacked, so as to continue the adverse possession in her right. As we said, the testimony of B. L. Stricklin amounted to no more than a conclusion on his part that his mother was in the possession of the land prior to her death, for he did not testify to any fact or circumstance from which it might be inferred that she was in possession of the land, but only stated his conclusion on the matter. B. L.

Stricklin testified that after his mother died his father told him that the land belonged to Mary D. Stricklin, his wife, and that he was holding the land for her children. This statement, being made after the death of Mary D. Stricklin, is not sufficient to show that she had possession of the land prior to her death.

The declarations of W. N. Stricklin, made after the death of his wife, as to her ownership of the land, are not sufficient to show that she

was in possession of the land previous to her death. To so hold would be to adopt the rule that a scintilla of evidence is sufficient to send the case to the jury, and this the court has never done. On the contrary, the court has uniformly held that, where there is no substantial evidence to support a verdict for the plaintiff, it is the duty of the trial court to so declare the law.

The petition for a rehearing will be denied.

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§ 7 (Mo.) Limitations did not begin to run in favor of the parties in possession of public land until the issuance of a patent correctly describing the land.—Marshall v. Hill, 151 S. W. 131.

(E) Duration and Continuity of Possession.

§ 41 (Tex. Civ. App.) A person and his assigns claiming title under a settler and holding adverse possession for 15 years of 100 feet of the 200 feet of land granted to a railroad for a right of way acquired title by adverse possession.—Ft. Worth & D. C. Ry. Co. v. Western Stockyards Co., 151 S. W. 1172.

(F) Hostile Character of Possession.

§ 62 (Ark.) Where a wife never had actual possession of land, the possession of the husband after her death was in his own right, and not as tenant by curtesy; and hence created title by adverse possession in himself as against an outstanding title and not in the heirs of the wife.—Stricklin v. Moore, 151 S. W. 1009.

§ 62 (Mo.) A widow occupying property under her quarantine cannot thereby acquire title as against the heir or remainderman.—Moran v. Stewart, 151 S. W. 439.

By delay during which a widow is permitted to occupy the whole of an estate, the other heirs do not lose their right to apply to the court to assign dower to her; the possession not being hostile.—Id.

§ 64 (Ky.) Possession under an unconditional parol gift of a well-defined body of land for 15 years confers title, but not so if the entry was under a mere expectation of a gift in the future.—Murphy v. Newingham, 151 S. W. 930.

§ 73 (Ky.) A patent, though void because including land previously granted, is color of title, and defines the possession of the patentee claiming to the extent of his boundary.—Bryant v. Strunk, 151 S. W. 881.

§ 80 (Mo.) A quitclaim deed purporting to convey land abutting a private alley, and describing such alley as "known as a private alley," held insufficient as color of title thereto, since it impeaches rather than asserts title.

—Dulce Realty Co. v. Stated Realty Co., 151 S. W. 415.

§ 84 (Mo.) Where defendant had held open and exclusive possession of land in dispute, claiming title, long enough for her possession to ripen into title, it did not affect that result because she may have known the record title was in another.—Cousins v. White, 151 S. W. 737.

§ 85 (Ark.) In ejectment between the heirs of a wife and a purchaser under an execution against the husband, evidence held insufficient to show any such change of possession under a colorable deed from the husband to the wife as gave her title by adverse possession prior to the execution sale.—Stricklin v. Moore, 151 S. W. 1009.

§ 85 (Ky.) Evidence held to sustain a chancellor's finding that plaintiff occupied the land in question by defendant's permission only and not under an unconditional parol gift.—Murphy v. Newingham, 151 S. W. 930.

(G) Payment of Taxes.

§ 87 (Ark.) Act March 18, 1899 (Laws 1899, p. 117), now Kirby's Dig. § 5057, providing that parties paying taxes on uninclosed and unimproved land shall be deemed to be in possession, but that no one can invoke the act unless he and his predecessors shall have made seven payments, three after its enactment, while retroactive, is not so as to persons under disability at its passage, but not under disability when payments began.—Deane v. Moore, 151 S. W. 286.

III. PLEADING, EVIDENCE, TRIAL, AND REVIEW.

§ 116 (Ky.) Where there is evidence of adverse possession by a junior patentee, the court must by its instructions define the extent of possession under the evidence.—Bryant v. Strunk, 151 S. W. 381.

§ 116 (Mo.) In an action for the recovery of land where adverse possession was set up, evidence held to sufficiently show defendant's possession under color of title, so as to authorize an instruction that 10 years possession under color of title would ripen into actual title.—Cousins v. White, 151 S. W. 737.

AFFIDAVITS.

See Appeal and Error, §§ 201, 242; Criminal Law, §§ 956, 958; Exceptions, Bill of, § 54; Judgment, § 158; Witnesses, § 392.

AFTER-ACQUIRED TITLE.

See Estoppel, § 88.

AGENCY.

See Principal and Agent.

AGGRAVATED ASSAULT.

See Assault and Battery, § 54.

AGREEMENT.

See Contracts.

ALAMO PROPERTY.

See Perpetuities, § 4; States, § 88.

ALIMONY.

See Divorce, § 245; Husband and Wife, § 288.

AMENDMENT.

See Costs, § 316; Criminal Law, § 214; Judgment, § 318; Pleading, §§ 236-252.

AMOUNT IN CONTROVERSY.

See Courts, § 120.

ANIMALS.

See Carriers, §§ 228, 229; Municipal Corporations, §§ 604, 631; Nuisance, §§ 3, 61; Railroads, §§ 103, 419-446; Sunday, § 19.

§ 51 (Mo.App.) Under Rev. St. 1909, § 773, it is not necessary for recovery of damages by one restraining a cow running at large that he give the owner written notice under section 772, when he gives the owner personal notice, though they do not agree on the damages.—Warren v. Cowden, 151 S. W. 501.

Where plaintiff, restraining a cow running at large, proceeds under Rev. St. 1909, § 773, dispensing, under certain circumstances, with necessity of written notice, under section 772, it is immaterial that he gave an insufficient written notice.—Id.

Authorizing recovery by plaintiff in replevin for his cow, restrained, when running at large, by defendant, without plaintiff having deposited the amount which he admitted to be due defendant or without an instruction to render verdict for that amount, if the jury found for plaintiff as to the other issues, was error.—Id.

ANSWER.

See Pleading, §§ 138, 408.

APPEAL AND ERROR.

See Abatement and Revival, § 69; Attorney and Client, §§ 57, 101; Bail, §§ 57, 65; Certiorari; Constitutional Law, § 316; Criminal Law, §§ 1028-1178; Divorce, § 184; Eminent Domain, § 256; Exceptions, Bill of; Homicide, §§ 332-340; Insane Persons, § 27; Justices of the Peace, § 191; Mandamus, §§ 16, 57; Municipal Corporations, § 642; Principal and Agent, § 113; Taxation, § 453; Wills, § 402.

II. NATURE AND GROUNDS OF APPELLATE JURISDICTION.

§ 23 (Mo.) The Supreme Court will determine its jurisdiction of the subject-matter in condemnation proceedings, though no question thereon is raised by counsel.—Springfield S. W. Ry. Co. v. Schweitzer, 151 S. W. 128.

III. DECISIONS REVIEWABLE.**(D) Finality of Determination.**

§ 71 (Tex.Civ.App.) A proceeding by defendant in replevin to compel the constable to accept a replevy bond is not within Rev. Civ. St. 1911, arts. 4644-4646, relative to appeals from orders granting or refusing temporary injunctions, but is a proceeding by mandamus, independent of the replevin action.—Keasler Lumber Co. v. Clark, 151 S. W. 345.

§ 76 (Tex.Civ.App.) A judgment from which an appeal was taken during the term held a final judgment, and appealable, where the term ended without a change therein or the granting of a new trial.—Robbie v. Upson, 151 S. W. 570.

§ 76 (Tex.Civ.App.) The fact that a judgment was entered nunc pro tunc did not affect its finality.—Snell v. Ham, 151 S. W. 1077.

§ 77 (Mo.) An order appointing commissioners to set off homestead and dower to a widow held merely a preliminary order, and not a final judgment.—Moran v. Stewart, 151 S. W. 439.

§ 78 (Ky.) An order sustaining a demurrer to an amended petition, but making no further disposition of the action, is not a final order, and is not appealable.—Rodes v. Yates, 151 S. W. 359.

§ 78 (Tenn.) A decree overruling a plea in abatement to the jurisdiction is not upon the merits, so as to be final and appealable.—Employers' Indemnity Co. v. Willard, 151 S. W. 1029.

§ 78 (Tex.Civ.App.) An order to preserve property under the control of the court in replevin is interlocutory, and not appealable.—Keasler Lumber Co. v. Clark, 151 S. W. 345.

§ 80 (Tenn.) A final decree, which is appealable, is one that disposes of the entire merits of the case.—Employers' Indemnity Co. v. Willard, 151 S. W. 1029.

§ 80 (Tex.Civ.App.) Judgment, which did not dispose of one defendant's cross-action against his codefendants, held not a final judgment, from which he could appeal.—Hamilton v. D. S. Cage & Co., 151 S. W. 894.

(E) Nature, Scope, and Effect of Decision.

§ 100 (Tex.Civ.App.) Under Acts 31st Leg. c. 34, amending Acts 30th Leg. c. 107, authorizing an appeal from an order granting, refusing, or dissolving a temporary injunction, no right of appeal lies from an order refusing to dissolve such an injunction.—Jaynes v. Burch, 151 S. W. 596.

§ 100 (Tex.Civ.App.) Jurisdiction to review an order denying a motion to dissolve or modify a temporary injunction is not given by Rev. Civ. St. 1911, art. 4644, authorizing appeal from an order granting, refusing or dissolving a temporary injunction.—Welborn v. Collier, 151 S. W. 655.

§ 113 (Ark.) An appeal does not lie from an order setting aside a default judgment as premature.—McPherson v. Consolidated Casualty Co., 151 S. W. 283.

§ 113 (Tex. Civ. App.) Where judgment was entered under a verdict rendered in pursuance of an agreement of the parties that a verdict might be returned by a majority of the jurors on which judgment might be entered, an order made at the same term setting aside the judgment and granting a new trial is not appealable.—Philadelphia Underwriters' Agency of Fire Ass'n of Philadelphia v. Brown, 151 S. W. 899.

V. PRESENTATION AND RESERVATION IN LOWER COURT OF GROUNDS OF REVIEW.**(A) Issues and Questions in Lower Court.**

§ 171 (Mo.) Where a proceeding was tried below and heard in the Supreme Court on the theory that it was a proceeding in the nature of quo warranto, it will be decided by the Supreme Court on the same theory.—State ex rel. Kumbrell v. People's Ice, Storage & Fuel Co., 151 S. W. 101.

§ 170 (Mo.) A constitutional question cannot be raised on appeal from the probate court, where no such issue was presented at the trial.—State ex rel. Nolte v. McQuillin, 151 S. W. 444.

§ 171 (Mo.App.) Complainant is bound on appeal by the theory of the cause adopted in his petition and at the trial.—Hight v. American Bakery Co., 151 S. W. 776.

(B) Objections and Motions, and Rulings Thereon.

§ 185 (Ark.) A party who did not object when a chancellor was substituted for the regular chancellor who announced his disqualification but went to trial cannot object on appeal.—Blagg v. Fry, 151 S. W. 699.

§ 187 (Ark.) Where there was no objection to a misjoinder of parties, it will not be considered on appeal.—Burnett v. Turner, 151 S. W. 249.

§ 193 (Ark.) Where there was no objection to an improper joinder of two causes of action, it will not be considered on appeal.—Burnett v. Turner, 151 S. W. 249.

§ 193 (Mo.App.) That a petition does not state a cause of action may be raised for the

first time on appeal.—*Angel v. City of Portageville*, 151 S. W. 192.

§ 195 (Ky.) An objection to the filing of an amended answer cannot be raised on appeal, where there was no objection to its filing below nor exception taken to the order filing it.—*Madden v. Meehan*, 151 S. W. 681.

§ 195 (Mo.App.) Failure to question in the trial court the validity of an amendment to a special tax bill or to its admission in evidence precludes a consideration of the question on appeal.—*Granite Bituminous Paving Co. v. Parkview Realty & Improvement Co.*, 151 S. W. 486.

§ 198 (Mo.) Error in directions to commissioners appointed to ascertain the value of real estate in a widow's action for dower *held* not reviewable, where there was no objection below, either at the time of appointment and direction or when the report was approved.—*Moran v. Stewart*, 151 S. W. 439.

§ 201 (Ark.) An objection not made below to the court's statement as to the effect of plaintiff's affidavit in replevin could not be reviewed.—*Jenkins v. Quick*, 151 S. W. 1021.

§ 204 (Ky.) A defendant who did not object to the admission of improper testimony may not avail himself of the error on appeal.—*Chesapeake & O. Ry. Co. v. Meyers*, 151 S. W. 19.

§ 204 (Ky.) A party, who, on the cross-examination of a witness, brings out incompetent testimony, and who does not object or except to it nor move to exclude it, may not complain thereof on appeal.—*Andonique v. Carmen*, 151 S. W. 921.

§ 216 (Mo.App.) That decedent had incipient epilepsy cannot be relied on as an excuse to negative contributory negligence, where it was abandoned by not being mentioned in the instructions offered by plaintiff.—*Brady v. City of St. Joseph*, 151 S. W. 234.

§ 216 (Mo.App.) The defect in an instruction on the measure of damages arising from the omission to give the legal elements on which the jury must base a verdict is but a nondirection, and defendant failing to request an instruction on the subject may not complain.—*Madden v. Missouri Pac. Ry. Co.*, 151 S. W. 489.

§ 221 (Tex.Civ.App.) Objection that an injunction against a nuisance was too broad cannot be reviewed on appeal, where no steps were taken below to limit the scope of the decree, which conformed to the prayer for relief and the findings.—*Nations v. Harris*, 151 S. W. 334.

§ 232 (Ark.) Where an objection below to an instruction was properly overruled, an objection on other grounds cannot be urged on appeal.—*St. Louis, I. M. & S. Ry. Co. v. Williams*, 151 S. W. 243.

§ 232 (Ark.) Objection to conclusion of physician from examination of X-ray pictures, when he was not an X-ray expert, *held* not to assign error from admission of testimony showing a controversy among the physicians as to plaintiff's injuries.—*St. Louis, I. M. & S. R. Co. v. Brogan*, 151 S. W. 690.

§ 232 (Mo.App.) An objection, first raised on appeal, that a petition does not state a cause of action does not present for review a merely defective statement of a cause of action.—*Angel v. City of Portageville*, 151 S. W. 192.

§ 242 (Tex.Civ.App.) The question of plaintiff, suing as administratrix, not having executed a bond as such, and so not having capacity to sue as such, required by *Sayles' Ann. Civ. St.* 1897, art. 1265, to be raised by plea verified by affidavit, is waived by defendant, where it failed to have it determined by the trial court and to assign error thereon.—*Casey v. Texarkana & Ft. S. Ry. Co.*, 151 S. W. 856.

(C) Exceptions.

§ 253 (Tex.Civ.App.) Where the record fails to show any exception to plaintiff's petition,

the question of the propriety of sustaining an exception thereto cannot be considered on appeal.—*Walker v. Metropolitan St. Ry. Co.*, 151 S. W. 1142.

§ 260 (Mo.App.) A ruling admitting evidence not excepted to is not reviewable.—*Byrd v. Vanderburgh*, 151 S. W. 184.

§ 262 (Mo.App.) Where plaintiff did not except to the giving of a peremptory instruction for defendant, the nonsuit must be held a voluntary one.—*Arnold v. Aetna Life Ins. Co.*, 151 S. W. 190.

§ 265 (Mo.App.) Unless excepted to, the propriety of taking an application for separate maintenance under advisement and postponing its decision so that the parties may become reconciled cannot be reviewed.—*Creasey v. Creasey*, 151 S. W. 215.

§ 266 (Mo.) Error in the directions to commissioners appointed to ascertain the value of real estate in a widow's action for dower and damages was not reviewable, where no exceptions were saved to the court's approval of the report of the commissioners.—*Moran v. Stewart*, 151 S. W. 439.

§ 270 (Mo.App.) An order overruling a motion in arrest of judgment will not be reviewed, in the absence of an exception.—*Angel v. City of Portageville*, 151 S. W. 192.

§ 272 (Mo.) Parties in a civil case should immediately except to errors of the trial court prejudicing their rights, to enable the court to correct the same.—*Moran v. Stewart*, 151 S. W. 439.

§ 274 (Mo.) Exceptions to the overruling of objections to commissioners' report *held* insufficient to present for review error in the approval of the report.—*Moran v. Stewart*, 151 S. W. 439.

Plaintiff's failure to except to approval of the report of commissioners in dower proceedings *held* not cured by a motion, made four years later, to set aside such approval, nor by exceptions to the striking of such motion.—*Id.*

§ 274 (Mo.App.) Where plaintiff did not except to a peremptory instruction for defendant, but took "an involuntary nonsuit with leave to move to set aside," an exception to the overruling of such motion could not relate back to the ruling on the instruction; the nonsuit being in fact voluntary.—*Arnold v. Aetna Life Ins. Co.*, 151 S. W. 190.

(D) Motions for New Trial.

§ 297 (Mo.App.) An adverse ruling on a motion to affirm the justice's judgment cannot be reviewed in the absence of a motion for new trial or a rehearing.—*Silberberg v. Gitenstein*, 151 S. W. 983.

§ 301 (Mo.App.) The error in a judgment on a special tax bill declaring that it should draw 8 per cent. interest appears on the face of the record, and is reviewable, though not complained of in the motion for new trial.—*Granite Bituminous Paving Co. v. Parkview Realty & Improvement Co.*, 151 S. W. 479.

§ 301 (Ark.) Objections to instructions and to the admission and exclusion of evidence are waived, where the party objecting fails to preserve exceptions to the rulings by assigning them as a ground in his motion for a new trial.—*Thomas v. Jackson*, 151 S. W. 521.

§ 305 (Mo.App.) Even where there has been a motion for new trial or a rehearing, the denial thereof is not open to review, unless there has been an exception to the ruling.—*Silberberg v. Gitenstein*, 151 S. W. 983.

VII. REQUISITES AND PROCEEDINGS FOR TRANSFER OF CAUSE.

(B) Petition or Prayer, Allowance, and Certificate or Affidavit.

§ 359 (Tenn.) Shannon's Code, 4889, authorizing the chancellor to allow an appeal in the

cases enumerated therein as a matter of discretion, does not authorize him to allow an appeal from a decree overruling a plea in abatement to his jurisdiction; that not being one of the cases mentioned.—*Employers' Indemnity Co. v. Willard*, 151 S. W. 1029.

§ 361 (Tex.) A statement merely asking the Supreme Court to take jurisdiction, under *Sayles' Ann. Civ. St.* 1897, art. 941, subds. 5, 7, and 8, without pointing out the exact statutory grounds of jurisdiction, did not comply with the rules of the Supreme Court.—*Edwards v. St. Louis Southwestern Ry. Co. of Texas*, 151 S. W. 289.

(C) Payment of Fees or Costs, and Bonds or Other Securities.

§ 374 (Tex.Civ.App.) One bringing action in her individual capacity and as administratrix cannot appeal in her individual capacity without giving a bond, but under *Sayles' Ann. Civ. St.* 1897, art. 1408, does not have to give bond in her capacity as administratrix.—*Casey v. Texarkana & Ft. S. Ry. Co.*, 151 S. W. 856.

(D) Writ of Error, Citation, or Notice.

§ 417 (Ark.) Under *Kirby's Dig.* § 1188, an appeal from an order vacating a default judgment and granting a new trial made in the term at which the judgment was rendered does not lie, unless the notice of appeal contains appellant's assent for judgment against him on the affirmance of the order.—*McPherson v. Consolidated Casualty Co.*, 151 S. W. 283.

VIII. EFFECT OF TRANSFER OF CAUSE OR PROCEEDINGS THEREFOR.

(A) Powers and Proceedings of Lower Court.

§ 447 (Ky.) Under *Civ. Code Prac.* § 747, providing for continuance of an injunction pending an appeal, the terms of the continuance must be first determined by the circuit court, and the party dissatisfied therewith may have the same reviewed by the Court of Appeals or judge thereof in vacation.—*Kentucky Coal & Timber Development Co. v. Carroll Hardwood Lumber Co.*, 151 S. W. 689.

(B) Jurisdiction Acquired by Appellate Court.

§ 456 (Ky.) Where an appeal in an action to restrain the cutting of timber involved difficult questions of law, an injunction dissolved in part by the trial court will be continued pending appeal.—*Kentucky Coal & Timber Development Co. v. Carroll Hardwood Lumber Co.*, 151 S. W. 689.

K. RECORD AND PROCEEDINGS NOT IN RECORD.

(A) Matters to be Shown by Record.

§ 499 (Mo.) The question whether the issues raised by a demurrer were concluded by an adverse ruling on motion to strike cannot be raised on appeal, where the record does not show that it was brought to the attention of the lower court.—*Montgomery v. Gahagan*, 151 S. W. 453.

§ 500 (Tex.Civ.App.) Where there is no judgment or record entry showing any ruling on an exception to the petition, such ruling cannot be reviewed on appeal, although preserved by a bill of exceptions.—*St. Louis & S. F. R. Co. v. Cartwright*, 151 S. W. 630.

§ 501 (Mo.App.) Where no exception to the overruling of a motion for new trial appears in the bill of exceptions, review is confined to the record proper.—*Angel v. City of Portageville*, 51 S. W. 192.

§ 501 (Mo.App.) A motion for judgment on the pleadings can only be reviewed, when there is an exception thereto duly preserved in a bill

of exceptions.—*Hodson v. McAnerney*, 151 S. W. 754.

§ 502 (Mo.App.) Unless an exception to the overruling of a motion for new trial appears of record in the bill of exceptions, all inquiry into the proceedings of the trial is closed to the appellate court; and it can only examine the record proper.—*Murphy v. Lorwood Cooperative Co.*, 151 S. W. 191.

§ 511 (Mo.App.) Where the record proper does not show the filing of the bill of exceptions, the bill cannot be reviewed.—*Hodson v. McAnerney*, 151 S. W. 754.

(B) Scope and Contents of Record.

§ 518 (Mo.) A motion to strike out pleadings if treated as a pure motion must appear in the bill of exceptions, or the ruling thereon is not reviewable.—*Parkyne v. Churchill*, 151 S. W. 446.

§ 532 (Mo.App.) The ruling on a motion to affirm the judgment of a justice cannot be reviewed, unless the motion and an exception to the ruling is preserved in the bill of exceptions.—*Silberberg v. Gitenstein*, 151 S. W. 983.

(C) Necessity of Bill of Exceptions, Case, or Statement of Facts.

§ 544 (Mo.App.) Where there is no bill of exceptions, the court can only ascertain whether the record proper discloses any legal cause for its interference.—*Advance Thresher Co. v. Speak*, 151 S. W. 235.

The record proper includes the verdict and judgment.—*Id.*

The rule that all matters contained in the record proper may be examined by an appellate court, though there is no bill of exceptions showing a motion in arrest, as modified, requires such a motion as to immaterial errors; but where the errors are material they will be examined on appeal without such motion, and, if fatal, will entitle appellant to a reversal.—*Id.*

§ 547 (Tex.Civ.App.) In the absence of a statement of facts, findings by the trial court cannot be reviewed.—*Cofield v. Supreme Camp of American Woodmen*, 151 S. W. 341.

§ 548 (Tenn.) A demurrer to the evidence need not be preserved by bill of exceptions to review a ruling thereon.—*King v. Cox*, 151 S. W. 58.

§ 548 (Tex.Civ.App.) An objection to the admission of testimony cannot be reviewed in the absence of a bill of exceptions.—*Gamble v. Martin*, 151 S. W. 327.

§ 548 (Tex.Civ.App.) Where there is no bill of exceptions showing that testimony mentioned in an assignment of error was excluded, the court's action cannot be reviewed.—*Walker v. Metropolitan St. Ry. Co.*, 151 S. W. 1142.

§ 549 (Ky.) Where on appeal instructions given and refused, while copied in the record, were not made a part thereof by bill of exceptions, the reviewing court can only determine whether the pleadings support the verdict.—*Madden v. Meehan*, 151 S. W. 681.

§ 554 (Tex.Civ.App.) The findings of fact are, in the absence of a statement of facts, conclusive.—*Holloway v. Hall*, 151 S. W. 895.

(D) Contents, Making, and Settlement of Case or Statement of Facts.

§ 560 (Tex.Civ.App.) A statement of facts covering 59 pages, a large part of which consisted entirely of questions and answers, held a violation of district court rules 72-78 (142 S. W. xxii) and Acts 32d Leg. c. 119, § 6, and was therefore subject to a motion to strike.—*Albrecht v. Lignoski*, 151 S. W. 886.

§ 564 (Tex.Civ.App.) Under Acts 32d Leg. c. 119, § 7, a statement filed more than 30 days after adjournment of court without any order having been entered authorizing the same

to be so filed cannot be considered.—*Cosfield v. Supreme Camp of American Woodmen*, 151 S. W. 341.

(E) Abstracts of Record.

§ 581 (Mo.) Matters in the bill of exceptions will not be reviewed, unless it is shown in the abstract of the record proper that a bill of exceptions was actually filed, as well as signed.—*Langstaff v. City of Webster Groves*, 151 S. W. 456.

Matters required to be presented in a motion for a new trial will not be reviewed, unless it appears from the abstract of the record entry of the court that such motion was filed and passed on.—*Id.*

§ 584 (Mo.) An abstract which commingles the record proper and matters of exceptions, so that it cannot be determined whether a motion for new trial was preserved in a bill of exceptions, and which under the caption "abstract of record" contains pleadings and the judgment, is fatally defective, and leaves for review only the record proper.—*Parkyne v. Churchill*, 151 S. W. 446.

(F) Making, Form, and Requisites of Transcript or Return.

§ 597 (Ky.) Under Civ. Code Prac. § 737, and court rule 27 (149 S. W. viii), relating to transcripts on appeal, the entire deposition of a witness, or the entire pleading, must be brought up, where any part of it is brought up.—*Dockins v. Dukes*, 151 S. W. 679.

§ 597 (Ky.) On an application to review an order continuing or refusing to continue an injunction pending appeal, the party applying for review must bring to the appellate court a transcript of that part of the record appertaining to the injunction.—*Kentucky Coal & Timber Development Co. v. Carroll Hardwood Lumber Co.*, 151 S. W. 689.

(H) Transmission, Filing, Printing, and Service of Copies.

§ 621 (Tex.Civ.App.) A transcript upon writ of error cannot be filed after the filing of a motion to affirm on certificate; the appeal having been perfected upon the filing of an appeal bond.—*Pitts v. Kane*, 151 S. W. 336.

§ 621 (Tex.Civ.App.) An appeal from an order granting a temporary injunction cannot be considered, where the transcript was not filed in the Court of Civil Appeals within 15 days from the entry of record.—*Jaynes v. Burch*, 151 S. W. 596.

(I) Defects, Objections, Amendment, and Correction.

§ 635 (Tex.Civ.App.) An appeal from a refusal to retax costs will be dismissed, where the record contains nothing to show jurisdiction to entertain the appeal.—*Smith v. Jordan*, 151 S. W. 1177.

§ 639 (Mo.) Where the abstract is proper as to the pleadings and judgment, the appeal will not be dismissed because of defects in the abstract.—*Parkyne v. Churchill*, 151 S. W. 446.

§ 655 (Tex.Civ.App.) The district court has jurisdiction to correct on motion the record on appeal by striking therefrom conclusions of fact and law not signed and filed within the time allowed by law.—*Houston Oil Co. of Texas v. Powell*, 151 S. W. 887.

(K) Questions Presented for Review.

§ 671 (Ky.) Where on appeal the record does not contain the evidence, the reviewing court can only determine whether the pleadings support the verdict.—*Madden v. Meehan*, 151 S. W. 681.

§ 671 (Tex.Civ.App.) In determining whether an application for a continuance was properly overruled, the appellate court can only consider the facts stated in the application, as shown

by the trial court's record.—*Continental Lumber & Tie Co. v. Wilroy*, 151 S. W. 840.

§ 695 (Mo.) Where the testimony of a surveyor who made a survey is meaningless without a plat to which he referred, and the plat is not in the record, the sufficiency of his testimony to support the finding will not be considered.—*Strother v. Barrow*, 151 S. W. 960.

XI. ASSIGNMENT OF ERRORS.

§ 719 (Tex.) In Rev. Civ. St. 1911, arts. 1607, 1612, requiring that errors at law not "apparent on the face of the record" be presented by timely assignments of error, the phrase quoted refers to such manifest error as when removed destroys the foundation of the judgment.—*Oar v. Davis*, 151 S. W. 794.

Refusal of Court of Civil Appeals to reverse or reform judgment in partition so as to allow life estate to a defendant who had made no claim for same held not an error of law apparent on the face of the record to which no timely assignment of error would be essential.—*Id.*

§ 719 (Tex.Civ.App.) The error in allowing an amendment to a pleading is not error apparent of record which must be considered without assignment of error, where the amendment is only made to appear by motion to correct the record.—*Gordon v. State*, 151 S. W. 867.

§ 719 (Tex.Civ.App.) Under Rule 24 for the Courts of Civil Appeals (142 S. W. xii), requiring assignments of error to distinctly specify the grounds of error, an objection to an instruction as to the degree of care due from the defendant carrier toward plaintiff cannot be reviewed in the absence of an assignment thereon; such error not being fundamental.—*Walker v. Metropolitan St. Ry. Co.*, 151 S. W. 1142.

§ 728 (Tex.Civ.App.) Error in overruling objections to questions cannot be held prejudicial, where appellant's brief and assignments of error do not show what answers were made.—*Western Union Telegraph Co. v. Vance*, 151 S. W. 904.

The exclusion of a question cannot be held prejudicial to appellant where the assignment of error does not show what witness' answer would have been.—*Id.*

§ 732 (Tex.Civ.App.) An assignment of error that the court erred in denying a new trial for reasons in the bill of exceptions, based on errors in the charge, cannot be considered, because not specifying the grounds of error relied on, as required by Rev. St. 1895, art. 1018, and court rules 24-26 (142 S. W. xii).—*Sullivan v. Houston & T. C. R. Co.*, 151 S. W. 838.

§ 742 (Tex.Civ.App.) An assignment of error, not followed by a statement, will not be considered.—*International Order of Twelve Knights & Daughters of Tabor v. Wilson*, 151 S. W. 320.

§ 742 (Tex.Civ.App.) A reviewing court under rules for the Courts of Civil Appeals (rule No. 32 [142 S. W. xiii]), relating to briefs, need not consider an assignment of error containing three separate and distinct propositions of law.—*Ft. Worth & D. C. Ry. Co. v. Winger*, 151 S. W. 586.

§ 742 (Tex.Civ.App.) An assignment of error followed by a proposition which merely refers to propositions found under other assignments of error, in violation of court rules 30, 33 (142 S. W. xii), will not be considered.—*Sullivan v. Houston & T. C. R. Co.*, 151 S. W. 838.

Where the proposition subjoined to an assignment of error complaining of a paragraph of the charge for failing to instruct on matters raised by the evidence does not disclose the evidence, the assignment cannot be considered, in view of court rule 31 (142 S. W. xiii).—*Id.*

Where the propositions following an assignment of error complaining of the giving of a special requested charge do not point out the

alleged errors, and the subjoined statements do not disclose error, the assignment will not be considered.—*Id.*

§ 742 (Tex.Civ.App.) Appellee's brief, in submitting four "counterpropositions to all of appellant's assignments" of error, violated the Court of Civil Appeals rule.—*Ft. Worth & D. C. Ry. Co. v. Southern Kansas Ry. Co.*, 151 S. W. 850.

§ 742 (Tex.Civ.App.) Where assignments of error are submitted as propositions, and as such they are multifarious, they will not be considered on appeal.—*Chambers v. Wyatt*, 151 S. W. 864.

§ 742 (Tex.Civ.App.) Rulings on evidence will not be reviewed where appellant's brief fails to disclose the grounds of objection made at the trial.—*Lee v. Simmons*, 151 S. W. 868.

§ 742 (Tex.Civ.App.) Where an assignment of error only raised the question that there was no evidence to support the verdict, a proposition, if intended to attack the verdict as against the preponderance of the evidence, was not germane to the assignment.—*Thompson Bros. Lumber Co. v. Longini*, 151 S. W. 888.

§ 742 (Tex.Civ.App.) Error in admitting evidence cannot be reviewed, where there is no showing in the assignments of error that witness gave the objectionable testimony, except certain statements from the motion for a new trial.—*Western Union Telegraph Co. v. Vance*, 151 S. W. 904.

The office of a proposition is to specifically present the question of law intended to be covered by the assignment, and the appellate court cannot consider any question not suggested by a proposition if the assignment is not relied on as such, nor need appellee answer such questions.—*Id.*

§ 742 (Tex.Civ.App.) Assignments of error submitted as propositions, without disclosing the point, as required by Courts of Civil Appeals Rule 30 (142 S. W. xiii), will not be considered.—*Anderson v. Crow*, 151 S. W. 1080.

An assignment of error, not supported by a proper proposition, but which merely refers to propositions under another assignment, will not be considered.—*Id.*

§ 742 (Tex.Civ.App.) A proposition under an assignment of error presenting an objection to testimony not raised by the assignment cannot be considered.—*Knox v. Robbins*, 151 S. W. 1134.

So far as the propositions under an assignment of error to the giving of an instruction state objections not embraced in the assignment of error, they will not be considered.—*Id.*

Assignments of error cannot be considered when the only statement under them is, "See statement under 15th assignment of error," if that statement refers to a question in no way relating to the questions presented by the particular assignments.—*Id.*

§ 750 (Tex.Civ.App.) An assignment of error that the verdict was against the preponderance of the evidence did not present the question whether it was excessive.—*Freeman v. Morales*, 151 S. W. 644.

§ 750 (Tex.Civ.App.) An assignment of error that the petition does not authorize the judgment does not raise the question of the sufficiency of service of process.—*First Bank of Springtown v. Hill*, 151 S. W. 652.

§ 750 (Tex.Civ.App.) Assignment of error that cause of action was barred by limitations, and there being no evidence to the contrary, the verdict and judgment was against the preponderance of the evidence, held to raise only the question whether the undisputed evidence showed that the cause was barred.—*Thompson Bros. Lumber Co. v. Longini*, 151 S. W. 888.

§ 750 (Tex.Civ.App.) An assignment of error in refusing a requested charge does not present

for review the contention that the request was sufficient to direct the court's attention to the issue desired to be submitted and to require it to submit a correct charge.—*Walker v. Metropolitan St. Ry. Co.*, 151 S. W. 1142.

§ 753 (Tex.Civ.App.) Where the transcript does not contain a copy of an assignment of errors required by the statute and court rules, the court will only consider fundamental errors apparent upon the record.—*Biggs v. Blount*, 151 S. W. 1114.

XII. BRIEFS.

§ 756 (Tex.Civ.App.) A brief containing 22½ pages of double-spaced typewritten matter on paper of letter size, which, if single-spaced, would not have contained over 12 pages of letter size, held not to violate Act April 8, 1909 (Laws 31st Leg. [1st Called Sess.] c. 6), or rule 37, as amended October 12, 1912 (see Amendment of Rules, 149 S. W. x), providing that briefs, if written, shall not exceed 15 pages.—*Powell v. Stephens*, 151 S. W. 833.

§ 757 (Tex.Civ.App.) Assignments of error complaining of the refusal of special charges will not be considered where the charges are not copied in appellant's brief, nor reference made to the page of the record where they can be found.—*Armstrong Packing Co. v. Clem*, 151 S. W. 576.

§ 759 (Tex.Civ.App.) It is a valid objection to the consideration of an assignment of error that only part of it is copied in the brief.—*Knox v. Robbins*, 151 S. W. 1134.

§ 773 (Tex.Civ.App.) Where plaintiff in error fails to file brief, and no fundamental error appears, the judgment will be affirmed.—*Moon v. Dozier*, 151 S. W. 656.

§ 773 (Tex.Civ.App.) The court may dismiss an appeal for want of prosecution without looking into the record where appellant's brief is not filed in time, and there is no agreement waiving the statutory requirement.—*Gordon v. State*, 151 S. W. 867.

XIII. DISMISSAL, WITHDRAWAL, OR ABANDONMENT.

§ 777 (Mo.) Where parties file a stipulation reciting that the case has been fully settled, and that an order of dismissal at the cost of appellant may be entered, the appeal will be dismissed.—*Mathis v. Wabash R. Co.*, 151 S. W. 421.

§ 781 (Ky.) Where a wife appealed from the judgment in her action for divorce, and, pending her appeal, the defendant died, leaving the widow with rights in his estate on renouncing the provisions of the will, so that only a moot question was presented, the appeal will be dismissed.—*Barger v. Barger*, 151 S. W. 406.

§ 807 (Tex.Civ.App.) Where a suit was dismissed because the court did not know of stipulation to continue from term to term until both parties were ready for trial, the court in its discretion could reinstate the case.—*Southern Pac. Co. v. Higgins Oil & Fuel Co.*, 151 S. W. 1161.

XV. HEARING AND REHEARING.

§ 835 (Mo.) Under Supreme Court rule No. 15 (73 S. W. vi), requiring that the briefs shall contain the points and authorities relied on, respondent cannot for the first time on rehearing assert that the order of the trial court granting it a new trial was correct because the damages were excessive.—*Honea v. St. Louis, I. M. & S. Ry. Co.*, 151 S. W. 119.

§ 835 (Tex.Civ.App.) Under Court of Civil Appeals Rule 22 (142 S. W. xii), requiring the parties before submission to see that the record is properly prepared, one may not for purpose of rehearing have considered a certified copy of a judgment not shown by the transcript of

the record on the original hearing.—*St. Louis & S. F. R. Co. v. Cartwright*, 151 S. W. 1004.
 § 835 (Tex.Civ.App.) Under Court Rule 22 (142 S. W. xii), relating to transcripts on appeal, a defendant in error on rehearing may not maintain a motion to amend or strike out the transcript.—*General Accident, Fire & Life Assur. Corporation v. Lacy*, 151 S. W. 1170.

XVI. REVIEW.

(A) Scope and Extent in General.

§ 837 (Tex.) Incompetent testimony received without objection cannot form the basis of findings of facts in an appellate court.—*Henry v. Phillips*, 151 S. W. 533.

§ 842 (Mo.App.) On appeal from an order granting a new trial in an action stating two causes of action in four counts, on the ground that the jury, by finding for plaintiff on all counts, had allowed a double recovery, the Court of Appeals cannot determine whether the total of the verdict exceeds the damages proved.—*Blackmer & Post Pipe Co. v. Mobile & O. R. Co.*, 151 S. W. 164.

§ 842 (Mo.App.) Objections that the verdict and judgment are for the wrong party, and are contrary to the evidence, urged as grounds for new trial, cannot be reviewed on appeal, as they merely go to the greater weight of the evidence.—*Byrd v. Vanderburgh*, 151 S. W. 184.

§ 842 (Tex.Civ.App.) The trial court's construction of a deed is not binding on appeal, since it is a conclusion of law rather than a finding of fact.—*Morris v. Short*, 151 S. W. 633.

§ 842 (Tex.Civ.App.) A finding that a conveyance was a bona fide sale of property and not a mere security held a finding of fact, or on a mixed question of law and fact, and not a conclusion of law, so as to be reviewable.—*Rider v. Radford*, 151 S. W. 1181.

§ 843 (Mo.) The question whether a court erred in ordering the cancellation of certain contracts will not be determined, where they had in the meantime expired by their own terms.—*State ex rel. Kimbrell v. People's Ice, Storage & Fuel Co.*, 151 S. W. 101.

§ 843 (Mo.) An assignment to the overruling of a demurrer to the evidence raising questions specified in other assignments will not be considered.—*Strother v. Barrow*, 151 S. W. 960.

§ 852 (Mo.App.) The denial of a motion to dismiss will be reviewed, on the theory that the motion was a proper mode of raising the question of jurisdiction; both parties and the trial court having proceeded on that theory, and no question in that regard being raised on appeal.—*Matthews v. Eby*, 151 S. W. 470.

§ 854 (Mo.) Where the trial court in sustaining a motion for a new trial recites an erroneous reason therefor, the order will be reversed, unless appellee points out some other ruling of the trial court which justified the order.—*Benjamin v. Metropolitan St. Ry. Co.*, 151 S. W. 91.

§ 854 (Mo.App.) An order granting a new trial will not be reversed, good reasons appearing on the record for granting a new trial, though the reasons assigned by the trial court were unsound.—*Warren v. Cowden*, 151 S. W. 501.

§ 854 (Mo.App.) The finding of a court sitting without a jury must be upheld on appeal if justified on any ground, where there was no finding of facts and no declarations of law given or refused, and the record does not otherwise indicate the ground on which the court based its finding.—*Griggs v. Bridgwater*, 151 S. W. 764.

(D) Amendments, Additional Proofs, and Trial of Cause Anew.

§ 889 (Mo.App.) Where a trial court ordered a reply to be amended to meet an objection thereto, it will be regarded on appeal as having been made, whether the verbal changes

were made or not.—*Locke v. Bowman*, 151 S. W. 468.

(E) Presumptions.

§ 907 (Ky.) The court, on appeal, must presume that the trial court decided properly, in the absence of the evidence heard by it.—*Dockins v. Dukes*, 151 S. W. 679.

§ 907 (Mo.App.) Where the abstract of record is in the short form, and contains a copy of the judgment appealed from and the order allowing the appeal, but contains no reference to an objection made by counsel, the reviewing court will presume in favor of the regularity of the trial court's action and affirm the judgment.—*Warner v. Michel*, 151 S. W. 159.

§ 907 (Tex.Civ.App.) Where, in determining priorities between two transfers, the judgment stated that one should be paid in full before the other, there being no statement of facts in the record, the judgment will be sustained.—*A. A. Fielder Lumber Co. v. Smith*, 151 S. W. 605.

§ 909 (Tex.Civ.App.) Where a cause was tried on the second amended petition filed after the running of limitations, in lieu of the first amended petition filed in time, and not in the record, the contention that the cause was barred must be overruled.—*Anderson v. Crow*, 151 S. W. 1080.

§ 916 (Ky.) On appeal, in testing the sufficiency of an answer to support a verdict for defendant, the facts alleged therein must be taken as true.—*Madden v. Meehan*, 151 S. W. 681.

§ 917 (Ky.) A demurrer to an amended answer not shown by the record to have been ruled on will be presumed to have been waived by the filing of a reply.—*Madden v. Meehan*, 151 S. W. 681.

§ 919 (Ky.) A motion to strike a part of an answer, not shown by the record to have been ruled on, will be presumed to have been waived by the filing of a reply.—*Madden v. Meehan*, 151 S. W. 681.

§ 920 (Tex.Civ.App.) The court, on appeal from a judgment denying a temporary injunction, will presume that the trial judge did not abuse his discretion, in the absence of any statement of facts, bill of exceptions, or findings of fact in the record.—*Spence v. Fenchler*, 151 S. W. 1004.

§ 924 (Mo.) Where no exception to a reference was saved, the case will be treated as compulsorily referable, in determining the conclusiveness of findings.—*State ex rel. Kimbrell v. People's Ice, Storage & Fuel Co.*, 151 S. W. 101.

§ 930 (Tex.Civ.App.) Where a general verdict is rendered for defendant in a case involving several defenses, and the evidence sustains one defense, it is immaterial that it does not sustain the others, the presumption being that the verdict was based on the defense sustainable.—*Parker v. Naylor*, 151 S. W. 1096.

§ 934 (Tex.Civ.App.) In the absence from the record of the pleadings, the court will presume that the pleadings on file authorized the judgment.—*Holloway v. Hall*, 151 S. W. 895.

§ 934 (Tex.Civ.App.) The evidence should be viewed in the light most favorable to the judgment.—*Ralls v. Parish*, 151 S. W. 1089.

(F) Discretion of Lower Court.

§ 977 (Mo.App.) The order of the trial court in granting a new trial will not be reversed, unless there is an abuse of discretion.—*Allen v. St. Louis S. F. R. Co.*, 151 S. W. 762.

Appellate courts are less disposed to reverse orders granting new trials than orders refusing them.—*Id.*

§ 978 (Mo.) Where the trial judge encountered several of the jurors and defendant's claim agent eating at the same table at a tavern, and thereafter the same jurors were seen playing at a game of pool with such agent, the discretion of the trial court in granting a new trial will not be disturbed, though the meeting

between the claim agent and the jurors was accidental, and no actual misconduct was shown.—*Benjamin v. Metropolitan St. Ry. Co.*, 151 S. W. 91.

(G) Questions of Fact, Verdicts, and Findings.

§ 987 (Mo.) While the appellate court may, in an equity case, review and weigh the evidence, it has no such power of review on appeal in actions at law.—*Cousins v. White*, 151 S. W. 737.

§ 994 (Mo.App.) The appellate court will not interfere with findings by the court which depend upon the credibility of witnesses.—*Byrd v. Vanderburgh*, 151 S. W. 184.

§ 999 (Mo.App.) A reviewing court is concluded by a determination of a jury upon a debatable issue of fact.—*Wilhite v. City of Huntsville*, 151 S. W. 232.

§ 1001 (Tex.Civ.App.) A verdict sustained by evidence is conclusive on appeal.—*Bledsoe v. Thompson Bros. Lumber Co.*, 151 S. W. 910.

§ 1002. A verdict on conflicting evidence will not be disturbed.

—(Ark.) *Doniphan Lumber Co. v. Fix*, 151 S. W. 986;

(Mo. App.) *Gillfillan v. Schmidt*, 151 S. W. 161.

§ 1002 (Ark.) A verdict on conflicting evidence will not be disturbed because it appears to be against the preponderance of the evidence.—*St. Louis, I. M. & S. Ry. Co. v. Williams*, 151 S. W. 243.

§ 1002 (Mo.App.) A verdict on conflicting evidence, rendered under proper instructions submitting the credibility of witnesses, is conclusive on appeal.—*Thornton v. Mersereau*, 151 S. W. 212.

§ 1002 (Tex.Civ.App.) Where the evidence was conflicting, the verdict will not be disturbed as against the weight of the evidence.—*St. Louis & S. F. R. Co. v. Cartwright*, 151 S. W. 630.

§ 1003 (Ky.) A verdict will be disturbed only when palpably against the evidence, and not in every case where the appellate court would, on the evidence, reach a different conclusion.—*Ætæa Life Ins. Co. v. Rustin*, 151 S. W. 366.

§ 1003 (Ky.) A verdict will not be disturbed unless flagrantly against the evidence.—*Louisville & N. R. Co. v. Goodwin*, 151 S. W. 376.

§ 1003 (Mo.App.) That the verdict is contrary to the greater weight of the evidence is not ground for disturbing the verdict on appeal.—*Byrd v. Vanderburgh*, 151 S. W. 184.

§ 1003 (Mo.App.) A verdict for a party whose evidence is substantial and presents issues of fact will not be set aside though the court, on appeal, believes that it is against the weight of the evidence.—*Madden v. Missouri Pac. Ry. Co.*, 151 S. W. 489.

§ 1006 (Tex.Civ.App.) Where the jury has given plaintiff a verdict three times, although the evidence is meager, the verdict will be permitted to stand; but that there have been three verdicts for plaintiff should not prevent this court from reviewing the evidence.—*S. W. Slayen & Co. v. Palmo*, 151 S. W. 649.

§ 1008 (Mo.) The rule as to the conclusiveness of the trial court's findings is not inapplicable because the testimony was wholly by deposition, or because one judge heard the evidence and another decided the case on the transcript thereof.—*State ex rel. Kimbrell v. People's Ice, Storage & Fuel Co.*, 151 S. W. 101.

§ 1008 (Mo.App.) A finding that shipment was damaged before delivery to carrier held conclusive on appeal.—*Bettman v. Mobile & R. Co.*, 151 S. W. 169.

§ 1009 (Ark.) The chancellor's finding supported by the clear preponderance of the evidence will not be disturbed.—*Henderson v. E. V. Emerson Co.*, 151 S. W. 251.

§ 1009 (Ark.) A finding of the chancellor on conflicting evidence will not be disturbed unless clearly against the weight of the evidence.—*Medlock v. Owen*, 151 S. W. 995.

§ 1009 (Ky.) In reviewing questions of fact, considerable weight is given to the judgment of the chancellor.—*Higgins v. Shields*, 151 S. W. 391.

§ 1009 (Ky.) In a suit to quiet title, findings of fact by the chancellor on conflicting evidence will be deferred to upon appeal.—*McCain v. Joiner*, 151 S. W. 406.

§ 1009 (Ky.) While considerable weight will be given to a chancellor's fact findings, his judgment will be reversed when not supported by the weight of the evidence, as shown by the face of the record.—*Coomes Bros. v. Grigsby & Co.*, 151 S. W. 943.

While a verdict will not be disturbed unless palpably against the evidence, a chancellor's findings have not the same weight, as he does not see and hear the witnesses.—*Id.*

§ 1009 (Mo.) While the Supreme Court is not bound by the chancellor's findings, it may properly defer in some degree to them.—*Waddie v. Frazier*, 151 S. W. 87.

§ 1010 (Mo.) A finding by the court, rendered without the giving of any declarations of law, will not be disturbed where there is any evidence to support it.—*Dolphin v. Klann*, 151 S. W. 956.

§ 1010 (Mo.) A finding sustained by testimony is conclusive on appeal.—*Strother v. Barrow*, 151 S. W. 960.

§ 1011 (Mo.) A finding on conflicting testimony will not be disturbed, though the Supreme Court doubts the correctness of the finding.—*Daman v. Remme*, 151 S. W. 429.

§ 1011 (Mo.App.) Finding of fact on conflicting testimony, is not subject to review.—*Lewis v. Fisher*, 151 S. W. 172.

§ 1011 (Mo.App.) On appeal in unlawful detainer, tried by the court without a jury, the judgment is conclusive as to a disputed issue of fact, unless not justified by the law and the facts.—*Griggs v. Bridgewater*, 151 S. W. 764.

§ 1011 (Tex.Civ.App.) Findings of the court on conflicting evidence will not be reviewed, though the appellate court might have reached a different conclusion.—*Polk v. State Mut. Fire Ins. Co.*, 151 S. W. 1126.

§ 1013 (Mo.) A finding of fact, based on a mere mathematical computation, is reviewable on appeal, since any incorrect finding is without evidence to support it.—*State ex rel. Kimbrell v. People's Ice, Storage & Fuel Co.*, 151 S. W. 101.

§ 1017 (Mo.) The appellate court may review findings of a referee and enter its own judgment thereon.—*State ex rel. Federal Lead Co. v. Reynolds*, 151 S. W. 85.

§ 1022 (Ky.) Findings on conflicting evidence by a special commissioner, concurred in by the lower court, will not be disturbed.—*Wilson v. Ward*, 151 S. W. 353.

§ 1022 (Mo.) The findings of the trial court, after setting aside those made by the referee, are not open for review as to the weight of evidence, since the referee's findings are not judicially made until approved; and where they are set aside the only findings are those of the court.—*State ex rel. Kimbrell v. People's Ice, Storage & Fuel Co.*, 151 S. W. 101.

§ 1022 (Tenn.) A concurrent finding by a master and chancellor will be sustained on appeal, where there is any evidence in its behalf.—*Gleason v. Prudential Fire Ins. Co.*, 151 S. W. 1030.

(H) Harmless Error.

§ 1027 (Tex.Civ.App.) Any error in findings that certain votes were not fraudulent would be immaterial, where the result of the election

would not be changed if such votes were thrown out.—*Ralls v. Parish*, 151 S. W. 1089.

§ 1028 (Tex.Civ.App.) Where the unchallenged findings attain justice, the judgment will not be reversed merely because of informality of procedure, not affecting the merits or the substantial rights of the parties.—*Holloway v. Hall*, 151 S. W. 895.

§ 1029 (Tex.Civ.App.) In trespass to try title, errors of law would not justify reversal of judgment for defendant, where the evidence failed to show that plaintiff had title to the land.—*Lee v. Simmons*, 151 S. W. 868.

§ 1029 (Tex.Civ.App.) Where, under the facts, plaintiff could not recover, any error of procedure at the trial was not prejudicial to him.—*Bledsoe v. Thompson Bros. Lumber Co.*, 151 S. W. 910.

§ 1031 (Ark.) Prejudice from introduction of incompetent evidence is presumed.—*St. Louis, I. M. & S. Ry. Co. v. Steed*, 151 S. W. 257.

§ 1032 (Ark.) The party introducing incompetent evidence has the burden of showing that no prejudice resulted.—*St. Louis, I. M. & S. Ry. Co. v. Steed*, 151 S. W. 257.

§ 1033 (Ark.) One complaining of a decree cannot take advantage of errors which are in his favor.—*Reeves v. Moore*, 151 S. W. 1025.

§ 1033 (Ky.) Where the evidence showed that the value and use of property had depreciated owing to an inadequate sewer which flooded the basement necessitating repairs at considerable cost, an instruction authorizing the assessment of such damages as will fairly and reasonably compensate for any damage done to the use of the property between specified dates, though erroneous, was not prejudicial to defendant.—*City of Louisville v. Kramer's Adm'r*, 151 S. W. 379.

§ 1033 (Mo.App.) Where the evidence did not show that a person suing for the purchase price of hay guaranteed it, an instruction that he did not guarantee that it was of any particular marketable grade, but only that it was of some value in some grade, was not prejudicial to defendant.—*Mullinax v. Lowry*, 151 S. W. 745.

§ 1033 (Tex.Civ.App.) In action against manufacturer of soap permitting plaintiff to test the soap, if error, *held* not prejudicial where the test failed to produce the expected result.—*Armstrong Packing Co. v. Clem*, 151 S. W. 576.

§ 1039 (Tex.Civ.App.) A plaintiff is not entitled to a reversal for insufficiency of the answer where the petition did not state a cause of action.—*Hicks v. Murphy*, 151 S. W. 845.

§ 1040 (Tex.Civ.App.) Any error in overruling an exception in an action on a note given for drilling water wells, to an allegation of the supplemental petition denying that plaintiff guaranteed the quality of the water, on the ground that such allegation was not responsive to any issue, was harmless.—*Miller v. Layne & Bowler Co.*, 151 S. W. 341.

§ 1040 (Tex.Civ.App.) Error in overruling special demurrers to those parts of plaintiff's petition relating to what insurer's agent told him about taking an inventory, and as to additional insurance, was harmless, in view of evidence showing a substantial compliance with the iron safe clause, and that the agent authorized additional insurance, or knew thereof before the loss.—*American Cent. Ins. Co. v. Hardin*, 151 S. W. 1152.

§ 1042 (Tex.Civ.App.) Any error in striking a part of the petition became harmless, where the trial court heard the evidence on the question raised thereby and filed findings thereon.—*Ralls v. Parish*, 151 S. W. 1089.

§ 1043 (Ky.) Refusal of a continuance in a will contest, on the ground that contestee was nervous and unable to testify or advise her counsel, and on the ground of the absence of a witness, *held*, in view of the presence and testimony of other witnesses and the testimony

of contestee, not reversible error.—*Crosthwaite v. Crosthwaite*, 151 S. W. 945.

§ 1046 (Ky.) The statement of the court that defendant resting at the close of plaintiff's case had no evidence to introduce *held* not prejudicial.—*Chesapeake & O. Ry. Co. v. Meyers*, 151 S. W. 19.

§ 1046 (Ky.) As Civ. Code Prac. § 317, subsec. 6, accords to the party having the burden of proof the conclusion of the argument, the denial of that right is reversible error.—*Shirley v. Renick*, 151 S. W. 357.

§ 1048 (Tex.Civ.App.) The error, if any, in overruling an objection to a question, is not prejudicial where no affirmative fact was elicited.—*First Bank of Springtown v. Hill*, 151 S. W. 652.

§ 1050 (Ark.) Admission of incompetent evidence is prejudicial error, especially where counsel for prevailing party refers to such evidence in his argument.—*St. Louis, I. M. & S. Ry. Co. v. Steed*, 151 S. W. 257.

§ 1050 (Ky.) Admission of evidence of employer's precaution after the injury by constructing a safe passway *held* harmless, where the uncontradicted evidence showed that it was negligence not to provide such passway.—*Fluehart Collieries Co. v. Elam*, 151 S. W. 34.

§ 1050 (Tex.Civ.App.) Error in admitting evidence is harmless; other evidence to substantially the same effect having been admitted without objection.—*Texas & P. Ry. Co. v. Good*, 151 S. W. 617.

§ 1050 (Tex.Civ.App.) Where testimony substantially the same as some complained of was not objected to, a case will not be reversed even if the testimony complained of was not admissible.—*S. W. Slayden & Co. v. Palmo*, 151 S. W. 649.

§ 1050 (Tex.Civ.App.) Any error in admitting evidence was harmless to defendant, where a witness for defendant testified to substantially the same fact.—*Western Union Telegraph Co. v. Vance*, 151 S. W. 904.

§ 1051 (Tex.Civ.App.) Where there was sufficient competent evidence to support a finding, that incompetent evidence was introduced is not reversible error.—*McDoel v. Jordan*, 151 S. W. 1178.

§ 1052 (Tex.) Though it appears that brokers suing for commission introduced the purchaser's testimony by one of the brokers that his firm effected the sale was harmless error, where that issue was not submitted to the jury.—*Ansley Realty Co. v. Pope*, 151 S. W. 525.

§ 1056 (Ky.) In an action for injuries to a child at a railroad crossing by a car on which there was no brakeman, it was not prejudicial to refuse to admit evidence that, even had there been a man on the car at the time of the accident, he could not have stopped the car, where the recovery was based on insufficient warning.—*Louisville & N. R. Co. v. Allnutt*, 151 S. W. 14.

§ 1056 (Mo.App.) Error in excluding evidence as to an item of property in controversy as to which judgment was rendered for appellant was harmless.—*Byrd v. Vanderburgh*, 151 S. W. 184.

§ 1058 (Tex.Civ.App.) Refusal to allow a witness to answer a question was harmless, where having elsewhere been permitted to testify to substantially the same facts.—*Texas & P. Ry. Co. v. Good*, 151 S. W. 617.

§ 1060 (Ky.) A remark of counsel of plaintiff in response to an objection to the admission of evidence *held* not prejudicial error.—*Chesapeake & O. Ry. Co. v. Meyers*, 151 S. W. 19.

§ 1060 (Ky.) Where, in an action for assault and battery, the plaintiff's attorney, over an adverse ruling, persisted in questions as to sickness caused plaintiff's wife and baby, *held*

reversible error.—*Shields' Adm'rs v. Rowland*, 151 S. W. 408.

§ 1060 (Tex.Civ.App.) In an action for injuries to a child while crossing railroad tracks, improper remarks of counsel, embracing matters outside the record, *held* not reversible where called for by remarks of opposing counsel, and the verdict was not excessive.—*Ft. Worth & D. C. Ry. Co. v. Wininger*, 151 S. W. 586.

§ 1061 (Mo.App.) Error in sustaining a demurrer to the evidence as to matters recited in favor of appellant is not reversible error.—*Byrd v. Vanderburgh*, 151 S. W. 184.

§ 1064 (Mo.App.) Error in authorizing a recovery, in an action for injuries by being struck by an automobile, if the driver did not use the highest care a careful person would exercise under like circumstances, when only specific acts of negligence were alleged, *held* reversible.—*McDonnell v. Columbia Taxicab Co.*, 151 S. W. 767.

§ 1064 (Tex.Civ.App.) An instruction that if plaintiff, after receipt of a message announcing his daughter's probable death, could, by usual means of travel, have reached her before her death, and failed to do so, he could not recover for negligent delay in the transmission and delivery of the telegram, was not affirmative error.—*Western Union Telegraph Co. v. Vance*, 151 S. W. 904.

§ 1064 (Tex.Civ.App.) Recital in court's charge that the case was submitted on special charges, not stating which side presented them, *held* not prejudicial to plaintiff, although the special charge was presented by defendant.—*Hengy v. Hengy*, 151 S. W. 1127.

§ 1064 (Tex.Civ.App.) Error in an instruction, that a street railway company was required to use that high degree of care "usually" exercised by very cautious and prudent persons under similar circumstances, *held* not ground for reversal.—*Walker v. Metropolitan St. Ry. Co.*, 151 S. W. 1142.

§ 1066 (Ark.) Instruction submitting issue of contributory negligence *held* harmless, where there was no evidence from which reasonable minds could have concluded that plaintiff was negligent.—*St. Louis, I. M. & S. R. Co. v. Brogan*, 151 S. W. 699.

§ 1066 (Mo.) An instruction which did not wholly follow the petition *held* harmless, if erroneous, in view of evidence clearly supplying an omitted issue and in light of Rev. St. 1909, § 1850, 2082.—*Honea v. St. Louis, I. M. & S. Ry. Co.*, 151 S. W. 119.

§ 1066 (Mo.App.) Where there was evidence that plaintiff's horse was not frightened as alleged, an instruction to find for defendant if plaintiff was injured from any other cause *held* harmless, though there was no evidence of other cause.—*Kiel v. Ott*, 151 S. W. 182.

§ 1066 (Mo.App.) Where there was no evidence of contributory negligence of plaintiff, an instruction that the city was bound to use ordinary care to keep its streets in a reasonably safe condition was harmless, though conveying the impression that the city was liable regardless of the negligence of plaintiff.—*Ledbetter v. City of Kirksville*, 151 S. W. 228.

§ 1066 (Mo.App.) It was not prejudicial error to charge that a fact concerning which there was no dispute was admitted by defendants, although they had not in fact admitted it.—*Mulmax v. Lowry*, 151 S. W. 745.

§ 1066 (Tex.Civ.App.) Instruction requiring office to, or knowledge by, insured's wife, as well as himself, that the company would no longer attend to the insurance on the premises *held* not prejudicial where there was no contention that either one had notice or knowledge.—*Commonwealth Fire Ins. Co. v. Obenchain*, 151 S. W. 611.

§ 1066 (Tex.Civ.App.) Where the evidence, in an action for injuries, did not warrant an issue of his assumption of risk, error in submitting that issue conjunctively with the inconsistent issue of contributory negligence was harmless to defendant.—*Armour & Co. v. Morgan*, 151 S. W. 861.

§ 1066 (Tex.Civ.App.) In an action for injuries to a servant, an instruction on an issue of negligence not presented by the proof *held* harmless.—*Continental Oil & Cotton Co. v. Gilliam*, 151 S. W. 890.

§ 1068 (Ark.) The error in an instruction based entirely on a party's claim, and ignoring the contention of the adverse party, is not prejudicial to the adverse party obtaining a verdict in his favor.—*Johnston-Reynolds Land Co. v. Fuqua*, 151 S. W. 693.

§ 1068 (Ky.) An instruction on contributory negligence without support in the evidence was not prejudicial, where the verdict for defendant did not rest on such instruction.—*Samuels v. Louisville Ry. Co.*, 151 S. W. 37.

§ 1070 (Mo.App.) In replevin, with counterclaim for damages and the surrender of notes, *held*, that a verdict for defendants for \$735 was not determinative of the issues, and was reversible error.—*Advance Thresher Co. v. Speak*, 151 S. W. 236.

§ 1073 (Mo.) Rendering default judgment in ejectment on sustaining demurrer to part of answer claiming affirmative relief, though there was also a general denial, *held* not harmless error.—*Montgomery v. Gahagan*, 151 S. W. 453.

§ 1074 (Tex.Civ.App.) Although on motion to open a default judgment many errors were committed in the trial of the issues to determine whether defendant had a valid defense, they are harmless, where no valid excuse is shown for not filing the answer in time.—*Gilaspie v. City of Huntsville*, 151 S. W. 1114.

(I) Error Waived in Appellate Court.

§ 1078 (Tex.Civ.App.) In absence of any ruling shown by the record upon a special exception to the answer, it will be presumed that such exception was waived.—*Western Union Telegraph Co. v. Vance*, 151 S. W. 904.

(J) Decisions of Intermediate Courts.

§ 1094 (Tex.) An application to the Supreme Court for writ of error, upon the grounds, as provided by Sayles' Ann. Civ. St. 1897, art. 941, § 8, that the decision of the Court of Civil Appeals practically settled the case, admits the correctness of the facts found, and merely challenges the law.—*Edwards v. St. Louis Southwestern Ry. Co. of Texas*, 151 S. W. 289.

(K) Subsequent Appeals.

§ 1096 (Mo.) In examining the trial court's conclusions on the facts, the reviewing court could consider the lapse of time, the discrepancy between the present testimony and that given on a former trial, and the fact that the changes made in the testimony conformed to the needs of the parties introducing the witnesses, as determined by the former decision.—*First Nat. Bank v. Renick*, 151 S. W. 421.

§ 1097 (Tex.Civ.App.) The decision of the court on appeal conclusively settles the questions determined thereby, and they will not be considered on a subsequent appeal.—*Campbell v. Elliott*, 151 S. W. 1180.

XVII. DETERMINATION AND DISPOSITION OF CAUSE.

(A) Decision in General.

§ 1108 (Tex.) A determination in a contest of the election that local option had not been adopted in the county, pending an appeal in an action on a liquor dealer's bond, *held* to warrant a determination that the bond was of no force

and effect, though the local option law provided that a contest of the election should not suspend enforcement of the law.—*State v. Savage*, 151 S. W. 530.

§ 1109 (Ky.) A judgment relates to the date of submission of an appeal so that the death of either party after submission is not material.—*Barger v. Barger*, 151 S. W. 406.

(B) Affirmance.

§ 1135 (Mo.) Where the only record is the record proper, which contains a good petition and a judgment responding to one count thereof, the judgment will be affirmed.—*Parkyne v. Churchill*, 151 S. W. 446.

§ 1140 (Tex. Civ. App.) The error in the amount of a judgment does not require a reversal, where it can be cured by a remittitur.—*Johnson v. Oswald*, 151 S. W. 1164.

(D) Reversal.

§ 1170 (Ky.) In view of Civ. Code Prac. § 756, the Court of Appeals, though doubtful as to whether the chancellor erred in not transferring issues for trial by jury, will not reverse if the findings and judgment of the chancellor are correct.—*Rieger v. Schulte & Eicher*, 151 S. W. 395.

§ 1175 (Tex.) Where the facts are undisputed, the Supreme Court on writ of error will not send the case back to the Court of Civil Appeals, failing to announce conclusions of fact as required by Rev. Civ. St. 1911, art. 1639.—*Foard County v. Sandifer*, 151 S. W. 523.

XVIII. LIABILITIES ON BONDS AND UNDERTAKINGS.

§ 1234 (Ky.) Under Civ. Code Prac. § 748, the obligors in a supersedeas bond are expressly made liable for any judgment the Court of Appeals may order to be rendered.—*White v. White*, 151 S. W. 1.

APPEARANCE.

See Justices of the Peace, § 84; Venue, § 32.

§ 9 (Mo.) Where heirs appeared specially in the probate court merely to object to the court's jurisdiction to order a sale, but took no part in the proceedings, the court acquired no jurisdiction over them.—*State ex rel. Deems v. Holtcamp*, 151 S. W. 153.

APPLIANCES.

See Master and Servant, §§ 107-129, 208, 270, 278.

APPLICATION.

See Payment, § 39.

APPROVAL.

See Dower, § 99.

APPURTENANCES.

See Easements, § 3.

ARBITRATION AND AWARD.

I. SUBMISSION.

§ 8 (Tex. Civ. App.) Though Sayles' Ann. Civ. St. 1897, art. 61, permits other than statutory forms of arbitration, the court has power to set aside a verdict and judgment entered upon an agreement of the parties that a verdict of a majority of the jurors should have the force of a judgment.—*Philadelphia Underwriters Agency of Fire Ass'n of Philadelphia v. Brown*, 151 S. W. 899.

In the absence of clear and specific averment, it will not be assumed that an agreement that a verdict might be returned by a majority of the jurors, and that judgment might be entered thereon, was intended to oust the court of its

jurisdiction to set aside the judgment at that term, and grant a new trial.—*Id.*

II. ARBITRATORS AND PROCEEDINGS.

§ 27 (Mo. App.) Where one acting as an arbitrator of the amount due under a contract for services to be rendered by plaintiff, unknown to plaintiff, owned an adjoining farm and was interested in a drainage ditch on which plaintiff did part of his work, he was disqualified as an arbitrator, and the plaintiff could treat the whole proceeding as void.—*Stone v. Johnston*, 151 S. W. 987.

III. AWARD.

§ 67 (Mo. App.) Evidence held to show that plaintiff had knowledge of defendant's fraud practiced in an arbitration proceeding when he treated a new contract arising therefrom valid, thus ratifying the award.—*Stone v. Johnston*, 151 S. W. 987.

ARGUMENT OF COUNSEL.

See Criminal Law, §§ 717-730, 1037; Trial, §§ 25, 124-133.

ARREST.

See Evidence, § 244; False Imprisonment; Weapons, § 11.

II. ON CRIMINAL CHARGES.

§ 63 (Ky.) Under Ky. St. §§ 1309, 1310, 1311, providing for the arrest of persons carrying concealed weapons by ministerial officers, a policeman, discovering a person carrying a pistol concealed while talking to him in regard to another charge, held justified in making his arrest.—*Madden v. Meehan*, 151 S. W. 681.

Under Ky. St. § 2885, and Cr. Code Prac. § 36, authorizing arrests by police officers, a policeman held not entitled to make an arrest for an offense committed out of his presence without a warrant.—*Id.*

ARSON.

See Criminal Law, §§ 595, 829.

ASSAULT AND BATTERY.

See Abatement and Revival, § 69; Appeal and Error, § 1060; Homicide, §§ 84-96, 257, 310; Witnesses, § 350.

I. CIVIL LIABILITY.

(A) Acts Constituting Assault or Battery and Liability Therefor.

§ 13 (Ky.) The mere fact that the assaulting party during the fight retreated a few steps before seizing a weapon does not amount to a withdrawal, so as to make the other party guilty of a fresh assault in following him up.—*Shields' Adm'rs v. Rowland*, 151 S. W. 408.

(B) Actions.

§ 34 (Ky.) Evidence of abusive language is admissible in mitigation of punitive damages for an assault.—*Shields' Adm'rs v. Rowland*, 151 S. W. 408.

§ 38 (Ky.) Plaintiff may recover for such mental or physical suffering, or both, as are the proximate result of the injury.—*Shields' Adm'rs v. Rowland*, 151 S. W. 408.

§ 39 (Ky.) Where an assault and battery was malicious, plaintiff may recover punitive damages in the jury's discretion.—*Shields' Adm'rs v. Rowland*, 151 S. W. 408.

§ 40 (Ky.) Though plaintiff may recover for such mental or physical suffering, or both, as are the proximate result of the injury, and if the tort was malicious, punitive damages in the jury's discretion he cannot recover more than the sum claimed.—*Shields' Adm'rs v. Rowland*, 151 S. W. 408.

§ 42 (Ky.) Evidence *held* to require a submission to the jury the question of punitive damages.—Shields' Adm'rs v. Rowland, 151 S. W. 408.

II. CRIMINAL RESPONSIBILITY.

(A) Offenses.

§ 54 (Tex.Cr.App.) Under Pen. Code 1911, arts. 1008, 1009, 1011, 1022, accused *held* properly convicted of aggravated assault in the house of a private family.—Ward v. State, 151 S. W. 1073.

§ 56 (Tex.Cr.App.) An assault with an ordinary saw was not an assault with a deadly weapon, where the injuries inflicted were very slight.—Fisher v. State, 151 S. W. 544.

(B) Prosecution and Punishment.

§ 96 (Tex.Cr.App.) Where accused testified that, to protect his son from violence, he struck prosecutor, the failure to submit the right of accused to defend his son was reversible error.—Coons v. State, 151 S. W. 820.

ASSESSMENT.

See Drains, §§ 14, 76; Municipal Corporations, §§ 450-567.

ASSIGNMENT OF ERRORS.

See Appeal and Error, §§ 719-753, 757, 759; Criminal Law, § 1129.

ASSIGNMENTS.

See Highways, § 113; Insurance, §§ 122, 212-222; Landlord and Tenant, §§ 75-79, 208; Lost Instruments; Subrogation, § 31.

I. REQUISITES AND VALIDITY.

(B) Mode and Sufficiency of Assignment.

§ 34 (Tex.Civ.App.) An oral transfer is as effective an equitable assignment as a written transfer.—A. A. Fielder Lumber Co. v. Smith, 151 S. W. 605.

§ 50 (Tex.Civ.App.) An order by a contractor to the supervising architect of a school building, on whose certificate estimates under the contract were to be paid to pay a material-man and charge to the contractor's account, was good as an equitable assignment of part of the fund in the hands of the school trustees.—A. A. Fielder Lumber Co. v. Smith, 151 S. W. 605.

II. OPERATION AND EFFECT.

§ 85 (Tex.Civ.App.) Transfers of portions of a fund will be satisfied in the order of their dates.—A. A. Fielder Lumber Co. v. Smith, 151 S. W. 605.

ASSIGNMENTS FOR BENEFIT OF CREDITORS.

See Bankruptcy.

ASSOCIATIONS.

See Charities, § 45.

ASSUMPSIT, ACTION OF.

See Work and Labor.

ASSUMPTION.

Of risk, see Master and Servant, §§ 203-226, 280, 288, 295; Trial, § 184.

ATTACHMENT.

See Garnishment; New Trial, § 89.

I. NATURE AND GROUNDS.

(A) Nature of Remedy, Causes of Action, and Parties.

§ 13 (Tex.) An attachment was properly issued in scire facias to have a judgment entry corrected by adding an omitted part, and to revive the judgment; the proceeding to revive being merely a suit for the debt.—Coleman v. Zapp, 151 S. W. 1040.

(B) Grounds of Attachment.

§ 32 (Mo.App.) From one's statement, when buying property, "I haven't got my checkbook here, and I can't pay you now, but I will send you a check when I get home," an implied affirmation that the money was in bank is permissible, making the debt one fraudulently contracted, as regards right to attachment; he not having the money in bank.—Matthews v. Eby, 151 S. W. 470.

VII. QUASHING, VACATING, DISSOLUTION, OR ABANDONMENT.

§ 233 (Mo.App.) Attachment in the circuit court *held* obtained through fraud, and so to give no jurisdiction.—Matthews v. Eby, 151 S. W. 470.

VIII. CLAIMS BY THIRD PERSONS.

§ 308 (Mo.App.) Interpleader in attachment claiming as purchaser has the burden of proving that he took actual possession as required by law.—Byrd v. Vanderburgh, 151 S. W. 184.

ATTORNEY AND CLIENT.

See Appeal and Error, § 1060; Constitutional Law, §§ 308, 321; Estoppel, § 58; Executors and Administrators, §§ 485, 496; Garnishment, § 191; Partition, § 114; Stipulations; Use and Occupation, § 1; Wills, § 405.

I. THE OFFICE OF ATTORNEY.

(C) Suspension and Disbarment.

§ 45 (Mo.App.) An attorney devising a scheme for the execution of false bills of sale and notes, and directing a party thereto to give perjured testimony and unlawfully procuring the papers of a decedent, and converting the same to his own use, *held* guilty of misconduct justifying disbarment.—In re Selleck, 151 S. W. 743.

§ 51 (Tenn.) It is the right and duty of a trial judge to make charges against attorneys, where matters justifying such charges are within his knowledge, under Shannon's Code, §§ 5781-5784.—In re Cameron, 151 S. W. 64.

§ 57 (Mo.App.) Where, in proceedings to disbar an attorney, the evidence is conflicting, the court will defer to the findings of the special commissioners.—In re Selleck, 151 S. W. 743.

II. RETAINER AND AUTHORITY.

§ 89 (Mo.App.) An attorney may dismiss his client's suit or stipulate that it shall abide the judgment in another suit where the facts and parties are the same, and has a wide range of action as to those things pertaining merely to the remedy.—Grant City v. Simmons, 151 S. W. 187.

§ 101 (Mo.App.) An attorney's general authority, as such, gives him no power to compromise his client's claim or to make any agreement, or take any action that will sacrifice his client's cause.—Grant City v. Simmons, 151 S. W. 187.

Where a stipulation by an attorney to dismiss an appeal was merely an incident to an unauthorized compromise of the case by him, it

related rather to the cause than the remedy and was unauthorized.—Id.

AUTHORITY.

See Attorney and Client, § 101; Brokers, § 44.

AUTOMOBILES.

See Appeal and Error, § 1064; Larceny, § 32; Municipal Corporations, § 706; Trial, § 191.

AWARD.

See Arbitration and Award, § 67.

BAGGAGE.

See Carriers, § 402.

BAIL.

II. IN CRIMINAL PROSECUTIONS.

§ 57 (Tex.Cr.App.) Where a recognizance does not state the punishment assessed against accused in compliance with Code Cr. Proc. 1911, arts. 900-903, his appeal must be dismissed.—White v. State, 151 S. W. 826.

§ 59 (Tex.Cr.App.) Under Code Cr. Proc. 1911, art. 321, subd. 5, and article 962, a bail bond binding defendant to appear at the next term of court on a date which fell within the term of court at which it was executed *held* to require an appearance on the specified date set, and not insufficient because of the inconsistency.—Barrett v. State, 151 S. W. 558.

§ 65 (Tex.Cr.App.) A recognizance which fails to recite the amount of punishment assessed is fatally defective, and the court on appeal does not acquire jurisdiction.—Bush v. State, 151 S. W. 554.

§ 93 (Tex.Cr.App.) Under Code Cr. Proc. 1911, § 321, a bond reciting that defendant was charged with a felony *held* not a variance from a judgment thereon, reciting that defendant was "charged with felony, to wit, burglary."—Barrett v. State, 151 S. W. 558.

BAILMENT.

See Larceny, § 32; Pledges; Sales, § 454; Sunday, § 19.

§ 16 (Tex.Civ.App.) Where defendant was in lawful possession of property and entitled to hold it until certain payment by plaintiff, there could be no conversion until the correct amount was tendered and paid.—May v. Anthony, 151 S. W. 602.

BANKRUPTCY.

III. ASSIGNMENT, ADMINISTRATION, AND DISTRIBUTION OF BANKRUPT'S ESTATE.

(B) Assignment, and Title, Rights, and Remedies of Trustee in General.

§ 142 (Mo.) Under Bankruptcy Act, July 1, 1898, §§ 70, 70e, a trustee takes no interest, estate, or title to land fraudulently conveyed by the bankrupt which will entitle him to sue under Rev. St. 1899, § 650, as amended in 1909 (Laws 1909, p. 343), giving a right of action to ascertain and determine any person's interest in land.—Mayhew v. Todisman, 151 S. W. 436.

(E) Actions by or Against Trustee.

§ 302 (Mo.) A petition by a trustee in bankruptcy to set aside a fraudulent conveyance, under Bankruptcy Act July 1, 1898, §§ 70, 70e, must clearly show that the property is needed to pay claims filed against the bankrupt debtor.—Mayhew v. Todisman, 151 S. W. 436.

BANKS AND BANKING.

See Limitation of Actions, § 66.

II. BANKING CORPORATIONS AND ASSOCIATIONS.

(E) Insolvency and Dissolution.

§ 84 (Tex.Cr.App.) One who had complete and personal charge of the business of an unincorporated bank, and knew of its insolvent condition when money was received on deposit by its president, was an accomplice to the crime.—Brown v. State, 151 S. W. 561.

§ 85 (Tex.Cr.App.) An indictment alleging that accused unlawfully received a deposit in the "unincorporated" bank named, of which he was president, while it was insolvent to his knowledge, charged that the bank was a private bank, and was bad under Pen. Code 1911, art. 532 (Acts 25th Leg. c. 100), for not alleging that accused was its owner, agent, or manager, or the names of the owners, and that they were insolvent.—Brown v. State, 151 S. W. 561.

In a prosecution for receiving money on deposit with knowledge of the bank's insolvency, the court should charge as to the rule for determining solvency.—Id.

In a prosecution of a bank president for receiving deposits on Monday with knowledge of the bank's insolvency, evidence that on the preceding Saturday other deposits were made was not admissible.—Id.

III. FUNCTIONS AND DEALINGS.

(C) Deposits.

§ 126 (Mo.App.) Where a depositor presented a check for deposit, he and the bank could agree that payment should be deferred for a reasonable time until the bank ascertained whether there were sufficient funds of the drawer to pay it.—Pollack v. National Bank of Commerce in St. Louis, 151 S. W. 774.

A plaintiff depositing a check, knowing of the custom of the bank to give credit subject to the right to charge the amount thereof in want of funds to pay the check, *held* estopped from preventing the bank from charging his account with the amount of the check.—Id.

§ 134 (Tex.Civ.App.) A garnishee bank holding a balance to the credit of a debtor's general account *held* not entitled to credit the same against the debtor's unmatured notes to the bank as against plaintiff in garnishment.—Presnell v. Stockyards Nat. Bank, 151 S. W. 873.

§ 140 (Mo.App.) A "check" is payable on demand, and where nothing more appears on bank on which it is drawn must either pay or reject it on presentment.—Pollack v. National Bank of Commerce in St. Louis, 151 S. W. 774.

§ 154 (Ky.) In an action to recover a deposit in a bank, evidence *held* sufficient to support the finding that the deposit was made.—Com. Banking Co. v. Bryant, 151 S. W. 393.

BAR.

See Judgment, §§ 568-718.

BASE FEE.

See Estates.

BASTARDS.

I. ILLEGITIMACY IN GENERAL.

§ 1 (Mo.) Under Rev. St. 1909, § 342, providing that the issue of all marriages "decreed null in law shall be legitimate, children of a woman with whom a husband lived in a common-law relation after having left his wife *held* legitimate; the word "decreed" being construed as meaning "deemed."—New v. Jones, 151 S. W. 80.

§ 3 (Mo.) In absence of proof to the contrary, it is presumed that a child is legitimate.—Nelson v. Jones, 151 S. W. 80.

The presumption that a marriage once established continues must give way to the presumption in favor of the legitimacy of children thereafter born to one of the parties living in the state of common-law marriage with another person.—Id.

§ 6 (Mo.) A child will not be adjudged illegitimate unless no other conclusion can be reached.—Nelson v. Jones, 151 S. W. 80.

BAWDY HOUSE.

See Disorderly House.

BENEFICIAL ASSOCIATIONS.

See Charities, § 45; Master and Servant, § 78.

BEST AND SECONDARY EVIDENCE.

See Criminal Law, § 404; Evidence, §§ 159-183.

BETTING.

See Gaming.

BILL OF EXCEPTIONS.

See Exceptions, Bill of.

BILL OF LADING.

See Carriers, § 159.

BILLS AND NOTES.

See Accord and Satisfaction, § 27; Appeal and Error, § 1040; Banks and Banking, §§ 128, 134, 140; Compromise and Settlement; Estoppel, § 78; Fraud, § 28; Gifts, § 4; Husband and Wife, § 268; Judgment, § 568; Limitation of Actions, § 157; Payment, § 39; Pleading, § 174; Pledges, § 80; Trial, § 253; Vendor and Purchaser, §§ 277, 308.

I. REQUISITES AND VALIDITY.

(D) Acceptance.

§ 66 (Tex.Civ.App.) An order by a creditor, directing his debtor to pay a portion of the account to a third person, is not binding on the debtor until after presentation and acceptance.—Gulf, T. & W. Ry. Co. v. Stark, 151 S. W. 641.

(E) Consideration.

§ 92 (Tex.Civ.App.) Extension of time held a sufficient consideration for a note executed by an abandoned wife for a community debt.—Crowder v. McLeod, 151 S. W. 1168.

(F) Validity.

§ 106 (Ky.) Note given for money advanced to pay candidate's election expenses, under an agreement that it would be void if the payee was employed as attorney by a person appointed by such candidate, held void because based on an illegal consideration.—Campbell v. Offutt, 151 S. W. 408.

Note given for money advanced to a candidate for office held void, although not mentioned in an agreement accompanying a note previously given by which such note was to be void if the payee was employed as attorney by such person when appointed to office.—Id.

III. MODIFICATION, RENEWAL, AND RESCISSION.

§ 139 (Tex.Civ.App.) A payment of part of interest due on a note is no consideration for an extension of time.—Corbett v. Sweeney, 151 S. W. 858.

V. RIGHTS AND LIABILITIES ON INDORSEMENT OR TRANSFER.

(D) Bona Fide Purchasers.

§ 348 (Ky.) Where a check, regular on its face and payable on demand, is transferred within two days after it is drawn, the transferee acquires title before it is overdue.—Asbury v. Taube, 151 S. W. 372.

§ 363 (Tex.Civ.App.) The purchaser of a note before maturity, in due course of trade, for a valuable consideration, and without notice of fraud on the maker, could recover thereon.—Harlan v. Guitar, 151 S. W. 628.

VI. PRESENTMENT, DEMAND, NOTICE, AND PROTEST.

§ 396 (Mo.App.) Demand on the maker of a note, and notice to the payee thereof and of nonpayment, is not necessary for liability of the payee to one to whom he indorsed it, not only when due, but after judgment on it against the maker, so that as to him it was no longer an obligation.—Hawkins v. Wiest, 151 S. W. 789.

VII. PAYMENT AND DISCHARGE.

§ 440 (Mo.App.) Under Rev. St. 1909, §§ 9978, 10035, a note indorsed by its payee, and reissued after he has obtained judgment on it, is as to him a valid note.—Hawkins v. Wiest, 151 S. W. 789.

VIII. ACTIONS.

§ 445 (Tex.Civ.App.) Cause of action on a note due October 1st, grace having been waived, held to accrue October 2d.—Standard v. Thurmond, 151 S. W. 627.

§ 497 (Ky.) Under the express provisions of Ky. St. § 3720b, subsecs. 55, 56, and 59, the transferee of a check, obtained from the maker by fraud, has the burden of showing that he acquired title as a holder in due course.—Asbury v. Taube, 151 S. W. 372.

§ 518 (Mo.) Evidence, in an action to set aside a deed of trust given to secure notes based upon a prior note, held to sustain a finding that the prior note was without consideration.—First Nat. Bank v. Renick, 151 S. W. 421.

§ 525 (Ky.) Evidence, held sufficient to show that plaintiff was a bona fide holder in due course.—Asbury v. Taube, 151 S. W. 372.

§ 525 (Tex.Civ.App.) Evidence held to warrant a finding that plaintiff purchased the note before maturity, in due course of trade, for value, and without notice of fraud.—Harlan v. Guitar, 151 S. W. 628.

BIRTH.

See Criminal Law, §§ 417, 444.

BOARDS.

See Schools and School Districts; Taxation, § 453.

BONA FIDE PURCHASERS.

See Bills and Notes, §§ 348, 363, 497, 525; Vendor and Purchaser, §§ 227-231.

BONDS.

See Appeal and Error, §§ 71, 242, 374, 621, 1234; Bail, §§ 59, 93; Criminal Law, § 1076; Guardian and Ward, § 92; Injunction, § 241; Intoxicating Liquors, § 82; Justices of the Peace, §§ 191, 210; Landlord and Tenant, § 274; Mechanics' Liens, § 313; Replevin, § 48.

BOUNDARIES.

See Adverse Possession, § 73; Deeds, § 114; Trial, § 252; Witnesses, § 406.

I. DESCRIPTION.

§ 3 (Ky.) The rule that courses and distances give way to monuments is to establish the actual location of the lines and corners, and has little application where the lines were not run out in the original survey.—*Bryant v. Strunk*, 151 S. W. 381.

The lines of a patent will not be extended to reach a designated monument on the ground where the surveyor made a mistake as to its location.—*Id.*

§ 3 (Mo.) An unmarked line is not a natural or artificial monument, and does not when called for in a deed overcome a call for distance.—*Dolphin v. Klann*, 151 S. W. 956.

Where a surveyor was not the county surveyor when he made a resurvey of a platted addition, and he did not give any data from which he made the survey, the survey did not overcome the calls in the plat.—*Id.*

§ 10 (Mo.) A plat of an addition must be taken as a whole, and a corner will not be so changed as to cause a shifting of the position of all the lots in the addition.—*Dolphin v. Klann*, 151 S. W. 956.

§ 21 (Mo.) The owner of property abutting a private way reserved in conveyances in partition which do not convey the fee to the way to any of the tenants *held* to have no more than half the way along the boundary, unless he acquired title to the other half by limitations.—*Dulce Realty Co. v. Staed Realty Co.*, 151 S. W. 415.

II. EVIDENCE, ASCERTAINMENT, AND ESTABLISHMENT.

§ 33 (Mo.) Under Rev. St. 1909, § 10290, relating to platting, the law presumes that a survey and marking formed the basis of the plat.—*Dolphin v. Klann*, 151 S. W. 956.

A plat of an addition *held* to show on its face that a survey was actually made before the making of the plat, and surveyor seeking to establish different lines from those designated on the plat must show good grounds therefor.—*Id.*

§ 35 (Mo.) Where the fact as to whether previous owners agreed on a boundary line was in issue, cross-examination of a witness to show that such boundary line as surveyed was not the true line *held* admissible; no one but the witness having ever heard of such agreement, and the line being an irregular one.—*Hilgedick v. Gruebbel*, 151 S. W. 731.

§ 36 (Mo.) Rev. St. 1909, § 11,301, does not preclude introduction in evidence of surveys by private or public surveyors other than the county surveyor, where their correctness has been first shown.—*Carter v. Spracklin*, 151 S. W. 451.

§ 37 (Mo.) Evidence in ejectment *held* to show that the prior owners of the respective tracts had not agreed upon a boundary line.—*Hilgedick v. Gruebbel*, 151 S. W. 731.

§ 40 (Ky.) The location of land granted by the state is for the court where there is no dispute as to the facts.—*Bryant v. Strunk*, 151 S. W. 381.

§ 40 (Mo.) Where the prima facie case made out by an official survey was disputed by other evidence, the issue as to the boundary was for the jury.—*Carter v. Spracklin*, 151 S. W. 451.

§ 41 (Mo.) Instructions given in ejectment involving a disputed boundary *held* to present the issue as favorably for plaintiff as he was entitled to.—*Hilgedick v. Gruebbel*, 151 S. W. 731.

§ 43 (Ky.) An agreed order that the chain of title to plaintiff's boundary, as set out in the petition, is deducible of record, and that the chain of title to defendant's boundary, as

shown by the deed filed, is deducible of record, does not show which title is the older, and does not necessarily require a judgment for plaintiff, though his title is superior.—*Dockins v. Dukes*, 151 S. W. 679.

§ 46 (Ark.) The grantee of timber rights on defendant's land which had been added to by accretions cannot demand that the accretions to which he is entitled, defendant having purchased adjoining property, shall be determined according to the boundary for such adjoining property fixed by defendant and its then owner by parol at a time prior to the formation of the accretions.—*Reeves v. Moore*, 151 S. W. 1025.

§ 46 (Mo.) A boundary may be established by agreement of parties.—*Hilgedick v. Gruebbel*, 151 S. W. 731.

§ 53 (Mo.) Where a survey is illegal in a matter which the court knows about, it will not presume that it is correct in those particulars as to which it is not informed.—*Dolphin v. Klann*, 151 S. W. 956.

§ 54 (Mo.) A survey is not admissible as an official survey where it appears on its face or from competent evidence that it was not made as the statute directs.—*Carter v. Spracklin*, 151 S. W. 451.

Where plaintiff introduced on the issue of a disputed boundary, not only the official survey, but also evidence contrary thereto, the court properly refused plaintiff's requested instruction that the survey made by the county surveyor was presumptively correct.—*Id.*

§ 55 (Mo.) A survey which violates an act of Congress in apportioning a surplus is illegal.—*Dolphin v. Klann*, 151 S. W. 956.

BRIBERY.

See Obstructing Justices, §§ 4-11.

BRIEFS.

See Appeal and Error, §§ 742, 756-773, 835.

BROKERS.

See Appeal and Error, § 1052; Counties, § 122; Limitation of Actions, § 46; Trial, §§ 244, 296.

III. EMPLOYMENT AND AUTHORITY.

§ 7 (Mo.App.) The testimony of defendant that he was not to pay a commission to plaintiff and defendant's brother previously employed to procure a purchaser jointly, but to the brother alone who would employ plaintiff and divide the commission, did not establish a joint obligation, and plaintiff could sue alone for the services rendered.—*Dodge v. Childers*, 151 S. W. 749.

§ 9 (Mo.App.) Where a contract employing a broker does not limit the duration of the agency, the law implies performance within a reasonable time, after the lapse of which either party may revoke the contract.—*Dodge v. Childers*, 151 S. W. 749.

IV. COMPENSATION AND LIEN.

§ 39 (Tex.Civ.App.) Owner *held* liable to real estate broker for commission on a sale to a purchaser procured by the broker's subagent; the owner having knowledge of the method of procurement of the purchaser.—*Bound v. Simkins*, 151 S. W. 572.

§ 44 (Ark.) A contract giving a broker the exclusive right to procure a purchaser of real estate *held* modified by a new contract giving the owner the right to sell and binding him to pay the broker a specified commission, and a sale made by the owner revoked the broker's authority.—*Johnston-Reynolds Land Co. v. Fuqua*, 151 S. W. 693.

§ 44 (Mo.App.) Where an owner mailed his notice of revocation after receiving a proposal from a purchaser procured by the broker, the

revocation was in bad faith, and did not deprive the broker of his commission.—*Dodge v. Childers*, 151 S. W. 749.

An owner may not escape liability for commissions by revoking the agency after the broker has procured a purchaser who subsequently made his proposal to the owner, and actually purchased the property.—*Id.*

§ 52 (Tex.) A contract by A. to give B. exclusive sale of land for 90 days, and to execute deed either to B. or persons to whom he might sell, B. to take any land remaining after the expiration of such time, was a contract of sale, and not of agency, and a broker who brought the parties together was entitled to a commission.—*Ansley Realty Co. v. Pope*, 151 S. W. 525.

§ 54 (Mo.App.) A broker, employed to procure a loan on real estate, held to have earned his commissions when he procured a lender ready and willing to make a loan on one of the two conditions agreed on.—*Crouch v. Bruckman*, 151 S. W. 176.

§ 56 (Tex.Civ.App.) An owner is liable for the commission of a sale of land to a purchaser procured by his broker, though he does not know that the purchaser was so procured, and makes the sale himself.—*Bound v. Simkins*, 151 S. W. 572.

§ 56 (Tex.Civ.App.) A broker producing several persons willing to purchase, a sale being made to some of them, earned his commission.—*Anderson v. Crow*, 151 S. W. 1080.

§ 57 (Tex.Civ.App.) That the deed was made jointly to the purchaser procured and to a third party did not deprive a broker of his right to a commission, where the contract of sale was between the principal and the purchaser procured.—*Bound v. Simkins*, 151 S. W. 572.

§ 63 (Tex.Civ.App.) Right to commission may not be defeated by the fraudulent act of the owner in withdrawing the property from the broker prior to the making of a contract.—*Anderson v. Crow*, 151 S. W. 1080.

V. ACTIONS FOR COMPENSATION.

§ 84 (Tex.Civ.App.) Fraudulent intent of an owner in withdrawing property from a broker, to defeat the right to a commission, may be inferred from the surrounding facts.—*Anderson v. Crow*, 151 S. W. 1080.

§ 86 (Tex.Civ.App.) Evidence held to support a finding that a broker was the procuring cause of a sale.—*Anderson v. Crow*, 151 S. W. 1080.

Evidence held to support a finding that an owner fraudulently withdrew the property from the broker to defeat the right to commission earned.—*Id.*

§ 87 (Tex.Civ.App.) Where a broker's right to a commission was based on his agreement with a third person, who had been employed by the owner, and the third person had assigned to the broker all interest in his claim for commission, the broker could recover the entire commission.—*Anderson v. Crow*, 151 S. W. 1080.

§ 88 (Ark.) In an action by a broker for commissions for procuring a purchaser, instructions held to sufficiently submit the issues.—*Johnston-Reynolds Land Co. v. Fuqua*, 151 S. W. 693.

§ 88 (Mo.App.) In an action for commissions, an instruction that the broker, to recover, must procure a purchaser ready, willing, and able to purchase on the terms fixed by the owner, held not erroneous, where plaintiff testified to a different contract than that proposed by the owner.—*Gillfillan v. Schmidt*, 151 S. W. 161.

§ 88 (Mo.App.) Instructions held to submit the issue of revocation of agency.—*Dodge v. Childers*, 151 S. W. 749.

BUILDING CONTRACTS.

See Contracts, §§ 9, 82, 212; Mechanics' Liens, § 313; Principal and Surety, § 112.

BUILDINGS.

See Schools and School Districts.

BURDEN OF PROOF.

See Evidence, § 91.

BURGLARY.

See Criminal Law, §§ 364, 369, 413, 419, 420, 650, 792, 814, 824, 1169; Witnesses, § 837.

II. PROSECUTION AND PUNISHMENT.

§ 22 (Tex.Cr.App.) Where a building is owned in common or jointly by two or more persons, an indictment for burglary may allege ownership in either or all of them.—*Whorton v. State*, 151 S. W. 300.

§ 28 (Tex.Cr.App.) An indictment alleging that a store burglarized belonged to the prosecuting witness was supported by proof that it belonged to witness and his son and that witness was in charge of it.—*Whorton v. State*, 151 S. W. 300.

§ 34 (Tex.Cr.App.) In a prosecution for burglary, evidence of the manager of the burglarized store held not objectionable, on the ground that the goods produced and alleged to have been stolen were not sufficiently identified as those stolen.—*Walker v. State*, 151 S. W. 922.

§ 41 (Tex.Cr.App.) Evidence held sufficient to sustain a conviction.—*Whorton v. State*, 151 S. W. 300; *Coggins v. Same*, *Id.* 311; *Bellew v. Same*, *Id.* 542; *Walker v. Same*, *Id.* 822.

CALLS.

See Boundaries.

CANCELLATION OF INSTRUMENTS.

See Appeal and Error, § 843.

I. RIGHT OF ACTION AND DEFENSES.

§ 4 (Ky.) Equity will set aside transactions in which influence exercised through confidential relations has been abused.—*Shacklette v. Goodall*, 151 S. W. 23.

§ 4 (Mo.App.) One seeking to annul an instrument, on the ground that it was obtained by fraud, must show that the representations were as to a material fact, and that they contributed to the injury.—*Birch Tree State Bank v. Dowler*, 151 S. W. 784.

§ 24 (Tex.Civ.App.) An administrator of a deceased grantor, who sues to set aside a deed, as procured by fraud of the grantee, need not offer to return the taxes paid by the grantee.—*Chambers v. Wyatt*, 151 S. W. 864.

II. PROCEEDINGS AND RELIEF.

§ 56 (Tex.Civ.App.) Where a grantee in a deed of one lot procured by fraud the insertion of a provision conveying also another lot, a recovery on the ground of fraud was limited to a cancellation of the deed as to the latter lot.—*Chambers v. Wyatt*, 151 S. W. 864.

§ 59 (Tex.Civ.App.) Where a grantee obtained a conveyance by fraud, and entered into possession and made improvements, he could not recover the value of the improvements on the setting aside of the deed.—*Chambers v. Wyatt*, 151 S. W. 864.

CARRIERS.

See Appeal and Error, § 1008; Damages, § 132; Evidence, § 407; Trial, §§ 194, 252; Witnesses, § 414.

II. CARRIAGE OF GOODS.

(A) Delivery to Carrier.

§ 40 (Ark.) The statute requiring carriers to furnish, without discrimination or delay, sufficient facilities for the carriage of freight does not make the duty an absolute one, and does not require the carrier to provide in advance for an unprecedented and unexpected rush of business.—*Cumbie v. St. Louis, I. M. & S. Ry. Co.*, 151 S. W. 240.

(B) Bills of Lading, Shipping Receipts, and Special Contracts.

§ 66 (Ark.) A shipper's order for a specified number of cars for a specified day, when accepted, is a contract binding the carrier to furnish the cars, and the shipper to furnish the goods, but does not render the carrier liable to parties who did not authorize the order.—*Cumbie v. St. Louis, I. M. & S. Ry. Co.*, 151 S. W. 240.

§ 67 (Ark.) A carrier who contracts to furnish all the cars necessary to transport the peach crop at a certain station, on failure to do so, cannot defend because of heavy and unprecedented traffic or other unavoidable casualties, nor does the contract relieve the shipper from ordering cars.—*Cumbie v. St. Louis, I. M. & S. Ry. Co.*, 151 S. W. 240.

(F) Loss of or Injury to Goods.

§ 123 (Tex.Civ.App.) Defendant carrier held not liable for loss sustained by plaintiffs on a car of cabbage, where the consignee's refusal to accept the cabbage was not because of the carrier's error in adding an icing charge to the expense bill.—*Freeman v. Quebedeaux*, 151 S. W. 643.

(H) Limitation of Liability.

§ 159 (Ark.) A provision in a bill of lading that a written notice of intention to claim damage should be presented to the carrier within 36 hours after delivery is not unreasonable.—*Cumbie v. St. Louis, I. M. & S. Ry. Co.*, 151 S. W. 237.

Where a carrier has examined goods at their destination and knows their condition, it is not necessary to present a written notice of "intention to claim damages," as provided in the bill of lading.—*Id.*

(J) Charges and Liens.

§ 197 (Tex.Civ.App.) *Sayles' Ann. Civ. St. 1897*, art. 324, authorizing a carrier to store unclaimed freight, does not authorize a sale of unclaimed freight.—*Gulf, C. & S. F. Ry. Co. v. Patten Mfg. Co.*, 151 S. W. 1158.

Sayles' Ann. Civ. St. 1897, arts. 327, 328, authorizing a sale of unclaimed freight, and article 324, authorizing the storage need not be construed together, and the right to sell unclaimed freight is not dependent on the use by the carrier of due diligence to notify the consignee of the arrival of the freight at destination.—*Id.*

Under *Sayles' Ann. Civ. St. 1897*, art. 327, a carrier may sell freight unclaimed for three months, regardless of whether any charges are due thereon.—*Id.*

Under *Sayles' Ann. Civ. St. 1897*, art. 327, the carrier may sell at a place other than the point of destination, and the owner, to avoid a sale at such other place, must show that the place selected was unreasonable and that he was probably injured.—*Id.*

A carrier failing to give the notice required by *Sayles' Ann. Civ. St. 1897*, art. 4520, may not charge for the storage of freight remaining unclaimed for three months and then sold.—*Id.*

III. CARRIAGE OF LIVE STOCK.

§ 228 (Tex.Civ.App.) Negligence in transportation of a shipment of cattle cannot be shown by evidence of another shipment about the same time having made the trip safely; it not being shown the two shipments were made under the same conditions.—*Texas & P. Ry. Co. v. Good*, 151 S. W. 617.

§ 228 (Tex.Civ.App.) The presumption of negligence against the last carrier, who receives live stock in good condition and subsequently delivers it in a damaged condition can only be indulged in the absence of testimony accounting for the injury.—*Texas Cent. R. Co. v. Scott & Robertson*, 151 S. W. 1113.

§ 229 (Tex.Civ.App.) A shipper's measure of damages for injuries to cattle is the difference between the market value at the time they arrived at destination and what would have been their market value had they arrived without delay.—*St. Louis & S. F. Ry. Co. v. Knox*, 151 S. W. 902.

IV. CARRIAGE OF PASSENGERS.

(A) Relation Between Carrier and Passenger.

§ 247 (Mo.) A person in the act of getting upon a street car is a passenger.—*Benjamin v. Metropolitan St. Ry. Co.*, 151 S. W. 91.

(C) Performance of Contract of Transportation.

§ 270 (Tex.Civ.App.) One railroad company which allowed another company to sell tickets over its line is bound to honor a ticket sold by the first company, where the purchaser had no notice of the limitation on the first company's authority.—*Chicago, R. I. & G. Ry. Co. v. Carroll*, 151 S. W. 1116.

(D) Personal Injuries.

§ 280 (Mo.) A carrier owes to a passenger the highest degree of care that a prudent person experienced in that business can practicably exercise.—*Benjamin v. Metropolitan St. Ry. Co.*, 151 S. W. 91.

§ 287 (Ky.) It is negligence to move a street car at all before a passenger has reasonable opportunity to reach the platform; but, if he has such opportunity, the company is not liable unless the car is started with an unusual jerk, or unless the passenger be feeble, etc.—*Samuels v. Louisville Ry. Co.*, 151 S. W. 37.

§ 287 (Mo.) If the conductor of a street car should have realized that a sudden starting of the car would throw down and injure a corpulent lady of 57 years who was entering the car, and she was accordingly thrown down and injured, the railroad company was liable.—*Benjamin v. Metropolitan St. Ry. Co.*, 151 S. W. 91.

§ 295 (Tex.Civ.App.) Municipal ordinances fixing the speed of street cars are for the benefit of persons crossing the track and not for passengers, and a violation of such ordinances does not raise an imputation of negligence *per se* in favor of an injured passenger.—*Walker v. Metropolitan St. Ry. Co.*, 151 S. W. 1142.

§ 305 (Mo.App.) The injury to one who, knowing a depot would not be heated or lighted at night, went to it two hours before time for his train and voluntarily got into a box car at the platform, occupied by a shipper, and in getting out fell, was not caused by any failure of the carrier to have the depot heated, lighted, and open a reasonable time before a train was due.—*Sweeney v. Missouri, K. & T. Ry. Co.*, 151 S. W. 198.

§ 306 (Ky.) Where the trains of one railroad company were run over tracks leased from a second, and the tracks were jointly used by the lessee and a third company, all three companies are liable as principals to passengers injured by the act of a switchman of the third company in opening a switch under a train of

the lessee.—Chicago, St. L. & N. O. R. Co. v. Rowell, 151 S. W. 950.

§ 314 (Mo.) Facts constituting carrier's negligence toward a passenger must be pleaded, either by a charge of special negligence, or of general negligence, stating facts with sufficient certainty to point the adversary to the event or the occurrence in the happening of which negligence is charged.—Benjamin v. Metropolitan St. Ry. Co., 151 S. W. 91.

§ 315 (Ky.) Where a passenger was injured by the sudden stopping of a car on which she was riding, the fact that it was not derailed will not defeat recovery on the ground of variance, despite the allegation in the petition that her injuries were caused by the carelessness of defendants in the construction and operation of the tracks and trains, and that the coach in which she was riding was wrecked, derailed, and thrown off the track.—Chicago, St. L. & N. O. R. Co. v. Rowell, 151 S. W. 950.

§ 317 (Ky.) Where it appeared that plaintiff, a passenger, did not tell the railroad company's servants that she was injured, evidence that they did not assist her from the coach was improperly admitted.—Chicago, St. L. & N. O. R. Co. v. Rowell, 151 S. W. 950.

In an action against a railroad company for injuries caused plaintiff by the sudden jolt or jar of a train in stopping, evidence by other passengers that there was no such jolt or jar as would throw a person about in a seat is admissible.—Id.

§ 318 (Tex.Civ.App.) In an action for injury to a lumber company's employé while riding on a logging train to his work, evidence held to warrant a finding that he was rightfully on the train.—Knox v. Robbins, 151 S. W. 1134.

§ 319 (Ky.) Where the servant of a railroad company turned a switch under a passenger train which was in motion, causing a derailment, punitive damages are properly allowed; the conduct of the servant showing a wanton and reckless disregard of human life.—Chicago, St. L. & N. O. R. Co. v. Rowell, 151 S. W. 950.

§ 320 (Ky.) Whether a street car started with an unusual jerk as plaintiff was boarding it held a jury question.—Samuels v. Louisville Ry. Co., 151 S. W. 37.

Whether a street car passenger was injured as claimed while boarding the car held a jury question.—Id.

§ 320 (Ky.) Where a passenger was injured by the sudden stopping of a train, part of the cars of which were derailed by the opening of a switch, evidence on that issue of negligence held sufficient to go to the jury.—Chicago, St. L. & N. O. R. Co. v. Rowell, 151 S. W. 950.

§ 320 (Mo.) Whether a street car was started "suddenly"—that is, without notice or unexpectedly to a boarding passenger—held, under the evidence, a question for the jury.—Benjamin v. Metropolitan St. Ry. Co., 151 S. W. 91.

Whether it is negligent to start a street car before a passenger has taken his seat is a question of fact for the jury.—Id.

Whether a woman of 57 years, weighing nearly 200 pounds, facing forward while entering a street car from the platform, could have been thrown forward by the sudden starting of the car, was for the jury.—Id.

Whether defendant was negligent in starting its car, so as to injure plaintiff, a woman of 57 years, weighing nearly 200 pounds, as she was making her way toward a seat, was for the jury.—Id.

It is not negligence per se to start a street car while passengers are standing either in the car or on the platform or in the vestibule.—Id.

§ 321 (Ky.) An allegation that plaintiff was not given "reasonable opportunity to fully board and enter" defendant's car did not imply a negligent starting of the car while plaintiff was boarding it, so that an instruction that

plaintiff was entitled to a reasonable opportunity to board the car was not required.—Samuels v. Louisville Ry. Co., 151 S. W. 37.

§ 321 (Mo.) An instruction that, if the carrier exercised all the care and prudence that were reasonably practicable, it was not negligent, was erroneous; the word "reasonably" rendering it confusing.—Benjamin v. Metropolitan St. Ry. Co., 151 S. W. 91.

§ 321 (Tex.Civ.App.) In an action for injury to a lumber company's employé while riding on a logging train, which was derailed, an instruction on the duty of defendant railway company under its contract with defendant lumber company to carry plaintiff held proper.—Knox v. Robbins, 151 S. W. 1134.

(E) Contributory Negligence of Person Injured.

§ 345 (Tex.Civ.App.) Evidence of prior or habitual acts of drunkenness was inadmissible, in an action for injuries to a passenger, on the question of his sobriety at the time of the alleged injury.—Mason v. Missouri, K. & T. Ry. Co. of Texas, 151 S. W. 350.

(F) Ejection of Passengers and Intruders.

§ 373 (Tex.Civ.App.) An initial carrier held not liable for ejection of a passenger by a connecting carrier, where its agent, who sold the ticket, had no knowledge of a rule of the connecting carrier to the effect that the ticket sold was not good on the train from which the passenger was ejected.—Chicago, R. I. & G. Ry. Co. v. Carroll, 151 S. W. 1116.

§ 381 (Tex.Civ.App.) Evidence held to show that the agent of an initial carrier selling a ticket to plaintiff had no knowledge of a rule of the connecting carrier that the ticket was not good on a particular train from which the passenger was ejected.—Chicago, R. I. & G. Ry. Co. v. Carroll, 151 S. W. 1116.

§ 382 (Tex.Civ.App.) Where plaintiff's wife, while traveling alone with three small children, was ejected from defendant's train, and forced to alight in a desolate spot, and was caused inconvenience, humiliation, and annoyance, a verdict of \$1,500 was not excessive.—Chicago, R. I. & G. Ry. Co. v. Carroll, 151 S. W. 1116.

§ 383 (Tex.Civ.App.) Where, in an action against a carrier for wrongful ejection, plaintiff's ticket as well as the rules of the railroad company affecting it were in evidence, the legal effect of such written testimony and whether plaintiff was entitled to ride on a given train was for the court.—Chicago, R. I. & G. Ry. Co. v. Carroll, 151 S. W. 1116.

(G) Passengers' Effects.

§ 402 (Tex.Civ.App.) Carrier held not liable for humiliation caused passengers by having their trunks unlawfully searched by parties whose suspicions were aroused through a stench with which the trunks were impregnated from being placed in a baggage car with a corpse.—Tarvin v. Texas & P. Ry. Co., 151 S. W. 640.

CATTLE GUARDS.

See Railroads, § 103.

CERTAINTY.

See Contracts, § 9.

CERTIFICATE

See Acknowledgment, §§ 37, 38; Appeal and Error, §§ 621, 835; Public Lands, § 175.

CERTIORARI.

See Justices of the Peace, § 210.

I. NATURE AND GROUNDS.

§ 5 (Mo.App.) Certiorari is allowed only when no appeal or writ of error or other available mode of review is afforded.—State ex rel. Goodman & Co. v. Circuit Court of St. Francois County, 151 S. W. 178.

Where a motion in the circuit court, under Rev. St. 1909, § 7573, for rule and attachment to compel a justice of the peace to allow an appeal and return his proceedings in an action, is denied, the ruling is reviewable by appeal or writ of error, and certiorari does not lie.—Id.

§ 16 (Mo.App.) Certiorari reaches only to cases in which there are final orders or judgments.—State ex rel. Goodman & Co. v. Circuit Court of St. Francois County, 151 S. W. 178.

§ 28 (Tenn.) Where the Court of Civil Appeals erroneously assumed jurisdiction of an appeal involving a constitutional question, instead of transferring it to the Supreme Court, its error in failing to so transfer gives the Supreme Court jurisdiction to review the appeal by certiorari.—Campbell County v. Wright, 151 S. W. 411.

CHANCERY.

See Equity.

CHANGE OF VENUE.

See Venue, §§ 41, 77.

CHARITIES.

See Adverse Possession, § 4; Common Law.

I. CREATION, EXISTENCE, AND VALIDITY.

§ 10 (Mo.) Enumeration of charities in the statute of charitable uses (St. 43 Eliz. c. 4) is not exclusive, and there are other objects deemed charitable in a legal sense.—Strother v. Barrow, 151 S. W. 960.

Any gift not inconsistent with law and promotive of the amelioration of the condition of mankind or the diffusion of useful knowledge is a "charity."—Id.

§ 30 (Mo.) The evidence to establish abandonment of a charitable use created by deed must be clear and conclusive.—Strother v. Barrow, 151 S. W. 960.

Abandonment of a charitable use involves the elements of intent to abandon permanently and the physical fact of nonuser.—Id.

Evidence held to support a finding that a charitable use created by a deed conveying land in trust for religious purposes was not abandoned.—Id.

II. CONSTRUCTION, ADMINISTRATION, AND ENFORCEMENT.

§ 36 (Mo.) A charitable trust created by deed conveying land to trustees of a Presbyterian church is not violated by a transfer of the property to a Universalist Church.—Strother v. Barrow, 151 S. W. 960.

Where land conveyed to trustees of a Presbyterian church for religious purposes was conveyed by such trustees to the Universalist general convention, without describing the business character of the grantee, the presumption was that the conveyance was for religious purposes, so that the second grantee acquired title.—Id.

§ 45 (Ark.) Where a charitable organization accepted a bequest which required it to maintain an imbecile daughter of testatrix during her life, and after her death to apply the remaining property to the purposes of the organization, it could not, during the life of the daughter, recover as upon a quantum meruit for her maintenance without returning the

trust moneys received.—Hare v. Sisters of Mercy, 151 S. W. 515.

CHARTER.

See Corporations, § 596; Municipal Corporations, §§ 485, 495, 564, 565.

CHattel MORTGAGES.

See Fraudulent Conveyances, § 300; Garnishment, § 29.

I. REQUISITES AND VALIDITY.

(A) Nature and Essentials of Transfers of Chattels as Security.

§ 5 (Tex.Civ.App.) A written transfer of money that will be due, which in its last clause states the purpose to be to secure payment of a note, no other consideration being stated, will be construed only to describe the debt to be paid and will not be held a mortgage.—A. I. Fielder Lumber Co. v. Smith, 151 S. W. 605.

IV. RIGHTS AND LIABILITIES OF PARTIES.

§ 177 (Tex.Civ.App.) One converting to his own use mortgaged chattels is only liable to the mortgagee for their market value at the time and place of conversion, and, where the value exceeds the debt, then only to the extent of the debt.—Johnson v. Oswald, 151 S. W. 1164.

The petition, in an action by a mortgagee for the conversion of mortgaged chattels, should specifically allege the time and place of conversion and the value of the chattels converted.—Id.

In an action by a mortgagee for the conversion of mortgaged property, evidence held not to show the value of the chattels at the time and place of conversion.—Id.

IX. FORECLOSURE.

§ 284 (Tex.Civ.App.) In foreclosure of a chattel mortgage on a horse sold by the mortgagor, to two partners a partner not made a party to the foreclosure action having intervened is entitled to possession as against the constable levying execution issued on the judgment.—Jones v. Lawrence, 151 S. W. 584.

CHECKS.

See Bills and Notes, § 348.

CHILDREN.

See Explosives.

CIRCUMSTANTIAL EVIDENCE.

See Criminal Law, § 784.

CLAIMS.

See Executors and Administrators, §§ 225-245.

COLLATERAL ATTACK.

See Corporations, § 29; Drains, § 14; Executors and Administrators, §§ 349, 383; Judgment, § 495.

COLOR OF TITLE.

See Adverse Possession, §§ 73, 80, 116.

COMBINATIONS.

See Monopolies.

COMMERCIAL PAPER.

See Bills and Notes.

COMMISSIONERS.

See Counties, §§ 113, 164, 165, 167, 192; Dowry, §§ 82, 99; Partition, §§ 78, 91.

COMMISSIONS.

See Brokers, §§ 39-63, 84-88; Counties, § 152.

COMMON CARRIERS.

See Carriers.

COMMON LAW.

See Bastards, §§ 1, 3; Evidence, § 80; Landlord and Tenant, §§ 20, 70, 274; Marriage, § 50; Municipal Corporations, § 605.

§ 7 (Mo.) The statute of charitable uses (St. 43 Eliz. c. 4) is a part of the common law of the state.—*Strother v. Barrow*, 151 S. W. 960.

COMMUNITY PROPERTY.

See Husband and Wife, §§ 268-276.

COMPENSATION.

See Brokers, §§ 39-63, 84-88; Eminent Domain, §§ 124, 134; Executors and Administrators, § 496; Receivers, § 196.

COMPLAINT.

See Criminal Law, § 214.

COMPROMISE AND SETTLEMENT.

See Attorney and Client, § 101; Evidence, § 213; Municipal Corporations, § 642.

§ 15 (Tex.Civ.App.) Where a note given by the owners for drilling a well was given after the parties had some negotiations for a settlement and made mutual concessions, they were precluded from claiming that the note was obtained by false representations as to the quality of the water.—*Miller v. Layne & Bowler Co.*, 151 S. W. 341.

COMPUTATION.

See Limitation of Actions, §§ 47-127.

CONCLUSION.

See Pleading, § 8.

CONCLUSIVENESS.

See Appeal and Error, §§ 1001-1022; Judgment, §§ 686-713.

CONCURRENT NEGLIGENCE.

See Master and Servant, § 226.

CONDEMNATION.

See Eminent Domain.

CONDITIONAL SALES.

See Sales, § 454.

CONDITIONS.

See Insurance, §§ 328-384.

CONFESSION.

See Criminal Law, §§ 518, 532.

CONFIRMATION.

See Reference, § 102.

CONNECTING CARRIERS.

See Carriers, § 373.

CONSENT.

See Courts, § 24.

CONSIDERATION.

See Bills and Notes, §§ 92, 106, 139, 518; Contracts, § 71; Deeds, § 70; Limitation of Actions, § 145.

CONSPIRACY.**I. CIVIL LIABILITY.**

See Criminal Law, § 422; Evidence, § 253.

(A) Acts Constituting Conspiracy and Liability Therefor.

§ 13 (Mo.) As a general rule, if a conspiracy exists and another joins with the conspirators, he is deemed a party to all acts done by any of the conspirators, before or afterwards, in furtherance of the common design.—*State ex rel. Kimbrell v. People's Ice, Storage & Fuel Co.*, 151 S. W. 101.

CONSTITUTIONAL LAW.

See Corporations, §§ 376, 484; Counties, §§ 18, 152; Courts, §§ 188, 198, 472; Death, § 31; Drains, § 76; Elections, § 203; Escheat, § 3; Judges, § 49; Jury, § 13; Master and Servant, § 228; Monopolies, § 3; Perpetuities, § 4; Statutes, §§ 40, 104, 107, 114, 150, 154; Telegraphs and Telephones, § 30.

II. CONSTRUCTION, OPERATION, AND ENFORCEMENT OF CONSTITUTIONAL PROVISIONS.

§ 18 (Ark.) In determining the intention in framing a constitutional amendment, the court must keep in view the Constitution as before it was amended, the evil to be remedied by the amendment, and the terms of the amendment.—*Ferrill v. Keel*, 151 S. W. 269.

Any interpretation of a constitutional amendment which would conflict with any other provision or is not absolutely necessary to effectuate the amendment should not be indulged.—*Id.*

§ 19 (Tenn.) In view of the contemporaneous construction of the provision of Const. art. 6, § 15, found in the act of 1835 (Shannon's Code, § 97), *held*, that the provision must be understood as authorizing the division of counties into districts either according to population or territory.—*Brown v. Sullivan County*, 151 S. W. 50.

§ 24 (Ark.) In order that a constitutional provision may be abrogated by another provision, there must be an irreconcilable conflict between the purposes of the two provisions.—*Ferrill v. Keel*, 151 S. W. 269.

Repeals by implication are not favored even in case of statutes and certainly not in case of long-enacted constitutional provisions.—*Id.*

§ 26 (Tex.Civ.App.) Within constitutional limits the power of the Legislature in the enactment of laws is supreme.—*Conley v. Daughters of the Republic of Texas*, 151 S. W. 877.

III. DISTRIBUTION OF GOVERNMENTAL POWERS AND FUNCTIONS.**(B) Judicial Powers and Functions.**

§ 70 (Mo.) The judgment of the Legislature, within its constitutional powers, is final; and the wisdom of its enactments cannot be questioned by the courts.—*State ex rel. Kimbrell v. People's Ice, Storage & Fuel Co.*, 151 S. W. 101.

XI. DUE PROCESS OF LAW.

§ 277 (Mo.) An equity in incumbered real estate is "property" within Const. art. 2, § 80, providing that no person shall be deprived of property without due process of law.—*State ex rel. Deems v. Holtcamp*, 151 S. W. 153.

§ 290 (Mo.) Where notice of a hearing on assessment of benefits for a drain was published

ed Feb. 16th, March 2d, 9th, and 16th, pursuant to Rev. St. 1909, § 5587, requiring notice in four issues of a weekly paper, the last insertion to be before the hearing day, it could not be said that the publication was so short as to deny due process of law in respect to an owner residing in New Jersey.—*State ex rel. Coleman v. Blair*, 151 S. W. 148.

A notice of drainage proceedings addressed to "the estate of B., B.'s heirs," etc., was not objectionable as not being due process of law because B.'s recorded will showed the name of the heir taking the estate.—*Id.*

§ 306 (Tenn.) Trial of an attorney on disbarment proceedings by a judge who had previously decided a question in issue *held* a violation of Const. art. 1, § 17, guaranteeing every one a remedy by due course of law.—*In re Cameron*, 151 S. W. 64.

§ 309 (Mo.) The probate court's order for the sale of incumbered realty in administration, without notice to the heirs, *held* a denial of due process of law, though Rev. St. 1909, §§ 147, 148, under which the sale was made, requires no notice.—*State ex rel. Deems v. Holtcamp*, 151 S. W. 153.

§ 316 (Mo.) Dismissal of an appeal to the circuit court from a probate order granting a new trial in proceedings to determine the sanity of a person *held* not to deprive the petitioners in such proceedings of due process of law.—*State ex rel. Nolte v. McQuillin*, 151 S. W. 444.

§ 316 (Tenn.) The Supreme Court *held* not authorized to try a case de novo, and render judgment which should have been rendered below, under Pub. Acts 1911, c. 32, where the trial judge was incompetent and the proper objection was made as this would violate Const. art. 1, § 17, providing for remedy by due course of law.—*In re Cameron*, 151 S. W. 64.

XII. RIGHT TO JUSTICE AND REMEDIES FOR INJURIES.

§ 321 (Tenn.) Trial of disbarment proceedings against an attorney by a judge who had already decided the question at issue *held* violative of Const. art. 1, § 17, guaranteeing the right to have justice administered without sale, denial, or delay.—*In re Cameron*, 151 S. W. 64.

CONSTRUCTION.

See Constitutional Law, §§ 18-26; Contracts, §§ 147-176; Deeds, §§ 95-165; Guaranty, § 34; Mines and Minerals, §§ 62-68; Mortgages, § 115; Statutes, §§ 174-227; Wills, §§ 441-673.

Of instructions, see Trial, §§ 295, 296.

CONSTRUCTIVE TRUSTS.

See Trusts, §§ 94, 102.

CONTEMPT.

See Criminal Law, § 657; Injunction, § 219.

CONTEST.

See Counties, § 35.

CONTINUANCE.

See Appeal and Error, §§ 671, 1043; Criminal Law, §§ 589-608, 1090, 1144.

§ 7 (Ky.) In ruling on motions for continuance, the trial court is exercising a discretionary power.—*Rose v. Monarch*, 151 S. W. 19.

§ 26 (Tex.Civ.App.) There was no abuse of discretion in denying an application for a continuance because of failure to receive depositions, where counsel made no inquiry as to the return of the depositions from November 16,

1910, when they were returned to the clerk and filed, until the case was called for trial on April 8, 1911.—*Continental Lumber & Tie Co. v. Wilroy*, 151 S. W. 840.

If defendant's counsel were advised by the notary who took depositions that they had been forwarded to the clerk of court, there was no lack of diligence in failing to inquire before trial whether they were on file, so as to preclude them from moving for a continuance for their loss.—*Id.*

§ 26 (Tex.Civ.App.) A continuance for absence of a witness is properly denied, where no diligence is shown to procure the testimony of the witness for the trial.—*Campbell v. Elliott*, 151 S. W. 1180.

§ 31 (Tex.Civ.App.) Surprise justifying a continuance *held* not predicable on the admission of evidence in shipper's action of particular acts of delay and rough handling, where the petition contained general allegations of delay and rough handling.—*St. Louis & S. F. R. Co. v. Cartwright*, 151 S. W. 630.

§ 51 (Tex.Civ.App.) It is within the sound discretion of the court to grant or refuse a second application for a continuance, which is not strictly a statutory application.—*Continental Lumber & Tie Co. v. Wilroy*, 151 S. W. 840.

CONTRACTS.

See Arbitration and Award, § 27; Assignments: Bills and Notes; Boundaries, § 46; Brokers: Cancellation of Instruments; Carriers, §§ 69, 67, 159, 270; Chattel Mortgages; Compromise and Settlement; Corporations, §§ 30, 300, 484, 628; Counties, §§ 113, 122, 152; Covenants; Damages, §§ 9, 62, 80, 123, 163, 189; Deeds; Dower, § 6; Evidence, §§ 60, 65, 213, 241, 407-466, 596; Frauds, Statute of; Fraudulent Conveyances; Guaranty; Highways, § 113; Husband and Wife, §§ 23, 39; Infants, §§ 47, 50; Insurance; Judgment, § 250; Landlord and Tenant; Logs and Logging, §§ 3, 15; Lost Instruments; Master and Servant, § 6; Mines and Minerals, § 62; Mortgages; Municipal Corporations, § 330; Parties, § 19; Partnership, § 53; Pleading, § 8; Principal and Agent, § 146; Reference, § 8; Sales; Set-Off and Counterclaim, § 20; Specific Performance; Stipulations; Trusts, § 240; Vendor and Purchaser; Witnesses, § 379; Work and Labor.

I. REQUISITES AND VALIDITY.

(A) Nature and Essentials in General.

§ 9 (Ark.) A contract fixing the time for completion of a building to be erected according to plans prepared by an architect, and which fixes damages per day for delay, and which requires the contractor to enter on the work immediately, *held* sufficiently definite.—*Friedman v. Schleuter*, 151 S. W. 696.

§ 10 (Ky.) A phosphate mining lease for 10 years, which did not give the lessor the right to terminate the lease within that time, or compel the lessee to begin operations, but permitted the lessee to begin work at any time within 10 years, and to quit when he chose, upon notice that the land did not contain paying quantities of phosphate, in his opinion, *held* lacking in mutuality.—*Killebrew v. Murray*, 151 S. W. 662.

(C) Formal Requisites.

§ 32 (Ark.) Where the terms of a contract are actually agreed on, the contract is effective, though it is expected that the contract shall be reduced to writing.—*Friedman v. Schleuter*, 151 S. W. 696.

Where a contract for the construction of a building was orally agreed on, including the time for completion and damages for delay, the mere fact that the contract was to be reduced to writing did not prevent it from being effective from the date of the agreement.—*Id.*

(D) Consideration.

§ 71 (Ark.) An agreement by a judgment creditor to subject to the judgment a less interest in land than might have been subjected on the other party refraining from bidding at a sale under the judgment held to constitute sufficient consideration to support the contract.—*Lay v. Brown*, 151 S. W. 1001.

A consideration such as will support a contract need not be a thing of pecuniary value or even reducible to money value; waiver of a legal right at the request of another party being sufficient consideration for a promise.—*Id.*

(E) Validity of Assent.

§ 99 (Ky.) Presumption of fraud, where a confidential relation exists between the parties, arises more readily in cases of gift than of contract.—*Shacklette v. Goodall*, 151 S. W. 23.

(F) Legality of Object and of Consideration.

§ 108 (Tex.Civ.App.) An agreement by a parent to emancipate his minor children, so as to relieve himself of their support for necessities, is contrary to public policy.—*Snell v. Ham*, 151 S. W. 1077.

§ 124 (Ky.) An agreement by a person seeking appointment to a public office to employ certain persons as his attorneys, if appointed, and pay them a part of the income of the office, is contrary to public policy, and void.—*Campbell v. Offutt*, 151 S. W. 403.

§ 130 (Ark.) An agreement by a judgment creditor to subject to her judgment a less interest in land than might have been subjected in consideration of the other party refraining from bidding at the sale under the judgment held not invalid as being against public policy.—*Lay v. Brown*, 151 S. W. 1001.

II. CONSTRUCTION AND OPERATION.**(A) General Rules of Construction.**

§ 147 (Ark.) The interpretation of a contract is to ascertain the intent of the parties as shown by the circumstances surrounding the subject, the relation of the parties, and the sense in which the words used would be commonly understood.—*Alf Bennett Lumber Co. v. Walnut Lake Cypress Co.*, 151 S. W. 275.

§ 153 (Tex.) A contract susceptible of two constructions, one of which will make it illegal and the other lawful, must be so construed as to make it legal.—*Foard County v. Sandifer*, 151 S. W. 523.

§ 176 (Tex.Civ.App.) Evidence held to require submission to the jury of question whether a clause in an agreement to procure an extension of an option to purchase land obligated defendants to obtain proper agreements or releases from the holders of superior liens.—*McPherson v. C. W. Hahl & Co.*, 151 S. W. 323.

(C) Subject-Matter.

§ 198 (Tex.Civ.App.) A contract to drill a "test well for water," which required the contractors to develop water-bearing strata, which, in their opinion, would afford the requisite supply of water "suitable for irrigation," did not require that the water should be suitable for irrigation.—*Miller v. Layne & Bowler Co.*, 151 S. W. 341.

(D) Place and Time.

§ 212 (Ark.) Where a contract to erect a building does not fix the time for completion, the law implies a reasonable time.—*Friedman v. Schleuter*, 151 S. W. 896.

In the absence of any provision in a building contract as to the time of payment, the law presumes that payment shall be made on the completion of the work.—*Id.*

CONTRADICTION.

See Witnesses, §§ 406, 414.

CONTRIBUTORY NEGLIGENCE.

See Master and Servant, § 203; Negligence, §§ 66-85.

CONVERSION.

§ 15 (Ky.) Where a testator devised his entire estate to his wife for life, with directions at her death to sell and divide the proceeds among his children, the children took no title to the property of the testator as such; the direction to sell working an equitable conversion.—*Cropper v. Gaar's Ex'r*, 151 S. W. 913.

CONVEYANCES.

See Acknowledgment, § 37; Deeds; Easements, § 3; Fraudulent Conveyances; Logs and Logging, § 3; Mortgages.

COPY.

See Appeal and Error, § 835.

CORPORATIONS.

See Acknowledgment, § 38; Banks and Banking; Carriers; Counties; Escheat, §§ 3, 6; Evidence, § 253; Execution, § 163; Garnishment, § 27; Injunction, § 35; Insurance, §§ 63-70; Judgment, § 713; Monopolies, §§ 3, 12-24; Municipal Corporations; Negligence, § 24; Perpetuities, § 4; Railroads; Removal of Causes, § 75; Schools and School Districts; States, § 88; Street Railroads; Telegraphs and Telephones; Trusts, § 102.

I. INCORPORATION AND ORGANIZATION.

§ 28 (Tex.Civ.App.) Although a private corporation may not have complied with all the statutory requirements, it is a "de facto corporation."—*Conley v. Daughters of the Republic of Texas*, 151 S. W. 877.

§ 29 (Tex.Civ.App.) The corporate existence of a private corporation cannot be attacked in a collateral proceeding.—*Conley v. Daughters of the Republic of Texas*, 151 S. W. 877.

§ 30 (Mo.App.) Where a promoter of a corporation entered into a contract which was to be assumed by it when incorporated, he was liable on such contract.—*Lewis v. Fisher*, 151 S. W. 172.

IV. CAPITAL, STOCK, AND DIVIDENDS.**(A) Nature and Amount of Capital and Shares.**

§ 67 (Tex.Civ.App.) When a corporation buys its own stock, the capital stock is not reduced by that amount, nor is the stock merged.—*San Antonio Hardware Co. v. Sanger*, 151 S. W. 1104.

V. MEMBERS AND STOCKHOLDERS.**(A) Rights and Liabilities as to Corporation.**

§ 174 (Tex.Civ.App.) Shares of stock in a corporation held to give member no right in the property of the corporation as such.—*Presnell v. Stockyards Nat. Bank*, 151 S. W. 873.

(D) Liability for Corporate Debts and Acts.

§ 244 (Tex.Civ.App.) The transferor of corporate stock directly to the corporation without the intervention of a trustee is not released from his liability on the stock.—*San Antonio Hardware Co. v. Sanger*, 151 S. W. 1104.

VII. CORPORATE POWERS AND LIABILITIES.

(A) Extent and Exercise of Powers in General.

§ 376 (Mo.) In view of Const. art. 12, §§ 7, 8, prohibiting corporations from issuing stock, except for money or its equivalent, or engaging in unauthorized business, and Rev. St. 1909, §§ 3339, 3354, providing that at least one-half of the capital of a business corporation shall consist of money, a business corporation with a capital of \$20,000 cannot purchase one-half of its shares at a premium, and a deed of trust given therefor is void.—*Hunter v. Garancio*, 151 S. W. 741.

§ 376 (Tex.Civ.App.) In the absence of charter or statutory prohibition, a solvent corporation, with the assent of its stockholders, may purchase its own stock for the purpose of settling differences in its management and preserving its business integrity, though it pays more than the market price therefor.—*San Antonio Hardware Co. v. Sanger*, 151 S. W. 1104.

Acts 1907, c. 166, § 3 (Rev. Civ. St. 1911, art. 1152), authorizing a retirement or decrease of capital stock, does not prohibit a corporation from purchasing its own stock for the purpose of settling differences in its management, with the intention of reissuing it again; especially where the seller knew the facts.—*Id.*

§ 388 (Tex.Civ.App.) Where a corporation's ultra vires contract is executory, neither party is estopped to deny its validity; but, where a corporation has purchased its own stock and received the benefits of the contract, it cannot, in an action on notes given therefor, set up ultra vires.—*San Antonio Hardware Co. v. Sanger*, 151 S. W. 1104.

(C) Property and Conveyances.

§ 434 (Ky.) Const. § 192, prohibiting corporations from holding real estate for over five years, except such as is necessary for their business, does not deny to a corporation the right in good faith to hold real estate for a necessary future use.—*Louisville & N. R. Co. v. Commonwealth*, 151 S. W. 934.

§ 444 (Mo.) Under Rev. St. 1909, §§ 2790, 2799, 3001, a deed executed by a corporation through the chairman of its board of trustees and its secretary held sufficiently executed.—*Strother v. Barrow*, 151 S. W. 960.

(D) Contracts and Indebtedness.

§ 484 (Mo.) As business corporations are forbidden by Const. art. 12, § 7, to engage in business other than that expressly authorized, such a corporation cannot become surety of its stockholder and pledge its credit for his purchase of its stock, and a deed of trust executed in pursuance of such a plan is void.—*Hunter v. Garancio*, 151 S. W. 741.

(E) Torts.

§ 492 (Ark.) Statements by the auditor of a packing company that there had been forgery and the clerk must settle held not in the course of the auditor's employment, so that the company was not liable.—*National Packing Co. v. Boullion*, 151 S. W. 244.

(F) Civil Actions.

§ 499 (Tex.Civ.App.) A private corporation, in the absence of a charter or statutory provisions to the contrary, has the same capacity to sue and be sued as a natural person, though not expressly conferred.—*Conley v. Daughters of the Republic of Texas*, 151 S. W. 877.

§ 507 (Mo.App.) Under Rev. St. 1909, §§ 1766, 1767, a return of service of process on a corporation held bad for failing to show that the president or other chief officer of the corporation was absent when the service was made on its agent or auditor.—*Handlan-Buck Mfg. Co. v. Chester, P. & Ste. G. R. Co.*, 151 S. W. 171.

§ 513 (Tex.Civ.App.) It is not necessary in a suit by a private corporation to allege that the suit is authorized by the board of directors.—*Conley v. Daughters of the Republic of Texas*, 151 S. W. 877.

§ 519 (Tex.Civ.App.) A suit by a corporation sanctioned by its president and other officers will be presumed to have been authorized by the corporation.—*Conley v. Daughters of the Republic of Texas*, 151 S. W. 877.

§ 519 (Tex.Civ.App.) Evidence, in an action against a corporation upon notes given by it as part of the purchase price of its own stock, held to show that the corporation at the time of the purchase was solvent, and its stock at par.—*San Antonio Hardware Co. v. Sanger*, 151 S. W. 1104.

VIII. INSOLVENCY AND RECEIVERS.

§ 537 (Tex.Civ.App.) "Insolvency," as the term is ordinarily used, is not a mere failure to pay debts, but is an insufficiency of property and assets to pay debts.—*San Antonio Hardware Co. v. Sanger*, 151 S. W. 1104.

XI. DISSOLUTION AND FORFEITURE OF FRANCHISE.

§ 596 (Ark.) In the absence of statute, strictly private corporations may surrender their charters and dissolve voluntarily except so far as creditors have a right to object.—*Freeo Valley R. Co. v. Hodges*, 151 S. W. 281.

§ 628 (Ark.) Liability of dissolved corporation for damages from wrongful cancellation of a contract held a debt for which its assets were liable under Kirby's Dig. § 958, authorizing the chancery court to pay such corporation's debts and distribute its assets.—*Alf Bennett Lumber Co. v. Walnut Lake Cypress Co.*, 151 S. W. 275.

CORROBORATION.

See Criminal Law, § 507; Rape, § 54; Seduction, § 46.

COSTS.

See Appeal and Error, § 635; Divorce, § 194; Garnishment, § 191; Partition, § 114; Prohibition, § 35.

IX. IN CRIMINAL PROSECUTIONS.

§ 316 (Ark.) As Kirby's Dig. § 2446, requiring judgment for costs against one convicted, is mandatory, a judgment of conviction may after the expiration of the term at which it was rendered be amended nunc pro tunc so as to require accused to pay the costs.—*Villines v. State*, 151 S. W. 1023.

COUNTERCLAIM.

See Set-Off and Counterclaim.

COUNTIES.

See Courts, § 42; Elections, § 203; Highways, §§ 7, 113; Indictment and Information, § 86; Private Roads, § 2; Venue, §§ 5, 32.

I. CREATION, ALTERATION, EXISTENCE, AND POLITICAL FUNCTIONS.

§ 18 (Tenn.) In view of Const. 1796, art. 5, § 12, and the act of 1835, found in Shannon's Code, § 97, Const. art. 6, § 15, gives the Legislature power to divide counties into districts according to population or according to territory. and Priv. Laws 1911, c. 620, dividing a county of 430 square miles into 22 districts, is valid.—*Brown v. Sullivan County*, 151 S. W. 50.

II. GOVERNMENT AND OFFICERS.

(B) County Seat.

§ 35 (Tex.Civ.App.) The burden was on parties contesting a decision that an election for

the removal of the county seat had resulted favorably to removal to show that the old county seat town was within a radius of five miles of the center of the county, and that the voters originally voted for the county seat, as located.—*Ralls v. Parish*, 151 S. W. 1089.

Evidence, in a suit by citizens of a town to contest an election by which the county seat was removed to another town, *held* to sustain a finding that in voting the county seat of such town the voters intended to vote with reference to the actual location of the building, and not to the town plat.—*Id.*

III. PROPERTY, CONTRACTS, AND LIABILITIES.

(B) Contracts.

§ 113 (Tex.Civ.App.) Under the statute, the commissioners' court of a county may contract for the construction of a courthouse.—*Allen v. Abernethy*, 151 S. W. 348.

Under Rev. Civ. St. 1911, art. 1373, the commissioners' court may appoint the county judge to make a contract for it for the construction of a courthouse.—*Id.*

§ 122 (Tex.) A contract between a county and a broker by which the latter is authorized to sell school land "at and for the sum of \$4 per acre" is not violative of the provision requiring the county to pay the cost of sale, but merely fixes the minimum price at which the land shall be sold.—*Foard County v. Sandifer*, 151 S. W. 523.

IV. FISCAL MANAGEMENT, PUBLIC DEBT, SECURITIES, AND TAXATION.

§ 152 (Tex.) A claim for commissions under a contract by which a county lists land with a broker for sale for a commission *held* not a debt within Const. art. 11, § 7, forbidding the creation of a debt, unless provision is made at the time for its payment.—*Foard County v. Sandifer*, 151 S. W. 523.

§ 164 (Tex.Civ.App.) Under the statute, the commissioners' court of a county contracting for the construction of a courthouse may issue interest-bearing warrants to pay therefor.—*Allen v. Abernethy*, 151 S. W. 348.

§ 165 (Tex.Civ.App.) Warrants issued by the commissioners' court to pay a contractor constructing a courthouse are not void because made payable at the county seat or at a point outside the state.—*Allen v. Abernethy*, 151 S. W. 348.

§ 167 (Tex.Civ.App.) Warrants issued by the commissioners' court to pay a contractor constructing a courthouse are nonnegotiable, and cannot be made so by a provision of the contract.—*Allen v. Abernethy*, 151 S. W. 348.

§ 192 (Tex.Civ.App.) A taxpayer may not complain of a tax levied by the commissioners' court for the construction of a courthouse, where the levy is for so much of 15 cents on \$100 as may be necessary.—*Allen v. Abernethy*, 151 S. W. 348.

COUNTY SEATS.

See Counties, § 35.

COURSES AND DISTANCES.

See Boundaries, § 8.

COURTHOUSES.

See Counties, §§ 113, 164, 165, 167, 192.

COURTS.

See Appeal and Error, §§ 23, 78, 100, 359, 361, 456, 635, 655, 852; Appearance, § 9; Arbitration and Award, § 8; Attachment, § 233; Bail, § 65; Certiorari, § 28; Constitutional Law, § 70; Evidence, §§ 5, 43, 82; Insane

Persons, § 23; Judges; Judgment, § 829; Justices of the Peace; Mandamus, §§ 16, 57; Prohibition; Vendor and Purchaser, § 277.

I. NATURE, EXTENT, AND EXERCISE OF JURISDICTION IN GENERAL.

§ 2 (Mo.) Courts possess the power to determine the general class to which a given case belongs; and, where title to property is involved, it is generally necessary that it be within the territorial jurisdiction of the court, and it must by its process or by voluntary appearance acquire jurisdiction over the persons whose rights will be affected by its decree.—*State ex rel. Deems v. Holtcamp*, 151 S. W. 153.

§ 24 (Mo.) Jurisdiction of the subject-matter cannot be conferred by consent of the parties.—*Springfield S. W. Ry. Co. v. Schweitzer*, 151 S. W. 128.

§ 35 (Ky.) Where a commissioner's deed to land recited that it was made pursuant to a judgment of the circuit court, *held*, that it would be presumed, the record having been burnt, to sustain the court's jurisdiction, that the construction of the will in which such land was devised was involved in the action.—*Landers v. Landers*, 151 S. W. 356.

§ 37 (Mo.) Jurisdiction of the subject-matter cannot be waived.—*Springfield S. W. Ry. Co. v. Schweitzer*, 151 S. W. 128.

II. ESTABLISHMENT, ORGANIZATION, AND PROCEDURE IN GENERAL.

(A) Creation and Constitution, and Court Officers.

§ 42 (Tex.Civ.App.) Acts 30th Leg. c. 5, creating and constituting Dallas county the Fourteenth and Forty-Fourth, and Sixty-Eighth judicial districts, are not unconstitutional on the ground that more than one district court with concurrent jurisdiction for Dallas county cannot exist.—*Kruegel v. Cockrell & Gray*, 151 S. W. 352.

(B) Terms, Vacations, Place and Time of Holding Court, Courthouses, and Accommodations.

§ 66 (Mo.App.) Where the judge of a court having only one judge was unable to attend a term, the sheriff, under Rev. St. 1909, § 3869, had authority only to adjourn the court until the next regular term.—*Grant City v. Simmons*, 151 S. W. 187.

(D) Rules of Decision, Adjudications, Opinions, and Records.

§ 90 (Tex.) The Supreme Court will generally follow the decisions of the Court of Criminal Appeals upon questions involving penal laws.—*State v. Savage*, 151 S. W. 530.

§ 92 (Ark.) A decision on which the case could have turned cannot be regarded as obiter dictum merely because, owing to the disposal of that contention, it was necessary to consider another question.—*Galloway v. Darby*, 151 S. W. 1014.

§ 93 (Mo.) The Supreme Court is not bound to follow its prior decisions if they be erroneous, though it usually follows them when to do otherwise would disturb a large number of titles.—*State ex rel. Coleman v. Blair*, 151 S. W. 148.

§ 93 (Mo.App.) A decision of the Supreme Court that the lien of special tax bills is superior to prior incumbrances is a rule of property.—*Granite Bituminous Paving Co. v. Parkview Realty & Improvement Co.*, 151 S. W. 479.

§ 116 (Tex.Civ.App.) An order of the judge, made in vacation, after trial and adjournment, incorporating certain depositions in the record, was without authority and ineffectual for that

purpose.—Continental Lumber & Tie Co. v. Wilroy, 151 S. W. 840.

III. COURTS OF GENERAL ORIGINAL JURISDICTION.

(A) Grounds of Jurisdiction in General.

§ 120 (Tex.Civ.App.) The district court was without jurisdiction to restrain the enforcement of a justice's judgment where the amount in controversy was less than \$20.—Pye v. Wyatt, 151 S. W. 1086.

§ 122 (Tex.Civ.App.) A petition for mandamus in the district court to compel an officer to accept a replevy bond and deliver property to the principal therein which did not show that the property was within the jurisdictional value of such court was insufficient.—Keasler Lumber Co. v. Clark, 151 S. W. 345.

§ 122 (Tex.Civ.App.) A petition for the dissolution of a firm and the appointment of a receiver, which contains no allegation of the value of the business or of plaintiff's interest therein, fails to show value sufficient to confer jurisdiction on the district court.—Childs v. Brown, 151 S. W. 1154.

IV. COURTS OF LIMITED OR INFERIOR JURISDICTION.

§ 188 (Mo.) Kansas City Charter art. 6, conferring jurisdiction on the municipal court in eminent domain proceedings for street purposes, is valid under Const. art. 9, § 16, and article 6, § 1.—State ex rel. Graham v. Seehorn, 151 S. W. 716.

V. COURTS OF PROBATE JURISDICTION.

§ 198 (Mo.) Under the express provision of Const. art. 6, § 34, a probate court has jurisdiction over the sale of land by administrators within its territorial jurisdiction.—State ex rel. Deems v. Holtcamp, 151 S. W. 153.

VI. COURTS OF APPELLATE JURISDICTION.

(B) Courts of Particular States.

§ 231 (Mo.) An appeal from a judgment sustaining exceptions to the referee's report, awarding defendant judgment in a specified amount, and substituting for it a judgment for plaintiff in a larger amount is within the jurisdiction of the Supreme Court, where the two amounts are more than the jurisdictional limit.—State ex rel. Federal Lead Co. v. Reynolds, 151 S. W. 85.

§ 231 (Mo.) Title to real estate must be involved directly, and not as a mere incident, in order to confer jurisdiction on the Supreme Court, under the Constitution.—Springfield S. W. Ry. Co. v. Schweitzer, 151 S. W. 128.

The Supreme Court may review judgments in condemnation proceedings which involve title to land.—Id.

An unexpired three-year lease on premises condemned was personal property, and not real estate, within the constitutional provision conferring appellate jurisdiction on the Supreme Court in cases involving title to real estate.—Id.

§ 246 (Tenn.) The complainants' appeal is not taken out of the jurisdiction of the Court of Civil Appeals because their bill charged unconstitutionality of the statute under which defendant was created; such question appearing to be abandoned, and not being referred to in complainant's brief.—Denton v. Miller, 151 S. W. 50.

§ 246 (Tenn.) Under Acts 1907, c. 82, § 7, Court of Civil Appeals held to have no jurisdiction to determine constitutional questions, whether they arise on appeals from the circuit courts or courts of equity.—Campbell County v. Wright, 151 S. W. 411.

Under Acts 1907, c. 82, § 7, and Acts 1909, c. 192, the only jurisdiction of the Court of

Civil Appeals over an appeal involving a constitutional question is to transfer the case to the Supreme Court.—Id.

VIII. CONCURRENT AND CONFLICTING JURISDICTION, AND COMITY.

(A) Courts of Same State, and Transfer of Causes.

§ 472 (Mo.) Const. art. 6, § 22, held not to confer exclusive original jurisdiction on circuit courts of proceedings to acquire property for street purposes in Kansas City in view of Kansas City Charter, art. 6.—State ex rel. Graham v. Seehorn, 151 S. W. 716.

§ 488 (Mo.App.) Where the Supreme Court transfers a case to the Court of Appeals, constitutional questions are eliminated.—Scientific American Club v. Horchitz, 151 S. W. 475.

COVENANTS.

See Limitation of Actions, § 47.

III. PERFORMANCE OR BREACH.

§ 96 (Tex.Civ.App.) A paramount outstanding title is an "incumbrance" within the meaning of a covenant against incumbrances.—Morris v. Short, 151 S. W. 633.

CREDIBILITY.

See Witnesses, §§ 311-414.

CRIMINAL LAW.

See Abortion; Adultery, § 11; Arrest, § 63; Assault and Battery, §§ 54-96; Bail, §§ 57-93; Banks and Banking, §§ 84, 85; Bastards; Burglary; Costs, § 316; Disorderly House; False Pretenses; Gaming; Grand Jury; Homicide; Husband and Wife, §§ 304, 313; Incest; Indictment and Information; Intoxicating Liquors, §§ 146-239; Larceny; Libel and Slander, §§ 141-155; Malicious Mischief; Municipal Corporations, §§ 635-642; Obstructing Justice, § 11; Pardon; Rape; Seduction.

IV. JURISDICTION.

§ 101 (Tex.Cr.App.) A transfer of a prosecution under an indictment returned in the district court for pursuing the occupation of selling intoxicating liquors in local option territory to the county court is properly denied.—Byrd v. State, 151 S. W. 1068.

VIII. PRELIMINARY COMPLAINT, AFFIDAVIT, WARRANT, EXAMINATION, COMMITMENT, AND SUMMARY TRIAL.

§ 214 (Tex.Cr.App.) A jurat affixed to a complaint held properly amended by permitting the officer to affix the proper date before trial.—Cubine v. State, 151 S. W. 301.

X. EVIDENCE.

(B) Facts in Issue and Relevant to Issues, and Res Gestæ.

§ 338 (Tex.Cr.App.) Testimony of accused's witness in an incest case, that she had stopped visiting at accused's home because she believed a third person and accused's wife were criminally intimate, was properly excluded, where neither the wife nor the third party were witnesses.—Drake v. State, 151 S. W. 315.

§ 338 (Tex.Cr.App.) Defendant's testimony that he had been in jail several months before trial and had but a few days to engage counsel was properly excluded.—Shaffer v. State, 151 S. W. 1061.

Evidence as to the fee paid attorneys who assisted in the prosecution was properly excluded.—Id.

§ 364 (Tex.Cr.App.) In a trial for a burglary followed by defendant's attempt to cut his

throat, the court properly permitted the chief of police to testify about defendant's condition and about his writing of statements concerning the offense upon scraps of paper soon after his arrest.—*Shaffer v. State*, 151 S. W. 1061.

(C) Other Offenses, and Character of Accused.

§ 369 (Ky.) Where two persons were killed at the same instant by the same persons, and possibly by the same shot, the court, on the trial of accused for the murder of one, properly admitted in evidence the murder of the other.—*Gross v. Commonwealth*, 151 S. W. 36.

§ 369 (Ky.) On a trial for rape on a female 14 years old, the admission of testimony that accused had committed a second offense a few weeks after the offense for which he was tried, and that prosecutrix had complained after the second offense, *held* not erroneous.—*Gamble v. Commonwealth*, 151 S. W. 924.

§ 369 (Tex.Cr.App.) In a prosecution for burglary, evidence that G., from whom defendant claimed he purchased goods stolen from the burglarized store, had committed other burglaries in the same town, with which defendant had nothing to do, *held* inadmissible.—*Walker v. State*, 151 S. W. 822.

§ 372 (Tex.Cr.App.) Under an indictment alleging that accused pursued the business of selling liquor in local option territory, the state may prove sales of liquor on other dates.—*Byrd v. State*, 151 S. W. 1068.

(E) Best and Secondary and Demonstrative Evidence.

§ 404 (Tex.Cr.App.) There was no error in admitting in evidence a bullet found on the ground where the killing occurred, where the position of deceased when shot was an issue on which the finding of the bullet would have a bearing, and the bullet was of a size fitting defendant's pistol, and was in a pool of blood that must have come from deceased.—*Kelly v. State*, 151 S. W. 304.

(F) Admissions, Declarations, and Hearsay.

§ 406 (Mo.) Testimony that person accused of defiling female child admitted visiting the house of woman of ill repute *held* competent as an admission on the issue of impotency raised by him.—*State v. Donnington*, 151 S. W. 975.

§ 406 (Tex.Cr.App.) Accused on trial for rape of a girl under 15 years of age may admit that prosecutrix was not 15 years of age at the time of the alleged offense, and be bound by such admission.—*Kearse v. State*, 151 S. W. 327.

§ 413 (Tex.Cr.App.) In a trial for burglary followed by an attempt to suicide, evidence that defendant told his foster mother the day after the crime that he did not know how the wound in his throat was inflicted and that it was not self-inflicted, being self-serving, was properly excluded.—*Shaffer v. State*, 151 S. W. 1061.

§ 413 (Tex.Cr.App.) Where accused did not testify, declarations made to third persons could not be proved because self-serving.—*Byrd v. State*, 151 S. W. 1068.

§ 417 (Tex.Cr.App.) An entry of date of birth made in a family Bible at or about the time of birth, is admissible to prove the date of birth, when the father who made the entry testifies that it was made contemporaneous with the event.—*Bigliben v. State*, 151 S. W. 1044.

§§ 419, 420 (Tex.Cr.App.) It was not error to refuse to permit defendant to testify that C. told him that he had seen two cattle of S.'s brand, and not the brand of deceased, in a certain pasture, it appearing that deceased had told cattle to the man who placed the cattle in the pasture, the testimony being hearsay.—*Kelly v. State*, 151 S. W. 304.

§§ 419, 420 (Tex.Cr.App.) The owner of the store burglarized was not entitled to testify to what he had been told by his clerk, who first discovered the burglary.—*Walker v. State*, 151 S. W. 822.

§§ 419, 420 (Tex.Cr.App.) In a prosecution for slander, evidence of a witness as to what he had been told by an unidentified boy *held* inadmissible as hearsay.—*Elder v. State*, 151 S. W. 1052.

§§ 419, 420 (Tex.Cr.App.) In a trial for burglary accompanied by an assault upon a young woman, evidence that defendant told his foster mother of his engagement to the young woman soon after it occurred and some months before the offense was hearsay.—*Shaffer v. State*, 151 S. W. 1061.

In a trial for burglary followed by an attempt to suicide, evidence that defendant told his foster mother the day after the crime that he did not know how the wound on his throat was inflicted, and that it was not self-inflicted, being hearsay, was properly excluded.—*Id.*

Evidence of conversations between defendant's foster mother and the officers about their finding blood and a handkerchief saturated with blood *held* properly excluded in a prosecution for burglary followed by assault and attempt to suicide.—*Id.*

Defendant's testimony as to what the newspapers had published regarding the crime was properly excluded where he stated that all his information was hearsay.—*Id.*

§ 421 (Tex.Cr.App.) On the issue of insanity, a witness was not entitled to testify over objection to what third persons had told him respecting the defendant's acts or conduct.—*Montgomery v. State*, 151 S. W. 813.

(G) Acts and Declarations of Conspirators and Codefendants.

§ 422 (Mo.) It is not necessary that coconspirators be indicted and tried together, in order to render the acts and declarations of one admissible against the others.—*State ex rel. Kimbrell v. People's Ice, Storage, & Fuel Co.*, 151 S. W. 101.

(H) Documentary Evidence and Exclusion of Parol Evidence Thereby.

§ 439 (Tex.Cr.App.) On an issue of defendant's insanity he was not entitled to introduce in evidence a chapter in a standard medical work on mental and nervous diseases.—*Montgomery v. State*, 151 S. W. 813.

§ 442 (Tex.Cr.App.) In a prosecution for seduction, evidence by the prosecutrix that certain letters were written by defendant to her rendered them admissible.—*Bishop v. State*, 151 S. W. 821.

§ 444 (Tex.Cr.App.) Where an entry of date of birth made in a family Bible at or about the time of birth is offered to prove the date of birth, and the father is in court, and the entry is shown to be in his handwriting, he must be called to testify that it was made contemporaneous with the event.—*Bigliben v. State*, 151 S. W. 1044.

§ 447 (Ark.) Testimony of justice of the peace that a judgment entry, offered to show conviction of a witness for petit larceny, was intended by him as such a conviction *held* properly excluded, where the entry did not show such conviction.—*Wilkerson v. State*, 151 S. W. 518.

(I) Opinion Evidence.

§ 472 (Tex.Cr.App.) In a homicide case, where defendant contended that deceased had cut him immediately before the shooting, an answer by a qualified physician to the question, "If a man so cut should get up and walk 15 feet and turn around, would the presence of blood have appeared on his face?" was admissible.—*Kelly v. State*, 151 S. W. 304.

§ 474 (Tex.Cr.App.) Where the defense was insanity resulting from a blow, the court properly permitted a doctor who treated defendant to testify that there was no evidence of concussion.—Shaffer v. State, 151 S. W. 1061.

§ 480 (Mo.) The sustaining of an objection, unless the witness further qualified himself, to a question asked a doctor as to whether in his opinion accused could have had sexual intercourse with the prosecutrix, was proper where the witness had stated that he had paid but little attention to the girl and was hardly qualified to answer.—State v. Donnington, 151 S. W. 975.

§ 485 (Tex.Cr.App.) Where the defense was insanity, a hypothetical question asked by the state properly included the substance of testimony given by the chief of police as to defendant's condition, and statements made by him after his arrest.—Shaffer v. State, 151 S. W. 1061.

§ 489 (Tex.Cr.App.) Where, in an incest case, a doctor testified, on cross-examination by accused that penetration to a certain depth would injure the hymen, it was not improper for the state to adduce, on redirect examination, that women had become impregnated without destroying the hymen.—Drake v. State, 151 S. W. 315.

§ 494 (Mo.) The jury had a right to find that an abortion four weeks after the use of instruments on the womb of prosecutrix was caused thereby, notwithstanding uncontradicted expert testimony that it could not have been so caused.—State v. Stapp, 151 S. W. 971.

(J) Testimony of Accomplices and Codefendants.

§ 507 (Tex.Cr.App.) On a trial for incest, prosecutrix held an accomplice as a matter of law, so that her testimony, to support a conviction, must be corroborated by connecting accused with the offense on the occasion alleged.—Burford v. State, 151 S. W. 538.

§ 507 (Tex.Cr.App.) Where one receives money from an officer to bring about the commission of a crime, and he does so, he is an accomplice within the rule requiring corroboration; but, where he believes that a crime is in contemplation and he takes steps to detect the crime, he is not an accomplice.—Bush v. State, 151 S. W. 554.

(K) Confessions.

§ 518 (Tex.Cr.App.) The fact that defendant by request takes persons to the place where they find the dead body is admissible in evidence, although he was under arrest and unwarned.—Ortiz v. State, 151 S. W. 1056.

Evidence that the defendant, while under arrest and unwarned, gave information from which the officers found decedent's watch, a fruit of the crime, was properly admitted.—Id.

§ 532 (Tex.Cr.App.) As preliminary to proof of a confession, and as fixing its time, it was proper to ask the prosecuting witness when he heard that his store was burglarized.—Whorton v. State, 151 S. W. 300.

(M) Weight and Sufficiency.

§ 552 (Tex.Cr.App.) To support a conviction on circumstantial evidence, each fact necessary to establish guilt must be proven, and the facts must be consistent with guilt and inconsistent with any other reasonable hypothesis.—Yarborough v. State, 151 S. W. 545.

Suspicious circumstances alone are not sufficient upon which to base a conviction.—Id.

XI. TIME OF TRIAL AND CONTINUANCE.

§ 589 (Tex.Cr.App.) Where it appeared that an appeal was pending from defendant's conviction upon the same facts as an accessory, his motion for a postponement until the final dis-

position of such former case should have been granted.—Harrison v. State, 151 S. W. 552.

§ 594 (Ark.) A continuance for absent witnesses is properly refused, where the court was warranted in finding that the attendance of such witnesses could not be procured.—Williams v. State, 151 S. W. 1011.

§ 594 (Tex.Cr.App.) Defendant's motion for a continuance until his fugitive partner in the crime who had been jointly indicted with him should be apprehended until they could agree upon the severance of the case was properly refused.—Ortiz v. State, 151 S. W. 1056.

§ 594 (Tex.Cr.App.) It was not error to refuse a continuance sought because of the absence of defendant's fugitive partner in the crime.—Ortiz v. State, 151 S. W. 1059.

§ 595 (Ky.) Testimony expected from defendant's absent witnesses on his prosecution for shooting with intent to kill, that the person shot had his hand in his pocket when defendant fired, and that he had threatened to kill defendant on sight, which threat was known to defendant, held material.—Breedon v. Commonwealth, 151 S. W. 407.

§ 595 (Tex.Cr.App.) In a prosecution for being an accomplice to arson, a continuance held improperly refused, where a witness who would contradict the testimony of the principal on a material fact had not been summoned.—Baggett v. State, 151 S. W. 560.

§ 595 (Tex.Cr.App.) An application for a continuance for absence of a witness, concerning whose testimony accused was not advised until the morning the application was filed, when the case was called for trial, held properly denied, where the evidence was immaterial.—Stanton v. State, 151 S. W. 808.

§ 596 (Ark.) The refusal of a continuance on account of the absence of a witness who would have testified as to threats made by deceased was not improper, where there was other evidence to that effect.—Williams v. State, 151 S. W. 1011.

§ 598 (Tex.Cr.App.) Where accused did not obtain process for witnesses or place the same in the hands of the officers until over a month after the finding of the indictment, a continuance on the ground of the absence of witnesses was properly denied.—Hogue v. State, 151 S. W. 805.

§ 598 (Tex.Cr.App.) A continuance for an absent witness held properly denied because of absence of diligence on the part of accused to procure his attendance.—Ward v. State, 151 S. W. 1073.

§ 600 (Ky.) Under Cr. Code Prac. § 189, providing for a continuance for the absence of a material witness, unless the commonwealth's attorney admits the facts sought to be proved where the commonwealth's attorney refused to admit the facts offered the refusal of a continuance was error.—Breedon v. Commonwealth, 151 S. W. 407.

§ 600 (Tex.Cr.App.) The state, to avoid a continuance on the ground of the absence of a witness for accused, must admit that the testimony of the absent witness is true.—Burford v. State, 151 S. W. 538.

§ 608 (Tex.Cr.App.) Where the defendant filed an application for a continuance, naming a number of witnesses, which the court overruled, it was proper to allow the state to show the presence of the witnesses in court.—Kelly v. State, 151 S. W. 804.

XII. TRIAL.

(B) Course and Conduct of Trial in General.

§ 650 (Tex.Cr.App.) In a prosecution for burglary, the owner of the store held entitled to illustrate with a stick the condition of the bar of the door that had been entered, and the door.—Walker v. State, 151 S. W. 822.

§ 655 (Tex.Cr.App.) It was proper for the court to admonish counsel for accused before the jury for an improper statement.—*Drake v. State*, 151 S. W. 315.

§ 657 (Tex.Cr.App.) It was not error in the absence of a jury to punish counsel for contempt in refusing to obey the court's rulings in excluding questions of a certain nature.—*Shaffer v. State*, 151 S. W. 1061.

(C) Reception of Evidence.

§ 665 (Tex.Cr.App.) It is within the discretion of the trial court to permit a witness who was placed under the rule and who heard the testimony to testify.—*Woods v. State*, 151 S. W. 296.

§ 666 (Tex.Cr.App.) Where defendant relied on eyewitnesses of the killing to prove self-defense, the state was not required to call and vouch for such witnesses.—*Pugh v. State*, 151 S. W. 546.

§ 673 (Tex.Cr.App.) Where defendant's testimony, introduced without objection, tended strongly to show his motive in killing deceased, a refusal to limit such testimony to the question of his credit as a witness was proper.—*Brock v. State*, 151 S. W. 801.

§ 675 (Tex.Cr.App.) Exclusion of cumulative evidence of accused's good character held not error.—*Drake v. State*, 151 S. W. 315.

§ 683 (Tex.Cr.App.) Under Code Cr. Proc. 1895, art. 698, the court, after defendant had rested, properly allowed the state to introduce eyewitnesses of the killing, and examine them generally.—*Montgomery v. State*, 151 S. W. 813.

(E) Arguments and Conduct of Counsel.

§ 717 (Tex.Cr.App.) Whether the state's counsel shall be permitted to read cases and discuss law to the trial court is within the court's sound discretion.—*Davis v. State*, 151 S. W. 313.

§ 721½ (Tex.Cr.App.) The state's attorney may in his argument to the jury comment on the absence of a witness for accused.—*Ward v. State*, 151 S. W. 1073.

§ 722½ (Tex.Cr.App.) In a criminal prosecution, questions by the state's attorney on cross-examination of witnesses held improper because of references to defendant's former conviction.—*Bishop v. State*, 151 S. W. 821.

§ 728 (Tex.Cr.App.) In the absence of a requested charge, remarks of the counsel for the state excepted to present no error.—*Kelly v. State*, 151 S. W. 304.

§ 730 (Tex.Cr.App.) Side remarks of the state's attorney did not constitute error where the court instructed the jury to disregard them.—*Shaffer v. State*, 151 S. W. 1061.

§ 730 (Tex.Cr.App.) Where accused objected to the remarks of the district attorney, and the court at once reprimanded him and directed the jury not to consider the remarks, and also gave the charge requested by accused, the remarks did not call for a reversal.—*Byrd v. State*, 151 S. W. 1068.

(F) Province of Court and Jury in General.

§ 736 (Tex.Cr.App.) A confession alleging that it was voluntarily made after due warning was not inadmissible, though accused's evidence raised an issue as to its voluntary character and his knowledge of its contents; that issue being for the jury.—*Drake v. State*, 151 S. W. 315.

§ 736 (Tex.Cr.App.) Where the evidence in no way connected a witness with the crime charged, he was not an accomplice, so as to require the submission of the question whether he was an accomplice.—*Tate v. State*, 151 S. W. 825.

§ 761 (Mo.) In a prosecution for obtaining property by false pretenses, an instruction held not improper as invading the province of the jury.—*State v. Lovan*, 151 S. W. 141.

§ 761 (Tex.Cr.App.) A criticism of an instruction on self-defense, in that it "required the jury to believe the threats were made," is without merit, where it was not disputed that threats were made.—*Kelly v. State*, 151 S. W. 304.

§ 761 (Tex.Cr.App.) A charge assuming as a fact that defendants or one of them was in the wrong from the beginning, and had assaulted the prosecuting witness with unlawful intent, when such conduct of defendants was a disputed issue, was erroneous.—*Young v. State*, 151 S. W. 1048.

§ 763, 764 (Tex.Cr.App.) A charge on defendant's explanation of his possession of the alleged stolen articles held not improper as a comment on the evidence.—*Coggins v. State*, 151 S. W. 311.

§ 763, 764 (Tex.Cr.App.) Where the state introduced threats by accused to kill deceased, the refusal of defendant's requested instruction that if such threats were made with no intention of taking the life of deceased, or were made in a jocular manner, they should not be considered, was properly refused, as invading the province of the jury to judge of the credibility of the witnesses and the weight of the evidence.—*Brock v. State*, 151 S. W. 801.

(G) Necessity, Requisites, and Sufficiency of Instructions.

§ 772 (Tex.Cr.App.) An instruction to convict if the jury believed beyond a reasonable doubt that the defendant committed the offense charged at the time stated was not misleading, in that it did not require the jury to find that the offense was committed in the town and precinct charged in the information.—*Walker v. State*, 151 S. W. 318.

§ 773 (Tex.Cr.App.) Where the defense was insanity produced by a blow, giving of instructions that insanity is a disease, and refusal of defendant's requested instruction on insanity, held not error.—*Shaffer v. State*, 151 S. W. 1061.

§ 783 (Tex.Cr.App.) Where the state on the cross-examination of a witness sought to impeach him by proof of contradictory statements based on his testimony before the grand jury, an instruction that the testimony before the grand jury could only be used to impeach the witness was proper.—*Kearse v. State*, 151 S. W. 827.

§ 784 (Tex.Cr.App.) Where a witness testified that defendant admitted to him that he was guilty, it was not necessary to charge on circumstantial evidence.—*Whorton v. State*, 151 S. W. 300.

§ 785 (Mo.) It was not error to refuse a requested instruction that the fact that prosecutrix, on a prosecution for abortion, was implicated, might be taken into consideration in determining credibility; the instruction not being a legal proposition, but merely a comment on the evidence.—*State v. Stapp*, 151 S. W. 971.

§ 785 (Tex.Cr.App.) Evidence which merely laid a predicate for the impeachment of certain witnesses held insufficient to require an instruction that it could be considered only for impeachment.—*Pugh v. State*, 151 S. W. 546.

§ 789 (Tex.Cr.App.) In a prosecution for slander, defendant held entitled to an instruction that, before he could be convicted, the jury must find beyond a reasonable doubt that the statements were false, and were maliciously and wantonly made.—*Elder v. State*, 151 S. W. 1052.

§ 792 (Tex.Cr.App.) Where the evidence showed that two persons participated in the offense,

a charge on the law of principals was applicable.—Coggins v. State, 151 S. W. 311.

§ 792 (Tex.Cr.App.) In a prosecution for burglary, evidence held to authorize an instruction on principals.—Walker v. State, 151 S. W. 822.

§ 800 (Tex.Cr.App.) An instruction on insanity in a prosecution for homicide was not objectionable for failure to define the words "lucid interval."—Montgomery v. State, 151 S. W. 813.

§ 806 (Tex.Cr.App.) The law as to insanity having been fully charged in a prosecution for homicide, the court was not bound to qualify paragraphs dealing with murder in the first and second degrees by referring to the charge on insanity.—Montgomery v. State, 151 S. W. 813.

§ 814 (Ky.) The court should not give an instruction on a theory of the case that is without evidence to sustain it.—Gamble v. Commonwealth, 151 S. W. 924.

§ 814 (Tex.Cr.App.) Instruction on a trial for manslaughter as to what would constitute adequate cause held improper, because inapplicable to the evidence.—Edwards v. State, 151 S. W. 294.

§ 814 (Tex.Cr.App.) An instruction, not called for by the evidence, was properly refused.—Davis v. State, 151 S. W. 313.

§ 814 (Tex.Cr.App.) Instruction in a prosecution for a gift of intoxicating liquors on election day held not erroneous for failure to state the purpose of the election, where the information stated the purpose, and the evidence did not put in issue its legality.—Walker v. State, 151 S. W. 318.

§ 814 (Tex.Cr.App.) Where the evidence clearly showed nighttime burglary, and the court instructed to acquit if it was a nighttime burglary, the submission of the issue of nighttime burglary alone was not error, though daytime burglary was also charged in the indictment.—Shaffer v. State, 151 S. W. 1061.

§ 822 (Tex.Cr.App.) It is not necessary that all the law be embodied in a single paragraph in the charge; but all objections to separate paragraphs are to be considered with reference to the charge as a whole.—Pinson v. State, 151 S. W. 556.

§ 823 (Ky.) Error in an instruction defining murder and aiding and abetting, arising from the failure to give defendant actually firing the fatal shot the benefit of the plea of self-defense, is cured by an instruction defining the right of self-defense and giving each of the defendants the full benefit thereof.—Gross v. Commonwealth, 151 S. W. 36.

(H) Requests for Instructions.

§ 824 (Tex.Cr.App.) The words "mitigate, excuse, or justify," used in a charge defining murder of the second degree, have a well-understood meaning, and, in the absence of a request, it was not necessary for the court to define them.—Kelly v. State, 151 S. W. 304.

§ 824 (Tex.Cr.App.) In a prosecution for burglary, an instruction on the issue of whether defendant was under arrest at the time he made explanations as to his possession of the alleged stolen property held unnecessary; no special charge having been requested.—Coggins v. State, 151 S. W. 311.

§ 824 (Tex.Cr.App.) In a prosecution for homicide, the court, in the absence of a request, was not bound to limit the purpose and effect of certain evidence introduced by defendant on the issue of insanity.—Montgomery v. State, 151 S. W. 813.

§ 824 (Tex.Cr.App.) Failure of the court to define the words "carnal knowledge" and "carnally know," as used in an instruction in an incest case, held not error, in the absence of a request therefor.—Drake v. State, 151 S. W. 315.

§ 829 (Tex.Cr.App.) Instruction that, if deceased attacked accused with a weapon calculated to produce murder, maiming, etc., it would be presumed that he intended to murder accused, held not covered by an instruction that, if accused believed his life was in danger, the jury should acquit; there being a legal presumption, under White's Ann. Pen. Code 1911, art. 676, that his life was in danger.—Edwards v. State, 151 S. W. 294.

§ 829 (Tex.Cr.App.) Charges fully covered by the main charge are properly refused.—Whorton v. State, 151 S. W. 300.

§ 829 (Tex.Cr.App.) It is not error to refuse requested charges, the substance of which is covered by instructions given.—Pugh v. State, 151 S. W. 546.

§ 829 (Tex.Cr.App.) Where, in a prosecution for being an accomplice to arson, a court charged generally on corroborative testimony, a refusal to instruct that the testimony of the principal must be corroborated on the point as to his hiring by the defendant held improper.—Baggett v. State, 151 S. W. 560.

§ 829 (Tex.Cr.App.) The refusal of instructions was not erroneous where the court charged in practically the same language, or sufficiently presented the issue in the general charge.—Washington v. State, 151 S. W. 818.

§ 830 (Mo.App.) In an action in which defendant's guilt is required to be established beyond a reasonable doubt, the court must give a proper instruction on the question of reasonable doubt although the one requested is faulty.—Grant City v. Simmons, 151 S. W. 187.

(I) Objections to Instructions or Refusal Thereof, and Exceptions.

§ 844 (Tex.Cr.App.) An objection to a part of an instruction, failing to specifically point out a defect, is insufficient.—Walker v. State, 151 S. W. 822.

(K) Verdict.

§ 871 (Tex.Cr.App.) The verdict need not be signed by the foreman or any others of the jury, even in a felony case.—Mackey v. State, 151 S. W. 802.

XIII. MOTIONS FOR NEW TRIAL AND IN ARREST.

§ 942 (Tex.Cr.App.) A new trial will not be granted for newly discovered evidence which is solely impeaching in character.—Pinson v. State, 151 S. W. 556.

§ 945 (Tex.Cr.App.) Discrepancy between the testimony of a doctor on motion for new trial and his testimony at an incest trial held not ground for a new trial, where the first testimony was corroborated by other evidence and accused's confession.—Drake v. State, 151 S. W. 315.

§ 949 (Tex.Cr.App.) A conviction will not be set aside because accused, as shown by his verification alone, was taken by surprise, in that his attorneys refused to go into the case at the last moment, and before he had opportunity to employ other counsel.—Giles v. State, 151 S. W. 1043.

§ 954 (Tex.Cr.App.) Objections, in a motion for a new trial, to paragraphs of the charge are unavailable, where they do not point out the specific defect objected to.—Pinson v. State, 151 S. W. 556.

§ 954 (Tex.Cr.App.) Objections to the charge in a motion for new trial, which do not set out the specific error, are insufficient.—Gage v. State, 151 S. W. 565.

§ 956 (Tex.Cr.App.) A motion for new trial on the ground that a witness would testify as claimed by accused, unsupported by affidavit of accused or of the witness, or of any excuse for failure to have him so testify on the trial held properly denied.—Bellew v. State, 151 S. W. 542.

58 (Tex.Cr.App.) A new trial for newly overed evidence was properly denied, where affidavits accompanying it indicated a lack diligence.—Pinson v. State, 151 S. W. 556.

70 (Tex.Cr.App.) An information charge a gift of intoxicating liquor on election was not ground for arrest of judgment, but it also charged that defendant informed the donee of the whereabouts of the liquor. —Walker v. State, 151 S. W. 318.

IV. APPEAL AND ERROR, AND CERTIORARI

Presentation and Reservation in Lower Court of Grounds of Review.

028 (Tex.Cr.App.) Where a motion to have an indictment was verbal, and not by the defendant's attorney and the court in open court, and ruled on by the court in open court, no question of its insufficiency is presented for review.—Simpson v. State, 151 S. W. 308.

036 (Ark.) Where accused neither objected to the testimony of a witness, nor moved it be excluded, he could not complain of error on appeal, though the court erred in admitting the evidence.—Wilkerson v. State, 151 S. W. 518.

037 (Tex.Cr.App.) Statements of state's counsel are not presented for review in the absence of an objection at the time or a request for an instruction thereon.—Wagoner v. State, 151 S. W. 313.

059 (Tex. Cr. App.) Under Code Cr. Proc., art. 743, an exception to a charge in a criminal case must specifically point out the error.—Byrd v. State, 151 S. W. 1068.

059 (Tex.Cr.App.) Where a special charge refused and accused excepts thereto, taking bill of exceptions, not giving any reason why could have been given, and in the motion for new trial merely complains of the refusal to give the charge, the court will not consider the question.—Ward v. State, 151 S. W. 1073. In a misdemeanor case, the charge of the offense can only be attacked by specially excepting to any omission therein at the time of the giving of the charge and requesting a written charge covering the point, and specially excepting to its refusal assigning the reasons therefor.—Id.

064 (Tex.Cr.App.) A motion for new trial on the ground that the court erred in sustaining an objection to evidence and in refusing admission to accused's attorney to state the facts on which the evidence was admissible is not to raise the question that court erred in refusing to permit accused's attorney to state the time what he expected to prove.—Kearse v. State, 151 S. W. 827.

Proceedings for Transfer of Cause, and Effect Thereof.

076 (Tex.Cr.App.) Where an appeal bond, filed in the record, is not in compliance with Cr. Proc. 1895, arts. 903 and 904, relating to terms thereof, the appeal will be dismissed.—Kearse v. State, 151 S. W. 1053.

081 (Tex.Cr.App.) A recitation, at the end of a sentence, that as defendant had given exception of appeal the judgment would be reversed, was not a sufficient entry of notice of appeal.—Raines v. State, 151 S. W. 811.

Record and Proceedings Not in Record.

086 (Tex.Cr.App.) Alleged error in the admission of evidence cannot be considered, where the record does not show that it was objected to at the time of its introduction, or that it was any motion made to exclude it.—Kearse v. State, 151 S. W. 801.

088 (Tex.Cr.App.) The bill of exceptions containing the argument of the state's at-

torney must show the circumstances under which the argument was made, and that accused requested a charge directing the jury to disregard the argument and the refusal of the court to give any charge.—Ward v. State, 151 S. W. 1073.

§ 1090 (Tex.Cr.App.) Where the record contains no bills of exception to the admission of testimony, the error in its admission cannot be reviewed.—Coggins v. State, 151 S. W. 311.

§ 1090 (Tex.Cr.App.) Denial of a motion to strike all the testimony down to the close of the state's case could not be reviewed, in the absence of a bill of exceptions.—Pugh v. State, 151 S. W. 546.

§ 1090 (Tex.Cr.App.) That the court required accused in a homicide case to go to trial without a special venire could not be reviewed, in the absence of a bill of exceptions.—Pinson v. State, 151 S. W. 556.

§ 1090 (Tex.Cr.App.) Unless defendants, in a misdemeanor case, take a bill of exceptions to the admission of evidence, the question of its admissibility cannot be held reversible.—Mackey v. State, 151 S. W. 802.

§ 1090 (Tex.Cr.App.) Where no bills of exceptions are reserved, matters complaining of the admission of certain testimony cannot be considered.—Alexander v. State, 151 S. W. 807.

§ 1090 (Tex.Cr.App.) Grounds of a motion for new trial relating to the admission and exclusion of evidence cannot be reviewed, in the absence of bills of exception.—Stone v. State, 151 S. W. 811.

§ 1090 (Tex.Cr.App.) Where there is neither a statement of facts nor bill of exceptions in the record, assignments in the motion for new trial are not reviewable.—Lodge v. State, 151 S. W. 812.

§ 1090 (Tex.Cr.App.) The denial of an application for a continuance will not be reviewed in the absence of a bill of exceptions, especially where other errors necessitate a new trial at which the attendance of the absent witness may be obtained.—Washington v. State, 151 S. W. 818.

§ 1090 (Tex.Cr.App.) Where there is neither statement of facts nor bills of exceptions no question is raised on appeal.—Gaston v. State, 151 S. W. 1048.

§ 1090 (Tex.Cr.App.) The sufficiency of the evidence to support a conviction cannot be reviewed, where the record contains no statement of facts or bills of exception.—Gerron v. State, 151 S. W. 1048.

Rulings on the admission of evidence cannot be reviewed, where the bills of exception thereto are not contained in the record.—Id.

§ 1090 (Tex.Cr.App.) Questions raised in a motion for new trial cannot be considered, where there is neither statement of facts nor bill of exceptions in the record.—Corbin v. State, 151 S. W. 1051.

§ 1090 (Tex.Cr.App.) Where the record does not contain any bills of exception, failure of the court to charge on a plea of temporary insanity cannot be reviewed.—Featherstone v. State, 151 S. W. 1055.

Nor can the exclusion of evidence be reviewed.—Id.

§ 1090 (Tex.Cr.App.) The refusal of a continuance cannot be reviewed where there is no bill of exceptions to the point.—Ortiz v. State, 151 S. W. 1059.

Error in the admission of evidence cannot be considered where it was not shown by a bill of exceptions.—Id.

§ 1091 (Tex.Cr.App.) On appeal from a conviction of violating the intoxicating liquor laws, bills of exception held insufficient to require consideration.—Woods v. State, 151 S. W. 296.

A bill of exceptions reserved to the reading of an entry in a stub book relating to liquor

license held not to show error because not showing that the entry was introduced in evidence.—Id.

In a prosecution for sales of intoxicating liquor on Sunday, a bill of exceptions complaining of the admission of testimony by a witness that he got a pint of whisky for a sick man, taken by itself, shows no error.—Id.

§ 1091 (Tex.Cr.App.) On appeal from conviction for unlawfully carrying a pistol, a bill of exceptions held not to sufficiently state the status of the case to show that the admission of evidence was erroneous.—McCrary v. State, 151 S. W. 812.

§ 1091 (Tex.Cr.App.) Where the bill of exceptions included evidence, some of which was clearly admissible, and none of which was clearly inadmissible, it was too general for consideration.—Ortiz v. State, 151 S. W. 1066.

The bill of exceptions should be sufficiently full as to disclose the error and prejudice therefrom and to overcome the legal presumption of the correctness of the trial court's rulings.—Id.

§ 1091 (Tex.Cr.App.) Error held not presented by a bill complaining of witnesses' violation of rule where the court qualified the bill by stating that the witnesses were out of sight and hearing of the witness on the stand.—Shaffer v. State, 151 S. W. 1061.

A bill showing the exclusion of questions whether defendant had fights when he was a boy did not show error where it did not state what the witness would have testified.—Id.

A bill complaining of the exclusion of evidence presented no error where it failed to give such a statement of the case or questions as to show that defendant was injured by the exclusion.—Id.

§ 1091 (Tex.Cr.App.) A bill of exceptions complaining of the refusal to require the state to indorse on the indictment the names of its witnesses does not present error where the court states that the indictment contained the indorsement of all the main witnesses.—Byrd v. State, 151 S. W. 1068.

§ 1092 (Mo.App.) Extension of time to file bill of exceptions to the last day of the next term held to give defendant until the last day of the second term thereafter where the first term was not held owing to the absence of the judge.—Grant City v. Simmons, 151 S. W. 187.

§ 1092 (Tex.Cr.App.) The court's approval of a bill of exceptions reciting the objection is not a certificate of the fact on which the objection was based, but merely of the exception.—Woods v. State, 151 S. W. 296.

§ 1092 (Tex.Cr.App.) Where defendant presented his bill of exceptions, which the court refused to sign because not full and correct, and defendant did not have his bills proved by bystanders, they will not be considered.—Kelly v. State, 151 S. W. 304.

§ 1092 (Tex.Cr.App.) Under Code Cr. Proc. 1911, art. 744 (Rev. Civ. St. 1911, art. 2058 et seq.), the judge may prepare a bill of exceptions where the bill presented by accused is incorrect, and, where the bill as prepared by the judge is not questioned, the court on appeal is bound thereby.—Kearse v. State, 151 S. W. 827.

§ 1093 (Tex.Cr.App.) A bill of exceptions stating that certain testimony was "leading, too general, and prejudicial," but which failed to show in what connection the evidence was offered, is too vague to present a question for review.—Black v. State, 151 S. W. 1053.

§ 1097 (Tex.Cr.App.) In the absence of a statement of facts, a question, raised by motion for new trial, that the verdict and judgment were contrary to the law and evidence, cannot be reviewed.—Quentes v. State, 151 S. W. 301.

§ 1097 (Tex.Cr.App.) Where the motion for a new trial raised questions which could only be considered in connection with a statement

of facts, the conviction must be affirmed in its absence.—Serson v. State, 151 S. W. 541.

§ 1097 (Tex.Cr.App.) Questions presented in the motion for new trial are not reviewable, where there is no statement of facts in the record.—Kincaid v. State, 151 S. W. 541.

§ 1097 (Tex.Cr.App.) Where there is no statement of facts in the record, the refusal of a requested charge is not reviewable.—Williams v. State, 151 S. W. 542.

§ 1097 (Tex.Cr.App.) Where the record on appeal from a conviction of murder in the first degree contains no statement of facts, the refusal to submit a lesser degree cannot be reviewed on appeal.—Morgan v. State, 151 S. W. 1048.

§ 1097 (Tex.Cr.App.) Questions attempted to be raised by motion for new trial cannot be considered without a statement of facts.—Chester v. State, 151 S. W. 1051.

§ 1099 (Tex.Cr.App.) Where the testimony relied upon as a ground for a new trial was not filed until after adjournment of the term, such ground could not be reviewed.—Drake v. State, 151 S. W. 315.

§ 1101 (Tex. Cr. App.) Where an appellant was deprived of a statement of facts without his fault, a reversal is warranted.—Lyster v. State, 151 S. W. 302.

§ 1109 (Tex.Cr.App.) An appellant who accepts a bill of exceptions as qualified is bound by its qualification.—Coggins v. State, 151 S. W. 311.

§ 1114 (Tex.Cr.App.) The court on appeal may only look to the authenticated record in considering the case on appeal, or any question raised or presented therein.—Kearse v. State, 151 S. W. 827.

§ 1114 (Tex.Cr.App.) Where the record on appeal does not contain the testimony or bills of exceptions, the questions whether an issue was material and whether accused was entitled to have the jury pass on certain testimony will not be considered.—Giles v. State, 151 S. W. 1043.

§ 1120 (Tex.Cr.App.) The sustaining of objections to questions propounded is not reviewable, where the answers to the questions are not stated in the record and the record does not state what could have been proven.—Bigliben v. State, 151 S. W. 1044.

§ 1120 (Tex.Cr.App.) Where the record on appeal shows questions to a witness, but no answer, it presents no question for review.—Black v. State, 151 S. W. 1053.

§ 1120 (Tex.Cr.App.) Where the record does not contain the evidence, the exclusion of evidence cannot be reviewed.—Featherstone v. State, 151 S. W. 1055.

§ 1120 (Tex.Cr.App.) Bill held not to show question asked of witness to be leading and suggestive where the witness' answer was not given.—Shaffer v. State, 151 S. W. 1061.

§ 1121 (Tex.Cr.App.) Where the record does not contain the evidence, its sufficiency to support a conviction cannot be reviewed.—Featherstone v. State, 151 S. W. 1055.

§ 1122 (Tex.Cr.App.) Where the record does not contain the evidence, the failure of the court to charge on a plea of temporary insanity cannot be reviewed.—Featherstone v. State, 151 S. W. 1055.

(E) Assignment of Errors and Briefs.

§ 1129 (Tex.Cr.App.) An assignment of error, on the ground that "the court erred in its charge to the jury in defining manslaughter" is too general to require attention.—Alexander v. State, 151 S. W. 807.

(F) Dismissal, Hearing, and Rehearing.

§ 1131 (Tex.Cr.App.) Where defendant, after appealing from a conviction and filing the

transcript, escaped, the appeal will be dismissed.—*Tate v. State*, 151 S. W. 541.

§ 1131 (Tex.Cr.App.) An appeal dismissed because of an insufficient recognizance will be reinstated on motion on the filing of a proper recognizance.—*White v. State*, 151 S. W. 826.

§ 1131 (Tex.Cr.App.) The rules of the Court of Criminal Appeals require that a request to withdraw accused's appeal must be signed in person and sworn to by accused.—*Jennings v. State*, 151 S. W. 1050.

(G) Review.

§ 1137 (Ky.) Accused may not complain of evidence brought out on the cross-examination of a state's witness.—*Gamble v. Commonwealth*, 151 S. W. 924.

§ 1144 (Tex.Cr.App.) The court reviewing the denial of a continuance for absence of witnesses will, in the absence of a showing to the contrary, presume that accused was arrested on the day the indictment was found or a day or two thereafter, and, to establish diligence, he must show that he procured process for the witnesses at once, or within a few days.—*Hogue v. State*, 151 S. W. 805.

§ 1144 (Tex.Cr.App.) Where there was no evidence to show the age of accused charged with aggravated assault on a female, it cannot be presumed that he was over the age of 21 years.—*White v. State*, 151 S. W. 826.

§ 1159 (Mo.) While it is the province of the jury to weigh the testimony and determine the facts, when the question of the sufficiency of the evidence is properly presented, an appellate court must determine it.—*State v. Donnington*, 151 S. W. 975.

§ 1159 (Tex.Cr.App.) The jury are the exclusive judges of the facts proved, and of the weight of the testimony, and the court on appeal may only determine whether there is sufficient evidence, if believed, to sustain the verdict.—*Kearse v. State*, 151 S. W. 827.

§ 1159 (Tex.Cr.App.) Where the testimony is unsatisfactory, yet, if true, would with the facts support the verdict, it will not be disturbed.—*Black v. State*, 151 S. W. 1053.

§ 1159 (Tex.Cr.App.) The jury are the exclusive judges of the credibility of the witnesses and the weight of their testimony, and the court on appeal will consider only whether the evidence is sufficient as a matter of law, if believed, to sustain a conviction.—*Hogue v. State*, 151 S. W. 805.

§ 1165 (Tex.Cr.App.) An erroneous ruling which actually or probably led to a higher punishment than the minimum is reversible error.—*Washington v. State*, 151 S. W. 818.

§ 1166½ (Tex.Cr.App.) Denial of an objection to jurors summoned in a prosecution for perjury, because they had heard remarks by a court concerning perjury and sentencing a person previously convicted of a different crime, held not error in the absence of prejudice shown.—*Craig v. State*, 151 S. W. 804.

§ 1166½ (Tex.Cr.App.) Where accused did not exhaust his peremptory challenges, he was not prejudiced by the overruling of challenges to certain jurors for cause, none of whom served as jurors.—*Walker v. State*, 151 S. W. 822.

§ 1166½ (Tex.Cr.App.) The refusal to sustain the trial to prepare, sign and approve a bill of exceptions is not reversible error, where the party complaining is subsequently given a bill in full.—*Kearse v. State*, 151 S. W. 827.

§ 1166½ (Tex.Cr.App.) Where no objection was made by a juror served in the case, accused could not complain of rulings on challenges to jurors.—*Byrd v. State*, 151 S. W. 1068.

§ 1168 (Tex.Cr.App.) Where a witness who was improperly permitted to testify was unable to answer the question propounded, the error was harmless.—*Woods v. State*, 151 S. W. 296.

§ 1169 (Mo.) In a prosecution for false pretenses, a prosecutor's reference to and evidence of another fraudulent transaction involving defendant held prejudicial, though the court afterward withdrew such testimony.—*State v. Lovan*, 151 S. W. 141.

§ 1169 (Tex.Cr.App.) In a prosecution for illegal sales of intoxicating liquors, where accused's own witness stated that he owned the saloon, the improper allowance of evidence showing that he was engaged in the saloon business was harmless.—*Woods v. State*, 151 S. W. 296.

§ 1169 (Tex.Cr.App.) In a prosecution for burglary, error, if any, in permitting evidence that defendant was 20 years of age, and that his companion was only 18, was harmless, where the jury assessed the minimum punishment.—*Whorton v. State*, 151 S. W. 300.

§ 1169 (Tex.Cr.App.) Error in permitting a witness to testify to defendant's habits, held harmless, where the jury fixed the minimum punishment.—*Davis v. State*, 151 S. W. 313.

§ 1169 (Tex.Cr.App.) Admission, in trial for bribing a witness to leave, of details of crimes to which the witness could testify but with which it was not claimed defendant had any connection, held prejudicial.—*Harrison v. State*, 151 S. W. 552.

§ 1169 (Tex.Cr.App.) The error, if any, in permitting the state on a trial for statutory rape to prove that the mother of prosecutrix was dead at the time of the alleged offense, held not prejudicial, in the absence of any improper use of the testimony.—*Kearse v. State*, 151 S. W. 827.

§ 1169 (Tex.Cr.App.) The age of a state's witness is immaterial, and the mere fact that a witness is permitted to state his age presents no error.—*Byrd v. State*, 151 S. W. 1068.

§ 1170 (Tex.Cr.App.) Error in excluding on a trial for statutory rape evidence of the bad reputation of prosecutrix for virtue and chastity is harmless, where it is conceded that she was a lewd woman at the time of the alleged offense.—*Kearse v. State*, 151 S. W. 827.

§ 1170 (Tex.Cr.App.) It was not error to sustain objection to question as to defendant's general character, conduct, and acts during his lifetime, where the same witness had testified that his reputation as a peaceable, quiet, and law-abiding citizen was good.—*Shaffer v. State*, 151 S. W. 1061.

Where the defense was insanity, it was not reversible error to refuse to permit a witness who had testified to defendant's appearance after the offense to state whether he looked like an insane man.—*Id.*

§ 1170½ (Tex.Cr.App.) A bill of exceptions complaining of the allowance of a question whether the witness remembered when the grand jury was summoned and how long before this it was that accused's saloon was open shows no error, where it appears that his answer was in the negative.—*Woods v. State*, 151 S. W. 296.

§ 1172 (Mo.) Erroneous submission of issue held prejudicial, where evidence to support another issue made it probable that the conviction was on the first issue.—*State v. Stapp*, 151 S. W. 971.

§ 1172 (Tex.Cr.App.) On a trial for carrying a concealed weapon, the error in a charge held not prejudicial, in view of the evidence and other instructions, where no other verdict than that of guilty could have been rendered.—*Carpenter v. State*, 151 S. W. 539.

§ 1172 (Tex.Cr.App.) Instruction on a prosecution for unlawfully carrying a pistol did not

prejudice accused, though the court used the word "have," instead of "carry."—*McCrary v. State*, 151 S. W. 812.

§ 1172 (Tex. Cr. App.) An erroneous charge which actually or probably led to a higher punishment than the minimum is reversible error.—*Washington v. State*, 151 S. W. 818.

§ 1172 (Tex. Cr. App.) An instruction erroneously permitting the jury to consider the testimony of a witness before the grand jury to impeach a witness for the state impeached by such character of testimony was in accused's favor, and he could not complain thereof.—*Kearse v. State*, 151 S. W. 827.

§ 1173 (Ky.) Under Cr. Code Prac. § 239, which provides that if there be a reasonable doubt of the degree of the offense committed defendant shall only be convicted of the lower degree, the failure to so instruct, when the evidence is calculated to raise such a reasonable doubt, is reversible error.—*Breeden v. Commonwealth*, 151 S. W. 407.

§ 1173 (Ky.) Accused, convicted of assault on a female under the age of 14 years and sentenced to the penitentiary from 10 to 20 years, held not entitled to complain of the refusal of an instruction submitting a lesser offense, and authorizing on his conviction thereof a penitentiary sentence.—*Gamble v. Commonwealth*, 151 S. W. 924.

§ 1173 (Tex. Cr. App.) Failure to charge on an issue raised by the testimony introduced by the state held harmless, where the entire evidence showed the guilt of accused.—*Coggins v. State*, 151 S. W. 311.

CROSS-EXAMINATION.

See Witnesses, §§ 277, 344, 392, 406.

CROSSINGS.

See Railroads, §§ 312-350.

CURTSEY.

See Adverse Possession, § 62.

§ 1 (Mo.) Rev. St. 1909, § 350, gives the husband an estate in the nature of dower, and does not make him his wife's "heir."—*Waddle v. Frazier*, 151 S. W. 87.

CUSTODIA LEGIS.

See Garnishment, § 58.

CUSTODY.

See Divorce, §§ 300, 303.

CUSTOMS AND USAGES.

See Intoxicating Liquors, § 235; Master and Servant, § 278.

DAMAGES.

See Animals, § 51; Appeal and Error, §§ 216, 266; Assault and Battery, §§ 34, 38-40, 42; Carriers, §§ 229, 319, 382; Death, §§ 93, 99; Dower, § 105; Eminent Domain, §§ 124, 134; Evidence, § 113; False Imprisonment, § 36; Injunction, § 187; Insurance, § 602; Landlord and Tenant, § 274; Mines and Minerals, § 51; New Trial, § 162; Railroads, § 349; Sales, § 418; Sheriffs and Constables, § 139; Telegraphs and Telephones, §§ 70, 71; Venue, § 5.

II. NOMINAL DAMAGES.

§ 9 (Mo. App.) The breach of a contract gives an absolute right to at least nominal damages; and hence an instruction that, unless defendant's breach caused plaintiff substantial damage, the jury should find for defendant, was erroneous.—*Tracy v. Buchanan*, 151 S. W. 747.

III. GROUNDS AND SUBJECTS OF COMPENSATORY DAMAGES.

(A) Direct or Remote, Contingent, or Prospective Consequences or Losses.

§ 40 (Ark.) A party agreeing to perform work for another and prevented from so doing by the other may recover the profits which he reasonably would have made if permitted to carry out the contract.—*Alf Bennett Lumber Co. v. Walnut Lake Cypress Co.*, 151 S. W. 275.

(B) Aggravation, Mitigation, and Reduction of Loss.

§ 62 (Mo. App.) In an action for breach of a contract to float logs, where the defendant misled the plaintiff as to his intention to perform, telling him that the water was not yet high enough, until the logs rotted, plaintiff's damages cannot be diminished for his failure to float the logs himself.—*Cronan v. Stutsman*, 151 S. W. 166.

§ 62 (Tex. Civ. App.) The owner through whose land a railroad company maintains tracks need not minimize the damages caused by trespassing animals by fixing cattle guards and the company's right of way fence.—*St. Louis Southwestern Ry. Co. of Texas v. Lee*, 151 S. W. 331.

IV. LIQUIDATED DAMAGES AND PENALTIES.

§ 80 (Mo. App.) Provision in a one-year employment contract for personal services, that the employé should forfeit \$250 for breach of same, held a provision for liquidated damages, and not for a penalty.—*Myers-Goldberg Neckwear Co. v. Grossman*, 151 S. W. 163.

VI. MEASURE OF DAMAGES.

(B) Injuries to Property.

§ 105 (Ky.) The fair "market price" of an article is the usual standard for measuring its value; it being worth what it may be reasonably sold for.—*Burke Hollow Coal Co. v. Lawson*, 151 S. W. 657.

(C) Breach of Contract.

§ 123 (Ark.) Where work has been done substantially in compliance with the contract, or where there has been an acceptance of the work by the contractee, a contractor may, notwithstanding defects therein, recover the contract price, less the cost of correcting such defects.—*Thomas v. Jackson*, 151 S. W. 521.

VII. INADEQUATE AND EXCESSIVE DAMAGES.

§ 132 (Ark.) A verdict of \$1,500 for injury to the ankle of a log scaler was not excessive: he having been confined to his room a month, and at the trial, four months later, testifying his ankle was still stiff, and that he suffered great pains; and there being evidence that the injury was permanent.—*Oak Leaf Mill Co. v. Littleton*, 151 S. W. 262.

§ 132 (Ark.) Verdict for \$25,000 for injury to fireman, necessitating amputation of one leg and resulting in a broken shoulder and permanently incapacitating him for his vocation, held not excessive.—*St. Louis, I. M. & S. R. Co. v. Brogan*, 151 S. W. 699.

§ 132 (Ky.) A verdict for \$5,500 for injuries to a man's head, hand, and leg held not excessive.—*Chesapeake & O. Ry. Co. v. Meyers*, 151 S. W. 19.

§ 132 (Ky.) Verdict of \$5,000 for personal injuries held not so excessive as to show passion or prejudice.—*Louisville & N. R. Co. v. Goodwin*, 151 S. W. 376.

§ 132 (Ky.) Where a female passenger was injured by the jar in the sudden stopping of a train, an award of \$7,500 is excessive; it appearing that her present condition might be caused by previous derangements.—*Chicago, St. L. & N. O. R. Co. v. Rowell*, 151 S. W. 950.

§ 132 (Tex.Civ.App.) Ten thousand dollars is not excessive recovery for the crushing of a foot of a child five years and eight months old, which necessitated amputation about halfway between the foot and the knee.—*Ft. Worth & D. C. Ry. Co. v. Wininger*, 151 S. W. 586.

§ 132 (Tex.Civ.App.) In an action for injuries resulting in the loss of plaintiff's left hand, a verdict allowing him \$8,000 held not excessive.—*Continental Oil & Cotton Co. v. Gilliam*, 151 S. W. 890.

§ 132 (Tex.Civ.App.) Seven thousand five hundred dollars is not excessive recovery for injuries to a logging employé in derailment of a logging train, where he became insane as a result.—*Knox v. Robbins*, 151 S. W. 1134.

VIII. PLEADING, EVIDENCE, AND ASSESSMENT.

(A) Pleading.

§ 158 (Mo.App.) A petition in an action for personal injuries held to charge internal injury other than to the nervous system, so that proof thereof is admissible.—*Haywood v. Kuhn*, 151 S. W. 204.

§ 159 (Tex.Civ.App.) A prayer for damages for the operation of a slaughterhouse, etc., for two years next preceding the filing of the petition would not warrant a recovery of damages to the time of trial.—*Nations v. Harris*, 151 S. W. 334.

(B) Evidence.

§ 163 (Ark.) The party suing to recover profits lost through defendant's breach of a contract has the burden of proving the amount of its damages therefrom.—*Alf Bennett Lumber Co. v. Walnut Lake Cypress Co.*, 151 S. W. 275.

§ 163 (Mo.App.) One who proves damage, but does not give any evidence to prove the amount thereof, can recover only nominal damages.—*Cronan v. Stutsman*, 151 S. W. 166.

§ 181 (Ky.) Defendant could be examined as to his financial condition, where, under the pleadings, punitive damages might be given, even though the court instructed that no punitive damages were authorized.—*Shields' Adm'rs v. Rowland*, 151 S. W. 408.

§ 187 (Ark.) Where there was evidence of plaintiff's age, good health, and occupation, the jury could estimate his life expectancy, though no mortuary tables were in evidence.—*St. Louis, I. M. & S. R. Co. v. Brogan*, 151 S. W. 699.

§ 189 (Mo.App.) In an action for breach of a contract to float logs, evidence held to warrant a finding that plaintiff had no notice of defendant's abandonment of the contract, so that he was not called upon to perform to lighten the damages.—*Cronan v. Stutsman*, 151 S. W. 166.

(C) Proceedings for Assessment.

§ 210 (Ark.) An instruction authorizing the jury to find such sum as "in your opinion and judgment will compensate him," is erroneous in not limiting their judgment and opinion to the evidence.—*St. Louis, I. M. & S. Ry. Co. v. Steed*, 151 S. W. 257.

§ 216 (Ark.) Instruction that the jury, in arriving at plaintiff's damages, could consider his expense, held not erroneous, where the evidence definitely limited such expense to a certain sum.—*St. Louis, I. M. & S. R. Co. v. Brogan*, 151 S. W. 699.

§ 216 (Mo.App.) An instruction, in an action for personal injuries, held to correctly define the measure of damages.—*Haywood v. Kuhn*, 151 S. W. 204.

§ 216 (Mo.App.) An instruction, in an action for personal injuries, on the measure of damages is not erroneous because it states the maximum damages the jury may assess if find-

ing a verdict for plaintiff.—*Madden v. Missouri Pac. Ry. Co.*, 151 S. W. 489.

§ 216 (Tex.Civ.App.) In an action for the loss of a foot a charge on loss of earning capacity held proper where the child injured was sound, healthy, and well developed, though there was no specific evidence thereon.—*Ft. Worth & D. C. Ry. Co. v. Wininger*, 151 S. W. 586.

In an action for injuries to a child, necessitating the amputating of her foot, received while crossing railway tracks, an instruction on an issue of physical and mental suffering held warranted.—*Id.*

§ 216 (Tex.Civ.App.) In an action for injuries to a servant, an instruction on the measure of damages held not erroneous as authorizing the jury to calculate the amount plaintiff would lose annually for life, and to allow him in such sum.—*Continental Oil & Cotton Co. v. Gilliam*, 151 S. W. 890.

§ 216 (Tex.Civ.App.) In a personal injury action, an instruction held not erroneous as authorizing double damages.—*Knox v. Robbins*, 151 S. W. 1134.

(D) Computation and Amount, Double and Treble Damages, and Remission.

§ 228 (Ky.) In an action for damages for personal injuries, the court on motion of plaintiff held authorized to remit an item of damages awarded.—*Chesapeake & O. Ry. Co. v. Meyers*, 151 S. W. 19.

§ 228 (Tex.Civ.App.) Errors in instructions as to damages are cured by a remittitur of the entire amount of damages.—*Nations v. Harris*, 151 S. W. 334.

DEATH.

See Abatement and Revival, § 69; Appeal and Error, § 1109; Evidence, § 314; Executors and Administrators, § 87; Landlord and Tenant, § 79; Master and Servant, §§ 278, 279, 286, 291, 295; Municipal Corporations, §§ 803, 816; Negligence, § 122; Pleading, § 433; Railroads, § 398; Trial, § 252.

I. EVIDENCE OF DEATH AND OF SURVIVORSHIP.

§ 4 (Tex.Civ.App.) In an action to recover land which plaintiff claimed by devise, where there was testimony that the witness knew the testator in 1862 and understood that he died during the war, such being the report, the word "war" must be understood as the war between the states, and "report" as meaning common rumor.—*McDoel v. Jordan*, 151 S. W. 1178.

II. ACTIONS FOR CAUSING DEATH.

(A) Right of Action and Defenses.

§ 14 (Mo.App.) The cause of action accruing to the wife for the husband's death while in defendant's employment must be grounded on defendant's negligence in performing or omitting some duty it owed to decedent.—*Goode v. Central Coal & Coke Co.*, 151 S. W. 508.

§ 14 (Tex.Civ.App.) An action against an employer for the death of an employé, caused by the negligence of a coemployé, not occupying the position of a vice principal, is not maintainable under *Sayles' Ann. Civ. St.* 1897, art. 3017, subd. 2, authorizing an action for death caused by the negligence of another.—*Bledsoe v. Thompson Bros. Lumber Co.*, 151 S. W. 910.

§ 31 (Ky.) Under Const. § 241, vesting an action for death in the personal representative, the distributees have no authority to contract with an attorney in relation thereto.—*Slusher v. Weller*, 151 S. W. 684.

§ 31 (Tex.Civ.App.) Where plaintiff's father rendered pecuniary assistance to plaintiff's family, and it is reasonably probable that he would have continued to do so, plaintiff may

recover for his father's wrongful death.—*Freeman v. Morales*, 151 S. W. 644.

(B) Jurisdiction, Venue, and Limitations.

§ 35 (Mo.App.) No action for wrongful death occurring in a foreign state can be maintained in the domestic forum, unless the action is allowed by the laws of the foreign state.—*Shelton v. Metropolitan St. Ry. Co.*, 151 S. W. 493.

(D) Pleading and Evidence.

§ 52 (Tex.Civ.App.) An allegation that decedent would have continued to render pecuniary aid to plaintiff was not objectionable as alleging remote, argumentative, and speculative damages.—*Freeman v. Morales*, 151 S. W. 644.

Where the petition, after alleging that plaintiff's decedent earned a certain amount, of which plaintiff received a large part, also alleged that plaintiff was damaged in a certain total sum, an objection to the former allegation as too uncertain was properly overruled.—*Id.*

§ 72 (Ark.) In an action for negligent death of an infant, brought for the benefit of his parents, evidence of the father's deafness and inability to obtain work was admissible, to show why the father was unemployed and needed his son's assistance.—*St. Louis, I. M. & S. Ry. Co. v. Jacks*, 151 S. W. 706.

§ 76 (Ky.) Evidence held not to show that polluted water from defendant's distillery caused intestate's death.—*Thomas' Adm'r v. Eminence Distilling Co.*, 151 S. W. 47.

It must appear, beyond a mere possibility or a bare probability, that the alleged negligence caused decedent's death in order to recover.—*Id.*

(E) Damages, Forfeiture, or Fine.

§ 93 (Mo.App.) Rev. St. 1909, § 5427, authorizing a consideration of mitigating or aggravating circumstances in awarding damages in death actions, does not authorize the award of punitive damages, unless there is wantonness or recklessness.—*Goode v. Central Coal & Coke Co.*, 151 S. W. 508.

§ 99 (Ark.) A verdict for \$5,000 for the death of a boy 16 years old held not excessive.—*St. Louis, I. M. & S. Ry. Co. v. Jacks*, 151 S. W. 706.

§ 99 (Mo.) An award of \$10,000 damages held not excessive for death of a section hand earning \$1.25 a day, in absence of showing by defendant that such earning capacity would not have increased.—*Ilonea v. St. Louis, I. M. & S. Ry. Co.*, 151 S. W. 119.

(F) Trial, Judgment, and Review.

§ 103 (Tex.Civ.App.) The question whether pecuniary aid rendered by plaintiff's deceased father to plaintiff's family was primarily in aid of plaintiff, or as a gift to his family, was for the jury.—*Freeman v. Morales*, 151 S. W. 644.

DECLARATIONS.

See Criminal Law, §§ 413, 422; Evidence, §§ 43, 210, 268, 271.

DEDICATION.

See Deeds, § 96.

DEEDS.

See Acknowledgment, §§ 38, 58; Adverse Possession, § 80; Appeal and Error, § 842; Cancellation of Instruments, §§ 24, 56; Corporations, § 444; Easements, § 3; Escrows; Estoppel, §§ 22-39, 59; Evidence, §§ 121, 230, 263, 417, 461; Fraudulent Conveyances, §§ 25, 154; Logs and Logging, § 3; Mortgages; Reformation of Instruments; Trespass to Try Title, §§ 6, 40; Trusts, § 94; Vendor and Purchaser, § 231; Wills, § 88.

I. REQUISITES AND VALIDITY.

(D) Delivery.

§ 56 (Tex.) The question of delivery depends on the intention of the grantor; and an actual delivery by him in person is not essential.—*Henry v. Phillips*, 151 S. W. 533.

Where the intention to deliver is clear, title passes to the grantee, though the grantor retains control of the deed during his lifetime.—*Id.*

§ 61 (Tex.) A grantor who executed a deed to his stepdaughters, whom he regarded as his own children, and who delivered it to the cashier of a bank for safe-keeping, with instructions to deliver to the grantees after his death, delivered the deed in escrow, and title passed to the grantees.—*Henry v. Phillips*, 151 S. W. 533.

§ 66 (Tex.) What constitutes a delivery essential to pass title is one of law, but whether there has been in fact a delivery is for the jury.—*Henry v. Phillips*, 151 S. W. 533.

(E) Validity.

§ 70 (Ky.) The rule that a voluntary conveyance made between parties standing in a confidential relation will be set aside extends to cases where the consideration is so grossly inadequate as to indicate fraud.—*Shacklette v. Goodall*, 151 S. W. 23.

§ 70 (Tex.Civ.App.) The rule that the failure of a grantee to perform his promises, in consideration of which a deed was executed, is not fraud justifying cancellation of the deed does not apply where the promises are made to defraud, and without any intent at the time of performing them.—*Chambers v. Wyatt*, 151 S. W. 864.

III. CONSTRUCTION AND OPERATION.

(A) General Rules of Construction.

§ 95 (Tex.Civ.App.) A deed which is not attacked for fraud, accident, or mistake should be construed according to its terms.—*Morris v. Short*, 151 S. W. 633.

§ 96 (Tex.Civ.App.) All citizens in a town were privies to a deed dedicating a section as the site of a town for use as streets, etc., whether the deed was formally accepted or not, so that recitals that a town had been built on the section were admissible in a suit by its citizens to retain the county seat at such place, especially where they themselves put the deed in evidence without limitations.—*Ralls v. Parish*, 151 S. W. 1080.

A recital in a deed as to its consideration is prima facie evidence on the question.—*Id.*

(B) Property Conveyed.

§ 114 (Ky.) A deed giving boundaries, which excluded 20 acres of a farm, having concluded said "boundary being known as the N. farm, except one-fourth acre, it being a graveyard with the right to go to and from the same," will be held to include the 20 acres, excepting the quarter acre, which was within the same.—*Howard v. Cornett*, 151 S. W. 370.

§ 114 (Tex.Civ.App.) A description in a deed as 1,000 acres undivided and part of a larger tract held sufficient to convey the quantity mentioned in whatever portion of the larger tract belonged to the grantor.—*Morris v. Short*, 151 S. W. 633.

(C) Estates and Interests Created.

§ 120 (Mo.) Evidence held to support a finding that the grantee in a warranty deed conveying the entire legal title acquired the entire beneficial interest, though the grantor had only a one-third beneficial interest.—*Daman v. Remme*, 151 S. W. 429.

§ 120 (Tex.Civ.App.) A deed absolute on its face cannot be construed as a contract for a

contingent interest in the land, in the absence of evidence of a contract different from that imported by the terms of the deed.—*Morris v. Short*, 151 S. W. 633.

§ 125 (Ky.) Grantees under a deed subject to a life estate, and providing that, on the death of either without bodily heirs, her share should become the absolute property of the survivor, *held* to take a fee subject to defeasance upon their death within the lifetime of the grantor, but that on surviving the grantor the defeasible estate ripened into a fee simple.—*Violet v. Purdy*, 151 S. W. 920; *Marple v. Banister*, Id. 921.

(E) Conditions and Restrictions.

§ 165 (Tex. Civ. App.) Where a deed is absolute on its face, agreements by the grantee to support the grantor for life and pay her a specified sum are covenants only, and a failure to perform them will not alone authorize the cancellation of the deed.—*Chambers v. Wyatt*, 151 S. W. 864.

IV. PLEADING AND EVIDENCE.

§ 196 (Ky.) The mere fact that a grantor was 75 years old when executing deeds to collateral heirs does not raise a presumption of incapacity or undue influence.—*Shacklette v. Goodall*, 151 S. W. 23.

A conveyance in trust to the grantor's nephew, reciting a money consideration, but in fact given as a reward for services of greater value than the land conveyed, where a confidential relation does not exist, the burden of proving fraud is on the heirs of the grantor seeking to set aside the deed.—*Id.*

§ 196 (Mo.) Deeds by a grantor, 93 years old, of all his property to a son with whom he was living, for a nominal consideration, created a presumption of undue influence which the son must overcome.—*Kincer v. Kincer*, 151 S. W. 424.

§ 203 (Tex.) In a suit by the executor to set aside a deed executed by testatrix to her daughter-in-law on the ground of fraud and undue influence, evidence that defendant's attorney had offered to give an heir his share if he would have nothing to do with the case was inadmissible.—*Rankin v. Rankin*, 151 S. W. 527.

Evidence that her son, grantee's wife did not object to the placing of the land in the inventory of her estate was not error, as it might be pertinent in a chain of circumstantial evidence.—*Id.*

Where a son procured his mother to make a deed of her land to his wife that he might have the control over it as his own, all evidence which would be admissible if the deed had been made to the son was admissible in a suit by the mother's executrix to set aside the deed.—*Id.*

§ 203 (Tex.) In an action to set aside deeds executed by a married woman, the certificate of the notary to her acknowledgment is not competent as testimony to show that she knew what land was covered by the deed.—*Oar v. Davis*, 151 S. W. 794.

§ 211 (Mo.) Where the grantor in a warranty deed delayed more than 20 years before claiming that the deed was secured through fraud, his testimony alone was insufficient to establish such fraud.—*Marshall v. Hill*, 151 S. W. 131.

§ 211 (Mo.) Evidence *held* to require a finding that deeds executed by a father to his son were the result of undue influence and invalid.—*Kincer v. Kincer*, 151 S. W. 424.

DEFAULT.

See Judgment, §§ 106-163, 419, 568.

DEFEASIBLE FEE.

See Deeds, § 125; Waste, § 5; Wills, § 602.

DEFECTS.

See Landlord and Tenant, §§ 164-169.

DELAY.

See Equity, §§ 69, 71, 346; Telegraphs and Telephones, § 66.

DELIVERY.

See Carriers, § 40; Deeds, §§ 61, 66; Escrows; Gifts, §§ 18, 21, 47, 49; Telegraphs and Telephones, § 37.

DEMAND.

See Bills and Notes, § 396; Jury, § 25.

DEMONSTRATIVE EVIDENCE.

See Evidence, § 199.

DEMURRER.

See Pleading, §§ 205-218.

To evidence, see Trial, §§ 155, 156.

DEPOSIT.

See Deeds, § 61.

DEPOSITARIES.

See Injunction, § 241.

DEPOSITIONS.

See Continuance, § 26; Evidence, § 210; Witnesses, § 311.

DEPOSITS.

See Banks and Banking, §§ 84, 85, 126-154.

DEPOTS.

See Carriers, § 305.

DESCENT AND DISTRIBUTION.

See Adverse Possession, §§ 62, 85; Appearance, § 9; Dower; Executors and Administrators; Wills.

I. NATURE AND COURSE IN GENERAL.

§ 9 (Ky.) Under the statute, and independent thereof, the proceeds on the sale of real estate of a lunatic, pursuant to order of court, to satisfy mortgages in which the wife joined are real estate, and on his death the wife is entitled only to dower in the surplus, and not to one-half absolutely.—*McClain v. McClain*, 151 S. W. 926.

DESCRIPTION.

See Boundaries, §§ 3-21.

DESERTION.

See Divorce, §§ 37, 133.

DILIGENCE.

See Continuance, § 26; Judgment, § 138.

DIRECTING VERDICT.

See Trial, §§ 139, 176-178.

DISBARMENT.

See Attorney and Client, §§ 45, 57.

DISCHARGE.

See Guaranty, §§ 54, 67; Principal and Surety, § 112.

DISCOVERED PERIL.

See Evidence, § 80.

DISCRETION OF COURT.

See Appeal and Error, §§ 359, 807, 920, 977, 978; Continuance, §§ 7, 51; Criminal Law, §§ 635, 717; Husband and Wife, § 298½; Injunction, § 172; Judgment, § 139; Pleading, § 236; New Trial, § 6; Trial, §§ 41, 62, 349.

DISMISSAL AND NONSUIT.

See Abatement and Revival, § 69; Appeal and Error, §§ 635, 639, 773, 777, 781, 807; Attorney and Client, § 101; Bail, § 57; Criminal Law, § 1131; Justices of the Peace, § 106; Venue, § 41.

I. VOLUNTARY.

§ 19 (Tex.Civ.App.) Under Rev. Civ. St. 1911, art. 1955, the court erred in dismissing an action for the price of land after defendant filed a plea in reconvention for the cancellation of the contract for fraud, and for damages, to the prejudice of defendant to be heard on the plea in reconvention.—*Leverette v. Rice*, 151 S. W. 594.

DISORDERLY HOUSE.

See Injunction, § 219; Nuisance, §§ 60, 75.

§ 2 (Tenn.) The keeping of a disorderly house is a nuisance, both at common law and under the statute, and the offense is a misdemeanor, for which the ordinary remedy is by criminal proceedings.—*Weldner v. Friedman*, 151 S. W. 56.

Renting or conducting or being an inmate of a disorderly house is a criminal offense.—Id.

§ 17 (Tex.Cr.App.) Evidence held to support a conviction for keeping a disorderly house.—*Hogue v. State*, 151 S. W. 806.

DISSOLUTION.

See Corporations, §§ 596, 628; Injunction, § 187; Railroads, § 32.

DISTRESS.

See Landlord and Tenant, § 274.

DISTRICT AND PROSECUTING ATTORNEYS.

See Criminal Law, §§ 721½-730.

DISTRICTS.

See Drains, § 14.

DIVORCE.

See Appeal and Error, § 781; Evidence, §§ 159, 586; Witnesses, § 277.

II. GROUNDS.

§ 37 (Mo.App.) Where a husband wrongfully abandoned his wife, she is not guilty of desertion in living apart from him unless he makes a bona fide effort to effect a reconciliation and she refuses and continues to live apart for the statutory period.—*Creasey v. Creasey*, 151 S. W. 219.

Where a husband abandoned his wife, insincere efforts to return and effect a reconciliation do not militate against a subsequent bona fide effort so as to render her acts a desertion.—Id.

Where a wife offers to return to her husband, who had abandoned her, but who had made numerous efforts to effect a reconciliation, held, that he was entitled to require that she promise to dismiss her action for separate maintenance without losing the benefit of his offers.—Id.

Offers of a deserted wife in her motions for attorney's fees in her action for separate maintenance, to resume marital relations, are not

such bona fide offers as to render the husband guilty of desertion.—Id.

Abandonment by the husband does not constitute desertion, if, within one year thereafter, the wife acquiesced in the separation.—Id.

Where a deserted wife refused to return to the husband for more than a year, although he in good faith requested her return, the separation does not entitle her to a divorce.—Id.

III. DEFENSES.

§ 55 (Mo.App.) Rev. St. 1909, §§ 2370, 2372, allowing a divorce to the "injured party," are given the same construction as Rev. St. 1845, c. 53, allowing the "innocent and injured party" a divorce; and where both parties are in fault the court will not attempt to find which is the most in fault, but will award neither the relief sought.—*Barth v. Barth*, 151 S. W. 769.

IV. JURISDICTION, PROCEEDINGS, AND RELIEF.

(A) Jurisdiction, Venue, and Limitations.

§ 62 (Mo.App.) Under Rev. St. 1909, §§ 2371, 2373, the court has no jurisdiction of a suit for divorce by a nonresident husband for his wife's adultery committed in the state while she resided therein.—*McConnell v. McConnell*, 151 S. W. 175.

(D) Evidence.

§ 130 (Mo.App.) In an action by a husband for divorce on the ground of indignities rendering his condition intolerable, evidence held to show that he was not an "injured party," within Rev. St. 1909, §§ 2370, 2372, having himself been guilty of improper conduct.—*Barth v. Barth*, 151 S. W. 769.

§ 133 (Mo.App.) Evidence held to show that a husband's first efforts at reconciliation were not in good faith, but that subsequent efforts and attempts were in good faith.—*Creasey v. Creasey*, 151 S. W. 219.

Evidence held to establish that a wife consented to her husband's living apart.—Id.

(G) Appeal.

§ 184 (Mo.App.) The Supreme Court in divorce cases will review the evidence and come to its own conclusion as to the facts, to see that a union was not dissolved on slight testimony or for trivial cause.—*Barth v. Barth*, 151 S. W. 769.

(H) Fees and Costs.

§ 194 (Ky.) Where a wife, appealing from the judgment in her action for divorce, has no means of her own, the costs of the appeal, upon dismissal after the husband's death, must be paid out of his estate.—*Barger v. Barger*, 151 S. W. 406.

V. ALIMONY, ALLOWANCES, AND DISPOSITION OF PROPERTY.

§ 245 (Mo.App.) Under Rev. St. 1909, § 2351, the court granting a divorce retains jurisdiction as to the modification of the judgment touching the maintenance of the wife.—*Wald v. Wald*, 151 S. W. 786.

VI. CUSTODY AND SUPPORT OF CHILDREN.

§ 300 (Mo.App.) Where the custody of a child is awarded, the child becomes a ward of the court, and it should not permit its removal into another jurisdiction, unless its best interests require it.—*Wald v. Wald*, 151 S. W. 786.

§ 303 (Mo.App.) Under Rev. St. 1909, § 2351, the court granting a divorce retains jurisdiction as to the modification of the judgment touching the custody of the child.—*Wald v. Wald*, 151 S. W. 786.

Where a wife, obtaining a divorce and the custody of the child, is about to remove it from the jurisdiction of the court, the husband is entitled to a hearing to determine whether the

best interests of the child require its retention within the jurisdiction of the court.—Id.

DOCUMENTARY EVIDENCE.

See Criminal Law, §§ 439-447.

DOCUMENTS.

See Evidence, §§ 78, 366.

DORMANT JUDGMENTS.

See Judgment, § 853.

DOWER.

See Adverse Possession, § 62; Appeal and Error, §§ 77, 198, 266, 274; Curtesy; Descent and Distribution, § 9; Partition, § 12; Wills, § 782.

I. NATURE AND REQUISITES.

§ 6 (Mo.) A marriage contract, invalid for want of sufficient consideration, could not entitle the widow to any interest in the property of her deceased husband.—*Moran v. Stewart*, 151 S. W. 439.

§ 13 (Ky.) A widow is entitled to dower in land in which her husband owns a defeasible fee.—*Landers v. Landers*, 151 S. W. 386.

III. RIGHTS AND REMEDIES OF WIDOW.

§ 81 (Mo.) Where defendant owned the remainder in two tracts of land subject to the widow's quarantine, dower, and homestead rights, the court properly ordered her dower assigned in both tracts at the same time to avoid multiplicity of suits.—*Moran v. Stewart*, 151 S. W. 439.

§ 82 (Mo.) The court need not, in a widow's action for dower, give written directions to the valuation commissioners.—*Moran v. Stewart*, 151 S. W. 439.

§ 99 (Mo.) Since Rev. St. 1909, §§ 374, 6713, do not require written exceptions to the report of commissioners appointed to assign dower, the court may, when written objections are filed, determine the correctness of the report on grounds not mentioned in such objections.—*Moran v. Stewart*, 151 S. W. 439.

That the court made a preliminary finding that plaintiff was entitled to dower in certain land did not show that the court's approval of the report of the commissioners, by which she was given no part in such land, was erroneous.—Id.

§ 105 (Mo.) Under Rev. St. 1909, § 389, defining the widow's right to dower, a judgment for damages must be against the interest of the party at fault, and a widow was not entitled to damages against a defendant who had not deprived her of possession of the land set off to her as dower.—*Moran v. Stewart*, 151 S. W. 439.

DRAINS.

See Arbitration and Award, § 27; Constitutional Law, § 290.

I. ESTABLISHMENT AND MAINTENANCE.

§ 14 (Mo.) The legality of the organization of a drainage district cannot be collaterally attacked in an action to collect drainage taxes.—*State ex rel. Coleman v. Blair*, 151 S. W. 148.

Rev. St. 1909, § 5587, requiring notice of application to incorporate a drainage district to be published in four issues of a weekly paper, the last insertion to be before the day set for hearing, does not require the last publication to be on the last day before the day set for hearing.—Id.

§ 14 (Mo.App.) Where it was sought to defeat payment of drainage assessments, on the ground that the clerk's premature issuance of process in proceedings for organization of the district deprived the county court of jurisdiction, the attack is collateral.—*State ex rel. Ryan v. Coles*, 151 S. W. 195; *Same v. Malone*, Id. 197; *Same v. Gray*, Id. 198.

Though the clerk's record showed that notice for the establishment of a drainage district was given before the making of the report of the viewers, instead of after, as required by law, such proceeding is not invalid on collateral attack; *Ann. St. 1906*, § 8288, requiring the court to first determine whether the required notice be given.—Id.

II. ASSESSMENTS AND SPECIAL TAXES.

§ 76 (Mo.) Notice of hearing on assessments published February 16th, March 2d, 9th, 16th, pursuant to Rev. St. 1909, § 5587, held constitutional as to an owner residing in another state.—*State ex rel. Coleman v. Blair*, 151 S. W. 148.

Rev. St. 1909, § 5584, relating to the assessment of benefits in establishing drains, and section 5587, requiring the clerk of the county court to give notice by name to all persons "who it may in any manner be ascertained" own the land affected, do not require the viewers to go to the record to ascertain the owners.—Id.

Since the drainage law does not require the same kind of notice as in ordinary suits to collect back taxes, the sufficiency of the notice of hearing in drainage assessment proceedings must be governed by the drainage law.—Id.

Though an order of the county court directed the clerk to insert notice of assessment of drainage benefits in the "Western Enterprise," insertion in the "Rich Hill Enterprise" was not a fatal variance, where the only paper in the city was designated by both names.—Id.

Notice addressed to "the estate of B., B's heirs," etc., held not objectionable though B's recorded will showed the names of those taking the estate.—Id.

In view of Rev. St. 1909, § 5615, defining "regular session" and "regular meeting" of the county court, it was sufficient, within section 5587, requiring the date of hearing objections to drainage assessments to be fixed at "the next regular term," to fix the date at an adjourned sitting.—Id.

DRAMSHOPS.

See Intoxicating Liquors.

DRUGGISTS.

See Intoxicating Liquors, § 221.

DRUGS.

See Abortion, §§ 11, 13.

DUE PROCESS OF LAW.

See Constitutional Law, §§ 277-316.

DUPLICITY.

See Indictment and Information, § 125.

EASEMENTS.

See Landlord and Tenant, § 123; Railroads, § 82.

I. CREATION, EXISTENCE, AND TERMINATION.

§ 1 (Tex.Civ.App.) An easement of way can only be acquired by express grant or by implied grant as a way of necessity or by prescription or limitation.—*Williams v. Kuykendall*, 151 S. W. 629.

§ 3 (Ky.) Where a grantor of land reserved for himself a way to the highway, such reservation is an appurtenance to the land retained, and passes to the grantor's subsequent grantee, though not expressly mentioned in the deed.—*Hatfield v. Hatfield*, 151 S. W. 3.

§ 3 (Mo.) An easement created by a partition held to pass as appurtenant and incident to the estates whether the word "appurtenances" be used or not, unless abandoned or extinguished.—*Dulce Realty Co. v. Staed Realty Co.*, 151 S. W. 415.

§ 5 (Ark.) A private way over the land of another may be acquired by adverse user, provided the use has been for the statutory period of seven years under a claim of right, openly, continuously, and adversely.—*Medlock v. Owen*, 151 S. W. 905.

§ 8 (Tex.Civ.App.) To establish a way by prescription, there must be an adverse user of the same against the owner.—*Williams v. Kuykendall*, 151 S. W. 629.

§ 9 (Mo.) A beginning of occupation of a private alley by permission with an assertion of an adverse claim of right only a short time before commencement of a suit to enjoin its use held insufficient as a claim of right supporting title by limitations.—*Dulce Realty Co. v. Staed Realty Co.*, 151 S. W. 415.

§ 18 (Tex.Civ.App.) A way of necessity arises where a grantor conveys land not having any outlet save over his remaining land.—*Williams v. Kuykendall*, 151 S. W. 629.

§ 30 (Mo.) An easement acquired by a deed cannot be lost by mere nonuser.—*Dulce Realty Co. v. Staed Realty Co.*, 151 S. W. 415.

§ 36 (Ky.) A person claiming a right of way across the land of another held to have the burden of showing that the use of such way was under a claim of right, and not by permission.—*Cahill v. Mangold*, 151 S. W. 373.

Where the use of a right of way is interrupted or controlled by the owner of the land, as a matter of right, this constitutes evidence that the use was permissive only.—*Id.*

Where a way across another's land is used, without interruption, for many years, it will be presumed that it existed, as a matter of right; and the burden is on the landowner to show that such use was permissive.—*Id.*

The presumption that the uninterrupted use of a way for many years was one of right may be rebutted by proof of acts showing that the landowner never intended to recognize that the use was other than permissive.—*Id.*

In an action to enjoin interference with a way across defendant's land, evidence held to support a finding that the previous use of such way by plaintiff was by the owner's permission, and not under a claim of right.—*Id.*

§ 36 (Tex.Civ.App.) One claiming an easement of way without express grant must establish all of the necessary facts by which the right may be presumed.—*Williams v. Kuykendall*, 151 S. W. 629.

§ 37 (Ky.) Whether the use of a way across another's land was under a claim of right or by permission is a question of fact.—*Cahill v. Mangold*, 151 S. W. 373.

II. EXTENT OF RIGHT, USE, AND OBSTRUCTION.

§ 44 (Ky.) A reservation of a passway by a grantor for the benefit of land retained held to give no further right than necessary to reach the highway, and, on change of the highway which made part of the passway unnecessary, the right to that extent was lost.—*Hatfield v. Hatfield*, 151 S. W. 3.

EJECTION.

See Carriers, §§ 373-383.

EJECTION.

See Appeal and Error, § 1073.

III. PLEADING AND EVIDENCE.

§ 86 (Mo.) Where, in ejection, defendant was in possession claiming under a plat of an addition as actually laid out on the ground, plaintiff could not recover except by affirmatively showing a better right.—*Dolphin v. Kiann*, 151 S. W. 956.

§ 95 (Mo.) Evidence held to justify a finding that a strip of land passed to a senior grantee, and not to a junior grantee of the same grantor.—*Strother v. Barrow*, 151 S. W. 960.

V. DAMAGES, MESNE PROFITS, IMPROVEMENTS, AND TAXES.

§ 144 (Mo.) A purchaser, sued in ejection by the vendor on default in payment, held entitled only to set off his improvements against the damages, and not to charge them as a lien on the land, under Rev. St. 1909, §§ 2401 et seq.—*Montgomery v. Gahagan*, 151 S. W. 453.

ELECTION.

See Wills, § 782.

ELECTION OF REMEDIES.

§ 3 (Mo.) The remedy by quo warranto against corporations constituting unlawful combinations in restraint of trade and the remedy by injunction, if any exists, are inconsistent, and cannot be prosecuted at the same time.—*State ex rel. Kimbrell v. People's Ice, Storage & Fuel Co.*, 151 S. W. 101.

§ 9 (Mo.App.) An unsuccessful action by insured for the premiums paid, on the ground of the insurer's wrongful forfeiture of the policy, does not bar, on the theory of election of remedies, an action by his widow and children for the amount of the policy.—*Hartwig v. Security Mut. Life Ins. Co.*, 151 S. W. 477.

§ 11 (Mo.App.) An election of remedies presupposes the existence of more than one remedy at the time of the election; and where one believes he has a remedy, when he has not, the rule does not apply.—*Hartwig v. Security Mut. Life Ins. Co.*, 151 S. W. 477.

ELECTIONS.

See Appeal and Error, §§ 1027, 1108; Bills and Notes, § 106; Counties, § 35; Criminal Law, § 814; Intoxicating Liquors, §§ 29, 226.

VIII. CONDUCT OF ELECTION.

§ 203 (Tex.Civ.App.) Where a county line had been in dispute for years and it was not shown that any one voting at a voting place situated within the disputed tract was disfranchised at the election, the count of the votes cast at such polling place held not to violate the spirit of the Constitution, though the voting place was situated without the county.—*Ralls v. Parish*, 151 S. W. 1089.

ELECTRICITY.

See Master and Servant, §§ 243, 248; Municipal Corporations, § 768; Negligence, § 24.

EMINENT DOMAIN.

See Appeal and Error, § 23; Courts, § 231; Prohibition, § 11.

II. COMPENSATION.

(C) Measure and Amount.

§ 124 (Tenn.) The assessment of compensation in condemnation proceedings should be determined as of the date of the actual taking, rather than of the filing of the petition.—*Southern Ry. Co. v. Michaels*, 151 S. W. 53.

§ 134 (Tenn.) Damages are not assessable for the value of a pocket in a river formerly used for the storing of logs during the use of the property for sawmill purposes.—*Southern Ry. Co. v. Michaels*, 151 S. W. 53.

III. PROCEEDINGS TO TAKE PROPERTY AND ASSESS COMPENSATION.

§ 177 (Mo.) The only necessary parties are the city and the owner of the property taken, and not owners of property benefited.—*State ex rel. Tuller v. Seehorn*, 151 S. W. 724.

§ 256 (Mo.) Under Kansas City Charter, art. 6, §§ 6, 23, relative to proceedings to acquire property for street purposes, persons interested held to have a right of appeal in a supplemental proceeding.—*State ex rel. Tuller v. Seehorn*, 151 S. W. 724.

EMPLOYÉS.

See Master and Servant.

EQUITABLE ASSIGNMENTS.

See Assignments, §§ 34, 50.

EQUITABLE ESTOPPEL.

See Estoppel, §§ 58-116.

EQUITABLE WASTE.

See Waste, §§ 4, 5.

EQUITY.

See Appeal and Error, §§ 987, 1170; Assignments, § 34; Cancellation of Instruments; Conversion; Estoppel, §§ 58-116; Injunction; Judgment, § 419; Nuisance, § 75; Partition; Quieting Title; Reference; Reformation of Instruments; Specific Performance; Subrogation; Trusts; Waste, §§ 4, 5.

I. JURISDICTION, PRINCIPLES, AND MAXIMS.

(A) Nature, Grounds, Subjects, and Extent of Jurisdiction in General.

§ 39 (Mo.) As a rule, a court of equity, upon acquiring jurisdiction for one purpose, will do complete justice, though required to adjudicate matters of law.—*Waddle v. Frazier*, 151 S. W. 87.

II. LACHES AND STALE DEMANDS.

§ 69 (Mo.App.) A failure to institute an equitable proceeding to redeem a policy of life insurance assigned as security held not barred by laches, though not commenced until after the death of the original assignee, in the absence of a showing of injury, or that the plaintiff had knowledge of his rights and an opportunity to sue before such death or any considerable time before commencement of suit.—*Locke v. Bowman*, 151 S. W. 468.

§ 71 (Mo.) Where the patentee of public land under an erroneous description transferred it by a warranty deed with the same description, and delayed for 20 years before claiming that the transfer was fraudulent, his grantee's representatives were not guilty of laches in seeking about 10 years thereafter, in response to the patentee's challenge, to establish their title.—*Marshall v. Hill*, 151 S. W. 131.

Time is an important element in the defense of laches, irrespective of the statute of limitations.—*Id.*

V. EVIDENCE.

§ 346 (Mo.App.) One asserting laches has the burden of proving it.—*Locke v. Bowman*, 151 S. W. 468.

IX. MASTERS AND COMMISSIONERS, AND PROCEEDINGS BEFORE THEM.

§ 409 (Ark.) A master's finding on a matter outside his authority will not be given weight.—*Henderson v. E. W. Emerson Co.*, 151 S. W. 251.

ERROR, WRIT OF.

See Appeal and Error.

ESCHEAT.

§ 3 (Ky.) In a proceeding to escheat a number of lots because held by a corporation in violation of Const. § 192, held, that certain lots along defendant's right of way used for storage, for residences of section foremen, for the business of shippers, and for the growing of locust trees for ties were not subject to escheat; but that a lot as to which no present or reasonably necessary future use was shown was so subject.—*Louisville & N. R. Co. v. Commonwealth*, 151 S. W. 934.

§ 6 (Ky.) Petition by the commonwealth to escheat real estate held by a corporation, and not proper or necessary for carrying on its business, in violation of Const. § 192, need only follow the constitutional prohibition, and need not negative the idea of a reasonable necessity for future use; that being a matter of defense.—*Louisville & N. R. Co. v. Commonwealth*, 151 S. W. 934.

ESCROWS.

See Deeds, § 61; Evidence, § 230.

§ 13 (Tex.) Where delivery is to a third person in escrow for delivery to the grantee, after the grantor's death, a delivery as directed relates back so as to divest the title of the grantor from the first delivery.—*Henry v. Phillips*, 151 S. W. 533.

ESTATES.

See Deeds, §§ 120, 125; Dower; Life Estates; Perpetuities; Tenancy in Common.

§ 6 (Ky.) The proprietor of a qualified or base fee has the same rights and privileges till the contingency upon which it is limited occurs as if he were a tenant in fee simple.—*Landers v. Landers*, 151 S. W. 386.

ESTOPPEL.

See Banks and Banking, § 126; Corporations, § 388; Criminal Law, § 1137; Infants, § 29; Insurance, §§ 198, 219; Landlord and Tenant, § 76; Public Lands, § 172; Reformation of Instruments, § 23.

II. BY DEED.

(A) Creation and Operation in General.

§ 22 (Tex.) Where a married woman is imposed upon by one in whom she has confidence, and induced to sign and acknowledge a deed covering land which she has not bargained to sell, she is not estopped, in an action to set the deed aside, to deny her want of knowledge of what land was covered by the deed.—*Oar v. Davis*, 151 S. W. 794.

§ 29 (Tex.Civ.App.) Acceptance of a quitclaim by the purchaser on foreclosure of a vendor's lien held not to create an estoppel.—*Gamble v. Martin*, 151 S. W. 327.

(B) Estates and Rights Subsequently Acquired.

§ 38 (Tex.Civ.App.) For an after-acquired title to pass to a grantee under a warranty of title, it is not necessary that the conveyance should have been upon a valuable consideration.—*Morris v. Short*, 151 S. W. 633.

§ 39 (Tex.Civ.App.) Title acquired by grantor subsequent to conveyance held to pass to grantee, where the deed contained neither an express warranty nor any limitation on the implied warranty provided for by Rev. St. 1895, art. 633.—*Morris v. Short*, 151 S. W. 633.

III. EQUITABLE ESTOPPEL.

(A) Nature and Essentials in General.

§ 58 (Tex.Civ.App.) Attorneys held not estopped by answer alleging that a conveyance was upon a contingency as against a subsequent purchaser who did not rely thereon and who paid nothing of value for his conveyance.—*Morris v. Short*, 151 S. W. 633.

§ 59 (Tex.Civ.App.) A grantee who obtained his deed by fraud cannot rely on an estoppel against the grantor to deny his title, based on her silence while he was making improvements.—*Chambers v. Wyatt*, 151 S. W. 864.

(B) Grounds of Estoppel.

§ 78 (Tex.Civ.App.) An agreement by the holder of a note to extend time of payment, though not based on any consideration, may estop him from exercising an option to declare the note due, where the maker was induced to relax his efforts to procure money which he could otherwise have procured.—*Corbett v. Sweeney*, 151 S. W. 858.

§ 91 (Ky.) Where a will gave a legatee an interest in the proceeds of property to be converted into money, failure of the legatee to object to the levy of an execution on his share, which share was not subject to that process, will not estop him or his successors from denying the validity of the execution.—*Cropper v. Gaar's Ex'r*, 151 S. W. 913.

§ 93 (Tex.Civ.App.) That plaintiff railroad company did not object when defendant's track was laid across the land in controversy did not create an estoppel against plaintiff, if plaintiff's officials did not know at the time that it owned the land.—*Ft. Worth & D. C. Ry. Co. v. Southern Kansas Ry. Co.*, 151 S. W. 850.

(C) Persons Affected.

§ 97 (Tex.Civ.App.) Any act by plaintiff, pursuant to an agreement between itself and another railroad company, could not be taken advantage of as an estoppel by defendant railroad company, which was not a party thereto.—*Ft. Worth & D. C. Ry. Co. v. Southern Kansas Ry. Co.*, 151 S. W. 850.

(E) Pleading, Evidence, Trial, and Review.

§ 116 (Mo.App.) One setting up estoppel has the burden of making out the facts upon which it rests.—*Locke v. Bowman*, 151 S. W. 468.

EVIDENCE.

See Abortion, §§ 11, 13; Adultery, § 11; Adverse Possession, §§ 85, 116; Appeal and Error, §§ 195, 204, 232, 260, 301, 548, 597, 671, 695, 728, 742, 750, 837, 842, 843, 907, 930, 994, 1002, 1003, 1006, 1009-1011, 1022, 1029, 1031-1033, 1042, 1046, 1050-1058, 1066; Assault and Battery, § 42; Arbitration and Award, § 67; Assault and Battery, § 34; Attachment, § 308; Attorney and Client, § 57; Banks and Banking, §§ 85, 154; Bastards, § 3; Bills and Notes, §§ 497, 518, 525; Boundaries, §§ 33, 35-37; Brokers, § 86; Burglary, §§ 34, 41; Carriers, §§ 228, 317, 318, 345, 381; Charities, § 30; Chattel Mortgages, § 177; Continuance, § 31; Contracts, § 99; Corporations, § 519; Counties, § 35; Courts, § 35; Criminal Law, §§ 338-352, 594-608, 942-958, 1036, 1090, 1091, 1120, 1121, 1137, 1144, 1168-1170½; Damages, §§ 163-189; Death, §§ 4, 72, 76; Deeds, §§ 196-211; Disorderly

House, § 17; Divorce, §§ 130, 133; Easements, § 36; Ejectment, §§ 86, 95; Equity, § 346; Estoppel, § 116; False Pretenses, §§ 38, 42, 49; Fraud, § 50; Fraudulent Conveyances, §§ 278-300; Gaming, §§ 94, 98; Gifts, §§ 47, 49; Homicide, §§ 158-257, 332; Husband and Wife, §§ 297, 313; Incest, §§ 13, 14; Insurance, §§ 198, 653, 665, 818; Intoxicating Liquors, §§ 224-236; Judgment, § 953; Larceny, § 55; Libel and Slander, §§ 101, 155; Limitation of Actions, § 195; Logs and Logging, § 15; Malicious Mischief, § 9; Marriage, §§ 40, 50; Master and Servant, §§ 6, 265-281; Mechanics' Liens, § 281; Mines and Minerals, § 51; Monopolies, § 24; Mortgages, §§ 36, 38; Municipal Corporations, §§ 122, 640, 654, 818; Negligence, § 122; New Trial, §§ 97, 103; Parent and Child, § 7; Partnership, §§ 53, 336; Payment, § 75; Principal and Agent, § 123; Quieting Title, § 44; Railroads, §§ 82, 347, 348, 398, 441, 442, 482; Rape, §§ 38-54; Sales, § 181; Schools and School Districts, § 68; Seduction, § 46; Taxation, § 611; Telegraphs and Telephones, §§ 20, 66; Trespass to Try Title, §§ 39, 40, 41; Trial, § 252; Trusts, §§ 41, 44, 86, 89; Usury, §§ 113, 117; Vendor and Purchaser, § 289; Wills, §§ 55, 164, 402, 433; Witnesses.

Reception at trial, see Criminal Law, §§ 665-683; Trial, §§ 41-89.

II. JUDICIAL NOTICE.

§ 5 (Mo.) Courts will take judicial notice that a very large percentage of the lands of the state, and some of the most valuable thereof, are incumbered.—*State ex rel. Deems v. Holtcamp*, 151 S. W. 153.

§ 43 (Tex.) A court in an action on a liquor dealer's bond held entitled to take judicial notice of its own prior decision determining that the local option election in the county in which the bond was given was invalid.—*State v. Savage*, 151 S. W. 530.

II. PRESUMPTIONS.

§ 60 (Mo.) All things are presumed in favor of life, liberty, and innocence.—*Nelson v. Jones*, 151 S. W. 80.

§ 60 (Tex.) In construing a contract, it must be presumed that the parties intended to obey the law.—*Foard County v. Sandifer*, 151 S. W. 523.

§ 65 (Tex.) A court in construing a contract must presume that the parties knew the law.—*Foard County v. Sandifer*, 151 S. W. 523.

§ 65 (Tex.Civ.App.) A special statute granting a right of way to a railroad company through the public lands of the state is a public law, so as to be constructive notice to another railroad company of the extent of the rights of the grantee.—*Ft. Worth & D. C. Ry. Co. v. Southern Kansas Ry. Co.*, 151 S. W. 850.

There is a pseudo-presumption that every one is presumed to know the law.—*Id.*

§ 67 (Mo.) A status once established is presumed to continue until the contrary is shown by evidence.—*Nelson v. Jones*, 151 S. W. 80.

§ 67 (Tex.Civ.App.) It cannot be presumed as a matter of law that the houses in the built-up part of a town were the same in 1910 as in 1891, when the town was made the county seat.—*Ralls v. Parish*, 151 S. W. 1089.

§ 78 (Mo.App.) Where party to a contract obtained documentary evidence from third person and destroyed part of it, held, that it will be presumed that the papers were as claimed by the other party; every presumption being against the depositor of documentary evidence.—*Tracy v. Buchanan*, 151 S. W. 747.

§ 80 (Mo.App.) Where one relies on the law of a sister state for his cause of action, and the petition states a good cause of action under the statutory law of Missouri, the presumption arises, on the failure of defendant to demur, that the law of the sister state is similar

to the law of Missouri.—*Madden v. Missouri Pac. Ry. Co.*, 151 S. W. 489.

The court cannot presume that the common law is in force in Kansas; but, in the absence of any showing to the contrary, it will presume that the statutory law of Kansas is like the statutory law of Missouri.—*Id.*

§ 80 (Mo.App.) The humanitarian rule is a common-law, and not a statutory, rule, and, in the absence of proof to the contrary, it will be presumed that it is recognized in a common-law sister state.—*Shelton v. Metropolitan St. Ry. Co.*, 151 S. W. 493.

The territory of which the state of Kansas is a part, never having been subject to Great Britain, but having been a French possession at the time of its purchase by the United States, no presumption can be indulged that the common law exists therein.—*Id.*

§ 82 (Mo.) The acts of the probate courts of the state are presumed to be regular until the contrary is shown.—*State ex rel. Nolte v. McQuillin*, 151 S. W. 444.

§ 84 (Tex.Civ.App.) The court cannot presume that, because a part of the plat of an existing town was within five miles of the center of the county, any part of the town itself, as it previously existed, was within that radius; that being a matter of proof.—*Balls v. Parish*, 151 S. W. 1089.

III. BURDEN OF PROOF.

§ 91 (Ark.) Burden is on plaintiff to prove the affirmative of a material fact alleged by him.—*Henderson v. E. W. Emerson Co.*, 151 S. W. 251.

IV. RELEVANCY, MATERIALITY, AND COMPETENCY IN GENERAL.

(A) Facts in Issue and Relevant to Issues.

§ 99 (Ky.) A plaintiff suing for a personal injury may testify what physicians examined him, and that defendant's physician examined him.—*Chesapeake & O. Ry. Co. v. Meyers*, 151 S. W. 19.

§ 113 (Mo.App.) As regards damages from loss of profits through defendant's breach of contract to furnish timber for plaintiff to manufacture into hubs to sell, the price at which another had contracted to buy the hubs of plaintiff is some evidence of their market value.—*Martin v. Bunker-Culler Lumber Co.*, 151 S. W. 984.

(B) Res Gestæ.

§ 121 (Tex.) Declarations by a grantor, made at the time of the execution of a deed, showing fraud and undue influence, are competent as a part of the res gestæ.—*Rankin v. Rankin*, 151 S. W. 527.

§ 127 (Tex.Civ.App.) In a personal injury action, witnesses held properly permitted to testify to declarations made by plaintiff as to existing pain, though he was then insane.—*Knox v. Robins*, 151 S. W. 1134.

(C) Similar Facts and Transactions.

§ 130 (Ark.) In an action by the grantors to reform their timber deed, evidence that the purchaser's grantee, who was made a party solely for that reason, had urged in an action between other parties a contention similar to that of the grantors, is irrelevant.—*Hearin v. Union Sawmill Co.*, 151 S. W. 1007.

§ 139 (Tex.Civ.App.) Testimony that mortgagee, an insurance company, issued a policy and sent a bill for the premium held competent to show agreement by it to attend to the insurance on premises covered by another deed of trust executed at the same time.—*Commonwealth Fire Ins. Co. v. Obenchain*, 151 S. W. 611.

V. BEST AND SECONDARY EVIDENCE.

§ 159 (Mo.) Evidence by a county judge, justice, and notary public in Missouri that he searched the records in a county in Arkansas was not the best evidence of the nonexistence of a divorce decree, the best evidence being that of the custodian of such records or other persons qualified to search them.—*Nelson v. Jones*, 151 S. W. 80.

§ 159 (Tex.Civ.App.) Where defendant pleaded avoidance of the policy sued on by breach of a provision against other insurance, parol evidence to show the execution, but not the contents of such other policies, was admissible.—*Philadelphia Underwriters Agency of Fire Ass'n of Philadelphia v. Brown*, 151 S. W. 899.

§ 162 (Tenn.) Under Shannon's Code, § 5579, dissolution of an injunction must be proved, in an action on the bond, by the record of the injunction suit.—*King v. Cox*, 151 S. W. 58.

§ 183 (Tenn.) Evidence held not to show that the pleadings, writ, and bond in an injunction suit were lost, so as to render certified copies admissible.—*King v. Cox*, 151 S. W. 58.

VI. DEMONSTRATIVE EVIDENCE.

§ 199 (Tex.Civ.App.) In action against manufacturer for injuries caused by soap, permitting test by pouring vinegar on the soap held not error.—*Armstrong Packing Co. v. Clem*, 151 S. W. 576.

VII. ADMISSIONS.

(A) Nature, Form, and Incidents in General.

§ 210 (Mo.App.) A deposition of a party to a suit is admissible in evidence as declarations of an adverse party, although such person is in court at the time.—*Wilson v. Salisbury*, 151 S. W. 194.

§ 213 (Tex.Civ.App.) In an action on contract, evidence that defendant's agent said that he would advise defendant to settle was not admissible to show an offer to compromise.—*S. W. Slayden & Co. v. Palmo*, 151 S. W. 649.

(B) By Parties or Others Interested in Event.

§ 222 (Tex.Civ.App.) An admission by plaintiff that he had obtained other insurance contrary to a provision in the policy sued on was competent as original evidence.—*Philadelphia Underwriters Agency of Fire Ass'n of Philadelphia v. Brown*, 151 S. W. 899.

(C) By Grantors, Former Owners, or Privies.

§ 230 (Tex.) Declarations by a grantor before or after the execution of a deed are not competent to prove fraud and undue influence.—*Rankin v. Rankin*, 151 S. W. 527.

§ 230 (Tex.) That a grantor subsequent to execution and delivery to a third person in escrow for delivery to the grantee after the grantor's death listed the property for sale could not be proved after the grantor's death as against grantee.—*Henry v. Phillips*, 151 S. W. 533.

(D) By Agents or Other Representatives.

§ 241 (Tex.Civ.App.) In an action on contract, evidence that defendant's agent said that he would advise defendant to settle was admissible to disprove an averment in the answer that plaintiff had abandoned his contract.—*Slayden & Co. v. Palmo*, 151 S. W. 649.

§ 243 (Ark.) Declaration of a coemployé, immediately after a servant's injury, that if he had done his duty it would not have happened is inadmissible against the master, not being part of the res gestæ, but a mere narrative of a past occurrence.—*River, Rail & Harbor Const. Co. v. Goodwin*, 151 S. W. 267.

§ 244 (Mo.App.) In an action for false imprisonment, the declaration of defendant's agent, the day after the arrest, that defendant had plaintiff arrested, was incompetent, not being a part of the res gestæ, but merely an account of a past event.—Carson v. St. Joseph Stockyards Co., 151 S. W. 752.

§ 244 (Tex.Civ.App.) Agreements or concessions by plaintiff's superintendents with reference to another part of its right of way than that in controversy, though a part of the same section, were not admissible in evidence, in trespass to try title between it and another railroad company.—Ft. Worth & D. C. Ry. Co. v. Southern Kansas Ry. Co., 151 S. W. 850.

§ 253 (Mo.) Declarations of defendant's president held admissible as declarations of a coconspirator to show an agreement by it with another company to fix prices, where there was other evidence of conspiracy.—State ex rel. Kimbrell v. People's Ice, Storage & Fuel Co., 151 S. W. 101.

VIII. DECLARATIONS.

(A) Nature, Form, and Incidents in General.

§ 268 (Tex.) Declarations by a grantor after making a deed are not admissible to show the grantor's mental condition at the time of the execution of the deed, unless made so near to that time as to justify the inference that such mental condition existed at that time.—Rankin v. Rankin, 151 S. W. 527.

§ 271 (Tex.Civ.App.) Abandoned pleadings drawn by one not a party, containing self-serving declarations, were properly excluded.—Gamble v. Martin, 151 S. W. 327.

IX. HEARSAY.

§ 314 (Tex.Civ.App.) After the lapse of a long period of time, death may be proven by hearsay.—McDoel v. Jordan, 151 S. W. 1178.

§ 317 (Tex.Civ.App.) Statements made by J. to a witness explaining his failure to testify on a prior trial held hearsay.—Gamble v. Martin, 151 S. W. 327.

§ 317 (Tex.Civ.App.) It was error to permit a witness to testify to the contents of a letter which was not itself admissible in evidence, as not binding the other party.—Ft. Worth & D. C. Ry. Co. v. Southern Kansas Ry. Co., 151 S. W. 850.

§ 317 (Tex.Civ.App.) In an action for injury to an employé in the derailment of a logging train, testimony that plaintiff's coemployé told witness after the wreck that they had orders not to ride on the train was properly excluded, as being hearsay.—Knox v. Robbins, 151 S. W. 1134.

§ 318 (Tex.Civ.App.) Letters passing between defendant's officials, relating to the land in controversy, are not admissible in trespass to try title, not binding plaintiff.—Ft. Worth & D. C. Ry. Co. v. Southern Kansas Ry. Co., 151 S. W. 850.

§ 322 (Tex.Civ.App.) In an action for injury to an employé claimed to have rendered him insane, testimony for defendant that before the accident "everybody talked about" plaintiff's insanity held properly excluded.—Knox v. Robbins, 151 S. W. 1134.

X. DOCUMENTARY EVIDENCE.

(D) Production, Authentication, and Effect.

§ 366 (Tenn.) To prove the dissolution of an injunction, a copy of the whole record must be produced.—King v. Cox, 151 S. W. 58.

XI. PAROL OR EXTRINSIC EVIDENCE AFFECTING WRITINGS.

(A) Contradicting, Varying, or Adding to Terms of Written Instrument.

§ 407 (Mo.App.) Recitals in bills of lading that goods were received in good order refer

only to the external appearance, and may be rebutted.—Bettman v. Mobile & O. R. Co., 151 S. W. 169.

§ 417 (Tex.) Where a grantor placed the deed in an envelope, indorsed with his name, and the names of the grantees, and delivered the same to a bank, his statement then made to the bank that it was for delivery to the grantees after his death was admissible as against the objection that it varied the terms of the indorsement.—Henry v. Phillips, 151 S. W. 533.

§ 420 (Tex.Civ.App.) Evidence that the vendor executed a contract upon condition that it should not become effective until approved by his co-owner held admissible.—Parker v. Naylor, 151 S. W. 1096.

(B) Invalidating Written Instrument.

§ 432 (Ky.) Parol evidence is admissible, in an action by a policy holder to recover premiums paid under a new policy and the surrender value of an old policy, to show that there was no consideration for the new policy or for a note given for premiums due thereon.—Provident Sav. Life Assur. Soc. of New York v. Shearer, 151 S. W. 938.

Since Ky. St. § 679, requires that a copy of an application for life insurance shall be attached to the policy such application when attached becomes a part of the contract, and parol evidence is admissible to vary its terms where the contract is assailed for want of consideration.—Id.

§ 434 (Ky.) In an action by a policy holder to recover premiums paid under a new policy and the surrender value of an old policy, parol evidence is admissible to show that the acceptance of the new policy was procured by false representations.—Provident Sav. Life Assur. Soc. of New York v. Shearer, 151 S. W. 938.

Since Ky. St. § 679, requires that a copy of an application for life insurance shall be attached to the policy, such application when attached becomes a part of the contract, and parol evidence is admissible to vary its terms where the contract is assailed for fraud.—Id.

§ 434 (Mo.) Fraudulent representations were not merged in a written contract, so that parol evidence of such fraud was admissible.—State v. Lovan, 151 S. W. 141.

(D) Construction or Application of Language of Written Instrument.

§ 448 (Tex.) Parol evidence is inadmissible to show the construction placed on an unambiguous written contract by the parties, where the intent may be ascertained therefrom.—Henry v. Phillips, 151 S. W. 533.

§ 461 (Ark.) Where a timber deed conveyed all the pine timber 10 inches and up, thus including old-field pine, parol evidence was inadmissible to show that it was not intended by the parties to include such timber.—Hearin v. Union Sawmill Co., 151 S. W. 1007.

§ 466 (Tex.) It is competent to show by parol that a written contract has been abandoned.—Henry v. Phillips, 151 S. W. 533.

XII. OPINION EVIDENCE.

(A) Conclusions and Opinions of Witnesses in General.

§ 471 (Ark.) The testimony of a witness that he guessed his mother was in the possession of land was not a statement of a substantive fact, but a mere conclusion of the witness.—Strickland v. Moore, 151 S. W. 1009.

§ 501 (Ky.) Where witnesses in a will contested that testator knew the objects of his bounty and the value of his stock and had a disposing mind, refusal to permit them to say whether testator was of sound or unsound mind was not error, since the question had been fully answered.—Crosthwaite v. Crosthwaite, 151 S. W. 945.

§ 501 (Ky.) One, not a medical expert, cannot testify that prior to the alleged injuries plaintiff was a well woman, but should be required to state the facts and the difference in appearance of plaintiff before and after the accident.—Chicago, St. L. & N. O. R. Co. v. Rowell, 151 S. W. 950.

(B) Subjects of Expert Testimony.

§ 527 (Tex.Civ.App.) Men of experience in the cattle business, qualified to know the effect of dipping cattle in arsenic solution, may give their opinion as to the effect of such dipping of cattle after being given certain feed.—Texas & P. Ry. Co. v. Good, 151 S. W. 617.

(C) Competency of Experts.

§ 538 (Tex.Civ.App.) Cattlemen, who for a number of years had been engaged in shipping and marketing stock to a given point, are competent to testify as experts as to the necessity of feeding, and watering cattle at a given point.—St. Louis & S. F. Ry. Co. v. Knox, 151 S. W. 902.

§ 539 (Ky.) Witnesses held qualified to testify that an employé would not have been injured by the breaking of a chain if other chains had been properly adjusted.—Louisville & N. R. R. Co. v. Goodwin, 151 S. W. 376.

§ 544 (Tex.Civ.App.) Cattlemen, who for a number of years had been engaged in shipping and marketing stock to a given point, are competent to testify as experts as to whether depreciation in value of cattle was due to rough handling and delay.—St. Louis & S. F. Ry. Co. v. Knox, 151 S. W. 902.

(D) Examination of Experts.

§ 548 (Ky.) Where a physician examines one to qualify himself as a witness, he cannot state what the party detailed as the history of her case, although the rule is otherwise where the physician is called to administer treatment.—Chicago, St. L. & N. O. R. Co. v. Rowell, 151 S. W. 950.

XIV. WEIGHT AND SUFFICIENCY.

§ 584 (Ark.) Affirmative evidence which is reasonable and consistent cannot arbitrarily be disregarded by the jury.—Ramsey v. St. Louis, I. M. & S. Ry. Co., 151 S. W. 288.

§ 586 (Mo.) Evidence held not to show that a divorce was not granted in a certain county in another state.—Nelson v. Jones, 151 S. W. 80.

§ 594 (Tenn.) Where the testimony of insured was in no way impeached, nor was there any attack made on his character, his statement as to the facts must be accepted as true, when standing uncontradicted.—Gleason v. Prudential Fire Ins. Co., 151 S. W. 1030.

§ 596 (Ky.) Plaintiff must establish his cause of action by evidence which does more than support a mere guess as to the existence of the facts establishing liability.—Thomas' Adm'r v. Eminence Distilling Co., 151 S. W. 47.

§ 596 (Ky.) To overturn a written contract, parol evidence must be clear and convincing, especially where its effect is to destroy the written contract or to give the attacking party an advantage.—Provident Sav. Life Assur. Soc. of New York v. Shearer, 151 S. W. 938.

EXAMINATION.

See Witnesses, §§ 236-287.

EXCEPTIONS.

See Appeal and Error, §§ 253-274; Pleading, § 205.

EXCEPTIONS, BILL OF.

See Appeal and Error, §§ 500-502, 511, 518, 544, 548, 549, 532, 581, 732; Criminal Law, §§ 1088-1093, 1109.

I. NATURE, FORM, AND CONTENTS IN GENERAL.

§ 6 (Mo.App.) When an appeal is taken to overrule a motion setting aside a default judgment, matters that occurred at the time of the default are immaterial, and have no place in the bill of exceptions.—State ex rel. Elrick v. Allen, 151 S. W. 756.

Matters of which the trial court took judicial notice are properly incorporated in a bill of exceptions.—Id.

§ 23 (Ark.) Direction in bill of exceptions that the "clerk here insert testimony" held not to authorize consideration as a part of the bill of testimony subsequently transcribed and certified to by the official stenographer, where it did not appear that it was approved by the trial judge.—Grand Lodge of A. O. U. W. of Arkansas v. Dreher, 151 S. W. 435.

II. SETTLEMENT, SIGNING, AND FILING.

§ 38 (Mo.) Where no bill of exceptions was filed at the term when the referee was appointed, nor leave taken to file such a bill, the referability of the proceeding was not open to review on appeal.—State ex rel. Kimbrell v. People's Ice, Storage & Fuel Co., 151 S. W. 101.

§ 51 (Mo.App.) That a bill of exceptions is not true is sufficient to justify a judge in not signing it.—State ex rel. Elrick v. Allen, 151 S. W. 756.

§ 53 (Mo.) A writ of prohibition restraining a circuit judge from signing and filing a bill of exceptions in a certain case which he had disposed of held a valid reason for his refusal to sign and file such bill.—State ex rel. Nolte v. McQuillin, 151 S. W. 444.

Mandamus will not be granted to compel a circuit judge to sign and file bills of exception where it would be a useless act.—Id.

§ 54 (Mo.App.) Rev. St. §§ 2030, 2031, 2034, provide the exclusive remedies for the refusal of the trial judge to sign bills of exception, and an ex parte affidavit of counsel in the abstract that an exception to the motion for new trial was preserved, cannot be considered so as to supply the exception, which was not in the bill.—Murphy v. Lorwood Cooperage Co., 151 S. W. 191.

§ 56 (Mo.) The judge's statement, at the end of a paper purporting to be a bill of exceptions, that it was allowed, signed, sealed, "filed, and made a part of the record," does not prove that it was filed.—Langstaff v. City of Webster Groves, 151 S. W. 456.

EXCESSIVE DAMAGES.

See Damages, § 132; Death, § 99.

EXCUSE.

See Judgment, § 143.

EXECUTION.

See Adverse Possession, § 85; Estoppel, § 91; Fraudulent Conveyances, § 241; Garnishment, § 60; Justices of the Peace, § 135; Wills, § 114.

II. PROPERTY SUBJECT TO EXECUTION.

§ 41 (Mo.App.) Trust property cannot be reached in an action at law for damages for breach of an executory contract, and it can

only be reached in equity.—*Markel v. Peck*, 151 S. W. 772.

§ 45 (Ky.) The interest of a legatee in the proceeds of property directed to be converted into money and distributed is not subject to levy under an ordinary execution and a judgment against the legatee does not create any lien on his interest in the land.—*Cropper v. Gaar's Ex'r*, 151 S. W. 913.

V. STAY, QUASHING, VACATING, AND RELIEF AGAINST EXECUTION.

§ 163 (Mo.App.) That a foreign corporation is not authorized to do business in the state is an affirmative defense to its right to an execution on a judgment in its favor; and the mere filing of an ex parte affidavit showing noncompliance by the corporation with the statutes, not presented to the court, is insufficient.—*Scientific American Club v. Horchitz*, 151 S. W. 475.

VI. CLAIMS BY THIRD PERSONS.

§ 181 (Tex.Civ.App.) A claimant in a trial of the right to property levied on is entitled to prevail, when his rightful possession was disturbed, or when he was entitled to possession, and has been deprived thereof by the levy.—*Jones v. Lawrence*, 151 S. W. 584.

EXECUTORS AND ADMINISTRATORS.

See Appeal and Error, § 374; Death, § 31; Descent and Distribution; Divorce, § 194; Husband and Wife, § 276; Infants, § 29; Public Lands, § 175; Wills.

II. APPOINTMENT, QUALIFICATION, AND TENURE.

§ 31 (Tex.Civ.App.) In view of Rev. Civ. St. 1911, art. 3235, providing that an intestate's property shall vest in his heirs at law or his estate shall pass to the administrator's possession for distribution, the appointment of a guardian of minor heirs held not to ipso facto supersede the administrator.—*Wilkin v. Simmons*, 151 S. W. 1145.

III. ASSETS, APPRAISAL, AND INVENTORY.

§ 55 (Tex.Civ.App.) A wife's administrator was entitled to administer separate property left by her under the supervision of the probate court.—*Lanza v. Roe*, 151 S. W. 571.

IV. COLLECTION AND MANAGEMENT OF ESTATE.

(A) In General.

§ 87 (Ky.) Under Const. § 241, vesting an administrator with the right of action for death, it was not necessary that the infant wife and child of deceased should be advised as to a settlement.—*Slusher v. Weller*, 151 S. W. 684.

(B) Real Property and Interests Therein.

§ 138 (Ky.) A will held to authorize decedent's executor to sell his land.—*Smith v. Scott's Ex'r*, 151 S. W. 42.

VI. ALLOWANCE AND PAYMENT OF CLAIMS.

(B) Presentation and Allowance.

§ 225 (Mo.App.) Rev. St. 1909, §§ 190-194, limiting the time for exhibiting claims against decedents' estates, are a special statute of limitations, not affecting the general statute, and a surety on a note paying a judgment thereon must file his claim for contribution against the estate of a deceased cosurety within five years from the payment, deducting the period between the cosurety's death and the granting of letters.—*Hinshaw v. Warren's Estate*, 151 S. W. 497.

§ 228 (Mo.App.) A claimant against a decedent's estate who makes out the claim, and takes

it to the home of the clerk of the probate court to have it sworn to, without requesting the clerk to file it, does not thereby file the claim within the statute.—*Hinshaw v. Warren's Estate*, 151 S. W. 497.

§ 232 (Mo.App.) An administrator who long before the running of limitations agreed to waive service of notice of claim against decedent's estate was not thereby estopped from pleading limitations, where claimant delayed the presentation of his claim until limitations had run.—*Hinshaw v. Warren's Estate*, 151 S. W. 497.

(C) Disputed Claims.

§ 245 (Mo.App.) To invoke the bar of limitations to a claim against a decedent's estate, it is not necessary to file a written pleading setting up limitations, either in the probate court or in the circuit court on appeal.—*Hinshaw v. Warren's Estate*, 151 S. W. 497.

VIII. SALES AND CONVEYANCES UNDER ORDER OF COURT.

(A) When Authorized.

§ 326 (Mo.) While under Rev. St. 1909, §§ 147, 148, a sale of incumbered real estate may be made in administration, if such sale will promote the interests of the heirs though there are no general debts, a sale merely to prevent a partition is not justified.—*State ex rel. Deems v. Holtcamp*, 151 S. W. 153.

§ 326 (Tex.Civ.App.) If the probate court had fixed the allowance for the support of a widow and minor children of decedent, and funds were needed for a year's support of the children, it could order a sale of land of the estate on the administrator's application for the support of such heirs.—*Wilkin v. Simmons*, 151 S. W. 1145.

The existence of orders by the probate court fixing the allowance for the year's support of minor children and the allowance for them in lieu of exempt property were not needed to give jurisdiction to order the sale of land of the estate for the support of such children as heirs.—*Id.*

(B) Application and Order.

§ 337 (Mo.) An administrator selling incumbered real estate to pay his own unprobated claim or the debts due to incumbrancers must proceed under Rev. St. 1909, §§ 150, 151, by petition accompanied by his account and inventory and a list of unpaid debts, and must give the notice required by section 152.—*State ex rel. Deems v. Holtcamp*, 151 S. W. 153.

Though Rev. St. 1909, §§ 147, 148, require no notice, such notice is necessary.—*Id.*

§ 349 (Tex.Civ.App.) If the probate court acquires jurisdiction of the property of an estate and of the persons interested therein, it has complete jurisdiction, so that its order of sale cannot be collaterally attacked.—*Wilkin v. Simmons*, 151 S. W. 1145.

The question whether a sale of the land was necessary for the support of minor heirs on an administrator's application for a sale for that purpose was for the determination of the probate court, and its judgment thereon cannot be collaterally attacked.—*Id.*

Lands sold on an administrator's application for an order of sale held sufficiently described in the application, as against collateral attack on the order of sale.—*Id.*

(C) Sale.

§ 383 (Tex.Civ.App.) While probate courts may not sell lands of a deceased person without the citation directed by Rev. St. 1895, art. 2123, on collateral attack it will be presumed that due service was obtained.—*Daimwood v. Driscoll*, 151 S. W. 621.

An application by an executor to sell real estate, though it did not comply with Rev. St.

1895, art. 2123, *held*, not void, and hence not open to collateral attack.—*Id.*

A sale of land by an executor by order of court, without notice, is not void, but voidable.—*Id.*

The failure to show the expenses and claims of the executor, in an application for sale of land, as required by Rev. St. 1895, art. 2123, rendered the sale only voidable, even though there were no debts due to any one; and it could not be collaterally attacked.—*Id.*

Where the application to sell lands showed that debts were due the executor, it will be presumed, on collateral attack, that the law in regard to claims of an executor was fully complied with.—*Id.*

§ 383 (Tex.Civ.App.) An administrator's sale of land upon an application stating that its sale was necessary for the support of heirs, etc., is not void so as to be subject to collateral attack, even though not made for a purpose authorized by law.—*Wilkin v. Simmons*, 151 S. W. 1145.

§ 388 (Tex.Civ.App.) Where the court, on an application by an executor, made an order of sale and confirmed it, a purchaser could assume that the order was properly made.—*Daimwood v. Driscoll*, 151 S. W. 621.

§ 388 (Tex.Civ.App.) An order for sale of the land of an estate, report thereof, and confirmation, are sufficient to give the purchaser title without the execution of a deed, so that it is immaterial that the deed executed was made before confirmation.—*Wilkin v. Simmons*, 151 S. W. 1145.

XI. ACCOUNTING AND SETTLEMENT.

(C) Charges and Credits.

§ 485 (Ky.) An attorney after qualifying as administrator cannot charge for services which he renders as attorney for himself.—*Slusher v. Weller*, 151 S. W. 684.

(D) Compensation.

§ 496 (Ky.) Where an attorney qualified as administrator at the request of an infant widow, and, without the service of any other attorney, obtained \$3,000 in settlement of her claim for decedent's wrongful death, *held* that, in view of the statute limiting administrators' commissions to 5 per cent., he was entitled to 5 per cent. on that amount.—*Slusher v. Weller*, 151 S. W. 684.

EXEMPTIONS.

See Homestead.

EXPLOSIVES.

See Master and Servant, §§ 118, 236, 289; Negligence, § 136.

§ 8 (Tex.Civ.App.) Whether an owner of explosives who placed them on the premises of a third person to which children resorted was guilty of actionable negligence, and liable for injuries to a child caused by an explosion, *held* for the jury.—*Little v. James McCord Co.*, 151 S. W. 835.

Whether the negligence of an owner of explosives who placed them on the premises of a third person was the proximate cause of an injury to a child caused by an explosion *held* for the jury.—*Id.*

An owner who placed explosives on the premises of a third person *held* not entitled to escape liability for injuries to a child caused by an explosion on the ground that children were attracted to the premises for the chief purpose of securing pecans.—*Id.*

EXPROPRIATION.

See Eminent Domain.

EXPULSION.

See Carriers, §§ 373-388.

FACTORS.

See Brokers.

FALSE IMPRISONMENT.

See Malicious Prosecution.

I. CIVIL LIABILITY.

(A) Acts Constituting False Imprisonment and Liability Therefor.

§ 15 (Tex.Civ.App.) Where plaintiff was arrested by an officer employed by a private person to keep the peace at a show, the fact that the person making the arrest was an officer did not show that he acted in his official capacity, nor was the fact of his employment sufficient to show that he acted as defendant's servant.—*Rucker v. Barker*, 151 S. W. 871.

Act of an officer doing private duty in defendant's show tent in dragging plaintiff out of a seat and causing him to be arrested, after defendant had instructed the officer to settle a dispute over possession of the seat, *held* not in the officer's official capacity, but performed in defendant's business, for which defendant was liable.—*Id.*

(B) Actions.

§ 36 (Tex.Civ.App.) Where plaintiff, a young unmarried man of good habits, was arrested in the presence of friends while occupying a reserved seat in a show tent, and, after being roughly handled and wounded in the face, was driven to jail in the police wagon, and locked up with negroes and Mexicans, a verdict of \$1,000 as compensatory damages for false imprisonment was not excessive.—*Rucker v. Barker*, 151 S. W. 871.

Where, in an action for false imprisonment there was evidence of actual malice on defendant's part, it was not error to allow \$250 by way of punitive damages.—*Id.*

FALSE PRETENSES.

See Criminal Law, §§ 761, 1169.

§ 12 (Mo.App.) A debtor who obtains a credit on account by means of an order drawn on a third person, not indebted to him, is not guilty of obtaining property under false pretenses, in violation of Rev. St. 1909, § 4505.—*State v. Martin*, 151 S. W. 504.

§ 34 (Mo.) Under Rev. St. 1909, § 4765, specifying the elements of the crime of false pretenses, an information *held* sufficient, though the charge as to obtaining the property was not included in the charging part of the information.—*State v. Lovan*, 151 S. W. 141.

§ 38 (Mo.) In an action for obtaining shares of stock by false representations as to the title to land, deeds to land described in the information *held* properly admitted.—*State v. Lovan*, 151 S. W. 141.

§ 42 (Mo.) In a prosecution for fraudulent representations that land was unincumbered, testimony for the defendant that deeds of trust on such property pledged to secure a loan could have been recovered by him at any time *held* admissible as bearing on intent.—*State v. Lovan*, 151 S. W. 141.

§ 49 (Mo.) On a prosecution for obtaining shares of stock by false pretenses as to the condition of the title to certain property, *held*, that there was no failure of proof of the subject-matter of the representation alleged in the information.—*State v. Lovan*, 151 S. W. 141.

FEDERAL COURTS.

See Judgment, § 829; Removal of Causes, § 75.

FELLOW SERVANTS.

See Master and Servant, §§ 180-201, 279.

FILING.

See Exceptions, Bill of, § 56; Executors and Administrators, §§ 225, 228.

FINDINGS.

See Equity, § 409.

FIRE INSURANCE.

See Insurance.

FIRES.

See Railroads, §§ 459, 482; Telegraphs and Telephones, §§ 15, 20.

FLOATAGE.

See Logs and Logging, § 15.

FLOWAGE.

See Waters and Water Courses, § 63.

FORCIBLE ENTRY AND DETAINER.

See Forcibly Entry and Detainer, § 6.

I. CIVIL LIABILITY.

§ 6 (Tex.Civ.App.) Instruction, on partnership accounting, that right to rents could not be awarded as to property as to which actions of forcible entry and detainer were pending, was held erroneous in view of Sayles' Ann. Civ. St. 1897, arts. 2529, 2542, limiting the issues in forcible entry and detainer to right of possession only.—Hengy v. Hengy, 151 S. W. 1127.

FORECLOSURE.

See Chattel Mortgages, § 284; Mortgages, §§ 330-480.

FOREIGN CORPORATIONS.

See Judgment, § 713.

FORFEITURES.

See Insurance, §§ 353, 384; Railroads, § 82.

FRANCHISES.

See Telegraphs and Telephones, §§ 10, 30.

FRAUD.

See Acknowledgment, § 58; Appeal and Error, § 1027; Arbitration and Award, § 67; Attachment, §§ 32, 233; Bankruptcy, § 142; Bills and Notes, §§ 363, 497, 525; Brokers, §§ 63, 84; Cancellation of Instruments, §§ 4, 24, 56, 59; Compromise and Settlement; Contracts, § 99; Deeds, §§ 70, 203, 211; Estoppel, § 59; Evidence, § 434; False Pretenses; Frauds, Statute of; Fraudulent Conveyances; Gifts, § 47; Guaranty, § 20; Insurance, § 723; Mines and Minerals, § 58; Public Lands, § 177; Vendor and Purchaser, §§ 36, 45.

I. DECEPTION CONSTITUTING FRAUD, AND LIABILITY THEREFOR.

§ 11 (Mo.App.) Mere expressions of opinion, as distinguished from representations as to existing facts, cannot be made the basis of an action for fraud.—Williamson v. Harris, 151 S. W. 500.

§ 18 (Mo.App.) One suing for damages from fraudulent representations, inducing the execution of an instrument, must show that the representations were as to a material fact, and that they contributed to the injury.—Birch Tree State Bank v. Dowler, 151 S. W. 784.

§ 20 (Mo.App.) A representation, to be actionable as a fraudulent representation, must be one on which the complaining party relied, and by which he was actually misled to his injury.—Birch Tree State Bank v. Dowler, 151 S. W. 784.

§ 20 (Mo.App.) To be actionable a vendor's false representations as to the quality of land must relate to a material fact relied upon by the purchaser.—Williamson v. Harris, 151 S. W. 500.

§ 28 (Tex.Civ.App.) If a test well was drilled and completed according to contract, the fact that thereafter the contractor made untrue representations as to the quality of the water was not actionable fraud constituting a defense to a note for the work.—Miller v. Layne & Bowler Co., 151 S. W. 341.

II. ACTIONS.**(C) Evidence.**

§ 50 (Ky.) The burden of proving actual fraud is on the party asserting it, unless fraud is implied from the confidential relation of the parties.—Shacklette v. Goodall, 151 S. W. 23.

FRAUDS, STATUTE OF.**V. AGREEMENTS NOT TO BE PERFORMED WITHIN ONE YEAR.**

§ 49 (Ark.) A contract to erect a building, which may be performed within a year, is not within the statute of frauds.—Friedman v. Schleuter, 151 S. W. 696.

VII. SALES OF GOODS.**(B) Acceptance of Part of Goods.**

§ 89 (Mo.App.) Where a buyer of goods in a store selected goods desired, and subsequently exchanged them for other goods in the store, there was a delivery and acceptance of the original goods, to constitute a valid sale within the statute of frauds (Rev. St. 1909, § 2784).—P. H. Rea Implement Co. v. Smith, 151 S. W. 203.

§ 90 (Mo.App.) Under the statute of frauds (Rev. St. 1909, § 2784), a seller of personality for more than \$30, unaccompanied by any writing or part payment, is not binding on the buyer, in absence of a delivery.—P. H. Rea Implement Co. v. Smith, 151 S. W. 203.

FRAUDULENT CONVEYANCES.

See Bankruptcy, § 302.

I. TRANSFERS AND TRANSACTIONS INVALID.**(B) Nature and Form of Transfer.**

§ 25 (Mo.) Where no rights of creditors intervened, an alteration in the date of a deed from a son to his mother, made after acknowledgment, but before record, would not avoid it as to subsequent creditors of the son.—Mayhew v. Todisman, 151 S. W. 436.

(D) Indebtedness, Insolvency, and Intent of Grantor.

§ 61 (Mo.App.) A gift by an insolvent father to his son is fraudulent as to creditors, whatever the intent.—Wilson v. Salisbury, 151 S. W. 194.

(F) Confidential Relations of Parties.

§ 104 (Mo.) Financial transactions between husband and wife are looked upon with suspicion.—First Nat. Bank v. Renick, 151 S. W. 421.

(H) Preferences to Creditors.

§ 115 (Mo.App.) A debtor may transfer his property in payment of his debts, though he thereby gives certain creditors a preference.—Gambrel v. Hines, 151 S. W. 474.

(D) Retention of Possession or Apparent Title by Grantor.

§ 135 (Mo.App.) An unrecorded bill of sale from a debtor to his creditors in payment of his debts without a change of possession *held* void under Rev. St. 1909, § 2887, making void as to creditors a sale of chattels without a change of possession.—*Gambrel v. Hines*, 151 S. W. 474.

§ 154 (Mo.) Where property was conveyed to a son for his mother, and the deed to the son was recorded, the omission of the mother to record her deed from the son would not vitiate it or give existing creditors a right to complain, though she could not claim the property against those giving the son credit on his apparent ownership.—*Mayhew v. Todisman*, 151 S. W. 436.

III. REMEDIES OF CREDITORS AND PURCHASERS.**(C) Right of Action to Set Aside Transfer, and Defenses.**

§ 241 (Mo.App.) In a judgment creditor's action to reach land fraudulently conveyed by the debtor, plaintiff need not procure an execution and return nulla bona, where the debtor has been proved insolvent.—*Wilson v. Salisbury*, 151 S. W. 194.

(G) Evidence.

§ 278 (Mo.) The common law, giving rise to the presumption that a husband furnished the money for the purchase of land during coverture, title to which was taken in the wife, has been abolished by Rev. St. 1909, §§ 8304, 8309, defining the powers of married women, and the presumption is entitled to but little weight in determining whether conveyances to a wife by a third person are fraudulent as against the husband's creditors.—*Crump v. Walkup*, 151 S. W. 709.

§ 295 (Ky.) Evidence *held* not to sustain a finding that certain mules and hogs were ever the property of defendants, or were transferred by them to their mother to defraud creditors.—*Coomes Bros. v. Grigsby & Co.*, 151 S. W. 943.

§ 300 (Mo.) Evidence *held* to show that a wife purchased property by means of her separate estate, so that the conveyances were not in fraud of the husband's creditors.—*Crump v. Walkup*, 151 S. W. 709.

That a husband, without his wife's knowledge, mortgaged her separate chattels, is not evidence that he owned the chattels, and that the wife's claim thereto is in fraud of his creditors.—*Id.*

That a husband listed personalty claimed by his wife as his own for taxation is not conclusive evidence that the wife's claim of ownership is in fraud of his creditors.—*Id.*

GAMING.

See Indictment and Information, §§ 70, 87.

III. CRIMINAL RESPONSIBILITY.**(A) Offenses.**

§ 76 (Tex.Cr.App.) When a person opens a house under his control, and permits persons to gather there and gamble without invitation, it becomes a "resort for gambling."—*Davis v. State*, 151 S. W. 313.

Where an unmarried man takes possession of a private house during the owner's absence, and permits gambling therein, he is guilty of unlawfully permitting property under his control to be used as a resort for gambling.—*Id.*

The act of a person in engaging with others in gambling on premises under his control constituted permission to the others to gamble.—*Id.*

(B) Prosecution and Punishment.

§ 88 (Tex.Cr.App.) An indictment for permitting gambling, in violation of Pen. Code 1911, art. 559, need not name the games played.—*Davis v. State*, 151 S. W. 313.

§ 89 (Tex.Cr.App.) An indictment for permitting gambling, in violation of Pen. Code 1911, art. 559, need not describe the premises, nor allege the house to be a public place.—*Davis v. State*, 151 S. W. 313.

§ 94 (Tex.Cr.App.) Evidence that shortly before the grand jury met defendant requested gambling to stop, *held* not to present the issue that gambling theretofore took place without his consent.—*Davis v. State*, 151 S. W. 313.

§ 98 (Tex.Cr.App.) Evidence *held* to sustain a finding that defendant permitted a house under his control to be used as a resort for gambling.—*Davis v. State*, 151 S. W. 313.

GARNISHMENT.

See Banks and Banking, § 134.

II. PERSONS AND PROPERTY SUBJECT TO GARNISHMENT.

§ 27 (Tex.Civ.App.) Under Rev. Civ. St. 1911, arts. 3745, 3742, 296, a stockholder's interest in a corporation, evidenced by shares of stock assigned to a bank as collateral security, could not be subjected to garnishment by service of notice on an officer of the bank.—*Presnall v. Stockyards Nat. Bank*, 151 S. W. 873.

§ 29 (Tex.Civ.App.) A debtor's equity of redemption in mortgaged cattle, pledged to a bank for a loan and of less value than the loan, *held* not subject to garnishment as against the bank.—*Presnall v. Stockyards Nat. Bank*, 151 S. W. 873.

§ 58 (Tex.) The principle underlying the rule that property in custodia legis is not subject to garnishment, etc., is to protect the jurisdiction of the court from invasion of another tribunal or officer, and not to protect the debtor's property.—*Turner v. Gibson*, 151 S. W. 793.

§ 60 (Tex.) In view of Rev. Civ. St. 1911, art. 3778, requiring the surplus upon an execution sale to be paid over to defendant, any excess remaining in the sheriff's hands after satisfying a writ of execution may be the subject of garnishment.—*Turner v. Gibson*, 151 S. W. 793.

VI. PROCEEDINGS TO SUPPORT OR ENFORCE.

§ 191 (Tex.Civ.App.) Where a garnishee answered claiming the property of the debtor and was unsuccessful, it became itself a litigant and could not recover attorney's fees or costs.—*Presnall v. Stockyards Nat. Bank*, 151 S. W. 873.

GAS.

See Mines and Minerals, § 68.

GIFTS.

See Adverse Possession, §§ 64, 85; Charities; Fraudulent Conveyances; Husband and Wife, § 49½; Wills, § 673.

I. INTER VIVOS.

§ 4 (Ky.) A deed of gift conveying all of the donor's estate, real and personal, is sufficiently definite and carries with it a note in favor of the donor.—*Taylor v. Purdy*, 151 S. W. 45.

§ 18 (Ky.) To constitute a gift inter vivos, there must be a delivery, actual or symbolical.—*Taylor v. Purdy*, 151 S. W. 45.

§ 21 (Ky.) A writing remitting future interest on a note *held* not valid as a gift inter vivos, where delivered only to the agent of the person attempting to make it; such agent be-

ing also designated as executor.—*Baldwin's Ex'r v. Barber's Ex'rs*, 151 S. W. 686.

§ 22 (Ky.) A gift, evidenced by a written instrument executed by the donor, is effectuated by a delivery of the instrument.—*Taylor v. Purdy*, 151 S. W. 45.

§ 47 (Ky.) Presumption of fraud, where a confidential relation exists between the parties, arises more readily in cases of gift than of contract.—*Shacklette v. Goodall*, 151 S. W. 23.

§ 47 (Ky.) Where a deed of gift to infants appeared in the possession of the trustee of the gift, its delivery will be presumed.—*Taylor v. Purdy*, 151 S. W. 45.

§ 49 (Ky.) Evidence held to establish delivery of a deed of gift to personalty.—*Taylor v. Purdy*, 151 S. W. 45.

GRAND JURY.

§ 7 (Tex.Cr.App.) An order directing the summoning of grand jurors for the three succeeding terms of court held without authority, and to warrant a dismissal of an indictment returned by a grand jury summoned for the second term.—*Mayfield v. State*, 151 S. W. 303.

GUARANTY.

I. REQUISITES AND VALIDITY.

§ 7 (Ark.) Where a traveling salesman wrote his employer, who refused to accept an order, to the effect that, if his indorsement was worth anything, the employer would ship the goods, the agent was bound on the employer shipping the goods in reliance on the guaranty, though there was no notice of acceptance.—*McCarroll v. Red Diamond Clothing Co.*, 151 S. W. 1012.

§ 20 (Ark.) One induced to execute a guaranty of performance of a contract by a third person by the fraudulent representations of such person may not escape liability to the other contracting party innocent of fraud.—*Publishers: George Knapp & Co. v. Wilks*, 151 S. W. 280.

II. CONSTRUCTION AND OPERATION.

§ 34 (Ark.) Where a traveling salesman wrote to his employer, refusing to accept an order, to the effect that, if his indorsement was worth anything, the employer should ship the goods, the agent was absolutely bound to pay on the employer shipping the goods in reliance of the guaranty.—*McCarroll v. Red Diamond Clothing Co.*, 151 S. W. 1012.

III. DISCHARGE OF GUARANTOR.

§ 54 (Ark.) A guarantor held not released from liability by the filling in of a blank space for the date in the contract to be guaranteed.—*Publishers: George Knapp & Co. v. Wilks*, 151 S. W. 280.

Nor was such guarantor released by subsequent insertion in a blank space of the number of papers to be furnished daily.—*Id.*

§ 67 (Ark.) Where a traveling salesman wrote his employer, who refused to accept an order, to the effect that, if his indorsement was worth anything, the employer would ship the goods, the agent was bound on the employer shipping the goods in reliance on the guaranty, though there was no notice of the buyer's failure to pay.—*McCarroll v. Red Diamond Clothing Co.*, 151 S. W. 1012.

GUARDIAN AD LITEM.

See Guardian and Ward, § 102.

GUARDIAN AND WARD.

See Executors and Administrators, § 31.

IV. SALES AND CONVEYANCES UNDER ORDER OF COURT.

§ 92 (Ky.) The bond required by Civ. Code Prac. § 493, to be executed to infants by their

guardian before a sale, need not, in view of section 497, be executed before sale in an action, under section 490, subsec. 2, for sale for partition.—*Hatterich v. Bruce*, 151 S. W. 31.

§ 102 (Ky.) Where, through mistake which was apparent of record, a guardian ad litem to sell land filed his report in the name only of other infants for whom he was not appointed, held, that that report sufficiently represented the infants for whom he was appointed, and an order made in pursuance thereof will not be set aside.—*Thomson's Guardian v. Thomson*, 151 S. W. 658.

VI. ACCOUNTING AND SETTLEMENT.

§ 148 (Ark.) Where, in a final settlement of a guardianship, the parties treated notes as worth their face value, the court, on the notes being surrendered by the administratrix of the deceased guardian, must give credit for the balance due on the face of the notes.—*Stubblefield v. Stubblefield*, 151 S. W. 994.

§ 159 (Ark.) Where the final settlement of a guardian did not show how much of the balance was money, or how much was notes drawing interest, interest must be charged at 10 per cent. per annum, and the court must then determine what credits should be allowed, and render judgment for the balance.—*Stubblefield v. Stubblefield*, 151 S. W. 994.

§ 161 (Ark.) The circuit court, on appeal from the probate court on exceptions to the final settlement of a guardian, should state the account without a jury.—*Stubblefield v. Stubblefield*, 151 S. W. 994.

§ 163 (Ark.) The court, on a final settlement of a guardian's account, must take as a basis for the settlement an intermediate settlement approved by the probate court, unless an affirmative showing is made that at the time of the approval there was property in the guardian's hands not included in the settlement.—*Stubblefield v. Stubblefield*, 151 S. W. 994.

HARMLESS ERROR.

See Appeal and Error, §§ 1027-1074; Criminal Law, §§ 1165-1173; Homicide, § 340.

HEARSAY EVIDENCE.

See Criminal Law, §§ 419-421; Evidence, § 314-322.

HEIRS.

See Descent and Distribution.

HIGHWAYS.

See Easements, §§ 3, 44; Mandamus, § 31; Mechanics' Liens, § 18; Private Roads.

I. ESTABLISHMENT, ALTERATION, AND DISCONTINUANCE.

(A) Establishment by Prescription, User, or Recognition.

§ 6 (Mo.) The use of a road for 10 years with the acquiescence of the owner makes it a valid road.—*Laclede-Christy Clay Products Co. v. City of St. Louis*, 151 S. W. 460.

§ 7 (Tex.Civ.App.) The public may by adverse use for the prescriptive period acquire right of highway in a road, though the county authorities have not recognized it as a public road.—*Porter v. Johnson*, 151 S. W. 599.

(B) Establishment by Statute or Statutory Proceedings.

§ 28 (Mo.) Order establishing a road held void where it was signed by 8 persons instead of 12 as required by law.—*Laclede-Christy Clay Products Co. v. City of St. Louis*, 151 S. W. 460.

(C) Alteration, Vacation, or Abandonment.

§ 77 (Tex.Civ.App.) Though the road, the closing of which was sought to be enjoined, was

not a part of the E. road as actually laid out by the county authorities, yet it being part of "what is known" as the E. road, and this being the allegation of the petition, there is no variance.—Porter v. Johnson, 151 S. W. 599.

III. CONSTRUCTION, IMPROVEMENT, AND REPAIR.

§ 113 (Tex.Civ.App.) A contractor for the construction of roads for a county who by an instrument directs payment to a bank of moneys due or to become due under the contract, and the issuance of warrants direct to the bank, thereby assigns the funds due him from the county subject to the claim of the county.—National Bank of Denison v. Coleman, 151 S. W. 1123.

A county employing a contractor to construct roads and accepting his assignment to a third person of the amount due him under the contract, without intimating that it would elect to pay claims of laborers and materialmen, held estopped from exercising the option as against the third person.—Id.

Laborers and materialmen of a contractor with a county for the construction of roads held not entitled to compel performance of the stipulation in the contract authorizing the county to pay laborers and materialmen.—Id.

HOLIDAYS.

See Sunday.

HOMESTEAD.

See Appeal and Error, § 77.

V. PROTECTION AND ENFORCEMENT OF RIGHTS.

§ 212 (Tex.Civ.App.) In trespass to try title by a municipal corporation to recover a portion of a street claimed by defendant as part of his homestead, the wife was not a necessary party.—Gillaspie v. City of Huntsville, 151 S. W. 1114.

HOMICIDE.

See Criminal Law, §§ 369, 404, 472, 603, 673, 800, 823, 824, 1090, 1097; Indictment and Information, § 60.

III. MANSLAUGHTER.

§ 39 (Tex.Cr.App.) Manslaughter is predicated on adequate cause, and, unless such cause exists, the homicide will not be reduced from murder, although committed under the influence of sudden passion, rendering the mind incapable of cool reflection.—Kelly v. State, 151 S. W. 304.

IV. ASSAULT WITH INTENT TO KILL.

§ 84 (Tex.Cr.App.) To constitute the offense of assault with intent to murder, there must be an assault with a specific intent to kill actuated by malice.—Young v. State, 151 S. W. 1048.

§ 86 (Tex.Cr.App.) Where there is no intent to kill, but simply a shooting to frighten or even to inflict injury without killing, the offense is aggravated assault.—Young v. State, 151 S. W. 1048.

§ 89 (Tex.Cr.App.) Where accused, seeing his wife insulted by another, shot at him and struck his wife, he would be guilty of aggravated assault only.—Hobbs v. State, 151 S. W. 809.

§ 96 (Tex. Cr. App.) Where accused accidentally shot his wife as he was defending himself against another, who was in his wife's company, he was entitled to defend on the ground of self-defense.—Hobbs v. State, 151 S. W. 809.

V. EXCUSABLE OR JUSTIFIABLE HOMICIDE.

§ 116 (Tex.Cr.App.) Threats of themselves alone will not justify a killing, but if deceased raised from his seat with a knife, and defendant thought he was going to carry into effect previous threats to kill him, the right of self-defense arose.—Kelly v. State, 151 S. W. 304.

Though an assault by deceased to carry out threats was such as would not reasonably cause one to believe that he was in danger of losing his life or suffering serious bodily injury, yet if the conduct at the time was such, taking into consideration such threats, as to cause a degree of anger or terror as to render the mind incapable of cool reflection, the offense would be manslaughter.—Id.

Threats made by one against another with the intention of provoking a difficulty on that occasion would not justify the other in killing him on another and different occasion before an act is done or word spoken.—Id.

VII. EVIDENCE.

(B) Admissibility in General.

§ 158 (Tex.Cr.App.) Threats by accused to kill deceased are admissible.—Brock v. State, 151 S. W. 801.

§ 166 (Tex.Cr.App.) Evidence that the sheriff had made statements as to defendant's defeat in an election loud enough for the latter, 15 or 20 feet away, to hear, was admissible to show motive, where immediately afterwards accused went to where deceased, who had fought him in the election, was sitting, and the difficulty resulted.—Kelly v. State, 151 S. W. 304.

Evidence elicited by the state on cross-examination that the witness was arrested by defendant at a given time was properly admitted where its only purpose was to fix the time, and was proved by the witness that defendant at that time told him he would let him go if he would tell on the deceased, as showing his state of mind toward the deceased.—Id.

(E) Weight and Sufficiency.

§ 250 (Tex.Cr.App.) Evidence held sufficient to sustain a conviction of murder.—Brock v. State, 151 S. W. 801.

§ 254. Evidence held to support a conviction for murder in the second degree.

—(Ark.) Wilkerson v. State, 151 S. W. 518; (Tex. Cr. App.) Pugh v. State, 151 S. W. 546; Pinson v. Same, Id. 556.

§ 255 (Ark.) Evidence held to support a conviction of voluntary manslaughter.—Williams v. State, 151 S. W. 1011.

§ 257 (Tex.Cr.App.) Testimony of a physician, that the hatchet with which accused struck his wife, in the hands of a strong man like defendant, was a weapon with which a person could be killed, held sufficient to show that it was a dangerous weapon.—Stanton v. State, 151 S. W. 808.

Evidence held to sustain a conviction of assault with intent to murder.—Id.

VIII. TRIAL.

(C) Instructions.

§ 294 (Tex.Cr.App.) An instruction defining murder held not objectionable in using the word "memory" instead of "mind," where insanity was pleaded.—Montgomery v. State, 151 S. W. 813.

An instruction on insanity held not objectionable as requiring defendant to prove insanity beyond a reasonable doubt or for failure to require that the insanity must be such as to deprive defendant of the knowledge of the nature and quality of his acts, or of the fact that he was doing wrong.—Id.

An instruction held not objectionable as lim-

iting the jury to the consideration of a particular form of insanity.—Id.

An instruction authorizing a conviction if accused knew the nature and quality of his act *held* not objectionable for failure to also require that he knew that his act in killing deceased was wrong.—Id.

§ 295 (Tex.Cr.App.) Evidence *held* to require submission as adequate cause in charge on manslaughter of repetition and renewal of insult, as well as communicated insults.—Washington v. State, 151 S. W. 818.

§ 300 (Tex.Cr.App.) Where a charge given was in the abstract, *held*, that a requested instruction on self-defense applying the law to the facts shown by the evidence should have been given.—Edwards v. State, 151 S. W. 294.

Instruction that if deceased attacked accused with a weapon calculated to produce murder, maiming, etc., it would be presumed that he intended to murder accused, *held* improperly denied.—Id.

Instruction that, where accused and deceased settled a difficulty between them, accused's right of perfect self-defense against a subsequent attack by deceased revived, *held* improperly denied.—Id.

§ 300 (Tex.Cr.App.) In an instruction on the abandonment of the difficulty, the use of the words "in good faith abandoned," etc., were improper, in that the jury might infer that the defendant intended at some future time to renew the difficulty.—Kelly v. State, 151 S. W. 304.

§ 300 (Tex.Cr.App.) Where accused, after having pleaded insanity only, introduced evidence of prior difficulty with deceased and prior communicated threats, the court did not err in charging on threats and self-defense.—Montgomery v. State, 151 S. W. 813.

§ 300 (Tex.Cr.App.) An instruction *held* erroneous as restricting defendant's right of self-defense.—McDowell v. State, 151 S. W. 1049.

§ 308 (Tex.Cr.App.) An instruction on murder in the second degree *held* justified by the evidence.—Pinson v. State, 151 S. W. 556.

§ 308 (Tex.Cr.App.) An instruction on murder in the second degree *held* erroneous, as authorizing a conviction of that offense, though defendant may have killed deceased in self-defense, or have been guilty of no higher offense than manslaughter, or unintentional killing.—McDowell v. State, 151 S. W. 1049.

§ 309 (Tex.Cr.App.) Where the state showed only a case of murder, and the defendant as justification alleged an assault with a knife by deceased, and threats on occasions other than when the assault was made, a charge on manslaughter which dealt only with such assault was proper.—Kelly v. State, 151 S. W. 304.

§ 309 (Tex.Cr.App.) Evidence *held* to require an instruction under White's Ann. Pen. Code 1911, art. 1149, on killing as the result of sudden passion by means not calculated to produce death without the specific intent.—McDowell v. State, 151 S. W. 1049.

Where, in a prosecution for homicide, there was no evidence of any former provocation, an instruction on manslaughter that the provocation must arise at the time, and not by any former provocation, was erroneous.—Id.

§ 310 (Ky.) In a prosecution under Ky. St. § 1166, for shooting and wounding with intent to kill, an instruction on the offense of shooting in sudden affray, defined by Ky. St. § 1242, and which is a degree of the offense of shooting with intent to kill, was proper.—Breeden v. Commonwealth, 151 S. W. 407.

§ 310 (Tex.Cr.App.) Where accused discovered a third person caressing his wife, whereupon he shot at him and injured his wife, he was entitled to an affirmative charge that he was guilty of no greater offense than aggravated assault.—Hobbs v. State, 151 S. W. 809.

§ 310 (Tex.Cr.App.) Where it might have been found from the evidence that there was no intent to kill, an instruction that had the assault resulted in a killing, which would have been manslaughter, there might be a verdict of aggravated assault was too restrictive, and the refusal to instruct that serious bodily injury with a deadly weapon without intent to kill or maim was an aggravated assault, was error.—Young v. State, 151 S. W. 1046.

X. APPEAL AND ERROR.

§ 332 (Tex.Cr.App.) Evidence *held* to sustain a jury's finding, sustained by the trial court, that accused was not so insane at the time he killed deceased as to free him from criminal responsibility.—Montgomery v. State, 151 S. W. 813.

§ 340 (Tex.Cr.App.) In an instruction on the abandonment of the difficulty, error in the use of the words "in good faith abandoned" *held* harmless, where there was no evidence from which an inference could be drawn that defendant intended at some future time to renew the difficulty.—Kelly v. State, 151 S. W. 304.

§ 340 (Tex.Cr.App.) Where the court submitted the issue of manslaughter, and the jury convicted defendant of that offense only, and error in failing to submit that issue in conformity with the evidence was harmless.—Alexander v. State, 151 S. W. 807.

§ 340 (Tex.Cr.App.) Where the jury convicted for murder in the second degree and assessed the punishment at 20 years' imprisonment, failure in charging on manslaughter to submit as adequate cause insults shown by the evidence was reversible error.—Washington v. State, 151 S. W. 818.

HUMANITARIAN DOCTRINE.

See Evidence, § 80.

HUSBAND AND WIFE.

See Acknowledgment, §§ 37, 58; Adverse Possession, §§ 62, 85; Bills and Notes, § 92; Curtesy; Death, § 14; Descent and Distribution; Divorce; Dower; Executors and Administrators, § 55; Fraudulent Conveyances, §§ 104, 278, 300; Homestead, § 212; Homicide, §§ 59, 96, 310; Insurance, § 115; Judgment, § 686; Landlord and Tenant, § 169; Marriage; Trial, § 41; Witnesses, §§ 190, 193.

I. MUTUAL RIGHTS, DUTIES, AND LIABILITIES.

§ 23 (Tex.Civ.App.) The wife of a contractor who, with his consent, was in active charge of the erection of a building was his agent in all things pertaining thereto, and authorized to execute transfers of money to materialmen from the funds due.—A. A. Fielder Lumber Co. v. Smith, 151 S. W. 605.

III. CONVEYANCES, CONTRACTS, AND OTHER TRANSACTIONS BETWEEN HUSBAND AND WIFE.

§ 39 (Mo.App.) A wife may now contract with her husband as if sole.—Crowley v. Crowley, 151 S. W. 512.

§ 49½ (Ky.) A wife, who takes property from her husband as a gift with knowledge that his mother had conveyed the property to him in consideration for maintenance, which she did not get, being unable to live with the wife, cannot object to the declaring of a lien in favor of the mother.—Hopper v. Hopper, 151 S. W. 359.

V. WIFE'S SEPARATE ESTATE.

(A) What Constitutes.

§ 121 (Mo.) Under Rev. St. 1909, §§ 8304, 8309, relative to rights of married women, real and personal property acquired by a wife by

means of her separate estate and labor constitute her separate property, and cannot be taken to satisfy her husband's debts.—*Crump v. Walkup*, 151 S. W. 709.

(B) Rights and Liabilities of Husband.

§ 144 (Mo.App.) Where a husband and wife lived together on the wife's farm, and the husband collected the rents and provided for the family, the wife cannot recover against his estate for such rents, because she never gave written consent to his use of such rents, as required by Rev. St. 1909, § 8309.—*Crowley v. Crowley*, 151 S. W. 512.

VII. COMMUNITY PROPERTY.

§ 268 (Tex.Civ.App.) A wife who has been abandoned by her husband can bind herself by the execution of a note for the settlement of community debts.—*Crowder v. McLeod*, 151 S. W. 1168.

§ 276 (Tex.Civ.App.) The general creditors of the husband of one of two deceased married women, claimed to have been partners in a business in their own right, could not intervene in a suit by the administrator of one of them against the administrator of the husband of the other, claiming that defendant had wrongfully taken possession of the property as community property when it was separate property.—*Lanza v. Roe*, 151 S. W. 571.

VIII. SEPARATION AND SEPARATE MAINTENANCE.

§ 288 (Ky.) A wife, who refused to live in a comfortable home provided at a place where her husband's business required him to be, was not entitled to alimony.—*Davis v. Davis*, 151 S. W. 361.

§ 288 (Mo.App.) In view of Rev. St. 1909, § 8295, a husband's abandonment of and failure to support his wife will not entitle her to separate maintenance for any given length of time, and his sincere offer to take her back and maintain her with conjugal kindness and affection, even after decree for maintenance, will defeat her right to separate maintenance.—*Creasey v. Creasey*, 151 S. W. 215.

§ 297 (Mo.App.) Evidence held to support a finding that the defendant offered in good faith to take plaintiff back and maintain her.—*Creasey v. Creasey*, 151 S. W. 215.

§ 298½ (Mo.App.) The trial court may take the case under advisement and postpone its decision in order to give the parties an opportunity to become reconciled.—*Creasey v. Creasey*, 151 S. W. 215.

The trial court has the discretionary power to reopen the case and hear additional evidence on the husband's attempt to effect a reconciliation after the decision has been taken under advisement.—*Id.*

§ 299 (Mo.App.) An adverse judgment based on a resumption of or offer to resume the conjugal relation will not bar a future action, if the husband thereafter continues his ill treatment, or if upon her return he repulses her.—*Creasey v. Creasey*, 151 S. W. 215.

IX. ABANDONMENT.

§ 304 (Mo.App.) A husband cannot be convicted of abandoning his wife and refusing to support her, where, although he has abandoned her, he has furnished means for her support.—*State v. Lasley*, 151 S. W. 752.

Where a husband, who had abandoned his wife, made arrangements for her support, in which she had first acquiesced, that she later became dissatisfied was not evidence of criminal intent, necessary to the offense of abandoning a wife and refusing to support.—*Id.*

§ 313 (Mo.App.) Evidence, on the prosecution of a husband for abandoning his wife and refusing to support her, held to require the

direction of a verdict for defendant.—*State v. Lasley*, 151 S. W. 752.

HYPOTHETICAL QUESTIONS.

See Criminal Law, § 485.

ICE.

See Monopolies, § 17.

IDENTITY.

See Adultery, § 11.

IMPEACHMENT.

See Witnesses, §§ 344, 346, 379, 380, 391.

IMPOTENCY.

See Witnesses, § 277.

IMPROVEMENTS.

See Cancellation of Instruments, § 59; Constitutional Law, § 290; Ejectment, § 144; Municipal Corporations, §§ 294-567; Vendor and Purchaser, § 198.

INCEST.

See Criminal Law, §§ 338, 489, 507, 824, 945.

§ 6 (Tex.Cr.App.) The depth of the penetration is not material to the crime of incest, where there is an emission.—*Drake v. State*, 151 S. W. 815.

§ 13 (Tex.Cr.App.) In an incest case the court properly excluded testimony as to what the police and detectives told prosecutrix and her mother when the complaint was made.—*Drake v. State*, 151 S. W. 815.

§ 14 (Tex. Cr. App.) Where accused charged with incest with his stepdaughter, had been married prior to his marriage to the mother of prosecutrix, the state should clearly show that at the time of the second marriage, his first wife was dead, or that the first marriage had been annulled.—*Burford v. State*, 151 S. W. 538.

INCUMBRANCES.

See Covenants, § 96; Evidence, § 5.

INDEMNITY.

See Guaranty; Mechanics' Liens, § 818.

INDEPENDENT CONTRACTORS.

See Master and Servant, § 88.

INDICTMENT AND INFORMATION.

See Banks and Banking, § 85; Burglary, §§ 22, 28; Criminal Law, § 1028; False Pretenses, §§ 34, 38; Gaming, §§ 88, 89; Grand Jury; Intoxicating Liquors, §§ 206, 221; Larceny, § 82.

V. REQUISITES AND SUFFICIENCY OF ACCUSATION.

§ 60 (Mo.) Indictment not showing whether or not death of woman or child was caused by abortion held insufficient, because it did not show whether the offense was abortion or manslaughter.—*State v. Stapp*, 151 S. W. 971.

§ 70 (Tex.Cr.App.) Information for gaming held defective, in that it did not present to the court that accused violated the law, but only that some affiant charged him with such offense.—*Zinn v. State*, 151 S. W. 825.

§ 86 (Tex.Cr.App.) An indictment alleging that defendant, in C. county, in the state, permitted property under his control, to wit, one house in C., to be used as a resort for gambling held to sufficiently allege that the offense

was committed in C. county.—Davis v. State, 151 S. W. 313.

§ 86 (Tex.Cr.App.) An information charging that on an election day in a specified town, voting precinct, and county defendant "then and there" gave intoxicating liquor to another sufficiently charged that the offense was committed in the town.—Walker v. State, 151 S. W. 318.

§ 87 (Tex.Cr.App.) An indictment alleging that defendant, on or about a certain day, permitted property to be used as a resort for gambling held to sufficiently allege the date of the offense.—Davis v. State, 151 S. W. 313.

§ 87 (Tex.Cr.App.) Where the record shows that an indictment was returned into court May 22d, charging the commission of an offense May 4th, a recital that the indictment was filed April 22d was a clerical error, and the indictment was found and returned after the commission of the offense as required by White's Ann. Code Cr. Proc. arts. 433, 434.—Fields v. State, 151 S. W. 1051.

§ 87 (Tex.Cr.App.) An indictment charging the commission of a statutory offense on a certain date, which was after the passage of the statute, is good on its face without containing the allegation that the offense was committed after such passage.—Byrd v. State, 151 S. W. 1068.

VI. JOINDER OF PARTIES, OFFENSES, AND COUNTS, DUPLICITY, AND ELECTION.

§ 125 (Mo.) The administration of drugs and the use of instruments to produce an abortion are separate offenses, and hence should not be charged in one count of an indictment.—State v. Stapp, 151 S. W. 971.

X. CONVICTION OF OFFENSE INCLUDED IN CHARGE.

§ 189 (Tex.Cr.App.) Under Code Cr. Proc. 1911, arts. 771, 772, subd. 2, 837, one indicted for an assault with intent to rape, for an attempt to have carnal knowledge, and for burglary with intent to have carnal knowledge, may be convicted of aggravated assault.—Ward v. State, 151 S. W. 1073.

INFANTS.

See Damages, §§ 132, 216; Guardian and Ward; Intoxicating Liquors, § 236; Landlord and Tenant, § 164; Master and Servant, §§ 286, 288, 289; Negligence, §§ 23, 82, 85, 136, 141; Parent and Child; Partition, §§ 12, 93; Railroads, §§ 338, 348, 350; Trial, §§ 125, 191, 244, 252.

III. PROPERTY AND CONVEYANCES.

§ 29 (Tex.Civ.App.) Where an infant solemnly ratified the sale of land of an executor after reaching maturity, he cannot set it aside for irregularities after the land has greatly increased in value.—Diamwood v. Driscoll, 151 S. W. 621.

§ 30 (Tex.Civ.App.) An infant, who did not attempt to disaffirm a sale until three years after his majority, will be held to have affirmed it.—Diamwood v. Driscoll, 151 S. W. 621.

IV. CONTRACTS.

§ 47 (Ky.) An infant is not bound by contract made by another person purporting to act for him, unless such person has been appointed guardian or next friend, or is in some manner authorized by law to act for him.—Slusher v. Weller, 151 S. W. 684.

§ 50 (Ky.) An infant is bound for necessities including legal services in defense of his civil or property rights.—Slusher v. Weller, 151 S. W. 684.

INFLUENCE.

See Wills, §§ 164-166.

INFORMATION.

See Indictment and Information; Quo Warranto, § 48.

INJUNCTION.

See Appeal and Error, §§ 71, 100, 221, 447, 456, 597, 621, 920; Courts, § 120; Election of Remedies, § 3; Evidence, §§ 162, 183, 366; Intoxicating Liquors, §§ 261, 274; Judgment, § 419; Justices of the Peace, § 135; Logs and Logging, § 3; Mortgages, § 338; Municipal Corporations, §§ 323, 513; Nuisances, §§ 60, 75; Pleading, § 8; Schools and School Districts, §§ 68, 111; Set-Off and Counterclaim, § 13; States, § 88; Taxation, §§ 608-611; Waste, § 5; Weights and Measures, § 8.

I. NATURE AND GROUNDS IN GENERAL.

(B) Grounds of Relief.

§ 12 (Mo.App.) A court of equity may enjoin a threatened irreparable injury to property rights, though no injury has then occurred.—Williams v. School Dist. No. 5, 151 S. W. 504.

II. SUBJECTS OF PROTECTION AND RELIEF.

(B) Property, Conveyances, and Incumbrances.

§ 35 (Tex.Civ.App.) A private corporation given the exclusive possession and control of property owned by the state, charged with its care and maintenance, has the right to defend its possession as against a trespasser by action to enjoin the trespass.—Conley v. Daughters of the Republic of Texas, 151 S. W. 877.

A private corporation vested by the Legislature with the exclusive possession and control of property belonging to the state to sustain a suit to enjoin a trespass, need not show express statutory authority, since the statute carried with it the grant of every power needed to carry its purpose into effect.—Id.

§ 46 (Tex.Civ.App.) A showing that its possession had been invaded and injured entitled a corporation in custody and control of property to an injunction restraining trespass.—Conley v. Daughters of the Republic of Texas, 151 S. W. 877.

III. ACTIONS FOR INJUNCTIONS.

§ 118 (Tex.Civ.App.) A petition to enjoin a substituted trustee from selling land which states that such trustee did not have authority under the trust deed, which was a conclusion, but pleads no facts showing whether the deed of trust gave him authority, was insufficient: a power to sell being strictly construed.—Hicks v. Murphy, 151 S. W. 845.

IV. PRELIMINARY AND INTERLOCUTORY INJUNCTIONS.

(A) Grounds and Proceedings to Procure.

§ 148 (Tex.Civ.App.) An injunction restraining a substituted trustee under a deed of trust from selling the land, but saying nothing about the collection of the notes for which the deed of trust was security, was not one restraining the collection of money within Sayles' Ann. Civ. St. 1897, art. 3008, requiring a refunding bond in such cases.—Hicks v. Murphy, 151 S. W. 845.

(B) Continuing, Modifying, Vacating, or Dissolving.

§ 172 (Tex.Civ.App.) Where the answer is a complete denial, the dissolution of a temporary injunction against the sale of land under a trust deed rests largely in the discretion of the trial court.—Corbett v. Sweeney, 151 S. W. 858.

§ 187 (Ark.) A temporary restraining order is not "an injunction to stay proceedings upon a judgment or final order" of the county court, within Kirby's Dig. § 3998, providing that upon the dissolution of an injunction to stay proceedings upon a judgment or final order damages shall be assessed by the court.—*Adcock v. Coker*, 151 S. W. 253.

VII. VIOLATION AND PUNISHMENT.

§ 219 (Tenn.) Dismissal on certiorari of bills in the chancery court to enjoin the maintenance of disorderly houses on the ground of want of jurisdiction *held* not to affect contempt proceedings for disobedience of the injunctions granted, although the imprisonment orders should be remitted.—*Weidner v. Friedman*, 151 S. W. 56.

§ 232 (Tenn.) The chancery court, in punishing a disobedience of its injunction as a contempt, may impose only \$50 fine and 10 days' imprisonment.—*Weidner v. Friedman*, 151 S. W. 56.

VIII. LIABILITIES ON BONDS OR UNDERTAKINGS.

§ 241 (Ark.) The chancery court, in a proceeding by the county treasurer to enjoin the county judge from establishing a depository for funds, *held*, on intervention by prosecuting attorney, asking for judgment on injunction bond for damages for interest on daily balances, to have no jurisdiction; the amounts of such interest, if any, being within the exclusive jurisdiction of the county court.—*Adcock v. Coker*, 151 S. W. 253.

§ 241 (Tenn.) Under Shannon's Code, § 6259, providing that damages from an injunction may be ascertained by a master, or upon an issue of fact tried by a jury, defendant may have a reference or sue on the injunction bond.—*King v. Cox*, 151 S. W. 58.

IN REM.

See Municipal Corporations, § 525.

INSANE PERSONS.

See Constitutional Law, § 316; Criminal Law, §§ 421, 439, 800, 806; Descent and Distribution; Evidence, §§ 127, 322; Homicide, § 294.

II. INQUISITIONS.

§ 23 (Mo.) Rev. St. 1909, § 482, *held* not to deprive the probate court of jurisdiction to sustain a motion by an alleged insane person to set aside the verdict finding her insane on a motion filed and heard, but not determined during the term.—*State ex rel. Nolte v. McQuillin*, 151 S. W. 444.

§ 27 (Mo.) Decree adjudging a person of unsound mind being subject to vacation at any subsequent term under Rev. St. 1909, § 519, no appeal lies therefrom.—*State ex rel. Nolte v. McQuillin*, 151 S. W. 444.

INSOLVENCY.

See Bankruptcy; Banks and Banking, §§ 84, 85; Corporations, § 537; Fraudulent Conveyances, § 241; Insurance, §§ 63-70, 536; Receivers.

INSPECTION.

See Master and Servant, §§ 124, 190, 265.

INSTRUCTIONS.

To jury, see Criminal Law, §§ 772-844, 1172, 1173; Homicide, §§ 294-310, 340; Trial, §§ 191-296.

INSURANCE.

See Appeal and Error, §§ 1040, 1066; Election of Remedies, § 9; Equity, § 69; Evidence, §§ 139, 159, 222, 432, 434, 594; Judgment, §§ 585; Master and Servant, § 78; Mortgages, § 480; Trial, § 192.

II. INSURANCE COMPANIES.

(B) Mutual Companies.

§ 63 (Tenn.) Mutual assessment fire insurance companies have no capital stock, the policy holders being the stockholders, and the cash paid in and the premium notes constituting the company's assets; and hence, upon the insolvency of such company, a policy holder cannot recover premiums paid in or avoid premium notes.—*Gleason v. Prudential Fire Ins. Co.*, 151 S. W. 1030.

§ 64 (Tenn.) Where a bill by an insured to recover on a policy of an insolvent insurance company is good as a creditors' bill, it cannot be rejected because complainant is not entitled to recover under the policy; all other creditors being given an opportunity to come in.—*Gleason v. Prudential Fire Ins. Co.*, 151 S. W. 1030.

§ 70 (Tenn.) The appointment of a receiver for an insolvent mutual assessment fire insurance company terminates all fire insurance contracts, regardless of the payment of premium and period to continue.—*Gleason v. Prudential Fire Ins. Co.*, 151 S. W. 1030.

III. INSURANCE AGENTS AND BROKERS.

(B) Agency for Applicant or Insured.

§ 113 (Tex.Civ.App.) Where a mortgagee agreed to attend to the insurance on the mortgaged premises and procured policies of insurance thereon and retained them in its possession, the mortgagor was chargeable with notice of their provisions.—*Commonwealth Fire Ins. Co. v. Obenchain*, 151 S. W. 611.

IV. INSURABLE INTEREST.

§ 115 (Tenn.) A husband, having a freehold estate in the property of his wife and the right to control it, has an insurable interest therein.—*Gleason v. Prudential Fire Ins. Co.*, 151 S. W. 1030.

§ 122 (Mo.App.) An assignment of an insurance policy to one who has no interest in the life of the insured *held* valid only to the extent of advances made.—*Locke v. Bowman*, 151 S. W. 468.

V. THE CONTRACT IN GENERAL.

(A) Nature, Requisites, and Validity.

§ 143 (Tenn.) Where by mistake a fire policy misdescribed the location of the property insured, insured's remedy is to ask for a reformation; but no action can be maintained upon the policy, where the property destroyed was not in the location described.—*Gleason v. Prudential Fire Ins. Co.*, 151 S. W. 1030.

VI. PREMIUMS, DUES, AND ASSESSMENTS.

§ 198 (Ky.) The acceptance and retention of a life policy will not estop insured from maintaining an action to recover the premiums paid on the ground of false representations inducing the contract.—*Provident Sav. Life Assur. Soc. of New York v. Shearer*, 151 S. W. 938.

Evidence *held* to support a verdict for insured for the amount of premiums paid on a life policy, based on want of consideration and fraudulent representations of the agent of insurer.—*Id.*

On recovery by insured of the premiums paid on a life policy on the ground of fraudulent representations by insurer's agent, the insurer is

entitled to credit for the actual cost of the insurance while the policy was in force.—Id.

VII. ASSIGNMENT OR OTHER TRANSFER OF POLICY.

§ 212 (Mo.App.) In an action to set aside an assignment of a policy of life insurance, the burden of showing its validity *held* to be on the defendant, where the complaint showed an assignment *prima facie* void.—Locke v. Bowman, 151 S. W. 468.

§ 219 (Mo.App.) An assignee of an assignee of a life insurance policy *held* to acquire only the rights of his assignor.—Locke v. Bowman, 151 S. W. 468.

An assignor of a policy of life insurance *held* not estopped to set up his title as against the assignee.—Id.

§ 219 (Tex.Civ.App.) Assignee of policy of fire insurance, knowing that the delivery of the policy was unauthorized, that it had never been accepted by the insured, and that on failure to pay premiums it was automatically canceled, *held* not entitled to recover.—Polk v. State Mut. Fire Ins. Co., 151 S. W. 1126.

§ 222 (Mo.App.) In an action to redeem a policy of life insurance assigned absolutely as security, an allegation of tender before suit brought *held* unnecessary.—Locke v. Bowman, 151 S. W. 468.

X. FORFEITURE OF POLICY FOR BREACH OF PROMISSORY WARRANTY, COVENANT, OR CONDITION SUBSEQUENT.

(B) Matters Relating to Property or Interest Insured.

§ 328 (Tex.Civ.App.) Insurance company liable although no policy was issued, because it had agreed to attend to the matter, *held* not relieved of liability by a conveyance as security two years before the loss because the policy, if issued, would have been subsequent to such conveyance.—Commonwealth Fire Ins. Co. v. Obenchain, 151 S. W. 611.

§ 335 (Tex.Civ.App.) Where the keeping of invoices and books of entry by insured was in substantial compliance with the iron-safe clause, he was entitled to recover.—American Cent. Ins. Co. v. Hardin, 151 S. W. 1152.

(E) Nonpayment of Premiums or Assessments.

§ 349 (Tenn.) Where a fire policy and a premium note provided that failure to pay any premium note when due should terminate the liability of insurer, insured's failure to pay a premium note according to its tenor avoided the policy.—Gleason v. Prudential Fire Ins. Co., 151 S. W. 1030.

§ 353 (Tenn.) Where the agent, in inducing insured to accept a fire policy, agreed to give him reasonable notice of the maturity of a premium note, that agreement will prevent the insurer from declaring forfeiture for nonpayment of the note, when no notice was given.—Gleason v. Prudential Fire Ins. Co., 151 S. W. 1030.

§ 362 (Tex.Civ.App.) Failure of insured to pay insurance premium when notified by local agent that it was due *held* not to relieve the company, the mortgagee, from liability where it had agreed to attend to the insurance, had done so for a time, and had not notified the insured that it would not continue to do so.—Commonwealth Fire Ins. Co. v. Obenchain, 151 S. W. 611.

XI. ESTOPPEL, WAIVER, OR AGREEMENTS AFFECTING RIGHT TO AVOID OR FORFEIT POLICY.

§ 384 (Tex.Civ.App.) An insurer whose agent consented in advance to additional insurance, and issued a slip showing such agreement, was estopped from asserting a forfeiture, though such slip was not attached to the policy until

after the loss.—American Cent. Ins. Co. v. Hardin, 151 S. W. 1152.

XIII. EXTENT OF LOSS AND LIABILITY OF INSURER.

(E) Accident and Health Insurance.

§ 525 (Ky.) Under a life insurance policy providing for liability so long as insured was confined to bed, liability *held* not removed by the fact that insured was up at times to get fresh air, etc.—Home Protective Ass'n v. Williams, 151 S. W. 361.

XIV. NOTICE AND PROOF OF LOSS.

§ 536 (Tenn.) Where the local agent, as well as the adjuster, of a fire insurance company, promised to furnish insured with blanks for proof of loss, their failure to furnish the blanks within the time stipulated by the policy is a waiver of the condition requiring insured to make proofs within that time.—Gleason v. Prudential Fire Ins. Co., 151 S. W. 1030.

Where an insurance company became insolvent and a receiver was appointed after a loss, but before the time for filing proofs had expired, and the court fixed a time within which creditors were required to file petitions establishing their claims, that order superseded the requirement of filing proofs of loss.—Id.

XVII. PAYMENT OR DISCHARGE, CONTRIBUTION, AND SUBROGATION.

§ 602 (Tex.Civ.App.) Acts 31st Leg. c. 108, § 35, making an insurer failing to pay a loss liable for damages and attorney's fees, requires the petition to specifically allege a demand and refusal to pay within the statutory time.—General Accident, Fire & Life Assur. Corporation v. Lacy, 151 S. W. 1170.

XVIII. ACTIONS ON POLICIES.

§ 629 (Ky.) Where a policy contains a general clause with a promise to pay, exceptions in a distinct clause limiting the general clause need not be pleaded by plaintiff.—Aetna Life Ins. Co. v. Rustin, 151 S. W. 366.

§ 653 (Tex. Civ. App.) Where the evidence tended to show that loss under a fire policy was occasioned by incendiaryism, evidence as to the existence of a mortgage on the property was admissible as tending to show a motive.—Philadelphia Underwriters Agency of Fire Ass'n of Philadelphia v. Brown, 151 S. W. 899.

§ 665 (Ky.) In action on policy, where defense was suicide, evidence *held* to make a *prima facie* case for plaintiff.—Aetna Life Ins. Co. v. Rustin, 151 S. W. 366.

Evidence in an action on a policy limiting insurer's liability for death from injuries intentionally inflicted, except assaults for burglary or robbery, *held* to justify a recovery, although it did not show that the injuries were inflicted in such an assault.—Id.

§ 669 (Ky.) In action on accident insurance policy, where suicide was the defense, instructions *held* to have properly submitted the case as made by the evidence.—Aetna Ins. Co. v. Rustin, 151 S. W. 366.

XX. MUTUAL BENEFIT INSURANCE

(B) The Contract in General.

§ 723 (Tex.Civ.App.) Where insured in her medical examination stated that she had had two miscarriages, proof that she had had two abortions did not show a breach of warranty.—Royal Neighbors of America v. Bratcher, 151 S. W. 885.

Proof that insured had been treated for headache three years prior to the issuance of her policy, she having stated that she had had no illness for seven years, was not necessarily a defense; the jury being authorized to find that it was not material to the risk under Acts 31st Leg. (2d Extra Sess.) c. 22.—Id.

(D) Forfeiture or Suspension.

§ 747 (Tex.Civ.App.) Where a member of a fraternal organization was not in good standing at the time of his death in the only subordinate temple to which he belonged, or could belong, there could be no recovery on the certificate.—International Order of Twelve Knights & Daughters of Tabor v. Wilson, 151 S. W. 320.

(F) Actions for Benefits.

§ 815 (Tex.Civ.App.) Where the petition in an action on a certificate issued by a fraternal organization alleged that decedent was a member of a subordinate temple, it was error to introduce in evidence the financial card of another temple.—International Order of Twelve Knights & Daughters of Tabor v. Wilson, 151 S. W. 320.

§ 818 (Tex.Civ.App.) A letter from a negro fraternal organization, written after the death of a member, notifying the beneficiary of her expulsion, held inadmissible on the issue as to whether insured was a member in good standing at his death.—International Order of Twelve Knights & Daughters of Tabor v. Wilson, 151 S. W. 320.

INTENT.

See Abortion, § 11; Brokers, § 84; Contracts, § 147; Homicide, § 86; Libel and Slander, § 143; Wills, §§ 441, 775.

INTEREST.

See Landlord and Tenant, § 232; Receivers, § 101; Usury.

Insurable interest, see Insurance, §§ 115, 122.

II. RATE.

§ 38 (Mo.App.) Under Rev. St. 1909, §§ 7179, 7181, making 6 per cent. the legal rate of interest, and declaring that judgments shall bear that rate, a judgment on a special tax bill draws such rate, though the city charter authorizes 8 per cent. on tax bills in case of default.—Granite Bituminous Paving Co. v. Parkview Realty & Improvement Co., 151 S. W. 479.

INTERPLEADER.

See Attachment, § 308.

INTERPRETATION.

See Constitutional Law, §§ 18-26; Contracts, §§ 147-176; Mines and Minerals, §§ 62-68; Mortgages, § 115; Statutes, §§ 174-227.

INTOXICATING LIQUORS.

See Appeal and Error, § 1108; Criminal Law, §§ 372, 814, 970, 1091, 1169; Evidence, § 43; Statutes, § 114.

III. LOCAL OPTION.

§ 29 (Mo.) Under the statutory construction section of Rev. St. 1889, § 6570, and Laws 1907, p. 263, defining the terms "general election," local option law (Laws 1887, p. 179), prohibiting a holding of a local option election within 60 days of a general election, held not to prohibit the holding of a local option election within 60 days of a primary.—State ex rel. Million v. Graham, 151 S. W. 729.

IV. LICENSES AND TAXES.

§ 82 (Tex.) A valid local option election resulting in the adoption of the law is essential to any liability on a liquor dealer's bond given under the local option law.—State v. Savage, 151 S. W. 530.

VI. OFFENSES.

§ 146 (Ark.) Defendant was asked by M. if he could get him some whisky, and was given

money to get it. He got it of B., who had told him he could get of him any time, and gave it to M., who did not know B. was engaged in selling it. Held, that he was a necessary factor in making the sale, and that he acted for B. as well as M., and so was a principal in the illegal sale.—Bobo v. State, 151 S. W. 1000.

§ 146 (Tex.Cr.App.) Where the state's witness gave defendant 50 cents to get some whisky, and when defendant returned with alcohol refused to take it, but afterwards followed defendant and took the alcohol from him without his consent, there was no sale; but if he took it in payment of the 50 cents, with defendant's consent, it would be a sale.—Scott v. State, 151 S. W. 550.

§ 146 (Tex.Cr.App.) The giving of whisky to be repaid in whisky is a sale.—Black v. State, 151 S. W. 1053.

§ 148 (Tex.Cr.App.) The offense of pursuing the business of selling intoxicating liquors in local option territory is a distinct offense from that of making a sale of intoxicating liquors, and is a felony.—Byrd v. State, 151 S. W. 1068.

VIII. CRIMINAL PROSECUTIONS.

§ 205 (Tex.Cr.App.) Under the Code, an indictment charging accused with pursuing the occupation of selling intoxicating liquors in local option territory and with making sales to persons named and to persons unknown is not bad for failing to allege that, during the time of the sales, accused continued to pursue the business of selling liquor.—Byrd v. State, 151 S. W. 1068.

§ 221 (Tex.Cr.App.) An information charging the giving of intoxicating liquors to another on election day need not state that the defendant is not a druggist within a proviso to the statute.—Walker v. State, 151 S. W. 318.

§ 224 (Tex.Cr.App.) In a prosecution for sales of intoxicants made by a licensed dealer on Sunday, the state, having introduced his application for a license in which he made affidavit that prohibition was not in effect, is not bound to show that the local option law had not been adopted.—Woods v. State, 151 S. W. 296.

§ 226 (Tex.Cr.App.) In a prosecution for a gift of intoxicating liquor on election day, the order of the commissioners' court creating the election precinct, as well as evidence that the town in which the offense was alleged to have been committed was in such precinct, was admissible.—Walker v. State, 151 S. W. 318.

§ 227 (Tex.Cr.App.) In a prosecution for illegal sales of intoxicating liquors, it is proper to allow witness to testify that accused was engaged in the saloon business, even if it had not been shown that the retail license introduced in evidence was issued to accused.—Woods v. State, 151 S. W. 296.

§ 233 (Tex.Cr.App.) In a prosecution for a sale of intoxicants on Sunday, it is not error for a witness to be asked whether he saw the side door of accused's saloon open on a stated Sunday.—Woods v. State, 151 S. W. 296.

§ 233 (Tex.Cr.App.) In a prosecution for the unlawful sale of intoxicating liquors, evidence to show that defendant had access to a quantity of whisky at the time of the alleged sales was admissible.—Black v. State, 151 S. W. 1053.

§ 233 (Tex.Cr.App.) Under an indictment charging accused with carrying on the business of selling liquor in local option territory, the state was properly permitted to show the amount of liquor received by accused and that it was delivered at the place where the business was carried on.—Byrd v. State, 151 S. W. 1068.

§ 234 (Tex.Cr.App.) Whether or not a liquor license had been issued is a fact, which may be

proved without the exhibition of the license, especially in view of Acts 31st Leg. (1st Ex. Sess.) c. 17, § 14, requiring the posting of licenses.—*Woods v. State*, 151 S. W. 296.

§ 235 (Tex.Cr.App.) On a trial for pursuing the business of selling liquor in local option territory, the refusal to permit accused to show his custom to order liquor for patrons *held* proper.—*Byrd v. State*, 151 S. W. 1068.

§ 236 (Tex.Cr.App.) In a prosecution for giving intoxicating liquor to a minor without the consent of his parent or guardian, evidence *held* insufficient to sustain a conviction.—*Simpson v. State*, 151 S. W. 303.

§ 238 (Tex.Cr.App.) In a prosecution for the sale of liquor, where the evidence was conflicting as to whether defendant consented to its taking from him by the state's witness, the failure to submit the question of his consent was reversible error.—*Scott v. State*, 151 S. W. 550.

§ 239 (Tex.Cr.App.) Proof that accused did not know that what she sold was intoxicating did not raise the issue of an offense committed by accident within Pen. Code 1911, arts. 45, 47, in the absence of proof that she used proper care to ascertain before offering to sell it.—*Mollenkopf v. State*, 151 S. W. 799.

Where the state's witnesses testified that they bought intoxicating wine from accused, while she claimed that she sold only unfermented grape juice, she was entitled to have an affirmative instruction submitting such issue to the jury.—*Id.*

An instruction as to what was necessary to show that accused engaged in the business of selling intoxicating liquor, etc., *held* misleading.—*Id.*

X. ABATEMENT AND INJUNCTION.

§ 261 (Tex.Civ.App.) Rev. Civ. St. 1911, art. 4643, does not authorize the court to enjoin a public nuisance created by pursuing the business of selling intoxicating liquors without a license, but the party seeking the remedy must show himself entitled thereto under the general principles of equity, or bring himself within some statute granting the relief.—*Spence v. Fenchler*, 151 S. W. 1094.

§ 274 (Tex.Civ.App.) A private person, to be entitled to a temporary injunction under Rev. Civ. St. 1911, art. 4674 (1), to abate a public nuisance, must allege that a person named pursued the business of selling intoxicating liquors without a license and thereby created a nuisance.—*Spence v. Fenchler*, 151 S. W. 1094.

IRON SAFE CLAUSE.

See Insurance, § 335.

IRREPARABLE INJURY.

See Injunction, § 12.

JOINDER.

See Parties, § 19.

JOINT TENANCY.

See Tenancy in Common.

JUDGES.

See Constitutional Law, § 316; Counties, § 113; Injunction, § 241; Justices of the Peace; New Trial, § 6.

IV. DISQUALIFICATION TO ACT.

§ 47 (Tenn.) A judge is not disqualified to act in a case merely because he will be a witness, in view of Shannon's Code, § 5594, making the judge a competent witness in any case before him.—*In re Cameron*, 151 S. W. 64.

Trial judge *held* not to have become prosecutor, and disqualified from hearing disbarment

proceedings, by consulting with others before making charges of misconduct, in order to test his recollection of what occurred.—*Id.*

§ 49 (Tenn.) A judge is not absolutely disqualified to hear and determine a case merely because he is personally prejudiced against a party; it being left to his personal discretion whether he will act.—*In re Cameron*, 151 S. W. 64.

A trial judge, who, as shown by uncontradicted evidence, had decided disbarment proceedings before hearing, *held* disqualified, under Const. art. 6, § 11, and Shannon's Code, § 5706.—*Id.*

A trial judge is not disqualified on the ground that he had decided the case in advance, unless it appears beyond any doubt that such is the fact; his denial, though not under oath, being conclusive on this point.—*Id.*

JUDGMENT.

See Appeal and Error; Arbitration and Award. § 8; Attachment, § 13; Bail, § 93; Bills and Notes, § 440; Boundaries, § 43; Costs, § 316; Divorce, § 245; Exceptions, Bill of, § 6; Execution; Husband and Wife, § 299; Interest, § 38; Partnership, § 219; Pleading, § 8; Set-Off and Counterclaim, § 13; Subrogation, § 31; Taxation, § 595; Vendor and Purchaser, § 289.

I. NATURE AND ESSENTIALS IN GENERAL.

§ 1 (Tex.) The judgment of a court is that which it pronounces; that is, the judicial act by which it declares the decision of the law upon the matter at issue.—*Coleman v. Zapp*, 151 S. W. 1040.

IV. BY DEFAULT.

(A) Requisites and Validity.

§ 106 (Tex.Civ.App.) The filing of a plea charging a defect of parties was not the filing of such answer as would prevent the entry of a judgment by default under Rev. Civ. St. 1911, art. 1936.—*Gillaspie v. City of Huntsville*, 151 S. W. 1114.

An answer filed, but not called to the attention of the court, will not render the entry of a judgment by default error.—*Id.*

§ 107 (Mo.) Defendant *held* not in default, so as to warrant judgment, where his answer contained a general denial, as well as the counterclaim to which a demurrer was sustained.—*Montgomery v. Gahagan*, 151 S. W. 453.

(B) Opening or Setting Aside Default.

§ 138 (Ky.) An order directing that the allegations of the petition, as amended, be taken as confessed, is an interlocutory order, which may be set aside at a subsequent term, without following the Code provisions for vacating judgments.—*Duff & Oney v. Rose*, 151 S. W. 22.

§ 138 (Tex.Civ.App.) A nonresident defendant, who did not attempt to engage counsel until a few days before the beginning of the term at which the case was to be tried, did not exercise sufficient diligence to warrant the setting aside of his default because he was unrepresented by counsel.—*Booker v. Coulter*, 151 S. W. 335.

Where a nonresident defendant knew, at least a month before trial, that he could not be present, and that his defense could only be established by his evidence, a default will not be set aside, on failure to have his deposition taken, to allow him to present his defense.—*Id.*

§ 139 (Tex.Civ.App.) An application to set aside a default judgment is addressed to the sound discretion of the court.—*Gillaspie v. City of Huntsville*, 151 S. W. 1114.

§ 143 (Tex.Civ.App.) A defendant who on appearance day suggested that his wife was a necessary party, and left the courtroom without answering to the merits, expecting the

court according to custom to take cognizance of the pleading filed, and to have him called when the case should be reached, no such custom being proved, did not present a valid excuse for failing to answer in time.—*Gillaspie v. City of Huntsville*, 151 S. W. 1114.

§ 143 (Tex.Civ.App.) A defendant who, before the end of the term, filed his application to vacate a default judgment and pleaded as an excuse a compromise and settlement of the claim and a promise by plaintiff to dismiss the action, showed a reasonable excuse for defaulting.—*General Accident, Fire & Life Assur. Corporation v. Lacy*, 151 S. W. 1170.

§ 145 (Tex.Civ.App.) A default judgment will not be vacated, on the ground that defendant was not represented by counsel, where, had he been represented by counsel, the result could not have been changed.—*Booker v. Coulter*, 151 S. W. 335.

§ 145 (Tex.Civ.App.) Where on the day following rendition of judgment by default defendant filed a motion to set aside and an answer to the merits, the court should have looked to the allegations of the answer to determine whether defendant had a meritorious defense.—*Gillaspie v. City of Huntsville*, 151 S. W. 1114.

§ 158 (Tex.Civ.App.) A motion to set aside a default must be denied, where the allegation of a meritorious defense is not supported by affidavit.—*Booker v. Coulter*, 151 S. W. 335.

§ 162 (Tex.Civ.App.) Where on the day following rendition of judgment by default defendant filed a motion to set aside and an answer to the merits, the court should have looked to the allegations of the answer to determine whether defendant had a meritorious defense, but could not hear proof to determine their truth.—*Gillaspie v. City of Huntsville*, 151 S. W. 1114.

§ 162 (Tex.Civ.App.) The court on a motion to open a default may take testimony on the merits of the defense interposed, where no objection is made to a trial of the issue in that way.—*General Accident, Fire & Life Assur. Corporation v. Lacy*, 151 S. W. 1170.

§ 163 (Tex.Civ.App.) The court on motion to open a default may not as a general rule pass on the merits of a defense in support of the motion.—*General Accident, Fire & Life Assur. Corporation v. Lacy*, 151 S. W. 1170.

VI. ON TRIAL OF ISSUES.

(B) Parties.

§ 239 (Mo.) A plaintiff suing two or more persons as joint tort-feasors may recover against one alone, and this rule is not changed by Rev. St. 1909, § 1734.—*Winn v. Kansas City Belt Ry. Co.*, 151 S. W. 98.

(C) Conformity to Process, Pleadings, Proofs, and Verdict or Findings.

§ 248 (Mo.App.) Judgments and decrees must be responsive to the pleadings and issues.—*Advance Thresher Co. v. Speak*, 151 S. W. 235.

§ 250 (Mo.App.) In an action for breach of a contract to float logs, brought on theory of mere failure of performance, causing total loss of the logs, plaintiff could not recover on the theory of defendant's abandonment of the contract, imposing on plaintiff the duty to minimize damages.—*Cronan v. Stutsman*, 151 S. W. 166.

§ 253 (Tex.Civ.App.) A money judgment cannot exceed the amount demanded in the petition.—*First Bank of Springtown v. Hill*, 151 S. W. 652.

§ 253 (Tex.Civ.App.) The amount plaintiff may recover is limited by the allegations of the petition.—*Anderson v. Crow*, 151 S. W. 1080.

§ 256 (Tex.Civ.App.) A finding that attorneys were entitled to part of land under a deed held to involve a finding that the deed was not one upon a contingency for one-half of the land recovered by the grantor in an action, and hence it was improper to limit their recovery to one-half the land.—*Morris v. Short*, 151 S. W. 633.

VII. ENTRY, RECORD, AND DOCKETING.

§ 293 (Tex.) The failure to correctly or fully enter a judgment upon the minutes does not annul it, but merely makes its record imperfect.—*Coleman v. Zapp*, 151 S. W. 1040.

VIII. AMENDMENT, CORRECTION, AND REVIEW IN SAME COURT.

§ 294 (Tex.) The right to have a judgment entry correspond with the terms of the judgment is not affected by rule 48 for the district courts (142 S. W. xxi), requiring counsel for the successful party to prepare the form of the judgment and submit it to the court.—*Coleman v. Zapp*, 151 S. W. 1040.

§ 299 (Tex.) A court's jurisdiction over its judgment records does not end with the term; the case being regarded as pending until the judgment is correctly recorded.—*Coleman v. Zapp*, 151 S. W. 1040.

§ 318 (Tex.) The right of a party to have a judgment entry corrected or amended to speak the truth cannot be exercised to the prejudice of innocent third persons.—*Coleman v. Zapp*, 151 S. W. 1040.

§ 321 (Tex.) A delay of six years after entry of a judgment in applying to correct it nunc pro tunc by adding an omitted part does not bar the relief where the parties had not changed their positions and no rights had intervened.—*Coleman v. Zapp*, 151 S. W. 1040.

§ 326 (Tex.) A court has inherent power to correct a judgment nunc pro tunc, so as to properly recite the effect of its judgment.—*Coleman v. Zapp*, 151 S. W. 1040.

§ 335 (Mo.) Petition stating the facts prescribed for a petition for review by Rev. St. 1899, § 780, held to be a petition for review, under Rev. St. 1899, §§ 777, 780, though an additional party was brought in, and one party was transferred to a different side.—*Marshall v. Hill*, 151 S. W. 131.

The proceeding named a "petition for review" is highly remedial, and must accommodate itself to the needs and practices of every proceeding that comes within its scope.—*Id.*

Under Rev. St. 1899, § 784, providing that a conveyance to satisfy a judgment shall not be affected by a vacation of the judgment on petition for review, as against innocent purchasers, the title of innocent purchasers for value from the holder of the legal title cannot be set aside in proceedings for review by the holders of the equitable title.—*Id.*

IX. EQUITABLE RELIEF.

(A) Nature of Remedy and Grounds.

§ 419 (Tex.Civ.App.) A default judgment against a partnership on allegation that it was a corporation and service having been had on a certain person as agent of the alleged corporation held void and its enforcement subject to injunction.—*Spaulding Mfg. Co. v. Kuvkendall*, 151 S. W. 1122.

XI. COLLATERAL ATTACK.

(B) Grounds.

§ 495 (Tex.Civ.App.) Every presumption is in favor of the jurisdiction of a court of general jurisdiction in a collateral attack on its judgment.—*Wilkin v. Simmons*, 151 S. W. 1145.

XIII. MERGER AND BAR OF CAUSES OF ACTION AND DEFENSES.**(A) Judgments Operative as Bar.**

§ 568 (Mo.App.) A default judgment for an indorser against the makers of the note is a bar in a second action between the same parties to charge real estate fraudulently conveyed, as to a defense that plaintiff was released by an extension of time, so that her payment of the note was voluntary.—*Wilson v. Salisbury*, 151 S. W. 194.

§ 572 (Tenn.) A decree on demurrer *held res judicata*, when a demurrer to a single ground of relief is overruled, when the demurrer is sustained and the bill dismissed, when the bill presents several grounds of relief and the court acts upon each ground, but not where there is a general judgment overruling a demurrer to a bill setting up several grounds of relief.—*Logan & Maphet Lumber Co. v. Cross*, 151 S. W. 51.

Judgment of Supreme Court that demurrer to bill alleging several grounds of relief was not well taken, and affirming the decree overruling it, and remanding the bill for answer and further proceedings, *held res judicata* as to a new bill containing the same grounds of relief.—*Id.*

(B) Causes of Action and Defenses Merged, Barred, or Concluded.

§ 585 (Mo.App.) A judgment adjudging that a party is not entitled to a release of a deed of trust securing a debt bars an action for the statutory penalty for a refusal to release the deed of trust.—*Warner v. Michel*, 151 S. W. 159.

§ 585 (Mo.App.) A judgment denying relief to insured suing for the premiums paid is not *res judicata* in a subsequent action by his widow and children for the amount of the policy, on the theory that Rev. St. 1889, § 5886, in force at the time, extended the insurance beyond the date of insured's death.—*Hartwig v. Security Mut. Life Ins. Co.*, 151 S. W. 477.

§ 606 (Ky.) Where the builders of a railroad wrongfully blasted rock into a river so as to divert its channel and cause a riparian owner's land to be overflowed, separate actions may be recovered for each of the recurring floods, and a recovery by the landowner will not bar his grantees.—*Turner v. J. M. Brooks & Sons*, 151 S. W. 948.

XIV. CONCLUSIVENESS OF ADJUDICATION.**(B) Persons Concluded.**

§ 686 (Ky.) A judgment in an action to which plaintiff's husband was a party, construing a will under which he claimed, which judgment had never been set aside or reversed, was conclusive against plaintiff as devisee of her husband.—*Landers v. Landers*, 151 S. W. 386.

(C) Matters Concluded.

§ 713 (Mo.App.) A judgment for a foreign corporation instituting an action is conclusive on its right to sue since such issue could have been tried.—*Scientific American Club v. Horchitz*, 151 S. W. 475.

§ 713 (Mo.App.) A judgment bars a subsequent suit between the same parties on the same cause of action as to all matters which might have been litigated in the prior action.—*Hartwig v. Security Mut. Life Ins. Co.*, 151 S. W. 477.

XVII. FOREIGN JUDGMENTS.

§ 829 (Ky.) The judgment of the United States Circuit Court, from which no writ of error has been taken, rendered after it has sustained its own jurisdiction and refused to remand the action, cannot be collaterally attacked in the state as void for want of jurisdiction.—*Tyson's Adm'x v. Illinois Cent. R. Co.*, 151 S. W. 404.

XIX. SUSPENSION, ENFORCEMENT, AND REVIVAL.

§ 853 (Ky.) A lapse of more than 15 years from the issuance of an execution will bar any attempt to subject the debtor's property to the judgment.—*Cropper v. Gaar's Ex'r*, 151 S. W. 913.

XXII. PLEADING AND EVIDENCE OF JUDGMENT AS ESTOPPEL OR DEFENSE.

§ 948 (Mo.) In the absence of a plea the question of *res judicata* need not be considered.—*Nelson v. Jones*, 151 S. W. 80.

§ 948 (Tex.Civ.App.) *Res judicata* must be pleaded and proven.—*Pye v. Wyatt*, 151 S. W. 1088.

§ 953 (Ky.) Evidence *held sufficient* to show that, in an action in which the construction of a will was involved, it was determined that a person had only a defeasible fee, although the papers in such action had been destroyed by fire.—*Landers v. Landers*, 151 S. W. 386.

JUDICIAL NOTICE.

See Evidence, §§ 5, 48; Exceptions, Bill of, § 6.

JUDICIAL SALES.

See Constitutional Law, § 309; Guardian and Ward, §§ 92, 102; Partition, § 77; Trusts, § 193½.

JURAT.

See Criminal Law, § 214.

JURISDICTION.

See Appeal and Error, §§ 23, 78, 100, 359, 361, 456, 635, 655, 852; Appearance, § 9; Arbitration and Award, § 8; Attachment, § 233; Bail, § 65; Certiorari, § 28; Courts, §§ 2-37, 121-488; Criminal Law, § 101; Death, § 35; Divorce, §§ 62, 303; Equity, § 39; Judgment, § 496; Prohibition, § 10; Vendor and Purchaser, § 277.

JURY.

See Criminal Law, § 871; Grand Jury; New Trial, § 52.

II. RIGHT TO TRIAL BY JURY.

§ 13 (Ky.) Const. § 7, guaranteeing the right of trial by jury, has reference to cases in which such right was given at common law, and issues of fact in equity cases are triable by a jury only at the discretion of the chancellor.—*Rieger v. Schulte & Eicher*, 151 S. W. 395.

§ 14 (Ky.) Under Civ. Code Prac. § 12, providing for a jury trial of issues in equitable actions, and Ky. St. §§ 2471, 2472, 2473, providing for the hearing of lien claimants by a commissioner and his report thereon, *held* that disputed questions as to whether alleged defects in a building were chargeable to any of the lien claimants, and, if so, to what extent their liens should be abated, are not triable by jury.—*Rieger v. Schulte & Eicher*, 151 S. W. 395.

§ 25 (Mo.) A motion for a trial by jury after a referee has filed his report is too late.—*State ex rel. Kimbrell v. People's Ice, Storage & Fuel Co.*, 151 S. W. 101.

§ 29 (Tex.Cr.App.) The statute which provides that defendant, in a misdemeanor case, may waive a jury, enables him to agree to a trial by a jury composed of less than six men.—*Mackey v. State*, 151 S. W. 802.

Where defendants agree to the trial of a misdemeanor before a jury of five, an objection to such a trial, first made after conviction, comes too late.—*Id.*

V. COMPETENCY OF JURORS, CHALLENGES, AND OBJECTIONS.

§ 142 (Ky.) After adverse verdict in a will contest, appellant *held* estopped from complaining of the overruling of a challenge to a juror for cause, where he did not on examination of the juror ask such questions or give such information as would have shown the juror's opinion.—*Crosthwaite v. Crosthwaite*, 151 S. W. 945.

JUSTICES OF THE PEACE.

See Appeal and Error, §§ 297, 532; Courts, § 120; Criminal Law, § 447.

IV. PROCEDURE IN CIVIL CASES.

§§ 73, 74 (Tex.Civ.App.) Where the regular justice was sick, a justice of the same precinct could, as authorized by *Sayles' Ann. Civ. St.* 1897, art. 1566, perform the duties of the office, provided he was the nearest justice.—*Chance v. Pace*, 151 S. W. 843.

§ 84 (Mo.App.) A defendant, appealing from a justice of the peace, and appearing on appeal for the sole purpose of quashing the return on the summons and dismissing the action, does not thereby waive defective service.—*Handlan-Buck Mfg. Co. v. Chester, P. & Ste. G. R. Co.*, 151 S. W. 171.

§ 84 (Tex.Civ.App.) An appearance by defendant in justice's court to obtain a continuance, and actually obtaining a continuance, is a waiver of the issuance and service of citation.—*Chance v. Pace*, 151 S. W. 843.

§ 106 (Tex.Civ.App.) Under *Rev. St.* 1895, art. 1301, providing that a party may take a nonsuit at any time before a decision is announced by the court, and article 1677, making the same procedure applicable to justices' courts, a nonsuit may be entered after the justice has announced his decision, but before formal judgment is rendered.—*Pye v. Wyatt*, 151 S. W. 1086.

§ 135 (Tex.Civ.App.) A petition to restrain an execution sale under a justice's judgment, which alleged that the justice was without jurisdiction because the suit was based on 20 notes of \$10 each and 10 per cent. attorney's fees, as against which a credit of \$45 had been allowed, did not show that the amount involved was in excess of \$200; there being no averment as to the date of the credit.—*Chance v. Pace*, 151 S. W. 843.

A defendant in justice's court, who made no defense, though he knew of the action, and who showed no excuse for his failure to appeal or bring certiorari, was not entitled to restrain an execution sale under the judgment.—*Id.*

Under *Sayles' Ann. Civ. St.* 1897, art. 1657-1659, making execution issued on justice's judgment returnable in 60 days, a writ not returned within that time lapses.—*Id.*

§ 135 (Tex.Civ.App.) The enforcement of a judgment of a justice of the peace will not be restrained unless the judgment is wholly void for want of jurisdiction, and not merely erroneous.—*Pye v. Wyatt*, 151 S. W. 1086.

The privilege to be sued before a justice in a given district is a matter of defense and does not affect the validity of a judgment rendered, and hence enforcement of such judgment will not be restrained.—*Id.*

In an action to enjoin a justice's judgment on the ground of a previous judgment of nonsuit, an allegation that in the first action the justice stated that he would be compelled to render judgment for defendant is not equivalent to an allegation that judgment had been pronounced so that no nonsuit could be taken.—*Id.*

V. REVIEW OF PROCEEDINGS.

(A) Appeal and Error.

§ 191 (Mo.App.) A surety on an appeal bond is in privity with the judgment debtor; and the judgment is binding on both.—*Scientific American Club v. Horchitz*, 151 S. W. 475.

(B) Certiorari.

§ 210 (Tex.Civ.App.) Where defendant, against whom a judgment was rendered in justice's court, brought certiorari, plaintiff, obtaining a judgment on the merits, was entitled to judgment against the sureties on the bond filed, as required by *Rev. Civ. St.* 1911, art. 749.—*Ingram v. McClure*, 151 S. W. 339.

KNOWLEDGE.

See Arbitration and Award, § 67; Attorney and Client, § 51; Vendor and Purchaser, § 308.

LACHES.

See Equity, §§ 69, 71, 346; Nuisance, § 75.

LANDLORD AND TENANT.

See Husband and Wife, § 144; Mines and Minerals, §§ 58-68; Pleading, § 8; Principal and Agent, § 146; Process, § 58; Railroads, § 121; Receivers, § 105; Sheriffs and Constables, § 137; Tenancy in Common, § 28; Trial, §§ 244, 256; Use and Occupation.

II. LEASES AND AGREEMENTS IN GENERAL.

(A) Requisites and Validity.

§ 20 (Mo.) At common law the term "real estate" did not include a lease.—*Springfield S. W. Ry. Co. v. Schweitzer*, 151 S. W. 128.

IV. TERMS FOR YEARS.

(A) Nature and Extent.

§ 70 (Mo.) At common law a term for years, created by lease, was a "chattel real."—*Springfield S. W. Ry. Co. v. Schweitzer*, 151 S. W. 128.

(B) Assignment, Subletting, and Mortgage.

§ 75 (Mo.App.) Under *Rev. St.* 1909, § 7880, prohibiting the assignment of a lease for a term not exceeding two years, or at will, or by sufferance without the written consent of the landlord, a lease extending from September 23, 1909, to January 1, 1913, *held* a proper subject of assignment.—*Griggs v. Bridgwater*, 151 S. W. 764.

§ 76 (Tex.Civ.App.) A lessee *held* to have no right to permit a third person to erect signboards on the roof of the leased premises; the lease and *Rev. St.* 1895, art. 3250, both forbidding a subletting without the consent of the lessor.—*Clayton D. Brown Co. v. O'Connor*, 151 S. W. 339.

A landlord *held* not estopped by acceptance of rent from compelling removal of such signboards.—*Id.*

§ 79 (Mo.App.) The rights of an assignee of a lease *held* not affected by the death of his assignor, though the personal representative of such assignor refused to take charge of the lease.—*Griggs v. Bridgwater*, 151 S. W. 764.

§ 79 (Tex.) An instrument executed by a lessee whereby he conveys the entire term and parts with all reversionary interest in the premises is an assignment, while, if he retains any reversionary interest, the instrument is a sublease.—*Davis v. Vidal*, 151 S. W. 290.

The word "term," in the rule that a tenant who parts with the entire term embraced in

his lease is an assignor of the lease, defined.—Id.

Where a tenant reserves, in the instrument, giving possession to his transferee, the right of re-entry on failure to pay rent, he retains an interest in the premises and the instrument is a subletting, though stated to be an assignment.—Id.

VII. PREMISES, AND ENJOYMENT AND USE THEREOF.

(A) Description, Extent, and Condition.

§ 123 (Tex.Civ.App.) Where an owner of a one-story building containing several rooms leases them to different tenants, each lessee has merely an easement in the roof and has no control over it.—Clayton D. Brown Co. v. O'Connor, 151 S. W. 339.

(D) Repairs, Insurance, and Improvements.

§ 150 (Mo.App.) Where a single dwelling was demised to one person, without any covenant as to repairs, no one, not even the landlord, could enter, without defendant's consent, to make repairs.—Korach v. Loeffel, 151 S. W. 790.

(E) Injuries from Dangerous or Defective Condition.

§ 164 (Ky.) Condition of outbuilding on leased premises, where an infant child of the tenant fell and was injured, *held* not dangerous or defective, and hence to impose no liability on the landlord.—Grant v. Seelye, 151 S. W. 401.

§ 164 (Ky.) Notice to a landlord sufficient to apprise a person of ordinary prudence that the leased premises are in a dangerous condition is equivalent to actual knowledge, rendering him liable for injuries to the tenant.—Andonique v. Carmen, 151 S. W. 921.

A tenant who knows of the defective condition of the premises, or who may have known thereof by a reasonable inspection, may not recover from the landlord for injuries sustained in consequence thereof.—Id.

§ 164 (Mo.App.) In the absence of an express warranty to repair, *held*, that there could be no recovery by the minor child of a tenant of a dwelling house, who was injured by the fall of a mantel.—Korach v. Loeffel, 151 S. W. 790.

A breach of the landlord's covenant to repair demised premises and make them reasonably safe will not support an action for personal injuries due to failure to repair.—Id.

§ 169 (Ky.) An instruction that if the landlord had knowledge of a defect in the premises by which the tenant was injured, "or such notice as would cause a reasonable person to act upon it," was misleading, as tending to impose on the landlord the duty of exercising ordinary care to discover defects.—Andonique v. Carmen, 151 S. W. 921.

Whether a tenant knew of a defect or could have discovered it by reasonable inspection *held* for the jury.—Id.

§ 169 (Mo.App.) In an action against a landlord for injuries to the tenant's wife caused by a defect in the premises, whether the premises were in the same condition at the time of the accident as when rented was for the jury.—Haywood v. Kuhn, 151 S. W. 204.

The instructions in such action *held* to cover the negligence charged in the petition.—Id.

The instructions also *held* to properly submit the issue of contributory negligence.—Id.

VIII. RENT AND ADVANCES.

(A) Rights and Liabilities.

§ 208 (Tex.) A landlord may recover the rent due from an assignee of the lessee.—Davis v. Vidal, 151 S. W. 290.

§ 209 (Tex.) A landlord may not recover the rent due from a subtenant.—Davis v. Vidal, 151 S. W. 290.

(B) Actions.

§ 232 (Ky.) Upon recovery of a judgment for an annual rent, each year's rent should bear interest from January 1st following its maturity.—White v. White, 151 S. W. 1.

(D) Distress.

§ 274 (Ky.) The remedies for wrongful distress prescribed by Ky. St. § 2303, and Civ. Code Prac. § 653, both of which require the tenant to execute a forthcoming bond, are not exclusive; Ky. St. § 2310, providing a remedy by replevin, section 7 a remedy by action without bond, and the common law affording a similar remedy.—Board v. Luigart, 151 S. W. 9.

In a common-law action for wrongful distress, double damages provided for by Ky. St. § 2312 cannot be recovered as being in the nature of a statutory penalty.—Id.

A petition in an action against a landlord and a constable for wrongful distress *held* to state a cause of action under the statute and at common law as against the landlord.—Id.

IX. RE-ENTRY AND RECOVERY OF POSSESSION BY LANDLORD.

§ 291 (Mo.App.) That the notice and demand for possession in unlawful detainer embraced more land than the amended petition on which the cause was tried would not justify a finding in favor of the defendant.—Griggs v. Bridgwater, 151 S. W. 764.

LAPSE.

See Willa, §§ 775, 858.

LARCENY.

See Burglary.

II. PROSECUTION AND PUNISHMENT.

(A) Indictment and Information.

§ 32 (Tex.Cr.App.) The custody of the keeper of an automobile garage in which was left a car did not constitute ownership for the purpose of the allegation of ownership and taking without consent in a prosecution for theft of a part of a machine.—Staha v. State, 151 S. W. 548.

(B) Evidence.

§ 55 (Tex.Cr.App.) Evidence *held* insufficient to support the conviction.—Yarbrough v. State, 151 S. W. 545.

§ 55 (Tex.Cr.App.) In a prosecution for theft from the person, evidence *held* sufficient to support the conviction.—Brooks v. State, 151 S. W. 549.

(C) Trial and Review.

§ 71 (Tex.Cr.App.) In a prosecution for theft from the person, where accused claimed that the property was taken to hold it as security to compel the prosecuting witness to reimburse him for whisky destroyed, a charge *held* to sufficiently submit accused's contention.—Brooks v. State, 151 S. W. 549.

LAST CLEAR CHANCE.

See Evidence, § 80.

LAW OF THE CASE.

See Appeal and Error, § 1097.

LEGISLATURE.

See Constitutional Law, §§ 26, 70.

LETTERS.

See Criminal Law, § 442; Evidence, §§ 317, 318.

LIBEL AND SLANDER.

See Criminal Law, §§ 419, 420, 789; Witnesses, § 277.

I. WORDS AND ACTS ACTIONABLE, AND LIABILITY THEREFOR.

§ 21 (Tex.Civ.App.) To justify recovery for libel, it is not necessary that plaintiff should be named, if pointed out by circumstances, or ascertainable from the words used.—*Express Pub. Co. v. Orsborn*, 151 S. W. 574.

To justify a recovery for libel, it is not necessary that all the world should understand who the person defamed was, if those knowing plaintiff can discern that she was meant.—*Id.*

II. PRIVILEGED COMMUNICATIONS, AND MALICE THEREIN.

§ 38 (Tex.Civ.App.) Questions asked by an attorney of a party while testifying as a witness are absolutely privileged, and cannot be made the basis of an action for slander, though otherwise actionable.—*Kruegel v. Cockrell & Gray*, 151 S. W. 352.

IV. ACTIONS.**(C) Evidence.**

§ 101 (Tex.Civ.App.) The burden is on a party suing for libel to prove that the libel was directed at him.—*Express Pub. Co. v. Orsborn*, 151 S. W. 574.

(E) Trial, Judgment, and Review.

§ 123 (Tex.Civ.App.) Question whether article referring to person as a negress was directed at plaintiff held a question for the jury, when considered in connection with another article apparently relating to the same matter and naming plaintiff.—*Express Pub. Co. v. Orsborn*, 151 S. W. 574.

Whether a libel was directed at plaintiff is a question of fact for the jury.—*Id.*

VI. CRIMINAL RESPONSIBILITY.**(A) Offenses.**

§ 141 (Mo.App.) To constitute an offense under Rev. St. 1909, § 4817, the words uttered must impute lack of chastity, and not be intended and to be understood merely as terms of abuse.—*State v. White*, 151 S. W. 757.

§ 143 (Mo.App.) In cases of criminal slander, the gist of the action is defendant's intention in uttering the words.—*State v. White*, 151 S. W. 757.

(B) Prosecution and Punishment.

§ 155 (Tex.Cr.App.) In a prosecution for slandering accused's wife by charging misconduct with S., circumstances tending to show preparation on the part of S. for the commission of the offense are admissible.—*Elder v. State*, 151 S. W. 1052.

Where accused charged with slandering his wife by alleging her intimacy with S. claimed that the flight of S. was an incriminating circumstance, S. was properly permitted to testify to a statement made to him by the wife as furnishing an innocent reason for the flight.—*Id.*

LICENSES.

See Municipal Corporations, § 122; Negligence, § 32; Telegraphs and Telephones, § 30.

I. FOR OCCUPATIONS AND PRIVILEGES.

§ 7 (Ky.) A municipal ordinance imposing a license tax on a telephone company is not invalid because not stating the purposes for which such tax is levied.—*Cumberland Telephone & Telegraph Co. v. City of Calhoun*, 151 S. W. 659.

§ 7 (Ky.) Under Ky. St. § 8290, subsec. 12, a city is authorized to make a reasonable classification of business for the imposition of license taxes.—*Sperry & Hutchinson Co. v. City of Owensboro*, 151 S. W. 932.

The business of a concern furnishing trading stamps to merchants was so different from that of an ordinary merchant as to furnish a reasonable basis for classification by a city in imposing a license tax on such business.—*Id.*

A city ordinance imposing a license tax on persons engaged in the trading stamp business of \$300 a year held void as unreasonable, oppressive, and prohibitory.—*Id.*

§ 15 (Ky.) Furnishing trading stamps, being a lawful business, cannot be taxed by a city in the exercise of its police power, but may be taxed a reasonable amount as a lawful business.—*Sperry & Hutchinson Co. v. City of Owensboro*, 151 S. W. 932.

LIENS.

See Ejectment, § 144; Jury, § 14; Mechanics' Liens; Municipal Corporations, §§ 519, 565; Partition, § 93; Schools and School Districts, § 86; Vendor and Purchaser, §§ 198, 277, 279, 289.

§ 7 (Ky.) Where a mother deeds property to her son in consideration of a home and maintenance, but is unable to get along with the latter's wife, and leaves, being old and unable to work, she is entitled to a lien on the property for her maintenance.—*Hopper v. Hopper*, 151 S. W. 359.

LIFE ESTATES.

See Wills, § 616.

§ 8 (Mo.) Neither a life tenant nor her grantee could claim adversely to the remainderman, until the death of the life tenant.—*Waddle v. Frazier*, 151 S. W. 87.

§ 8 (Mo.) Possession of one holding as life tenant can never become hostile to the remaindermen.—*Moran v. Stewart*, 151 S. W. 439.

§ 22 (Ky.) A life tenant held to have an action for depreciation in rental value and time and money spent in repairs made necessary by the inadequacy of a city sewer.—*City of Louisville v. Kramer's Adm'x*, 151 S. W. 379.

LIFE INSURANCE.

See Insurance.

LIMITATION OF ACTIONS.

See Adverse Possession; Appeal and Error, §§ 750, 909; Executors and Administrators, §§ 225, 245; Municipal Corporations, § 564; Time, §§ 9, 10.

I. STATUTES OF LIMITATION.**(A) Nature, Validity, and Construction in General.**

§ 4 (Mo.App.) The Legislature may fix arbitrarily the time in which different actions may be commenced.—*Hinshaw v. Warren's Estate*, 151 S. W. 497.

§ 5 (Mo.) The statute of limitations applies alike to all actions, whether legal or equitable.—*Marshall v. Hill*, 151 S. W. 131.

§ 15 (Ark.) Kirby's Dig. § 5079, providing that an oral acknowledgment or promise shall not take an action out of the statute of limitations, has no application to an oral waiver of the statute, or a promise not to plead it.—*Burnett v. Turner*, 151 S. W. 249.

A promise not to plead limitations is based on estoppel and must be such a promise as the creditor has a right to rely on.—*Id.*

(B) Limitations Applicable to Particular Actions.

§ 28 (Ky.) A surety who pays the debt without taking an assignment of the creditor's judgment therefor, and who seeks relief against the principal, upon an implied obligation, must proceed within five years from the time of payment.—*Fidelity & Deposit Co. of Maryland v. Souseley*, 151 S. W. 353.

Under Ky. St. § 4666, entitling a surety who has satisfied a judgment against his principal to an assignment thereof, such assignment need not be in writing nor made a matter of record, and thereunder the surety's right to recover against his principal is not limited to an action on an implied promise, barred within five years, but extends for the same time that the right of the judgment creditor extends.—*Id.*

§ 28 (Mo.App.) A surety on a note who pays a judgment thereon is entitled to recover from the cosurety one-half of the amount paid, provided he sues therefor within the five-year statute of limitations.—*Hinshaw v. Warren's Estate*, 151 S. W. 497.

§ 32 (Mo.App.) The injury from polluting a stream flowing through the land of an individual by the construction of a city sewer emptying into the stream is permanent, inflicted on the completion of the work, and an action therefor is barred in 10 years.—*Luckey v. City of Brookfield*, 151 S. W. 201.

§ 39 (Tex.) A proceeding by scire facias to supply a part of a judgment omitted from the judgment record is not an "action" to correct a judgment within Rev. St. 1895, art. 3353, requiring every action other than to recover realty for which no limitation is otherwise prescribed, to be brought within four years.—*Coleman v. Zapp*, 151 S. W. 1040.

II. COMPUTATION OF PERIOD OF LIMITATION.**(A) Accrual of Right of Action or Defense.**

§ 46 (Tex.Civ.App.) A cause of action by a broker for commissions, accrues when a sale is finally consummated.—*Anderson v. Crow*, 151 S. W. 1080.

§ 47 (Mo.App.) Covenant of seisin is breached at date of the deed, and the statute then commences to run; the covenantor having then no estate, title, or possession, but merely a tax deed, void because based on a judgment against one dead at time of its rendition.—*Frank v. Organ*, 151 S. W. 504.

§ 55 (Ky.) Where a sewer was adequate at the time of its original construction, but became inadequate, owing to the connection of other sewers with it, a cause of action for injuries arising after such connection accrued at the time the injury was inflicted, and not at the time the sewer was originally constructed.—*City of Louisville v. Kramer's Adm'r*, 151 S. W. 379.

(B) Performance of Condition, Demand, and Notice.

§ 66 (Ky.) The statute of limitations does not begin to run against a depositor in a bank until refusal of payment on demand; this being so though the bank failed to credit the depositor with the deposit in his passbook.—*Corbin Banking Co. v. Bryant*, 151 S. W. 393.

(D) Death and Administration.

§ 83 (Mo.App.) Where a surety on a note paid a judgment thereon, the subsequent death of his cosurety suspended the running of limitations as to the time in which the surety must sue for contribution, until letters of administration were issued.—*Hinshaw v. Warren's Estate*, 151 S. W. 497.

(H) Commencement of Action or Other Proceeding.

§ 118 (Mo.App.) Whether an action has been commenced within the statute of limitations is determined by whether plaintiff complied with Rev. St. 1909, § 1756, providing that the filing of a petition and suing out process shall be deemed the commencement of the action.—*Hinshaw v. Warren's Estate*, 151 S. W. 497.

§ 127 (Tex.Civ.App.) In action for railway employe's death, amendment of petition charging negligence of his foreman so as to allege negligence on the part of the engineer of the train by which he was struck *held* not to introduce a new cause of action barred by limitations.—*Texas & P. Ry. Co. v. Myers*, 151 S. W. 337.

III. ACKNOWLEDGMENT, NEW PROMISE, AND PART PAYMENT.

§ 145 (Ark.) An agreement to extend the time of payment beyond the period of limitations is a sufficient consideration to support a new promise suspending limitations.—*Burnett v. Turner*, 151 S. W. 249.

A promise by a debtor, that when he got his father out of the penitentiary he would pay, upon which the creditor, without agreeing not to sue, forbore suit, was without the consideration necessary to make it an original promise.—*Id.*

§ 146 (Ark.) The general rule that, in the absence of a forbidding statute, an oral acknowledgment or promise will interrupt the statute of limitations, is changed by Kirby's Dig. § 5073, requiring such acknowledgment or promise to be in writing.—*Burnett v. Turner*, 151 S. W. 249.

§ 157 (Ky.) The holder of a note cannot apply on the note anything he owes the maker without his consent, so as to interrupt the running of the statute of limitations.—*Samuel v. Samuel's Adm'r*, 151 S. W. 676.

V. PLEADING, EVIDENCE, TRIAL, AND REVIEW.

§ 195 (Tex.Civ.App.) A defendant has the burden of showing that the cause of action is barred.—*Anderson v. Crow*, 151 S. W. 1080.

§ 199 (Tex.Civ.App.) In an action for cutting timber on another's land, in which defendant pleaded limitations, evidence *held* to present a question for the jury whether the timber was cut within two years before the commencement of the action.—*Thompson Bros. Lumber Co. v. Longini*, 151 S. W. 888.

LIMITATION OF LIABILITY.

See Carriers, § 159.

LIQUIDATED DAMAGES.

See Damages, § 80.

LIQUOR SELLING.

See Intoxicating Liquors.

LIVE STOCK.

See Carriers, §§ 228, 229.

LOCAL OPTION.

See Intoxicating Liquors.

LOGS AND LOGGING.

See Appeal and Error, § 456; Carriers, §§ 318, 321; Damages, §§ 62, 132; Eminent Domain, § 134; Evidence, §§ 130, 461; Judgment, § 250; Limitation of Actions, § 199; Master and Servant, §§ 286, 289, 295; Negligence, § 32; Trespass, § 67.

§ 3 (Ark.) Parties who committed a substantial breach of a contract to sell timber *held* not

entitled to recover for a subsequent breach by the other parties thereto.—Keopple & McIntosh v. Delight Lumber Co., 151 S. W. 259.

An acceptance of payments contrary to the terms of a contract for the sale of logs and a shipment by the seller after notification that he would consider the contract void *held* a waiver of a right to consider the purchasers' noncompliance with its terms a breach.—Id.

§ 3 (Ark.) A timber deed, which conveyed all the pine timber 10 inches and up, includes every kind of pine on the land, regardless of whether it is worth sawing, and so includes old-field timber.—Hearin v. Union Sawmill Co., 151 S. W. 1007.

§ 3 (Ark.) In an action by the grantee of timber rights to enjoin his grantor from preventing the removal of such timber and for reformation of the contract, where the grantor asked a cancellation on the ground of fraud, evidence *held* sufficient to show that the grantee was entitled to the timber on the property specifically described in the contract and no more.—Reeves v. Moore, 151 S. W. 1025.

§ 3 (Ky.) A buyer of standing timber, with a year in which to remove it, and with good roads for a time sufficient to have removed it, prevented from removing it by unusually heavy rains and muddy roads in the winter, *held* not prevented by any unforeseen casualty or misfortune, and to have no right to remove it after the expiration of the year.—Z. Harrell & Co. v. Danks, 151 S. W. 13.

§ 15 (Mo.App.) In an action for breach of a contract to float logs providing the water was high enough, evidence *held* to warrant a finding that there was sufficient water.—Cronan v. Stutsman, 151 S. W. 166.

LOST INSTRUMENTS.

§ 1 (Tex.Civ.App.) The fact that a written transfer of a portion of a fund was lost does not affect its validity or sufficiency.—A. A. Fielder Lumber Co. v. Smith, 151 S. W. 605.

LUNATICS.

See Insane Persons.

MACHINERY.

See Master and Servant, §§ 107-129, 201, 270, 286, 289, 293; Negligence, § 23.

MAINTENANCE.

See Husband and Wife, § 288; Liens, § 7.

MALICE.

See Malicious Prosecution, § 16.

MALICIOUS MISCHIEF.

§ 1 (Ark.) A sister, who conceals the death of hogs killed by her brother, is not guilty of malicious mischief, committed by the killing of the hogs.—Wright v. State, 151 S. W. 990.

§ 9 (Ark.) Evidence *held* to support a conviction for malicious mischief.—Wright v. State, 151 S. W. 990.

MALICIOUS PROSECUTION.

II. WANT OF PROBABLE CAUSE.

§ 16 (Tex.Civ.App.) One having probable cause for instigating a criminal prosecution is not liable for malicious prosecution, though malice actuated him.—Smith v. Pierson, 151 S. W. 1113.

§ 18 (Tex.Civ.App.) Where a constable attempted to execute a warrant after the return

day thereof, and a dismissal of the prosecution, and took accused into custody thereunder, probable cause existed for the prosecution of the constable for false imprisonment.—Smith v. Pierson, 151 S. W. 1113.

MANDAMUS.

See Appeal and Error, § 71; Courts, § 122; Exceptions, Bill of, § 53.

I. NATURE AND GROUNDS IN GENERAL.

§ 16 (Tex.Civ.App.) Where the record on appeal shows conclusively that the conclusions of fact and law were not filed in time, mandamus does not lie to compel the district court to correct the record by striking therefrom the conclusions of fact and law.—Houston Oil Co. of Texas v. Powell, 151 S. W. 887.

II. SUBJECTS AND PURPOSES OF RELIEF.

(A) Acts and Proceedings of Courts, Judges, and Judicial Officers.

§ 31 (Mo.) As mandamus will not be granted to direct the course of judicial action, but may issue to compel a judicial officer to proceed with the cause, the writ of mandamus may be properly issued to require a circuit court judge to proceed with a cause to establish a private road, though not to direct the appointment of commissioners or in any way govern his action.—State ex rel. McDermott Realty Co. v. McElhinney, 151 S. W. 457.

§ 57 (Tex.Civ.App.) Mandamus lies to compel the district court to correct the record on appeal, when necessary to have the error corrected.—Houston Oil Co. of Texas v. Powell, 151 S. W. 887.

MANSLAUGHTER.

See Homicide, § 39.

MANUFACTURES.

See Negligence, § 27.

MARRIAGE.

See Bastards, §§ 1, 3; Divorce; Husband and Wife.

§ 40 (Mo.) A marriage once shown to exist is, as a rule, presumed to continue until the contrary is shown.—Nelson v. Jones, 151 S. W. 80.

§ 50 (Mo.) Evidence *held* to show a common-law marriage.—Nelson v. Jones, 151 S. W. 80. Strong proof is necessary to establish a common-law marriage.—Id.

MASTER AND SERVANT.

See Appeal and Error, § 1066; Damages, §§ 132, 216; Death, § 14; Evidence, §§ 243, 317; False Imprisonment, § 15; Pleading, § 433; Railroads, §§ 281, 376, 377; Torts, § 10; Trial, §§ 251, 253, 260, 296; Work and Labor.

I. THE RELATION.

(A) Creation and Existence.

§ 6 (Mo.App.) Testimony of a witness that defendant agreed to pay plaintiff and witness a specified sum per week for services was admissible to prove the contract with plaintiff, in the absence of a showing that the contract referred to by witness was a joint one.—Thornton v. Mersereau, 151 S. W. 212.

II. SERVICES AND COMPENSATION.**(B) Wages and Other Remuneration.**

§ 78 (Mo.App.) A petition against an employer claiming benefits under a co-operative insurance scheme, *held* demurrable for want of allegations showing that the managers of the association had ordered the claim paid or that they were bound to do so.—*Legg v. Swift & Co.*, 151 S. W. 230.

III. MASTER'S LIABILITY FOR INJURIES TO SERVANT.**(A) Nature and Extent in General.**

§ 88 (Mo.) Where a roller in an iron and steel mill was injured because of the absence of a safety post, and the mill was owned, controlled, and operated by defendant company, it was liable for the injuries sustained without reference to whether plaintiff was a servant of the company or of the head roller acting as an independent contractor.—*Jewell v. Sturges*, 151 S. W. 966.

Where an owner undertakes to furnish the place and appliances with which an independent contractor is to perform his contract, and retains control over the place and appliances, such owner is liable for injuries sustained by the contractor's servants by a failure to make and keep the place reasonably safe.—*Id.*

(B) Tools, Machinery, Appliances, and Places for Work.

§§ 101, 102 (Ark.) On the question of negligence in furnishing appliances and place to work, the test is what a reasonably prudent person would ordinarily have done in like circumstances.—*Oak Leaf Mill Co. v. Littleton*, 151 S. W. 262.

§§ 101, 102 (Mo.App.) Employer *held* to owe employé duty of providing and maintaining a chain on the machine operated by the employé reasonably suited to the purposes of its intended use.—*Bradley v. Northern Cent. Coal Co.*, 151 S. W. 180.

§§ 101, 102 (Mo.App.) An employer is required to exercise reasonable care to provide his servants with a reasonably safe place of work.—*Goode v. Central Coal & Coke Co.*, 151 S. W. 508.

§ 107 (Ky.) A master's duty to provide a safe place to work included the places to and from which the employé might be required to go.—*Fluehart Collieries Co. v. Elam*, 151 S. W. 34.

§ 107 (Mo.App.) An employer who continued a chain on a machine in use after it had become worn and dangerous, and after reasonable regard for the safety of employées required that it should be replaced, was negligent.—*Bradley v. Northern Cent. Coal Co.*, 151 S. W. 180.

§ 118 (Ky.) A master who directed a blasting man to use an iron pipe to load dynamite into drilled holes, assuring him that it was safe, but which, because of its weight and rougher surface end, might and did discharge dynamite, was negligent in not furnishing a reasonably safe appliance for the work, whether or not he knew the danger.—*Hough & Spradlin Co. v. Clark*, 151 S. W. 28.

§ 118 (Ky.) Mining company *held* not relieved from liability for failure to provide a safe passageway around elevator shafts by the fact that there was no statute, or rule of the state mining department, requiring such passageway.—*Fluehart Collieries Co. v. Elam*, 151 S. W. 34.

§ 124 (Mo.App.) Rev. St. 1909, § 8447, requiring daily inspection of coal mines generating explosive gas, does not apply to mines not generating gases.—*Goode v. Central Coal & Coke Co.*, 151 S. W. 508.

A coal mine owner was bound to inspect the mine roof at reasonable intervals, and, on discovering an insecure rock, to remove it for the protection of workmen required to be near it.—*Id.*

§ 129 (Ark.) Leaving two planks unfastened in the floor of a log deck in a sawmill was the proximate cause of the injury to the log scaler, where, when he was on the deck, a knot in a log rolled down, struck the lower end of one of the planks, striking against other logs, and causing them to roll down on him.—*Oak Leaf Mill Co. v. Littleton*, 151 S. W. 262.

(C) Methods of Work, Rules, and Orders.

§ 149 (Mo.) A foreman giving an order to employes to bring the rigging used in certain work from the second to the first floor of a building *held* not guilty of actionable negligence.—*McCollin v. James Black Masonry & Construction Co.*, 151 S. W. 973.

(E) Fellow Servants.

§ 180 (Mo.App.) The common-law rule that the negligence of a servant causing injury to a fellow servant may not be imputed to the master has been abrogated by statute, so far as employes of railroad companies are concerned.—*Madden v. Missouri Pac. Ry. Co.*, 151 S. W. 489.

Employes in railroad shops moving from the blacksmith shop to the roundhouse a brakebeam are within the fellow servant statute of Kansas (Gen. St. Kan. 1909, § 6999).—*Id.*

§ 190 (Ark.) The master is liable for injury to a foreman from the manager's neglect of his duty to inspect and discover defects in the appliances used, where such duty rests on the manager.—*Worts v. Ft. Smith Biscuit Co.*, 151 S. W. 691.

§ 197 (Mo.App.) A machinist's helper in railroad shops and a machinist acting as foreman are fellow servants while moving a brakebeam from the blacksmith shop to the roundhouse, there to be unloaded and placed under a locomotive.—*Madden v. Missouri Pac. Ry. Co.*, 151 S. W. 489.

§ 197 (Tex.Civ.App.) Employes in a sawmill engaged in removing planks from a saw as fast as they are sawed, are fellow servants.—*Bledsoe v. Thompson Bros. Lumber Co.*, 151 S. W. 910.

§ 201 (Tex.Civ.App.) Where the master's negligence in failing to guard dangerous machinery is the proximate cause of injury, he is not relieved from liability by the fact that plaintiff's fellow servant was negligent in operating the machine.—*Armour & Co. v. Morgan*, 151 S. W. 861.

(F) Risks Assumed by Servant.

§ 203 (Ark.) The defenses of "assumed risk" and "contributory negligence" are separate and independent; the former arising out of contract relations, and the latter not.—*St. Louis, I. M. & S. R. Co. v. Brogan*, 151 S. W. 699.

§ 203 (Tex.Civ.App.) The defenses of assumption of risk and contributory negligence are inconsistent, and the existence of one necessarily excludes the other.—*Armour & Co. v. Morgan*, 151 S. W. 861.

§ 204 (Tex.Civ.App.) Under Acts 29th Leg. c. 163, providing that a servant's knowledge of a danger shall not charge him with assumption of risk if the master also knew the facts, and a person of ordinary care would have continued in the service, a brakeman, under such conditions, *held* not to assume the risk of injury by stumbling over clinkers while walking by a moving car in railroad yards.—*Freeman v. Kennerly*, 151 S. W. 580.

§ 208 (Mo.App.) Risk of injury from a chain breaking under unusual and unavoidable circumstances *held* assumed by employé, but risks resulting from the use of a chain so defective as to be unsafe for ordinary use were not assumed.—*Bradley v. Northern Cent. Coal Co.*, 151 S. W. 180.

§ 211 (Ky.) A mine employé assumed ordinary risks connected with his employment, but not risks from the company's negligent fail-

ure to furnish a reasonably safe place to work.—*Fluehart Collieries Co. v. Elam*, 151 S. W. 34.

§ 216 (Mo.) A section hand on a hand car operated under direction of a foreman, who had a schedule of trains, *held* not to assume risk of injury from the foreman's negligent failure to clear the track to avoid a train on schedule time.—*Honea v. St. Louis, I. M. & S. Ry. Co.*, 151 S. W. 119.

§ 216 (Mo.App.) Under the rule of assumption of risk in force in Missouri or in Kansas, an employé in railroad shops assisting a co-employé in moving a brakebeam does not assume the risk of the latter's negligence.—*Madden v. Missouri Pac. Ry. Co.*, 151 S. W. 489.

§ 217 (Ark.) A fireman, injured from a collision between his engine and a car negligently left by the railway company on a side switch, is not chargeable with having assumed the risk of such injury, unless he knew of the dangerous position of the car, and realized the danger, and voluntarily exposed himself to it.—*St. Louis, I. M. & S. R. Co. v. Brogan*, 151 S. W. 699.

§ 217 (Ark.) Knowledge by an employé of defects and danger therefrom *held* essential to an assumption of the risk, though he is chargeable with knowledge of danger which is so obvious as to be apparent to one of ordinary intelligence.—*Fullerton v. Henry Wrape Co.*, 151 S. W. 1005.

An experienced operator of a circular saw in a lumber mill *held* to have assumed the risk of being injured through a piece of lumber "pinching" on the saw and being thrown back, owing to want of a guard and insufficiency of a device designed to prevent pinching.—*Id.*

§ 217 (Ky.) An employé of mature years who used the stairway on the employer's premises in going to and from the place of her work *held* to assume the risk of injury by falling down the stairway.—*J. M. Robinson, Norton & Co. v. Legrande*, 151 S. W. 383.

Though the business may be hazardous and the surroundings not free from danger, an employé who with knowledge of the conditions continues without objection assumes the risk.—*Id.*

§ 218 (Ark.) Under the evidence, *held*, the danger of one of the two pieces of wood driven in the ground pulling out, when the pole put between them was being bent over, was not so obvious that an inexperienced employé could be said to have assumed the risk, unless he was warned or appreciated the danger.—*River, Rail & Harbor Const. Co. v. Goodwin*, 151 S. W. 267.

§ 219 (Ark.) A servant does not assume, as incident to his employment, risks from latent defects in appliances or place of work.—*Oak Leaf Mill Co. v. Littleton*, 151 S. W. 262.

§ 219 (Ark.) A factory employé *held* to have assumed the risk from defects which were obvious, where he had been warned not to do the act causing his injury and fully appreciated the danger.—*Worts v. Ft. Smith Biscuit Co.*, 151 S. W. 691.

§ 224 (Tex.Civ.App.) Employé riding on employer's log train for his own benefit *held* a licensee, and not to be so riding on the employer's implied invitation.—*Kirby Lumber Co. v. Gresham*, 151 S. W. 847.

§ 226 (Mo.App.) A servant does not, and cannot, assume risks caused by the master's negligence.—*Bradley v. Northern Cent. Coal Co.*, 151 S. W. 180.

(G) Contributory Negligence of Servant.

§ 228 (Tex.Civ.App.) Acts 31st Leg. (1st Ex. Sess.) c. 10, declaring that contributory negligence of an employé shall not bar a recovery but that the damages shall be diminished, is not unconstitutional.—*Freeman v. Kennerly*, 151 S. W. 590.

§ 234 (Ky.) An employé is not guilty of contributory negligence in continuing work, although he knows of defects in the machine operated by him, unless the danger is so obvious and imminent that he must or should have known thereof.—*Louisville & N. R. Co. v. Goodwin*, 151 S. W. 376.

§ 234 (Mo.App.) Employé knowing of defect in appliance *held* not guilty of contributory negligence if a reasonably careful man would not have anticipated danger of injury.—*Bradley v. Northern Cent. Coal Co.*, 151 S. W. 180.

§ 236 (Ky.) A servant, though assured by the master's overseer that an iron pipe was a safe tool in loading dynamite into drilled holes, was negligent, if it was so obviously unsafe that an ordinarily prudent person of the servant's experience would not have used it.—*Hough & Spradlin Co. v. Clark*, 151 S. W. 28.

§ 240 (Ark.) A brakeman *held* guilty of contributory negligence where, on being sent to flag trains, he crawled under a car on a storage track and was killed by a work train backing against such car.—*Mitchell v. Chicago, R. I. & P. Ry. Co.*, 151 S. W. 520.

§ 240 (Tex.Civ.App.) A brakeman injured by stumbling over a clinker while walking by a moving car to couple it with an engine in railroad yards *held* entitled to recover as against the claim that he chose a dangerous way though he might have walked between the rails or on another track.—*Freeman v. Kennerly*, 151 S. W. 580.

§ 243 (Ky.) In handling a high tension electric wire, the utmost care must be used, not only by the master, but the servant, and the servant or his personal representative cannot recover where his negligent disobedience of orders caused personal injury or death.—*West Kentucky Coal Co. v. Kuykendall's Adm'r*, 151 S. W. 928.

§ 248 (Ky.) Where a servant of an electric light company was killed by a high tension wire because of his disobedience of orders, the master was not liable where it did not learn of the danger in which the servant had placed himself by his negligence in time to avoid the injury.—*West Kentucky Coal Co. v. Kuykendall's Adm'r*, 151 S. W. 928.

(H) Actions.

§ 252 (Mo.App.) An action under Gen. St. Kan. 1909, § 6909, brought within eight months after the sustaining of the injury complained of, is maintainable without the service of the notice specified in the statute.—*Madden v. Missouri Pac. Ry. Co.*, 151 S. W. 489.

§ 265 (Ark.) Burden *held* on defendant railway company to prove contributory negligence of an injured fireman.—*St. Louis, I. M. & S. R. Co. v. Brogan*, 151 S. W. 699.

§ 265 (Mo.App.) The fact that a rock fell upon a coal miner was not sufficient proof of negligence as to inspection.—*Goode v. Central Coal & Coke Co.*, 151 S. W. 508.

One suing for a coal miner's death must show that the rock which fell on him would have been discovered by the exercise of reasonable care in time to have prevented the injury.—*Id.*

§ 270 (Ark.) Evidence of repair of the appliance by the master after the accident is incompetent to show negligence of a master in furnishing a defective appliance by which an employé is injured.—*St. Louis, I. M. & S. Ry. Co. v. Steed*, 151 S. W. 257.

§ 270 (Ky.) It was error to admit evidence of precautions taken by the master in constructing a safe passway around an elevator shaft after the injury.—*Fluehart Collieries Co. v. Elam*, 151 S. W. 34.

Evidence of subsequent improvements or repairs is excluded because it does not establish

that the wrongdoer was guilty of negligence before the accident.—*Id.*

§ 270 (Tex.Civ.App.) In an action for injuries from unguarded machinery, on an issue as to whether it could have been guarded, evidence that a guard was placed over part of it, and that it did not interfere with its operation, was competent.—*Armour & Co. v. Morgan*, 151 S. W. 861.

§ 276 (Ky.) In an action against a master for the wrongful death of a servant, evidence held to show that the proximate cause of the servant's death was a disobedience of orders.—*West Kentucky Coal Co. v. Kuykendall's Adm'r*, 151 S. W. 928.

§ 276 (Tex.Civ.App.) In an action for injury to a lumber company's employé while riding on a logging train to his work, evidence held to warrant a finding that the accident was caused by the concurrent negligence of the railroad and the lumber company.—*Knox v. Robbins*, 151 S. W. 1134.

In an action for injury to a lumber company's employé while riding on a logging train which was derailed, evidence held to warrant a finding that the accident proximately caused his insanity.—*Id.*

§ 278 (Ark.) The custom of others under like conditions is evidence, but not conclusive, of what a reasonably prudent person would ordinarily do in furnishing appliances and place to work.—*Oak Leaf Mill Co. v. Littleton*, 151 S. W. 262.

§ 278 (Ark.) In an action for the death of an employé, evidence held not to show actionable negligence.—*Mitchell v. Chicago, R. I. & P. Ry. Co.*, 151 S. W. 520.

§ 278 (Ky.) Evidence held to sustain verdict for coal mine employé injured from the derailling of a car by its being struck by an overhead cross-beam.—*Jellico Coal Mining Co. v. Lee*, 151 S. W. 26.

§ 278 (Ky.) In an action for the death of an employé drowned while rowing a boat across a river, evidence held to show that the employer was not guilty of a breach of duty in failing to warn and instruct the servant of a dangerous appliance.—*Stewart's Adm'r v. Ohio River Contract Co.*, 151 S. W. 398.

§ 278 (Mo.) Evidence held to establish a railroad company's negligence causing death of an employé.—*Honea v. St. Louis, I. M. & S. Ry. Co.*, 151 S. W. 119.

§ 278 (Tex.Civ.App.) Evidence held to show that an employer operating a sawmill was not guilty of negligence in operating the mill while a transfer chain carrying sawed planks was broken, or in failing to furnish an employé a safe place in which to work.—*Bledsoe v. Thompson Bros. Lumber Co.*, 151 S. W. 910.

§ 279 (Ky.) In an action for the death by drowning of an employé while rowing a boat across a river, evidence held to show no failure of a foreman seated in the bow of the boat to exercise care to prevent the deceased from needlessly placing himself in a place of danger.—*Stewart's Adm'r v. Ohio River Contract Co.*, 151 S. W. 398.

§ 279 (Mo.App.) In an action for injuries to a railroad servant evidence held to support a finding of negligence of a fellow servant.—*Madden v. Missouri Pac. Ry. Co.*, 151 S. W. 489.

§ 280 (Tex.Civ.App.) In an action for injury to a lumber company's employé while riding on a logging train to his work, evidence held to warrant a finding that plaintiff did not assume the risk.—*Knox v. Robbins*, 151 S. W. 1134.

§ 281 (Mo.) Evidence held to show that decedent, a railroad employé, was not guilty of contributory negligence.—*Honea v. St. Louis, I. M. & S. Ry. Co.*, 151 S. W. 119.

§ 281 (Tex.Civ.App.) In an action for injury to a lumber company's employé while riding on

a logging train to his work, evidence held to warrant a finding that plaintiff was not guilty of contributory negligence.—*Knox v. Robbins*, 151 S. W. 1134.

§ 286 (Ark.) Evidence, in an action for injury to a log scaler from logs rolling against him while on the log deck, held to make a question for the jury as to negligence because of the log deck being constructed with two unfastened planks in it.—*Oak Leaf Mill Co. v. Littleton*, 151 S. W. 262.

§ 286 (Ky.) Evidence held to present a question for the jury whether plaintiff would have been injured if chains on the machine he was operating had been properly adjusted.—*Louisville & N. R. Co. v. Goodwin*, 151 S. W. 376.

§ 286 (Mo.App.) If the circumstances permit reasonable differences of opinion as to whether an employer was negligent, the question is for the jury.—*Goode v. Central Coal & Coke Co.*, 151 S. W. 508.

§ 286 (Tex.Civ.App.) In an action for the death of an employé struck by a train while crossing the track to a position of safety after attempting to remove a hand-car from the track, evidence held to present a question for the jury as to the negligence of the engineer of the train.—*Texas & P. Ry. Co. v. Myers*, 151 S. W. 337.

§ 286 (Tex.Civ.App.) Whether a switching crew which pushed cars against others to make a coupling, and not succeeding, repeated this killing a car inspector, who in the meantime had gone between those first on the track to inspect them, was guilty of negligence, in not giving him warning of the second attempt, held a question for the jury.—*Casey v. Texarkana & Ft. S. Ry. Co.*, 151 S. W. 856.

§ 286 (Tex.Civ.App.) In an action by a minor servant for personal injuries, held, that the question of defendant's negligence in failing to guard dangerous machinery was for the jury.—*Armour & Co. v. Morgan*, 151 S. W. 861.

§ 288 (Ark.) Whether an employé assumed the risk held for the jury.—*St. Louis, I. M. & S. Ry. Co. v. Jacks*, 151 S. W. 706.

§ 288 (Tex.Civ.App.) Whether a car inspector, who, after cars had been pushed against others to make a coupling, went between those first there to inspect them, assumed the risk of the switching crew repeating this without notice to him, the first attempt having been unsuccessful, held a question for the jury.—*Casey v. Texarkana & Ft. S. Ry. Co.*, 151 S. W. 856.

§ 288 (Tex.Civ.App.) In an action for injuries to a minor servant, plaintiff held not to have assumed the risk as a matter of law.—*Continental Oil & Cotton Co. v. Gilliam*, 151 S. W. 890.

§ 289 (Ark.) Evidence in action for injury to log scaler held to make question for the jury as to contributory negligence.—*Oak Leaf Mill Co. v. Littleton*, 151 S. W. 262.

§ 289 (Ark.) Whether an employé was guilty of contributory negligence held for the jury.—*St. Louis, I. M. & S. Ry. Co. v. Jacks*, 151 S. W. 706.

§ 289 (Ky.) The question of a servant's contributory negligence in using an iron pipe to load dynamite into a drilled hole too deep to be loaded with the wooden poles, which were safer on account of their lighter weight, was for the jury.—*Hough & Spradlin Co. v. Clark*, 151 S. W. 28.

§ 289 (Ky.) A coal miner injured while going through an elevator shaft in obedience to his foreman's orders, without having been warned and in the exercise of ordinary care, he being inexperienced in shaft mines, held not negligent as a matter of law.—*Fluehart Collieries Co. v. Elam*, 151 S. W. 34.

§ 289 (Mo.App.) In an employé's action for injuries, evidence held to present a question for the jury whether the danger of a chain breaking, which the employé knew to be defective,

was so obvious as to render the employé guilty of contributory negligence.—Bradley v. Northern Cent. Coal Co., 151 S. W. 180.

§ 289 (Tex.Civ.App.) Whether a brakeman stumbled over a clinker while walking by a moving car, or recklessly placed his foot on the coupler of a car or engine and was thereby injured, *held* for the jury.—Freeman v. Kennerly, 151 S. W. 580.

§ 289 (Tex.Civ.App.) A minor servant injured while oiling certain bearings in a dangerous method *held* not negligent as a matter of law in adopting the same.—Continental Oil & Cotton Co. v. Gilliam, 151 S. W. 890.

§ 289 (Tex.Civ.App.) In an action for injury to a lumber company's employé while riding on a logging train which was derailed, *held*, under the evidence, a jury question whether plaintiff was guilty of contributory negligence.—Knox v. Robbins, 151 S. W. 1134.

§ 291 (Mo.) In an action for death of a section hand by collision of a hand car with a train, an instruction *held* not inapplicable to the pleading.—Honea v. St. Louis, I. M. & S. Ry. Co., 151 S. W. 119.

§ 293 (Ark.) Refusing an instruction that the master is only required to use ordinary care to furnish safe tools for use of employes, and giving one that it was defendant's duty to furnish safe tools for its employes to work with, was error.—St. Louis, I. M. & S. Ry. Co. v. Steed, 151 S. W. 257.

§ 293 (Tex.Civ.App.) In an action for injuries to a servant, an instruction given *held* not erroneous as charging that defendant was negligent in requiring plaintiff to oil certain machinery, a duty he was employed to perform.—Continental Oil & Cotton Co. v. Gilliam, 151 S. W. 890.

§ 295 (Ark.) The court properly refused to modify instructions dealing only with the issue of assumed risk, so as to present also the issue of contributory negligence.—St. Louis, I. M. & S. R. Co. v. Brogan, 151 S. W. 890.

§ 295 (Ark.) In an action for the death of a boy acting as clerk to a railroad storekeeper, an instruction on assumption of risk *held* correct.—St. Louis, I. M. & S. Ry. Co. v. Jacks, 151 S. W. 706.

§ 295 (Tex.Civ.App.) In an action for injury to an employé in the derailment of a logging train on which he was riding, an instruction on assumption of risk *held* proper.—Knox v. Robbins, 151 S. W. 1134.

§ 296 (Ark.) In an action for the death of a boy acting as clerk to a railroad storekeeper, an instruction on contributory negligence *held* correct.—St. Louis, I. M. & S. Ry. Co. v. Jacks, 151 S. W. 706.

§ 296 (Ky.) An instruction *held* to fairly present the question of the servant's contributory negligence in the use of a tool, notwithstanding the master's assurance of safety.—Hough & Spradlin Co. v. Clark, 151 S. W. 28.

MASTERS IN CHANCERY.

See Equity, § 409.

MEASURE OF DAMAGES.

See Damages, §§ 105, 123.

MECHANICS' LIENS.

See Schools and School Districts, § 86.

I. NATURE, GROUNDS, AND SUBJECT-MATTER IN GENERAL.

§ 13 (Tex.Civ.App.) The construction of roads is a public work and laborers and materialmen have no lien.—National Bank of Denison v. Coleman, 151 S. W. 1123.

II. RIGHT TO LIEN.

(E) Subcontractors, and Contractors' Workmen and Materialmen.

§ 111 (Ky.) Subcontractors and materialmen who comply with the specifications are entitled to liens, irrespective of nonperformance by the contractor or the other subcontractors or materialmen.—Rieger v. Schulte & Eicher, 151 S. W. 395.

§ 115 (Ky.) Subcontractors and materialmen are entitled to a lien to the total amount of the contract price, though the owner has paid the same in full.—Rieger v. Schulte & Eicher, 151 S. W. 395.

IV. OPERATION AND EFFECT.

(A) Amount and Extent of Lien.

§ 164 (Ky.) Subcontractors and materialmen have a lien up to the amount for which the contractor was entitled to a lien.—Rieger v. Schulte & Eicher, 151 S. W. 395.

VII. ENFORCEMENT.

§ 281 (Ark.) In a suit by subcontractors against an owner to enforce mechanics' liens, with a cross-complaint by the contractor to recover the balance of the contract price over the alleged liens, *held*, that finding that damages to which the owner had been subjected did not arise from negligence of the contractor was supported by the evidence.—Fellheimer v. Higgins, 151 S. W. 991.

VIII. INDEMNITY AGAINST LIENS.

§ 313 (Mo.App.) Where a builder's contract appeared on one side of a printed sheet, and the bond for performance on the other, but the principal who signed the contract did not sign the bond, the surety, signing the bond, was bound thereby, where the principal was bound by the contract, and the bond was a complete instrument when executed by the surety alone.—Roennigke v. Essig, 151 S. W. 765.

MENTAL SUFFERING.

See Assault and Battery, §§ 38, 40; Telegraphs and Telephones, § 70.

MINES AND MINERALS.

See Contracts, § 10; Master and Servant, §§ 118, 124, 211, 265, 278, 289; Pleading, § 406; Trial, §§ 251, 253.

II. TITLE, CONVEYANCES, AND CONTRACTS.

(A) Rights and Remedies of Owners.

§ 51 (Ky.) Evidence, in an action for damages for mining coal from plaintiff's land, *held* not to sufficiently show the quantity of coal taken to sustain judgment for plaintiff.—Burke Hollow Coal Co. v. Lawson, 151 S. W. 657.

The measure of damages for coal taken from another's land through an honest mistake is the value of the coal taken as it lay in the mine, or the usual reasonable royalty paid for the right of mining.—Id.

(C) Leases, Licenses, and Contracts.

§ 58 (Ky.) Evidence *held* to show that a phosphate mining lease was procured by fraud on the part of lessees.—Killebrew v. Murray, 151 S. W. 662.

§ 62 (Ky.) A phosphate mining lease which required the lessees to pay a royalty of 25 cents per ton on the phosphate mined and \$5 annually as a minimum to be credited thereon, whether the land was mined or not, *held* an executory contract.—Killebrew v. Murray, 151 S. W. 662.

§ 63 (Ky.) A phosphate mining lease, which authorized the lessee to terminate it at any time by written notice, will be construed as also mak-

ing it terminable at the will of the lessor.—Killebrew v. Murray, 151 S. W. 662.

§ 68 (Ky.) A phosphate mining lease of land valued at \$23,000, lessee to pay a royalty of 25 cents per ton for phosphate mined, *held* not to permit lessees to continue to hold the lease for the full 10-year period by paying annually \$5 to the lessor, which payment the lease provided was a part of the royalties, and the minimum amount to be paid as such, but to require the beginning of operations within a reasonable time.—Killebrew v. Murray, 151 S. W. 662.

The lessees' failure to begin work under a gas and oil lease operates as an abandonment in a shorter time than in case of a phosphate lease, because of the greater danger of loss in the former case by reason of the migratory character of the minerals.—Id.

In the absence of a provision in a phosphate mining lease fixing the time for beginning operations, it will be presumed that operations were to begin within a reasonable time.—Id.

Where the lessees inferentially fixed a year or 18 months as the time for beginning work, such period must be considered a reasonable time.—Id.

In such case lessor could properly treat the failure to begin operations within 3½ years as an abandonment of the lease.—Id.

MISCHIEF.

See Malicious Mischief.

MISREPRESENTATION.

See Cancellation of Instruments, § 4; Fraud.

MISTAKE.

See Insurance, § 143; Public Lands, § 127.

MONOPOLIES.

See Election of Remedies, § 3; Evidence, § 253; Quo Warranto, § 48.

I. VALIDITY AND EFFECT OF GRANTS.

§ 3 (Tex.Civ.App.) "Monopoly," as forbidden by Const. art. 1, § 26, defined, and *held*, that Act Jan. 26, 1905 (Acts 29th Leg. c. 7), vesting the exclusive custody of state property in a private corporation to be maintained for historical and patriotic purposes, did not violate the constitutional provision.—Conley v. Daughters of the Republic of Texas, 151 S. W. 877.

II. TRUSTS AND OTHER COMBINATIONS IN RESTRAINT OF TRADE.

§ 12 (Mo.) The anti-trust act, in unambiguous language, condemns every direct restraint of trade, great or small, without regard to what the courts may think as to the extent of its effect.—State ex rel. Kimbrell v. People's Ice, Storage & Fuel Co., 151 S. W. 101.

§ 17 (Mo.) Charge of making a combination to restrict competition in sale of ice *held* not refuted by the fact that defendant sold small quantities of ice during the spring and fall months through persons not parties to the combination.—State ex rel. Kimbrell v. People's Ice, Storage & Fuel Co., 151 S. W. 101.

§ 20 (Mo.) The corporation succeeding to the rights of another in an unlawful combination in restraint of trade *held* not relieved of liability because the unlawful combination existed prior to its organization.—State ex rel. Kimbrell v. People's Ice, Storage & Fuel Co., 151 S. W. 101.

§ 24 (Mo.) Evidence of preliminary steps in formation of unlawful combination prior to the date when the combination was alleged to exist, *held* admissible.—State ex rel. Kimbrell v. People's Ice, Storage & Fuel Co., 151 S. W. 101.

Where defendant succeeded to the rights of another, which was a party to an unlawful

combination to restrict competition, evidence *held* not to show, as a matter of law, that defendant did not have knowledge of the unlawful character of the combination.—Id.

In a proceeding against persons charged with effecting an unlawful combination to restrict competition, evidence *held* to support the trial court's findings that certain of the defendants had effected such an unlawful combination.—Id.

MONUMENTS.

See Boundaries, § 8.

MOOT QUESTIONS.

See Appeal and Error, § 781.

MORTGAGES.

See Bills and Notes, § 518; Chattel Mortgages; Corporations, § 484; Injunction, §§ 118, 148, 172; Insurance, § 113; Judgment, § 585; Vendor and Purchaser, §§ 279, 289.

I. REQUISITES AND VALIDITY.

(A) Nature and Essentials of Conveyances as Security.

§ 36 (Ark.) In a suit to declare a deed absolute on its face a mortgage, the burden is upon the complainant to show that it was a mortgage.—Edwards v. Bond, 151 S. W. 243.

§ 38 (Ark.) In the absence of fraud or imposition, the proof to overcome the presumption that a deed absolute on its face is an absolute conveyance, and to establish it as a mortgage must be clear, unequivocal, and convincing.—Edwards v. Bond, 151 S. W. 243.

III. CONSTRUCTION AND OPERATION.

(B) Parties and Debts or Liabilities Secured.

§ 115 (Tex.Civ.App.) Where defendants were deemed certain property on which plaintiff held a vendor's lien, evidenced by notes, and defendants asked for an extension of time, and executed a trust deed reciting that they "are justly indebted to the plaintiff, as evidenced by certain notes assumed," an indebtedness was created on the part of the defendants.—Peterson v. Kerbey, 151 S. W. 321.

IX. FORECLOSURE BY EXERCISE OF POWER OF SALE.

§ 330 (Tex.Civ.App.) Acts 1889, c. 118 (Rev. St. 1895, art. 2369), having been continued in force in its exact language by section 16 of the general provisions of Revised Statutes 1911, and such article not requiring notice of a sale under a power contained in the mortgage, governs a sale made in 1911, notwithstanding a subsequent statute requiring service of notice on the defendant in execution, especially in view of Act 1903, c. 77 (Rev. Civ. St. 1911, art. 3757).—Corbett v. Sweeney, 151 S. W. 858.

§ 338 (Tex.Civ.App.) A maker of notes secured by a trust deed cannot enjoin a sale thereunder for the entire debt on the ground that attorney's fees and commissions are extortionate.—Corbett v. Sweeney, 151 S. W. 858.

X. FORECLOSURE BY ACTION.

(E) Parties and Process.

§ 426 (Tex.Civ.App.) In a suit to foreclose a mortgage, the only proper parties are the mortgagor, mortgagee, and those acquiring rights or interests under them subsequent to the mortgage.—Gamble v. Martin, 151 S. W. 327.

(H) Trial or Hearing and Reference.

§ 480 (Tex.Civ.App.) Evidence *held* to present question for jury whether mortgagee, a fire insurance company, agreed to attend to the insurance on the premises, and did attend to it

for a time, so as to justify the mortgagor in believing that it would continue to do so.—Commonwealth Fire Ins. Co. v. Obenchain, 151 S. W. 611.

MOTIONS.

See Appeal and Error, §§ 297-305; Criminal Law, § 589; Judgment, §§ 162, 163; Pleading, §§ 360-367; Trial, §§ 25, 176-178; Venue, § 32.

§ 54 (Ark.) A nunc pro tunc order necessarily relates back to the date as of which it should have been entered.—Villines v. State, 151 S. W. 1023.

MOTIVE.

See Homicide, § 166.

MUNICIPAL CORPORATIONS.

See Carriers, § 295; Courts, § 188; Deeds, § 96; Eminent Domain, §§ 177, 256; Evidence, §§ 67, 84; Homestead, § 212; Licenses, § 7; Limitation of Actions, § 55; Nuisance, § 61; Pleading, § 8; Schools and School Districts; Street Railroads; Telegraphs and Telephones, §§ 10, 30; Trial, § 252.

IV. PROCEEDINGS OF COUNCIL OR OTHER GOVERNING BODY.

(B) Ordinances and By-Laws in General.

§ 122 (Ky.) The burden of showing that a municipal occupation or license tax is unreasonable, oppressive, and confiscatory is upon the party attacking the tax, and, in the absence of evidence, cannot be held invalid on those grounds.—Cumberland Telephone & Telegraph Co. v. City of Calhoun, 151 S. W. 659.

IX. PUBLIC IMPROVEMENTS.

(B) Preliminary Proceedings and Ordinances or Resolutions.

§ 294 (Mo.App.) Cities of the third class are required to publish a preliminary resolution stating directly, or by reference, the nature and character of the improvement, a patented article furnishing its own standard in such case; otherwise the proceedings are without jurisdiction.—Custer v. City of Springfield, 151 S. W. 759.

§ 297 (Mo.App.) Person having contract for purchase of property abutting on the street held to be a "property owner" entitled to sign a protest against the improvement of a street, under Rev. St. 1909, § 9255.—Shaw v. Goben, 151 S. W. 209.

A person moving out of a city, although he states he intends to return, held not a resident owner entitled to sign a protest against the improvement of a street, under Rev. St. 1909, § 9255.—Id.

Owner of property in a city, residing outside the city, who moves to the city intending to remain there and become a citizen, held immediately qualified to sign a protest against the improvement of a street, under Rev. St. 1909, § 9255.—Id.

A signer of a protest against the improvement of a street, under Rev. St. 1909, § 9255, must have been qualified to sign it at the time a resolution for the improvement of the street was passed.—Id.

§ 297 (Mo.App.) Property owners may prevent the improvement of a street by filing a remonstrance within a certain time.—Custer v. City of Springfield, 151 S. W. 759.

§ 323 (Mo.App.) A city council acting in good faith in selecting patented paving material, not shown to be fraudulent or inferior to other paving materials in common use and less expensive, will not be restrained by property owners who have made no preliminary remonstrance.—Custer v. City of Springfield, 151 S. W. 759.

(C) Contracts.

§ 330 (Mo.App.) Where a city charter provides that public work shall be let to the lowest bidder, there must be opportunity for active competition, but where, in the bona fide opinion of the public authorities, a patented article is so superior that it would be a public injury not to use it, it may be required to be used.—Custer v. City of Springfield, 151 S. W. 759.

(E) Assessments for Benefits, and Special Taxes.

§ 450 (Ky.) Where territory on but one side of a street to be improved has been divided into squares by streets, the assessment district on the unplatted side must be to a line the same distance from the street as on the other side.—Long v. Barber Asphalt Paving Co., 151 S. W. 6.

§ 465 (Ky.) The cost of an improvement must be equally apportioned to all the property in an assessment district.—Long v. Barber Asphalt Paving Co., 151 S. W. 6.

§ 485 (Mo.App.) Under St. Louis city charter, making special tax bills prima facie evidence of proper assessment, a special tax bill held properly adjudged valid.—Granite Bituminous Paving Co. v. Parkview Realty & Improvement Co., 151 S. W. 487.

§ 495 (Mo.) Under Kansas City Charter, art. 6, §§ 6, 23, in a supplemental proceeding to assess the benefits of a public improvement, neither the municipal nor the circuit court has jurisdiction over property properly included in the verdict in the original proceeding in view of article 6, §§ 4, 5, 8, and 13.—State ex rel. Tuller v. Seehorn, 151 S. W. 724.

§ 513 (Ky.) Though defendant in injunction, after its demurrer to the petition was overruled, made no defense, except as to the value of plaintiff's lots, yet the petition and proof showing the lots were corner lots, the decree, disregarding the rule that such a lot may be assessed for half its value for the improvement of each street, was erroneous.—City of Latonia v. Carroll, 151 S. W. 400.

§ 519 (Mo.App.) Special taxes for street improvements are a lien superior to other incumbrances.—Granite Bituminous Paving Co. v. Parkview Realty & Improvement Co., 151 S. W. 479.

(F) Enforcement of Assessments and Special Taxes.

§ 525 (Mo.App.) A suit to enforce special tax bills is in rem, and enforcement can be made by sale alone.—Granite Bituminous Paving Co. v. Parkview Realty & Improvement Co., 151 S. W. 479.

§ 564 (Mo.App.) Under St. Louis City Charter, art. 6, § 25, an action to enforce a tax bill brought within two years after maturity of the bill by service of notice on the owner, wherein the purchaser at mortgage foreclosure sale is made a party defendant, held not barred by limitations.—Granite Bituminous Paving Co. v. Parkview Realty & Improvement Co., 151 S. W. 486.

§ 565 (Mo.App.) Beneficiaries of prior incumbrances on land subject to a lien for special taxes are not necessary, but proper, parties in a suit to enforce the bills.—Granite Bituminous Paving Co. v. Parkview Realty & Improvement Co., 151 S. W. 479.

The owner against whom a special tax bill issued, and who was the legal owner at the time the lien attached, is the only necessary party defendant in a suit to enforce the lien.—Id.

The word "owner," in the St. Louis city charter, providing for special tax bills and their enforcement in suits against the owner, means the "legal owner."—Id.

§ 567 (Mo.App.) An answer in a suit to enforce a special tax bill *held* to allege new matter which defendants must establish.—Granite Bituminous Paving Co. v. Parkview Realty & Improvement Co., 151 S. W. 487.

X. POLICE POWER AND REGULATIONS.

(A) Delegation, Extent, and Exercise of Power.

§ 604 (Mo.App.) An ordinance forbidding the use of a building for keeping stallions where such use disturbs the peace of the neighborhood, or violates public decency, is valid.—City of Tarkio v. Miller, 151 S. W. 208.

§ 605 (Mo.App.) A business which is a nuisance at common law may be suppressed by ordinance.—City of Tarkio v. Miller, 151 S. W. 208.

(B) Violations and Enforcement of Regulations.

§ 631 (Mo.App.) One keeping stallions, in a city in such a way as to scandalize the immediate neighborhood violates an ordinance forbidding such keeping so as to violate public decency.—City of Tarkio v. Miller, 151 S. W. 208.

§ 635 (Mo.App.) A prosecution for the violation of a city ordinance is a civil and not a criminal case.—Grant City v. Simmons, 151 S. W. 187.

§ 640 (Mo.App.) A person prosecuted for a violation of an ordinance, which is also an offense under the public laws of the state, is entitled to the presumption of innocence and to have his guilt established beyond a reasonable doubt.—Grant City v. Simmons, 151 S. W. 187.

§ 642 (Mo.App.) Notwithstanding Rev. St. 1909, § 2083, limiting appellate courts to an examination of the record, the court may, on a motion to dismiss the appeal, receive evidence dehors the record to show a compromise or settlement.—Grant City v. Simmons, 151 S. W. 187.

A party moving to dismiss an appeal on the ground of a settlement has the burden of showing the same and that the person agreeing thereto on behalf of the appellant had authority to make such agreement.—Id.

XI. USE AND REGULATION OF PUBLIC PLACES, PROPERTY, AND WORKS.

(A) Streets and Other Public Ways.

§ 646 (Ky.) Where a street improved for travel has not been dedicated or accepted or recognized by the municipality as such, it is not a public street.—Long v. Barber Asphalt Paving Co., 151 S. W. 6.

§ 647 (Mo.) St. Louis Scheme of Separation, § 10, providing that the interest of the county, in public roads shall vest in the city, is applicable to a road established by user.—Laclede-Christy Clay Products Co. v. City of St. Louis, 151 S. W. 460.

§ 654 (Ky.) An owner of property, asserting that a public use of a walkway for 15 years was merely permissive, *held* to have the burden of proof that the use was as claimed.—White v. City of Calhoun, 151 S. W. 362.

§ 654 (Mo.) Evidence *held* to establish the existence of a street by user and recognition.—Laclede-Christy Clay Products Co. v. City of St. Louis, 151 S. W. 460.

A void order establishing a public road *held* admissible as evidence of the existence of a street by prescription.—Id.

§ 657 (Mo.) Rev. St. 1909, § 10,446, providing that 10 years nonuser shall constitute abandonment of road, does not apply to city streets.—Laclede-Christy Clay Products Co. v. City of St. Louis, 151 S. W. 460.

Right of city and public to use a street *held* not lost by abandonment or adverse possession,

though the street commissioners declared that it was not a street, and the city condemned a right of way therein for sewers and water pipes.—Id.

§ 691 (Ky.) A public service corporation which uses the streets of a city without the right to do so is a mere trespasser, and cannot invoke in its favor any of the laws enacted for the protection of corporations that have observed the law.—Cumberland Telephone & Telegraph Co. v. City of Calhoun, 151 S. W. 659.

§ 706 (Mo.App.) In an action for injuries from an automobile, where the only issue was as to its ownership or control, an instruction permitting the jury to find against defendant if his agent was operating the machine at the time, without requiring a finding that the agent was operating it for him, or in the course of his employment, was erroneous.—Warrington v. Bird, 151 S. W. 754.

§ 706 (Mo.App.) In an action for injuries by being struck by a taxicab, in which specific acts of negligence were alleged, it was error to authorize a finding for plaintiff if the jury found that the driver was not using the highest degree of care a careful person would use under similar circumstances at the time of the injury.—McDonnell v. Columbia Taxicab Co., 151 S. W. 767.

XII. TORTS.

(C) Defects or Obstructions in Streets and Other Public Ways.

§ 762 (Ky.) Where a city knows that rock has been placed in a street by an abutting owner, it must see to it that it is properly guarded.—City of Carlisle v. Campbell, 151 S. W. 673.

A city may not shift the statutory burden imposed on it of keeping its streets reasonably safe for public travel, by adopting an ordinance permitting property owners to use portions of the streets when erecting improvements on abutting lots.—Id.

§ 763 (Ky.) A city must maintain its streets in a reasonably safe condition.—City of Carlisle v. Campbell, 151 S. W. 673.

§ 768 (Mo.App.) A city engaged in the business of carrying high and dangerous currents of electricity on overhead wires *held* not an insurer of the safety of persons passing beneath, but bound to exercise reasonable care therefor.—Wilhite v. City of Huntsville, 151 S. W. 232.

A city *held* liable for the electrocution of a horse by his stepping on a telephone wire, broken in a severe sleet storm, which fell across an uninsulated portion of an electric light wire containing a dangerous current.—Id.

§ 803 (Mo.App.) Where there was no apparent reason why a 19 year old boy, familiar with the locality, fell over an embankment in a street in the daytime and was killed, he must have been guilty of contributory negligence.—Brady v. City of St. Joseph, 151 S. W. 234.

§ 816 (Mo.App.) Whether decedent's fall over an embankment in daylight, without any apparent reason, was explainable by his having incipient epilepsy cannot be considered, where that fact was not pleaded.—Brady v. City of St. Joseph, 151 S. W. 234.

§ 818 (Mo.App.) Evidence of the financial ability of the city to meet all of its obligations and duties as a corporation, is inadmissible in an action for personal injuries caused by defective sidewalk.—Ledbetter v. City of Kirksville, 151 S. W. 228.

§ 822 (Mo.App.) An instruction in an action against a city for damages for injuries caused by defective sidewalk *held* not erroneous as in effect charging that the city is liable regardless of the traveler's negligence.—Ledbetter v. City of Kirksville, 151 S. W. 228.

MURDER.

See Homicide.

NAMES.

§ 18 (Tex.Civ.App.) Where the name of the grantee of a patent was identical with that of the signer of a will who was named in probate proceedings, the identity of names will, in the absence of other evidence, sufficiently establish the fact that the testator was the grantee of the patent.—*McDoel v. Jordan*, 151 S. W. 1178.

NAVIGABLE WATERS.**III. RIPARIAN AND LITTORAL RIGHTS.**

§ 44 (Ark.) In case of accretions, where the bore line is not irregular, they should be apportioned by giving to each section a proportion of the outer boundary line of the accretions in the ratio that the old shore line, on the particular section, bore to the whole of the old shore line, and though the main stream has gone west of the new shore line, leaving only a hute dividing the accretions from a former island in the river, the measurements must be made from such chute as the new shore line.—*Leaves v. Moore*, 151 S. W. 1025.

NECESSARIES.

See Infants, § 50; Parent and Child, § 3.

NECESSITY.

See Easements, §§ 1, 18.

NEGLIGENCE.

See Appeal and Error, §§ 216, 1064, 1066, 1068; Carriers, §§ 228, 280-345; Death; Explosives; Landlord and Tenant, §§ 164-169; Master and Servant, §§ 88-296; Mechanics' Liens, § 281; Municipal Corporations, §§ 706, 762-822; Pleading, §§ 8, 433; Railroads, §§ 233-482; Receivers, § 105; Street Railroads; Sunday, § 19; Telegraphs and Telephones, §§ 16, 37-71; Trial, §§ 191-296; Waters and Water Courses, § 63.

II. ACTS OR OMISSIONS CONSTITUTING NEGLIGENCE.**(A) Personal Conduct in General.**

§ 1 (Mo.App.) Negligence is distinguishable from actionable negligence, in that the former may mean mere carelessness not involving liability, while the latter means the violation of a duty owed by the party charged to the party injured.—*Hight v. American Bakery Co.*, 151 S. W. 776.

(B) Dangerous Substances, Machinery, and Other Instrumentalities.

§ 23 (Ky.) The "turntable doctrine" is based upon the idea that a dangerous instrumentality has been constructed where children habitually congregated, or at a place inviting to children, so the owner's knowledge, so that he ought to have anticipated that they would be attracted to it.—*Meyer v. Union Light, Heat & Power Co.*, 151 S. W. 941.

§ 23 (Mo.App.) To sustain a recovery for injuries to a child under the turntable doctrine, the machinery or appliance must have been dangerous in itself, or liable to become so when put in motion, and defendant must have been negligent in leaving it unguarded or unsecured in a place to which children had access.—*Hight v. American Bakery Co.*, 151 S. W. 776.

In an action for injuries to a child by having his arm run over by defendant's wagon as he was reaching between the wheels to seize a toy thrown out by men in the wagon, defendant held not guilty of actionable negligence, and

was not, therefore, liable under the turntable doctrine.—*Id.*

§ 23 (Tex.Civ.App.) One who leaves unguarded dangerous machinery usually attractive to children is liable for injuries to a child attracted to the machinery, though he is there without express permission.—*Little v. James McCord Co.*, 151 S. W. 835.

§ 24 (Ky.) Where defendant power company did not know that there was a rock pile against a brick wall surrounding a churchyard, in which it had dangerous electrical apparatus, so that children could climb over it, and did not know that boys were in the habit of playing in a lot adjoining the churchyard, held, that it was not liable for injuries to a boy who climbed over the churchyard wall, and was injured by contact with its wires.—*Meyer v. Union Light, Heat & Power Co.*, 151 S. W. 941.

§ 27 (Tex.Civ.App.) Manufacturer of soap held liable for injuries from poisonous substances therein, although there was no contract or privity between it and the person injured.—*Armstrong Packing Co. v. Clem*, 151 S. W. 576.

Facts held to show sufficiently that a manufacturer of soap failed to use care in its preparation and hence that it was liable for injuries from its use.—*Id.*

(C) Condition and Use of Land, Buildings, and other Structures.

§ 32 (Tex.Civ.App.) Person riding on another's log train without invitation, but by consent, held to be a licensee to whom the owner owed the duty only of ordinary care, and who was not liable for injuries caused by the condition of the track.—*Kirby Lumber Co. v. Gresham*, 151 S. W. 847.

III. CONTRIBUTORY NEGLIGENCE.**(A) Persons Injured in General.**

§ 66 (Tex.Civ.App.) A purchaser of soap is not required to test it for poisonous substances, but, where he is ignorant of defects therein, may assume that it is fit for use.—*Armstrong Packing Co. v. Clem*, 151 S. W. 576.

§ 82 (Mo.App.) Where a child placed his arm between the wheels of a slowly moving wagon in order to seize a toy, and, not having withdrawn it in time, it was caught by the wheel and injured, the placing of his arm between the wheels, and not the attractiveness of the toy, was the proximate cause of the injury.—*Hight v. American Bakery Co.*, 151 S. W. 776.

(B) Children and Others Under Disability.

§ 85 (Mo.App.) A child of 10, injured by getting his arm under the wheel of a wagon passing slowly along the street as he was trying to seize a toy, held guilty of contributory negligence.—*Hight v. American Bakery Co.*, 151 S. W. 776.

IV. ACTIONS.**(A) Right of Action, Parties, Preliminary Proceedings, and Pleading.**

§ 117 (Mo.) Contributory negligence is an affirmative defense which must be pleaded, unless it is shown by plaintiff in making out his own case.—*Benjamin v. Metropolitan St. Ry. Co.*, 151 S. W. 91.

(B) Evidence.

§ 122 (Mo.App.) It cannot be presumed that a decedent exercised due care for his safety, where the unexplained facts show that he saw, or should have seen, the danger.—*Brady v. City of St. Joseph*, 151 S. W. 234.

(C) Trial, Judgment, and Review.

§ 136 (Ky.) In a negligence action, where the evidence is equally consistent with the existence or nonexistence of negligence, the case should not be submitted to the jury.—*Wood v.*

Cumberland Telephone & Telegraph Co., 151 S. W. 29.

§ 136 (Tex.Civ.App.) Negligence is one of law only when from the undisputed facts no inference except that of negligence can reasonably be drawn, or when unprejudiced minds cannot reasonably disagree as to the facts.—Freeman v. Kennerly, 151 S. W. 580.

§ 136 (Tex.Civ.App.) Whether a child injured by an explosion of an explosive left by the owner on the premises of a third person was guilty of contributory negligence *held* for the jury.—Little v. James McCord Co., 151 S. W. 835.

§ 141 (Mo.) An instruction that, if plaintiff was guilty of negligence of any character which directly contributed to her injuries, she could not recover, was erroneous, as not specifying the facts constituting such negligence.—Benjamin v. Metropolitan St. Ry. Co., 151 S. W. 91.

§ 141 (Tex.Civ.App.) In an action for injuries to a child received while crossing railroad tracks, an instruction *held* properly refused for its imputation of contributory negligence of the child's father to her.—Ft. Worth & D. C. Ry. Co. v. Wininger, 151 S. W. 586.

In an action for injuries to a child while crossing railway tracks, an instruction *held* properly refused for its tendency to hold a child of tender years responsible for contributory negligence without inquiry as to her discretion and mental capacity.—*Id.*

NEGOTIABLE INSTRUMENTS.

See Bills and Notes.

NEWLY DISCOVERED EVIDENCE.

See Criminal Law, §§ 942, 958; New Trial, § 103.

NEW PROMISE.

See Limitation of Actions, § 145.

NEW TRIAL.

See Appeal and Error, §§ 76, 113, 297-305, 417, 501, 502, 581, 732, 835, 842, 854, 977, 978; Arbitration and Award, § 8; Criminal Law, §§ 942-970, 1064, 1090, 1097.

I. NATURE AND SCOPE OF REMEDY.

§ 6 (Mo.App.) Trial judges have a wide discretion in granting new trials.—Allen v. St. Louis & S. F. R. Co., 151 S. W. 762.

II. GROUNDS.

(C) Rulings and Instructions at Trial.

§ 40 (Mo.App.) Though defendant did not except to instructions, the court may of its own motion notice error therein and grant him a new trial on account thereof.—Warren v. Cowden, 151 S. W. 501.

(D) Disqualification or Misconduct of or Affecting Jury.

§ 52 (Tex.Civ.App.) Averaging jurors' estimates of damages *held* not ground for a new trial, where it did not appear that there was any prior agreement that the average should constitute their verdict, or that it was returned as their verdict.—Armstrong Packing Co. v. Clem, 151 S. W. 576.

(F) Verdict or Findings Contrary to Law or Evidence.

§ 71 (Tex.Civ.App.) Where the evidence was conflicting, but sustained the verdict, a new trial on the ground that it was against the preponderance of the evidence was properly denied.—St. Louis & S. F. R. Co. v. Cartwright, 151 S. W. 630.

§ 72 (Mo.App.) Where plaintiff's case rested almost exclusively on his own testimony, and

his credibility was attacked, there was no such preponderance of evidence in his favor as warranted a new trial.—Kiel v. Ott, 151 S. W. 182.

(G) Surprise, Accident, Inadvertence, or Mistake.

§ 89 (Mo.App.) Where, in attachment, interpleader's evidence was that it had marked the attached goods, it could not claim a new trial for surprise by the attaching creditor's evidence that the goods were not marked when attached.—Byrd v. Vanderburgh, 151 S. W. 184.

§ 90 (Mo.App.) Rev. St. 1909, § 2022, authorizing a new trial for perjury or mistake on the part of a witness resulting in an improper finding, gives the trial judge a wide discretion to be reasonably exercised.—Byrd v. Vanderburgh, 151 S. W. 184.

§ 97 (Mo.App.) If a party is surprised at the admission of evidence, he should ask a postponement to enable him to produce counter evidence or move for nonsuit, in order to rely thereon for a new trial.—Byrd v. Vanderburgh, 151 S. W. 184.

(H) Newly Discovered Evidence.

§ 103 (Mo.App.) In an action for personal injury, newly discovered evidence of the sister of the plaintiff, that the plaintiff intended to be injured, and afterwards feigned injury, *held* to justify the granting of a motion for a new trial.—Allen v. St. Louis & S. F. R. Co., 151 S. W. 762.

III. PROCEEDINGS TO PROCURE NEW TRIAL.

§ 126 (Mo.App.) A ground for new trial that the judgment and verdict are against the law is not sufficiently specific.—Byrd v. Vanderburgh, 151 S. W. 184.

§ 162 (Ky.) The rule that, where the judgment is excessive, a new trial must be awarded, does not apply where the items constituting the damages recovered are separable, so that the court may eliminate those not properly recoverable.—Chesapeake & O. Ry. Co. v. Meyers, 151 S. W. 19.

§ 162 (Mo.App.) The trial court did not err in granting a new trial for excessive damages, notwithstanding plaintiff's offer to remit the excessive portion, where he did not indicate how much should be remitted, but threw the burden of determining the proper amount on the court.—Blackmer & Post Pipe Co. v. Mobile & O. R. Co., 151 S. W. 164.

NONRESIDENCE.

See Process, § 58.

NONSUIT.

See Dismissal and Nonsuit.

NONUSER.

See Easements, § 80.

NOTARIES.

See Acknowledgment, § 58.

NOTICE.

See Animals, § 51; Appeal and Error, §§ 417, 1066; Bills and Notes, §§ 363, 396, 525; Carriers, §§ 159, 197; Constitutional Law, §§ 290, 309, 1081; Drains, § 76; Evidence, § 65; Executors and Administrators, §§ 337, 383; Guaranty, § 7; Insurance, §§ 113, 353, 536; Landlord and Tenant, §§ 164, 291; Master and Servant, §§ 217, 234, 252; Mines and Minerals, § 63; Mortgages, § 330; Municipal Corporations, § 294; Parent and Child, § 7; Railroads, § 312; Taxation, §§ 363, 611; Vendor and Purchaser, §§ 227, 228, 231, 289.

§ 9 (Mo.) If the law fixes a definite date, a notice cannot be returned on a different date.—*State ex rel. Coleman v. Blair*, 151 S. W. 148.

§ 11 (Mo.) As a rule, when the law requires a notice to be published for a certain number of days before legal proceedings are had, it is sufficient if the last publication occur before the date fixed.—*State ex rel. Coleman v. Blair*, 151 S. W. 148.

NUISANCE.

See Appeal and Error, § 221; Disorderly House, § 2; Injunction, § 219; Intoxicating Liquors, §§ 261, 274; Municipal Corporations, § 605.

I. PRIVATE NUISANCES.

(A) Nature of Injury, and Liability Therefor.

§ 3 (Mo.App.) One maintaining a barn and corral near a street for the sole purpose of keeping stallions to which he bred mares brought there maintains a nuisance to persons living from 200 to 400 feet from the barn.—*McNulty v. Miller*, 151 S. W. 208.

(C) Abatement and Injunction.

§ 36 (Tex.Civ.App.) Decree for abatement of a slaughterhouse as a nuisance allowed the plaintiff *held* proper though there was evidence that the premises had been made cleanly before trial, in view of the verdict that it was a nuisance.—*Nations v. Harris*, 151 S. W. 334.

II. PUBLIC NUISANCES.

(A) Nature of Injury, and Liability Therefor.

§ 60 (Tex.Civ.App.) Rev. Civ. St. 1911, art. 4689, authorizing the enjoining of bawdyhouses at the suit of the state or any citizen, except the statute shall not interfere with the regulation of bawdyhouses in towns and cities, makes bawdyhouses nuisances, subject to be abated by injunction at the suit of the state or any citizen; but the limitation of the right is valid.—*Spence v. Fenchler*, 151 S. W. 1094.

§ 61 (Mo.App.) The keeping in a city of stallions for breeding purposes is lawful, and not a nuisance per se, unless conducted in an improper manner.—*City of Tarkio v. Miller*, 151 S. W. 208.

(B) Rights and Remedies of Private Persons.

§ 75 (Tenn.) The chancery court has no jurisdiction of bills by private persons to enjoin the keeping of disorderly houses in a red light district, where the evidence does not show how much any house was responsible for the special injury alleged by complainants.—*Weidner v. Friedman*, 151 S. W. 56.

A bill to enjoin the maintenance of disorderly houses in a red light district, which have existed there for more than 25 years, should be dismissed for laches.—*Id.*

NUNC PRO TUNC.

See Appeal and Error, § 76; Judgment, § 326; Motions, § 54.

OBJECTIONS.

See Appeal and Error, §§ 185-242; Dower, § 99.

OBSTRUCTING JUSTICE.

§ 4 (Tex.Cr.App.) To constitute the offense of bribing a witness to avoid a process, there must have been a process either issued or served.—*Harrison v. State*, 151 S. W. 552.

§ 9 (Tex.Cr.App.) A party is not guilty of bribery as principal for paying a witness to take another witness from the county.—*Harrison v. State*, 151 S. W. 552.

§ 11 (Tex.Cr.App.) Indictment for bribing a witness to avoid process *held* fatally defective where it failed to state the character of the process.—*Harrison v. State*, 151 S. W. 552.

OCCUPATION.

See Licenses, § 7.

OFFICERS.

See Arrest, § 63; Contracts, § 124; Corporations, § 492; False Imprisonment, § 15; Receivers; Replevin, § 48; Sheriffs and Constables; States, § 191; Trial, § 252.

OIL.

See Mines and Minerals, § 68.

OPEN AND CLOSE.

See Trial, § 25.

OPENING.

See Judgment, §§ 138-163.

OPINION EVIDENCE.

See Criminal Law, §§ 472, 494; Evidence, §§ 471-548.

ORDERS.

See Motions, § 54.

ORDINANCES.

See Municipal Corporations, §§ 604, 605, 631-642.

OTHER OFFENSES.

See Criminal Law, §§ 369-372.

OWNERSHIP.

See Larceny, § 32.

PARDON.

§ 9 (Ark.) A complete pardon granted one convicted of crime cannot be interposed to defeat a nunc pro tunc order amending the judgment, so as to impose on accused the burden of paying the costs.—*Villines v. State*, 151 S. W. 1023.

PARENT AND CHILD.

See Contracts, § 108; Death, §§ 31, 72; Deeds, § 211; Divorce, §§ 300, 303; Explosives; Fraudulent Conveyances, § 61; Liens, § 7; Negligence, § 141.

§ 3 (Tex.Civ.App.) While a parent cannot be charged for necessities furnished by a stranger for his minor child, except by his express or implied promise to pay, such promise may be inferred from his legal duty to furnish necessities.—*Snell v. Ham*, 151 S. W. 1077.

An instruction, in an action against a parent for clothing furnished a minor child, that there must have been an express or implied authority to the child to purchase or an express or implied promise to pay, and an express promise to pay for goods other than necessities, *held* erroneous, not stating whether the clothing was a necessity, or defining express or implied authority, and leading the jury to believe that explicit evidence of a promise was necessary.—*Id.* If articles furnished to minor children were reasonably necessary for their support and comfort the father's promise to pay therefor would be inferred, in absence of a showing that he was ready to himself supply the children therewith.—*Id.*

To charge a parent with payment for articles, not necessities, furnished minor children, they must have been expressly authorized by the father to purchase, or he must have permitted their purchase with knowledge thereof, leading

the seller to believe that they were purchased with his consent, or must have expressly agreed to pay for them.—Id.

If goods furnished a minor child were necessary, so that the law would imply the parent's promise to pay therefor, his knowledge of whether the seller expected him to pay would be immaterial on his liability.—Id.

It was error not to charge, in an action against a parent for clothing furnished a minor child, that direct and positive evidence was not necessary to prove defendant's promise to pay for such necessities.—Id.

§ 7 (Ky.) A parent, who has not emancipated a child, may recover for loss of services and medical care and attention from injuries received in the employment of the child by one with notice of the minority, but not where he had emancipated such child, or where the child was employed without notice of the minority.—Chesapeake & O. Ry. Co. v. De Atley, 151 S. W. 363.

In a father's action for injuries to his son while in defendant's employ, evidence held to show that the father consented that his son might work for himself, and surrendered his right to his control and services.—Id.

Father held not entitled to recover for injuries to a minor sustained while in defendant's employ because he had impliedly, if not expressly, emancipated his son.—Id.

Employer of minor held not liable to his father for personal injuries where he exercises reasonable care to ascertain his age, and where his appearance indicates that he is over 21 years of age.—Id.

Employer held not charged with notice that an employé was a minor by the fact that, on a previous employment in a different department, its clerks had advised the employé to misstate his age.—Id.

PAROL EVIDENCE.

See Evidence, §§ 159, 407-466, 596.

PARTIES.

See Appeal and Error, § 187; Attachment, § 308; Attorney and Client, § 51; Eminent Domain, § 177; Highways, § 28; Homestead, § 212; Judgment, §§ 239, 686; Mortgages, § 426; Municipal Corporations, § 565; Vendor and Purchaser, § 279.

I. PLAINTIFFS.

(B) Joinder.

§ 19 (Mo.App.) A several action on a contract by one with two others jointly to pay them a certain sum for services to be performed by them jointly cannot be maintained by one of the obligees against the obligor.—Frumberg v. Haderlein, 151 S. W. 160.

PARTITION.

See Appeal and Error, § 719.

II. ACTIONS FOR PARTITION.

(A) Right of Action and Defenses.

§ 12 (Ky.) Under Civ. Code Prac. § 490, subsec. 2, land owned by infants jointly, subject to dower of their mother in a third of it, may be sold for partition in an action by their guardian; the mother consenting to take the present value of her dower.—Hatterich v. Bruce, 151 S. W. 81.

(B) Proceedings and Relief.

§ 77 (Ky.) Under Civ. Code Prac. § 490, providing that a vested estate jointly owned by two or more may be sold by a court of equity, though plaintiff or defendant is an infant, where the property cannot be divided without materially impairing its value, a sale of certain real estate held proper.—Riddell v. Wilcox, 151 S. W. 25.

§ 78 (Tex.Civ.App.) Under Rev. Civ. St. 1911, art. 6108, the commissioners in partition may divide the land according to value, although the court determines that each party is entitled to one-half.—McShan v. Johnson, 151 S. W. 597.

§ 83 (Mo.) The rule that partition cannot be had, where one claims adversely to those seeking partition, without first determining the right of possession in ejectment does not apply where the adverse claimant voluntarily comes into the partition suit and sets up an equitable claim to the land.—Waddle v. Frazier, 151 S. W. 87.

§ 85 (Tex.Civ.App.) A tenant in common is entitled to have improvements made by him without intent to embarrass his cotenant set apart to him in partition if it can be done without injury to the cotenant, and, if it cannot be done, he is entitled to compensation.—Holloway v. Hall, 151 S. W. 895.

§ 91 (Tex.Civ.App.) In partition, a court did not err in appointing new commissioners and surveyor to make partition, when those first appointed failed or refused to act.—McShan v. Johnson, 151 S. W. 597.

Motion for appointment of surveyor and commissioners upon failure of those previously appointed to act held sufficient, although defendant did not state that a writ of partition, accompanied by a certified copy of the decree, was ever issued to the sheriff.—Id.

§ 93 (Ky.) Where the court ordered a sale of land owned by an adult and an infant, and the infant was before payment protected by the lien retained by the judgment, any irregularity in the time of the execution of the bond to the infant required by Civ. Code Prac. § 493, did not affect the validity of the sale.—Riddell v. Wilcox, 151 S. W. 25.

§ 114 (Ark.) Kirby's Dig. § 5793, relating to sale of the land, and providing for deducting the costs, furnishes no basis for the allowance of solicitor's fees to plaintiff where no sale was made.—Gardner v. McAuley, 151 S. W. 997.

Where defendants appear by attorney or the proceeding is adversary in its nature, plaintiffs in partition, though successful, are not entitled to have their solicitor's fees taxed as part of the costs.—Id.

PARTNERSHIP.

See Forcible Entry and Detainer, § 6; Judgment, § 419; Set-Off and Counterclaim, § 13; Trial, §§ 244, 256.

I. THE RELATION.

(A) Creation and Requisites.

§ 5 (Mo.App.) Where defendant, who had employed his brother as agent to procure a purchaser of his farm, employed plaintiff to advertise the property for a commission, without revoking the agency of the brother to whom plaintiff should turn over answers, the brother and plaintiff were not partners, and plaintiff could sue alone for the services rendered.—Dodge v. Childers, 151 S. W. 749.

(C) Evidence.

§ 53 (Ark.) Evidence held to sustain a finding that a partnership contract was for buying and selling but two cars of cotton seed during a season.—Henderson v. E. W. Emerson Co., 151 S. W. 261.

II. THE FIRM, ITS NAME, POWERS, AND PROPERTY.

§ 67 (Tex.Civ.App.) Property purchased with money withdrawn by a partner from the business is firm property, where it is withdrawn in bad faith, without the knowledge and consent of the other partner, but not where the other partner knows of and consents to such transaction.—Hengy v. Hengy, 151 S. W. 1127.

§ 68 (Tex.Civ.App.) Where a partner incurs a debt to secure money to buy land, and subsequently pays such debt out of partnership funds, the partnership does not thereby acquire any claim on the land.—Hengy v. Hengy, 151 S. W. 1127.

IV. RIGHTS AND LIABILITIES AS TO THIRD PERSONS.

(D) Actions by or Against Firms or Partners.

§ 218 (Mo.App.) The fact of partnership is for the jury, where there are facts authorizing a verdict to that effect; but the court must determine whether there is such evidence.—Thornton v. Mersereau, 151 S. W. 212.

§ 219 (Tex.Civ.App.) Where the petition in an action against a firm was sufficient to support a judgment against each partner personally, as well as against the firm, a partner against whom a personal judgment was rendered could not complain because no such judgment was rendered against the copartners.—First Bank of Springtown v. Hill, 151 S. W. 652.

VII. DISSOLUTION, SETTLEMENT, AND ACCOUNTING.

(D) Actions for Dissolution and Accounting.

§ 329 (Tex.Civ.App.) In action for partnership settlement, submission of question whether plaintiff paid one-half the purchase money for certain land individually held proper under the pleadings and evidence.—Hengy v. Hengy, 151 S. W. 1127.

§ 336 (Tex.Civ.App.) On a partnership accounting, where partner claimed land as his individual property, and claimed that he paid for it out of a bank deposit, exclusion of bank account offered to show that he had no such deposit held error.—Hengy v. Hengy, 151 S. W. 1127.

Letter from one partner to another stating properties owned by the writer in another state held irrelevant on a partnership accounting.—Id.

On partnership accounting between father and son, admission of letter of father showing property owned by him in another state held calculated to prejudice the jury.—Id.

§ 342 (Tex.Civ.App.) On a partnership accounting where there was a dispute as to the date when the partnership commenced, an auditor, having no power to pass upon this question, properly reported the amount due each of the partners on each of the different theories concerning such date.—Hengy v. Hengy, 151 S. W. 1127.

PASSENGERS.

See Carriers, §§ 247-402.

PASSWAYS.

See Easements.

PATENTS.

See Municipal Corporations, § 330; Names; Public Lands, § 127.

PAYMENT.

See Bills and Notes, § 139; Usury, § 57.

II. APPLICATION.

§ 39 (Ky.) A holder of several notes, in the absence of a direction to apply on either note, may credit a payment on any or all of the notes not barred by limitations.—Samuel v. Samuel's Adm'r, 151 S. W. 676.

§ 39 (Tex. Civ. App.) Where a debtor making a payment gives no directions as to the application thereof, the creditor may generally do

so within a reasonable time.—Compton v. Ahrens & Ott Mfg. Co., 151 S. W. 884.

IV. PLEADING, EVIDENCE, TRIAL, AND REVIEW.

§ 75 (Tex.Civ.App.) The application by a creditor of a payment, where the debtor gives no directions as to application, may be established by circumstances.—Compton v. Ahrens & Ott Mfg. Co., 151 S. W. 884.

Where a guaranty covered only part of an account, and the debtor made a part payment without directing its application, and the creditor demanded of the guarantor payment of the balance, and the guarantor made no objection, there was an application of the partial payment on the excess of the account over the guaranty, so that the guarantor was liable for the balance due.—Id.

PERJURY.

See Criminal Law, § 1166½.

PERPETUITIES.

§ 4 (Tex.Civ.App.) Act Jan. 26, 1905 (Acts 29th Leg. c. 7), which vested a private corporation with the exclusive possession and control of the so-called "Alamo property," charged with its repair and maintenance, and subject to future legislation, did not violate Const. art. 1, § 26, forbidding perpetuities.—Conley v. Daughters of the Republic of Texas, 151 S. W. 877.

PERSONAL INJURIES.

See Carriers, §§ 280-345; Damages, §§ 132, 158, 216; Evidence, §§ 99, 127; Landlord and Tenant §§ 164-169; Master and Servant, §§ 88-296; Railroads, §§ 233-400.

PETITION.

See Private Roads, § 2.

PHYSICIANS AND SURGEONS.

See Appeal and Error, § 232; Criminal Law, §§ 474, 480; Evidence, § 548; Homicide, § 257.

PLATS.

See Boundaries, §§ 8, 10, 33.

PLEADING.

See Appeal and Error, §§ 78, 195, 232, 242, 499, 500, 501, 518, 549, 584, 597, 639, 671, 719, 750, 889, 909, 916, 917, 919, 934, 1039-1042, 1066, 1135; Bankruptcy, § 302; Carriers, §§ 314, 315; Chattel Mortgages, § 177; Corporations, § 513; Courts, § 122; Damages, §§ 157-159; Death, § 52; Estoppel, § 58; Evidence, § 271; Injunction, § 118; Insurance, §§ 629, 815; Judgment, §§ 106, 107, 248-253, 948; Justices of the Peace, § 135; Landlord and Tenant, § 274; Limitation of Actions, § 127; Master and Servant, § 78; Municipal Corporations, § 567; Negligence, § 117; Quo Warranto, § 48; Sales, §§ 355, 411; Schools and School Districts, § 111; Sheriffs and Constables, § 137; Statutes, § 281; Trespass to Try Title, § 32; Trial, § 251; Trover and Conversion, § 34; Venue, § 5; Weights and Measures, § 8; Work and Labor, § 22.

I. FORM AND ALLEGATIONS IN GENERAL.

§ 2 (Ky.) While the Code abolishes forms of pleading, it does not change the substance of various pleas.—Shirley v. Renick, 151 S. W. 357.

§ 8 (Mo.) The facts constituting contributory negligence must be pleaded, and it is insufficient to merely allege that plaintiff received his in-

juries at the time mentioned in the petition as the result of his own fault and negligence.—*Benjamin v. Metropolitan St. Ry. Co.*, 151 S. W. 91.

§ 8 (Mo.App.) In an action to enjoin municipal officers from entering into a contract for paying with patented material, the facts constituting illegality must be pleaded, and an allegation that the patent was a subterfuge to prevent competitive bidding is not an allegation of fact.—*Custer v. City of Springfield*, 151 S. W. 759.

§ 8 (Mo.App.) In an action against a landlord for injuries to the tenant's child from the falling of a mantel in the premises, an averment that it was the landlord's duty to have the premises in a safe condition for the use of plaintiff was a mere conclusion, and was not equivalent to an allegation of an express covenant to repair.—*Korach v. Loeffel*, 151 S. W. 790.

§ 8 (Tex.Civ.App.) Averments that a judgment of a justice of the peace was void, and that the justice had no jurisdiction over the subject-matter or the person of plaintiff suing to restrain enforcement of the judgment, are mere legal conclusions.—*Pye v. Wyatt*, 151 S. W. 1086.

§ 8 (Tex.Civ.App.) Where, in a purchaser's action for breach of contract, an answer alleging that vendor had been induced to sign the contract by plaintiff's fraudulent representations that it bound plaintiff to purchase, "assuming" a certain debt, when in fact it merely bound him to purchase "subject to" such debt, was not demurrable for failure to allege special damage from the fraud; such allegation, if made, being a conclusion.—*Parker v. Naylor*, 151 S. W. 1098.

§ 34 (Ky.) A pleading is construed most strongly against the pleader.—*Samuels v. Louisville Ry. Co.*, 151 S. W. 37.

§ 34 (Mo.App.) A pleading must be read as a whole.—*Goode v. Central Coal & Coke Co.*, 151 S. W. 508.

When first attacked after judgment, a pleading should be construed favorably to the pleader, and all doubts resolved in his favor.—*Id.*

§ 34 (Tex.Civ.App.) On general demurrer, every reasonable intent must be indulged in favor of the pleading assailed.—*National Lumber & Creosoting Co. v. Maris*, 151 S. W. 325.

III. PLEA OR ANSWER, CROSS-COMPLAINT, AND AFFIDAVIT OF DEFENSE.

(D) Matter in Avoidance.

§ 133 (Ky.) Even under the Code, a plea of son assault demesne must give color.—*Shirley v. Renick*, 151 S. W. 357.

An answer which in the first paragraph traverses the allegation of malice in the commission of an assault, and the second paragraph alleges that defendant attempted to assist a constable in making an arrest, whereupon plaintiff attempted to restrain defendant, who to protect himself struck plaintiff, amounts to a plea in confession and avoidance.—*Id.*

IV. REPLICATION OR REPLY AND SUBSEQUENT PLEADINGS.

§ 162 (Tex.Civ.App.) The only purpose of a supplemental petition is to allege new facts in reply to those alleged by the defendant in his pleading.—*May v. Anthony*, 151 S. W. 602.

The purpose of an amendment to a petition is to add or withdraw something to or from what has been properly pleaded; and, where plaintiff intended to correct the date of an alleged conversion, it should have been done by amendment and not by supplemental petition.—*Id.*

§ 174 (Tex.Civ.App.) A supplemental petition in an action on a note for drilling a well, denying that plaintiff had guaranteed that the water

should be of a certain quality, was responsive to the answer which alleged that the note was given on plaintiff's representation that water struck was suitable for rice irrigation.—*Miller v. Layne & Bowler Co.*, 151 S. W. 341.

§ 183 (Tex.Civ.App.) Supplementary answers are to meet matters appearing for the first time in a supplemental pleading of the opposite party, and facts pleaded in defense for the first time should not be incorporated in a supplemental answer.—*Philadelphia Underwriters' Agency of Fire Ass'n of Philadelphia v. Brown*, 151 S. W. 899.

§ 185 (Mo.App.) As the Code specifically provides that the reply shall be the last pleading in a cause, a rebutter to the reply, though filed, will not be considered.—*Murphy v. Lorwood Coöperage Co.*, 151 S. W. 191.

V. DEMURRER OR EXCEPTION.

§ 205 (Tex.Civ.App.) Exceptions to allegations in defendants' answer because they were insufficient, indefinite, and uncertain, failed to show material facts, and in effect attempted to vary the written contract by parol, held merely a general demurrer to each of the allegations attacked.—*Parker v. Naylor*, 151 S. W. 1098.

§ 214 (Tex.Civ.App.) A demurrer admits the facts well pleaded.—*Lanza v. Roe*, 151 S. W. 571.

§ 214 (Tex.Civ.App.) A petition tested by a general demurrer must be taken as true.—*Chance v. Pace*, 151 S. W. 843.

§ 218 (Ark.) On demurrer it is a question of law whether the facts alleged are sufficient to show that a provision of a bill of lading is unreasonable, and not an issue for the jury under act approved April 30, 1907 (Laws 1907, p. 558, § 3).—*Cumbe v. St. Louis, I. M. & S. Ry. Co.*, 151 S. W. 237.

VI. AMENDED AND SUPPLEMENTAL PLEADINGS AND REPLEADER.

§ 236 (Mo.) Under Rev. St. 1909, § 1848, it would be gross error not to allow an amendment in the land description in a petition, where, after action commenced, the court orders a survey of the land, and it differs from the prior survey.—*Wright v. Groom*, 151 S. W. 465.

§ 245 (Ark.) The court did not abuse its discretion in refusing to allow amendments to the complaint several days after the action was dismissed.—*Cumbe v. St. Louis, I. M. & S. Ry. Co.*, 151 S. W. 237.

§ 246 (Ark.) The court did not err in refusing to allow an amendment which, in the court's view of the complaint would have rendered the same inconsistent and contradictory.—*Cumbe v. St. Louis, I. M. & S. Ry. Co.*, 151 S. W. 237.

§ 252 (Mo.App.) Where, after a demurrer sustained, plaintiff files a new petition, the original petition is abandoned, and goes out of the record.—*Korach v. Loeffel*, 151 S. W. 790.

XI. MOTIONS.

§ 360 (Tex.Civ.App.) In passing upon a defense upon a motion to strike, the court is required to look alone to the facts alleged, and to take them as true.—*Philadelphia Underwriters' Agency of Fire Ass'n of Philadelphia v. Brown*, 151 S. W. 899.

§ 367 (Mo.) The motion will be denied, when the facts are beyond the knowledge of plaintiff, or are particularly within that of defendant.—*Benjamin v. Metropolitan St. R. Co.*, 151 S. W. 91.

XII. ISSUES, PROOF, AND VARIANCE.

§ 395 (Mo.App.) A plaintiff cannot plead one cause of action and recover on another.—*Mad-den v. Missouri Pac. Ry. Co.*, 151 S. W. 489.

XIII. DEFECTS AND OBJECTIONS, WAIVER, AND AID BY VER- DICT OR JUDGMENT.

§ 403 (Mo.App.) Defective allegations of a petition are cured by answer.—*Angel v. City of Portageville*, 151 S. W. 192.

§ 406 (Ky.) Defect in a petition, in an action for damages for wrongfully mining coal from plaintiff's land, in only describing plaintiff's land as adjoining the property where defendant was operating its plant, was cured by evidence definitely locating the land in absence of demurrer or motion to make more specific.—*Burke Hollow Coal Co. v. Lawson*, 151 S. W. 657.

§ 409 (Tex.Civ.App.) A verified pleading containing allegations intended as denials and a prayer for dissolution of the injunction and general relief, in the absence of objection as to form, will be held sufficient as an answer, although styled a "motion to dissolve injunction."—*Hicks v. Murphy*, 151 S. W. 845.

§ 412 (Ky.) Error as to a departure in the reply is waived, where defendant did not demur or move to strike, but traversed the new matter.—*Killebrew v. Murray*, 151 S. W. 662.

§ 418 (Mo.) A defendant who answers over after the overruling of a demurrer, or a motion in the nature of a demurrer, waives the ruling.—*Parkyn v. Churchill*, 151 S. W. 446.

§ 418 (Mo.App.) Where defendant answered over, after demurrer overruled, the only question for review, under Rev. St. 1909, § 1804, is the jurisdiction over the subject-matter, and whether the petition states a cause of action.—*Angel v. City of Portageville*, 151 S. W. 192.

§ 418 (Mo.App.) Where defendant pleaded over after overruling of demurrer, that the petition did not state a cause of an action was not ground for setting aside a verdict for plaintiff, or arresting judgment, if it was sustained by the evidence.—*Hight v. American Bakery Co.*, 151 S. W. 776.

§ 433 (Mo.) Under Rev. St. 1909, § 2119, relating to the sufficiency of a petition after verdict, a petition in an action for negligence held sufficient after verdict in the absence of any demurrer.—*Winn v. Kansas City Belt Ry. Co.*, 151 S. W. 98.

§ 433 (Mo.App.) A petition, in an action for injuries occurring in Kansas to an employe in railroad shops, held to state a cause of action under Rev. St. 1909, § 5434, and Gen. St. Kan. 1909, § 6999, as against an objection raised for the first time after verdict.—*Madden v. Missouri Pac. Ry. Co.*, 151 S. W. 489.

§ 433 (Mo.App.) Where the petition in an action depending on a rule of the common law of a sister state which could not be presumed to have adopted the common law failed to allege such adoption, and defendant answered over, it will be presumed after verdict that such rule did exist.—*Shelton v. Metropolitan St. Ry. Co.*, 151 S. W. 493.

§ 433 (Mo.App.) Allegations of the complaint, in an action for a miner's death, as to the place where he was killed held sufficient, in absence of demurrer or motion, to sustain a judgment for plaintiff, based upon proof that the rock fall was not over the place where decedent was working.—*Goode v. Central Coal & Coke Co.*, 151 S. W. 508.

PLEDGES.

See Garnishment, § 27.

§ 30 (Ky.) Where a defendant bank assigned a note secured by a mortgage to plaintiff as security for a loan, agreeing to take up the note as soon as it could, such agreement constituted a waiver of diligence in enforcing a judgment on the security.—*Deposit & Savings Bank v. Wright*, 151 S. W. 679.

POISONS.

See Negligence, §§ 27, 66.

POLICE POWER.

See Municipal Corporations, §§ 604-642.

POSSESSION.

See Adverse Possession; Bailment, § 16; Chat-tel Mortgages, § 284; Injunction, § 35.

PREFERENCES.

See Fraudulent Conveyances, § 115.

PREJUDICE.

See Judges, § 49.

PREMIUMS.

See Insurance, §§ 63, 198, 349-362.

PRESCRIPTION.

See Adverse Possession; Easements, §§ 5-9; Highways, § 7; Limitation of Actions.

PRESENTATION.

See Executors and Administrators, §§ 225-232.

PRESUMPTIONS.

See Appeal and Error, §§ 907-934; Criminal Law, § 1144; Evidence, §§ 60-84.

PRINCIPAL AND AGENT.

See Attorney and Client; Brokers; Evidence, §§ 241-253; Husband and Wife, § 23; Insurance, §§ 113, 362, 384, 536; Process, § 58; Telegraphs and Telephones, § 37; Usury, § 57; Vendor and Purchaser, § 3; Witnesses, § 379.

I. THE RELATION.

(A) Creation and Existence.

§ 17 (Tex.Civ.App.) An agent may employ a subagent to perform a service involving no discretion or judgment.—*Bound v. Simkins*, 151 S. W. 572.

(B) Termination.

§ 33 (Ark.) Contract by manufacturer of lumber making another party its exclusive sales agent held not terminable until all the timber owned by it should have been cut into lumber.—*Alf Bennett Lumber Co. v. Walnut Lake Cypress Co.*, 151 S. W. 275.

Principal who borrowed money from agent and who, after requesting the cancellation of the agency, procured a further loan held to have waived previous breaches in the contract of agency.—*Id.*

§ 41 (Ark.) Evidence, in an action for breach of contract of agency, held insufficient to show that agent's representations as to its ability to sell lumber for manufacturer were false.—*Alf Bennett Lumber Co. v. Walnut Lake Cypress Co.*, 151 S. W. 275.

II. MUTUAL RIGHTS, DUTIES, AND LIABILITIES.

(B) Compensation and Lien of Agent.

§ 84 (Tex.Civ.App.) Under an employment of plaintiff to sell nursery stock, he to receive a commission on sales and be charged with all goods shipped, defendants are not chargeable with sales uncollected, whether represented by notes or otherwise.—*F. T. Ramsey & Son v. Cook*, 151 S. W. 346.

III. RIGHTS AND LIABILITIES AS TO THIRD PERSONS.

(A) Powers of Agent.

§ 113 (Mo.App.) Accused's father, who managed and conducted her defense, as agent, had no authority to bind her by an agreement to dismiss an appeal from a judgment of conviction and pay the costs if the amount of the fine was remitted.—*Grant City v. Simmons*, 151 S. W. 187.

§ 123 (Ark.) Evidence, in an action to charge one with the price of goods bought by another, held insufficient to show apparent or ostensible authority to buy them on its account.—*Wales-Riggs Plantations v. Dye*, 151 S. W. 998.

Authority of an agent cannot be proved by the mere fact that the person claiming the power has exercised it; but the person to be charged as principal must be shown to have assented to the act.—*Id.*

(B) Undisclosed Agency.

§ 146 (Ark.) A person who took possession of leased premises was not excused of liability for the rent by informing the landlord that he was merely acting as attorney for the tenant's creditors, where he did not disclose the names of the creditors.—*Cooley v. Ksir*, 151 S. W. 254.

§ 146 (Mo.App.) An agent, who conceals the fact of his agency and contracts as the ostensible principal, is liable on the contract, as though he were the real principal.—*Lewis v. Fisher*, 151 S. W. 172.

PRINCIPAL AND SURETY.

See Corporations, § 484; Guaranty; Justices of the Peace, § 191; Limitation of Actions, §§ 28, 83; Subrogation, § 31.

I. CREATION AND EXISTENCE OF RELATION.

(A) Between Individuals.

§ 14 (Mo.App.) One requesting a merchant to let a third person have goods and promising to pay for them is, when the goods are sold and charged to him, a surety.—*P. H. Rea Implement Co. v. Smith*, 151 S. W. 203.

III. DISCHARGE OF SURETY.

§ 112 (Mo.App.) Where a building contract containing a stipulation that the owner retain part of the contract price as security against possible liens was by its terms made part of the bond, and also required payment of the final installment 10 days after completion, such payment was in effect with the surety's consent, and hence did not discharge him.—*Roennigke v. Essig*, 151 S. W. 765.

V. RIGHTS AND REMEDIES OF SURETY.

(B) As to Principal.

§ 182 (Ky.) Where a surety for two persons as assignees satisfies a judgment against them, growing out of their failure to faithfully discharge their duties, he may proceed against them individually.—*Fidelity & Deposit Co. of Maryland v. Sounsley*, 151 S. W. 353.

PRIORITIES.

See Appeal and Error, § 907; Assignments, § 85.

PRIVATE ROADS.

See Mandamus, § 31.

§ 2 (Mo.) Under Rev. St. 1909, § 10,447, the petition for a private road need not state that the petitioner is an inhabitant of the state.—*State ex rel. McDermott Realty Co. v. McElhinney*, 151 S. W. 457.

In view of Rev. St. 1909, § 4001, and as an appeal in a proceeding for the establishment of

a private road is not governed by section 10,440, but by section 3956, the record of a proceeding to establish a private road begun in a county court, need not, to confer jurisdiction on the circuit court to hear the appeal, show that the petitioner was a citizen of the state.—*Id.*

PRIVILEGED COMMUNICATIONS.

See Libel and Slander, § 38; Witnesses, §§ 190, 193.

PROBABLE CAUSE.

See Malicious Prosecution, §§ 16, 18.

PROBATE COURTS.

See Courts, § 198; Evidence, § 82; Insane Persons, § 23; Prohibition, § 11.

PROCESS.

See Corporations, § 507; Obstructing Justice, §§ 4-11; Venue, § 32.

II. SERVICE.

(A) Personal Service in General.

§ 58 (Ky.) A nonresident owner, who employs a resident agent to rent land and collect the rents, is engaged in business in the state within Civ. Code Prac. § 51, subsec. 6, so that, in an action for damages to a tenant, process may be served on the agent.—*Andonique v. Carmen*, 151 S. W. 921.

(B) Substituted Service.

§ 70 (Mo.) Statutes giving jurisdiction by constructive service must be strictly construed.—*State ex rel. Coleman v. Blair*, 151 S. W. 148.

PROFITS.

See Damages, § 40.

PROHIBITION.

I. NATURE AND GROUNDS.

§ 10 (Mo.) The Supreme Court may prevent by prohibition inferior courts from exceeding their jurisdiction.—*State ex rel. Deems v. Holtcamp*, 151 S. W. 153.

§ 10 (Mo.) Prohibition will lie to prevent the exercise of judicial power by a court having no jurisdiction to exercise any authority, or where the court is exceeding its jurisdiction in a case rightfully before it.—*State ex rel. Tuller v. Seehorn*, 151 S. W. 724.

In supplemental proceedings to assess benefits from public improvements, the judge of the circuit court will be restrained by prohibition from assuming jurisdiction over assessments on property properly included in the verdict in the original proceeding.—*Id.*

§ 11 (Mo.) Where a probate court possesses the power to determine the propriety of a sale of incumbered realty in administration, it should not be prohibited from exercising its statutory jurisdiction, since its error can be corrected on appeal.—*State ex rel. Deems v. Holtcamp*, 151 S. W. 153.

§ 11 (Mo.) Irregularities in eminent domain proceeding held not to affect court's jurisdiction, and therefore it would not be prevented by prohibition from acting in the matter.—*State ex rel. Graham v. Seehorn*, 151 S. W. 716.

II. JURISDICTION, PROCEEDINGS, AND RELIEF.

§ 35 (Mo.) Where a writ of prohibition is issued against judges, it should go at relator's costs.—*State ex rel. Federal Lead Co. v. Reynolds*, 151 S. W. 85.

PROMISSORY NOTES.

See Bills and Notes.

PROMOTERS.

See Corporations, § 30.

PROSTITUTION.

See Disorderly House.

PUBLICATION.

See Drains, § 14; Notice, § 11.

PUBLIC IMPROVEMENTS.

See Municipal Corporations, §§ 294-587; Prohibition, § 10.

PUBLIC LANDS.

See Adverse Possession, § 7; Equity, § 71; Evidence, § 65; Trusts, § 94; Vendor and Purchaser, § 231.

II. SURVEY AND DISPOSAL OF LANDS OF UNITED STATES.**(F) Swamp and Overflowed Lands.**

§ 61 (Mo.) A certificate of entry on swamp lands does not pass title, although a receiver's receipt for the purchase money confers an equitable interest in the land on the person to whom the receipt is issued.—*Hunter v. Pemiscot Land & Cooperaage Co.*, 151 S. W. 714.

(K) Remedies in Cases of Fraud, Mistake, or Trust.

§ 127 (Mo.) Where public land was patented under an erroneous description, and the patentee transferred same by a warranty deed under the same description, the land department properly issued a corrected patent to the patentee.—*Marshall v. Hill*, 151 S. W. 131.

III. DISPOSAL OF LANDS OF THE STATES.

§ 172 (Tex.Civ.App.) Under Rev. Civ. St. 1911, art. 6482, Sayles' Ann. Civ. St. 1897, art. 4423, giving railroads a right of way over state lands, and article 6484, Sayles' Ann. Civ. St. 1897, art. 4425, giving them the right to lay out their road not exceeding 200 feet in width, the grant of a right of way, by special charter in 1873 (Sp. Laws 1873, c. 208), to the Ft. Worth & Denver City Railway Company, "to the extent of 200 feet in width through the public lands," is not void for uncertainty.—*Ft. Worth & D. C. Ry. Co. v. Southern Kansas Ry. Co.*, 151 S. W. 850.

A grant of a right of way through the public lands by special charter in 1873 (Sp. Laws 1873, c. 208), to the Ft. Worth & Denver City Railway Company became effective in present, and not after the first 25 miles were built, if completed within three years, and the completion of 30 miles every two years thereafter until completed, as provided by section 12.—*Id.*

Failure of the Ft. Worth & Denver City Railway Company to file a map of its line of road with the Commissioner of the General Land Office within six months after organization, as required by its special charter of 1873 (Sp. Laws 1873, c. 208) § 15, which contained no conditions of forfeiture, did not forfeit its rights under the grant.—*Id.*

§ 172 (Tex.Civ.App.) The grant of a right of way to the Ft. Worth & Denver City Railway Company under special act of 1873 (Sp. Laws 1873, c. 208) was effective in present, and binding on subsequent grantees and their assigns.—*Ft. Worth & D. C. Ry. Co. v. Western Stockyards Co.*, 151 S. W. 1172.

Where a grant of a right of way to a railroad in public lands rested upon a condition subsequent, failure to perform such condition did not revoke the grant, but merely authorized

a forfeiture by judicial proceedings or legislative act.—*Id.*

Acceptance by a railroad of deed from settler to part of a right of way granted it by the state *held* not to estop the railroad from suing for the entire grant.—*Id.*

By acceptance of contract wherein it admitted another's ownership of one-half the width of its right of way granted to it by the state, railroad company *held* estopped thereafter to claim the same.—*Id.*

§ 173 (Tex.Civ.App.) Substitute purchaser of school lands *held* not to have made sufficient settlement thereon under Rev. St. 1895, art. 4218k, where he did not personally go on the lands for two months after the purchase, and did not reside there continuously thereafter.—*McWhorter v. Eriksen*, 151 S. W. 624.

§ 174 (Tex.Civ.App.) Acts 12th Leg. (2d Sess.) c. 57, providing in effect that if a headright certificate, etc., is not returned to and filed in the General Land Office within eight months from the passage of the act, the location and survey made thereunder shall be void, is constitutional.—*Guedry v. Keith*, 151 S. W. 1167.

§ 175 (Tex.Civ.App.) Location under an unconditional land certificate *held* to have exhausted the holder's right to appropriate public lands, and location under an unconditional certificate subsequently issued, and under a duplicate certificate, the unconditional certificate having been lost, was void.—*Thompson Bros. Lumber Co. v. Toler*, 151 S. W. 1111.

Issuance of unconditional land certificate and duplicate certificate upon loss of the unconditional certificate *held* not a judicial determination that the location under the original certificate had been abandoned.—*Id.*

Where a valid location was made under a land certificate after the passage of the act of August 30, 1856 (Laws 1856, c. 145, § 2; Rev. St. 1895, art. 4134), expressly prohibiting the lifting or floating of certificates, a subsequent location under a duplicate certificate was void.—*Id.*

A location under a land certificate by the administrator of the original holder who had transferred it was not void, but inured to the benefit of the transferee.—*Id.*

§ 175 (Tex.Civ.App.) Under Acts 12th Leg. (2d Sess.) c. 57, where a headright certificate was not returned to and filed in the General Land Office, a location and survey made thereunder was void.—*Guedry v. Keith*, 151 S. W. 1167.

§ 177 (Tex.Civ.App.) The state alone may take advantage of fraud in transactions for the acquisition of its lands, where the rights of an individual do not antedate such fraud.—*Campbell v. Elliott*, 151 S. W. 1180.

PUBLIC POLICY.

See Contracts, §§ 103, 124, 130.

PUBLIC SERVICE CORPORATIONS.

See Carriers; Municipal Corporations, § 691; Railroads; Street Railroads; Telegraphs and Telephones.

PUNISHMENT.

See Injunction, § 232.

QUALIFICATIONS.

See Judges, §§ 47, 49.

QUANTUM MERUIT.

See Charities, § 45; Work and Labor.

QUARANTINE.

See Adverse Possession, § 62.

QUASHING.

See Venue, § 32.

QUIETING TITLE.

See Appeal and Error, § 1009; Statutes, § 267; Trespass to Try Title.

I. RIGHT OF ACTION AND DEFENSES.

§ 22 (Mo.) In an action under Rev. St. 1899, § 650, to quiet title, a record title in plaintiff from P., and in defendant from P. and another, did not show a common source, and plaintiff, claiming only a paper title, was required to show a good one.—*Hunter v. Pemiscot Land & Cooperaage Co.*, 151 S. W. 714.

II. PROCEEDINGS AND RELIEF.

§ 44 (Ky.) Evidence held insufficient to warrant a finding that the land which plaintiff claimed was included in a 99-year lease.—*McCain v. Joiner*, 151 S. W. 406.

§ 49 (Mo.) In an action to quiet title between the owners of the equitable and legal title, in which a purchaser from the owner of the legal title is made a party, the court may, on finding in favor of the equitable owner, enforce the contract of sale, directing payment of the price to the equitable owner; the purchaser having placed valuable improvements on the land, though having notice of the equitable title.—*Marshall v. Hill*, 151 S. W. 131.

QUITCLAIM.

See Estoppel, § 29.

QUO WARRANTO.

See Appeal and Error, § 171; Election of Remedies, § 3.

I. NATURE AND GROUNDS.

§ 1 (Mo.) Proceedings in the nature of quo warranto, not instituted under the statute, are of common-law origin, and, as a general rule, equitable rules are not applicable to them.—*State ex rel. Kimbrell v. People's Ice, Storage & Fuel Co.*, 151 S. W. 101.

II. JURISDICTION, PROCEEDINGS, AND RELIEF.

§ 48 (Mo.) Information in a quo warranto proceeding against a combination in restraint of trade held not to be construed after judgment as alleging that competitive conditions existed at all times prior to a specified date, so as to overthrow findings based on evidence of acts prior to that date.—*State ex rel. Kimbrell v. People's Ice, Storage & Fuel Co.*, 151 S. W. 101.

RAILROADS.

See Adverse Possession, § 41; Appeal and Error, §§ 1056, 1060; Carriers; Damages, § 62; Escheat, §§ 3, 6; Estoppel, §§ 93, 97; Evidence, § 66; Judgment, § 606; Master and Servant; Negligence, § 141; Public Lands, § 172; Trespass to Try Title, §§ 39, 40; Trial, §§ 140, 191, 244, 252; Waters and Water Courses, § 63; Witnesses, § 236.

II. RAILROAD COMPANIES.

§ 18 (Ark.) Railroad corporations have powers not enjoyed by strictly private corporations and are required to perform public duties which such private corporations do not owe.—*Freeo Valley R. Co. v. Hodges*, 151 S. W. 281.

§ 32 (Ark.) Kirby's Dig. § 957, authorizing the voluntary dissolution of corporations, held

not to apply to railroad corporations in view of section 845.—*Freeo Valley R. Co. v. Hodges*, 151 S. W. 281.

V. RIGHT OF WAY AND OTHER INTERESTS IN LAND.

§ 82 (Tex.Civ.App.) The forfeiture of its charter by a railroad for failure to construct its road in time did not cause the right of way to revert to the original owner, but remained subject to extension of charter or grant of new charter, under Rev. St. 1895, art. 4473.—*Scott v. Missouri, O. & G. Ry. Co.*, 151 S. W. 578.

In the absence of proof of the adverse use of a right of way by abutting owners, the easement of the road will not be lost.—*Id.*

A railroad which graded its right of way, paid taxes, and never ceased trying to use it for railroad purposes, and finally succeeded in so doing cannot be held to have abandoned it, though when first graded the company put gates in each fence, and the owners remained in possession.—*Id.*

§ 82 (Tex.Civ.App.) In trespass to try title to a strip granted to plaintiff as a railroad right of way, evidence as to the necessity of using the land for switches was admissible on the issue of abandonment.—*Ft. Worth & D. C. Ry. Co. v. Southern Kansas Ry. Co.*, 151 S. W. 850.

VI. CONSTRUCTION, MAINTENANCE, AND EQUIPMENT.

§ 103 (Tex.Civ.App.) The word "field" in Rev. Civ. St. 1911, arts. 6595-6598, regulating cattle guards, defined.—*St. Louis Southwestern Ry. Co. of Texas v. Lee*, 151 S. W. 331.

A railroad company held to maintain a track through a field within Rev. Civ. St. 1911, arts. 6595-6598, so that it must maintain cattle guards at points of entry sufficient to turn hogs.—*Id.*

VII. SALES, LEASES, TRAFFIC CONTRACTS, AND CONSOLIDATION.

§ 121 (Tex.Civ.App.) Railroad lines held not competing or parallel lines, within the prohibition of leases by such lines by Rev. St. 1895, art. 4529.—*Scott v. Missouri, O. & G. Ry. Co.*, 151 S. W. 578.

X. OPERATION.

(B) Statutory, Municipal, and Official Regulations.

§ 233 (Ark.) A motor car for passengers operated by a railroad company is a "train" within Acts 1911, p. 275, requiring persons running trains to keep a constant lookout for persons and property on the track.—*Central Ry. Co. of Arkansas v. Lindley*, 151 S. W. 246.

§ 244 (Tex.) Rev. Civ. St. 1911, art. 6564, requiring a whistle to be blown and a bell rung at least 80 rods from crossings, requires the signals to be given at such a point beyond the 80 rods as will give notice of the train's approach.—*Edwards v. St. Louis Southwestern Ry. Co. of Texas*, 151 S. W. 289.

(D) Injuries to Licensees or Trespassers in General.

§ 281 (Mo.) The act of a flagman required to prevent boys from getting on cars at his crossing in forcibly seizing a boy from a car ladder and causing him to fall under the train is within the scope of his employment, and the railroad company is liable for the resulting injuries.—*Winn v. Kansas City Belt Ry. Co.*, 151 S. W. 98.

§ 282 (Mo.) Whether a flagman required to prevent boys from getting on trains at his crossing was guilty of negligence in forcibly jerking a boy from a car ladder held for the jury.—*Winn v. Kansas City Belt Ry. Co.*, 151 S. W. 98.

(F) Accidents at Crossings.

§ 312 (Ky.) A railroad must take notice of the location, use, and character of public crossings, and exercise that degree of care as may be necessary to perform its duty to give reasonably sufficient notice and warning of the movement of trains and cars to those using the crossing.—*Louisville & N. R. Co. v. Allnutt*, 151 S. W. 14.

§ 326 (Ky.) A traveler failing to exercise proper care for his own safety in crossing a defective railroad crossing with knowledge of the defects held not entitled to recover for the injuries sustained.—*Chesapeake & O. Ry. Co. v. Meyers*, 151 S. W. 19.

§ 327 (Mo.App.) The duty to look and listen for an approaching train before attempting to cross a highway crossing, is absolute.—*Farris v. St. Louis & S. F. R. Co.*, 151 S. W. 979.

The duty to look and listen at a crossing is particularly applicable to pedestrians, whose danger zone is smaller.—*Id.*

Though a pedestrian knows that a train is due to stop at a nearby station and sees the train approaching, he cannot assume that it is the local train which will stop, so as to excuse him from ascertaining whether it is the expected train.—*Id.*

§ 328 (Mo.App.) That the view was obstructed in approaching a crossing made it more obligatory to look for approaching trains.—*Farris v. St. Louis & S. F. R. Co.*, 151 S. W. 979.

§ 334 (Mo.App.) A traveler, who without his own fault is placed in imminent peril at a crossing, is not guilty of contributory negligence, thought he did not select the wisest course to extricate himself.—*Farris v. St. Louis & S. F. R. Co.*, 151 S. W. 979.

§ 335 (Mo.App.) Plaintiff's showing that he went on the track without seeing the train, when he could have done so by looking, destroys his prima facie case, made by proof of failure to give signals.—*Farris v. St. Louis & S. F. R. Co.*, 151 S. W. 979.

§ 338 (Ky.) A railroad which has not given a child such warning or notice of the movement of a train as would be reasonably sufficient to prevent a child of his years from putting himself in a place of peril cannot escape liability on the ground of contributory negligence.—*Louisville & N. R. Co. v. Allnutt*, 151 S. W. 14.

§ 347 (Ky.) To show the measure of duty a railroad owes the public at a crossing, evidence may be introduced to show the character of the crossing, the conditions existing, and the use of it by the public, not only at the time of an accident under investigation, but for a reasonable time before.—*Louisville & N. R. Co. v. Allnutt*, 151 S. W. 14.

§ 347 (Ky.) In an action for injuries to a traveler on a defective railroad crossing, testimony of other accidents at the crossing held admissible.—*Chesapeake & O. Ry. Co. v. Meyers*, 151 S. W. 19.

§ 348 (Ky.) In an action for injuries to a child at a crossing, evidence held to warrant a verdict for the plaintiff.—*Louisville & N. R. Co. v. Allnutt*, 151 S. W. 14.

§ 349 (Ky.) The pushing of cars over a crossing at a time when there were school children at the crossing, without ringing a bell or blowing a whistle, or without any person on the cars to control or give notice or warning, the watchman on duty giving no warning, was "gross negligence" authorizing punitive damages.—*Louisville & N. R. Co. v. Allnutt*, 151 S. W. 14.

§ 350 (Ky.) In an action for injuries to a child at a crossing, evidence held sufficient to take the question of the child's contributory

negligence to the jury.—*Louisville & N. R. Co. v. Allnutt*, 151 S. W. 14.

Where a railroad crossing was an exceptionally dangerous one, and school children had to cross it in numbers, it cannot be said, as a matter of law, that having a watchman alone, or ringing the bell or whistle alone, or having a man stationed on the moving cars alone, would be an adequate performance of its duty to afford reasonable protection to the public.—*Id.*

§ 350 (Ky.) Whether a traveler injured on a defective railroad crossing was guilty of contributory negligence held for the jury.—*Chesapeake & O. Ry. Co. v. Meyers*, 151 S. W. 19.

§ 350 (Tex.Civ.App.) In an action for injuries to a child evidence held sufficient to go to the jury on the question of the defendant's liability.—*Ft. Worth & D. C. Ry. Co. v. Winger*, 151 S. W. 586.

(G) Injuries to Persons on or near Tracks.

§ 356 (Tex.Civ.App.) Public use of railroad yards as a passageway held to require employes to use ordinary care to prevent injury.—*Ft. Worth & D. C. Ry. Co. v. Winger*, 151 S. W. 586.

§ 369 (Tex.Civ.App.) A conductor in charge of a train, who saw persons crossing the yard in which it was located, held chargeable with the duty of keeping a lookout in their direction before giving a signal for the movement of such cars.—*Ft. Worth & D. C. Ry. Co. v. Winger*, 151 S. W. 586.

§ 370 (Mo.App.) An engineer is required to keep a sharp lookout for pedestrians on the track only at places where he has reason to expect they may be.—*Shelton v. Metropolitan St. Ry. Co.*, 151 S. W. 493.

§ 376 (Tex.Civ.App.) Railroad employes in charge of a train standing in a railroad yard, and cars moving therein, were chargeable with the duty of using ordinary care to avoid injuring licensees, of whose presence they were aware.—*Ft. Worth & D. C. Ry. Co. v. Winger*, 151 S. W. 586.

§ 377 (Ark.) Employes in charge of a train held entitled to presume that a person seen on the track will get out of the way, but required to give extra alarms when he does not do so, and to stop the train if he does not heed the alarm.—*St. Louis & S. F. R. Co. v. Newman*, 151 S. W. 255.

§ 390 (Mo.App.) The humanitarian rule applies where the servants of a railroad company in charge of its engine could have discovered a person on the track, and averted injury to him.—*Shelton v. Metropolitan St. Ry. Co.*, 151 S. W. 493.

§ 398 (Ark.) In an action for the death of a person killed while riding a speeder on a railway track, evidence held to sustain a finding that the train could have stopped in time to have prevented the injury after the discovery of the deceased on the track.—*St. Louis & S. F. R. Co. v. Newman*, 151 S. W. 255.

(H) Injuries to Animals on or near Tracks.

§ 419 (Tex.) A railroad company may move its trains at farm crossings with the usual and necessary noise, without keeping a lookout for frightened teams.—*Edwards v. St. Louis Southwestern Ry. Co. of Texas*, 151 S. W. 289.

§ 441 (Ark.) Under Acts 1911, p. 275, requiring a lookout on railway trains and casting the burden of showing that one was kept on the company, evidence of plaintiff in an action for injuries to stock tending to show that the injury was caused by a failure to keep a lookout cast on the defendant the burden of showing such vigilance.—*Central Ry. Co. of Arkansas v. Lindley*, 151 S. W. 246.

§ 442 (Ark.) In an action for injury to stock on a railway trestle, brought under Acts 1911, p. 276, evidence of loud talking in the car alleged to have caused the injury near the scene thereof held admissible, where only the motor-man and another were shown to have been in the car.—Central Ry. Co. of Arkansas v. Lindley, 151 S. W. 246.

§ 446 (Ark.) In an action for the death and injury of horses on a railway trestle, evidence held not to warrant directing a verdict for the defendant.—Central Ry. Co. of Arkansas v. Lindley, 151 S. W. 246.

(I) Fires.

§ 459 (Ark.) Under Act April 2, 1907, making railroads liable for damages by fire set out by their locomotives, contributory negligence by the owner, short of an act so grossly negligent as to amount to fraud, is no defense.—Kansas City Southern Ry. Co. v. Harris, 151 S. W. 992.

§ 482 (Ark.) In an action for negligently firing plaintiff's property, evidence held sufficient to support the judgment.—Kansas City Southern Ry. Co. v. Harris, 151 S. W. 992.

RAPE.

See Criminal Law, §§ 369, 406, 1169, 1170, 1173; Indictment and Information, § 189; Witnesses, §§ 277, 344.

I. OFFENSES AND RESPONSIBILITY THEREFOR.

§ 16 (Tex.Cr.App.) Under Pen. Code 1911, arts. 1008, 1063, defendant held guilty of assault with intent to rape, though he was not at any time sufficiently close to prosecutrix to have taken hold of her person.—Gage v. State, 151 S. W. 565.

II. PROSECUTION AND PUNISHMENT.

(B) Evidence.

§ 38 (Tex.Cr.App.) On a trial for statutory rape, evidence as to the whereabouts of the family of prosecutrix, and that her mother was dead at the time of the offense, held admissible.—Kearse v. State, 151 S. W. 827.

On a trial of statutory rape, evidence that a third person charged with having raped prosecutrix had been acquitted was inadmissible.—Id.

§ 40 (Tex.Cr.App.) Under Pen. Code 1911, art. 1063, defining rape on a girl under 15 years of age with her consent, evidence that prosecutrix under 15 years of age was a lewd woman at the time of the alleged offense was inadmissible.—Kearse v. State, 151 S. W. 827.

§ 49 (Tex.Cr.App.) The testimony of prosecutrix that she was prevented by force by defendant's partner in the crime from making complaint until the night of the following day was properly admitted.—Ortiz v. State, 151 S. W. 1059.

§ 52 (Ky.) Evidence held to justify a conviction of rape on a female 14 years of age.—Gamble v. Commonwealth, 151 S. W. 924.

§ 52 (Mo.) Where accused was charged with statutory rape and defilement of a female child and convicted of the latter offense, sufficiency of the evidence held to be tested by rules applicable to cases of rape.—State v. Donnington, 151 S. W. 975.

Evidence held insufficient to support a conviction for defiling a female child.—Id.

§ 54 (Mo.) A conviction for rape may be had on the uncorroborated testimony of the prosecutrix, but if her testimony is contradictory, or not convincing, or leaves the mind clouded with doubts, it must be corroborated.—State v. Donnington, 151 S. W. 975.

RATE.

See Interest, § 38.

RATIFICATION.

See Arbitration and Award, § 67; Infants, § 29; Tenancy in Common, § 43.

REAL ACTIONS.

See Partition; Quieting Title; Trespass to Try Title.

REASONABLE DOUBT.

See Criminal Law, § 830.

RECEIVERS.

See Courts, § 122; Insurance, §§ 70, 536.

IV. MANAGEMENT AND DISPOSITION OF PROPERTY.

(A) Administration in General.

§ 101 (Ky.) A receiver having used the fund or commingled it with his own funds is chargeable with interest.—Higgins v. Shields, 151 S. W. 391.

§ 105 (Ky.) A receiver in renting and collecting rents must exercise such care as may reasonably be expected of an ordinarily prudent person under the circumstances, and, failing by negligence to collect rents, is liable therefor.—Higgins v. Shields, 151 S. W. 391.

VII. ACCOUNTING AND COMPENSATION.

§ 196 (Ky.) A receiver negligent or guilty of misconduct may, if the circumstances warrant it, be denied any compensation for services.—Higgins v. Shields, 151 S. W. 391.

RECEPTION OF EVIDENCE.

See Criminal Law, §§ 685-683; Trial, §§ 41-69.

RECITALS.

See Deeds, § 96.

RECOGNIZANCES.

See Bail, §§ 57, 65.

RECONVENTION.

See Dismissal and Nonsuit, § 19.

RECORDS.

See Acknowledgment, § 5; Adverse Possession, § 84; Appeal and Error, §§ 253, 466-485, 835, 907, 909, 917, 919, 934, 1075, 1135; Criminal Law, §§ 447, 1086-1122; Evidence, §§ 159, 162; Fraudulent Conveyances, § 154; Judgment, §§ 293, 299; Mandamus, § 16; Vendor and Purchaser, §§ 231, 279.

§ 17 (Mo.) Act March 28, 1901 (Laws 1901, p. 251), making Carleton's Abstract Book prima facie evidence of the contents of destroyed records of Pemiscot county, does not make such abstract books prima facie evidence of entries in a registry of selections or locations of swamp lands, as such register is not a public record.—Hunter v. Pemiscot Land & Cooperation Co., 151 S. W. 714.

RECRIMINATION.

See Divorce, § 55.

REDEMPTION.

See Vendor and Purchaser, § 289.

REFERENCE.

See Appeal and Error, §§ 924, 1017, 1022; Arbitration and Award; Exceptions, Bill of § 38.

I. NATURE, GROUNDS, AND ORDER OF REFERENCE.

§ 8 (Mo.) Under Rev. St. 1909, § 1906, a compulsory reference is proper in a suit on contracts involving lengthy accounts, credits, and counterclaims.—State ex rel. Federal Lead Co. v. Reynolds, 151 S. W. 85.

§ 34 (Mo.) Objections to a reference should be made when the referee is appointed, and to the court itself.—State ex rel. Kimbrell v. People's Ice, Storage & Fuel Co., 151 S. W. 101.

II. REFEREES AND PROCEEDINGS.

§ 41 (Mo.) A referee has no power to set aside his own appointment, on the ground that the cause is not referable.—State ex rel. Kimbrell v. People's Ice, Storage & Fuel Co., 151 S. W. 101.

III. REPORT AND FINDINGS.

§ 99 (Mo.) In case of a compulsory reference, the trial court may act upon the referee's report and find therefrom different conclusions from those reported by the referee.—State ex rel. Kimbrell v. People's Ice, Storage & Fuel Co., 151 S. W. 101.

In the case of compulsory reference, the referee's power is limited to recommending judgment, and the reference can only aid the trial judge, upon whom rests the responsibility as to the judgment.—Id.

§ 102 (Mo.) Rev. St. 1909, § 2013, giving a referee's report, when confirmed, the same effect as a special verdict, does not apply where the court does not confirm the report, but sustains exceptions thereto and makes independent findings.—State ex rel. Kimbrell v. People's Ice, Storage & Fuel Co., 151 S. W. 101.

§ 103 (Mo.) In case of reference in equity or under the statute, the trial court may not only set aside the findings, but may supplant them with findings of its own, and enter judgment accordingly.—State ex rel. Federal Lead Co. v. Reynolds, 151 S. W. 85.

REFERENDUM.

See Statutes, § 40.

REFORMATION OF INSTRUMENTS.

See Evidence, § 130.

I. RIGHT OF ACTION AND DEFENSES.

§ 23 (Ark.) Where a timber deed included all the pine timber 10 inches and up, and had been read by the grantors, who upon a subsequent execution of a correction deed made no objection to that description, they are not entitled to have it reformed at a later time on the ground that the description was inserted by the grantee's fraud or through mistake.—Hearin v. Union Sawmill Co., 151 S. W. 1007.

REHEARING.

See Appeal and Error, § 835.

REINSTATEMENT.

See Appeal and Error, § 807.

REJOINDER.

See Pleading, § 183.

RELEASE.

See Guaranty, §§ 54, 67.

RELEVANCY.

See Evidence, §§ 99, 113.

RELIGIOUS SOCIETIES.

See Adverse Possession, § 4.

REMAINDERS.

See Adverse Possession, § 62; Life Estates.

REMITTITUR.

See Appeal and Error, § 1140.

REMONSTRANCE.

See Municipal Corporations, § 297.

REMOVAL OF CAUSES.**V. AMOUNT OR VALUE IN CONTROVERSY.**

§ 75 (Tex.Civ.App.) The cause was not removable to the federal court, though one of defendants was a federal corporation, no joint liability being alleged, the amount claimed of it being less than \$2,000, and the petition not showing the damage inflicted by it was more.—Texas & P. Ry. Co. v. Good, 151 S. W. 617.

RENT.

See Landlord and Tenant, §§ 208-274.

REPAIRS.

See Landlord and Tenant, §§ 150, 164; Master and Servant, § 270.

REPEAL.

See Constitutional Law, § 24; Statutes, § 159.

REPLEVIN.

See Animals, § 51; Appeal and Error, §§ 71, 78, 201, 1070; Trial, § 244.

III. PROCEEDINGS FOR TAKING AND REDELIVERY OF PROPERTY.

§ 48 (Tex.Civ.App.) Where the officer in replevin has accepted plaintiff's bond, and delivered the property to him, the court on petition of defendant may not require the officer to accept defendant's bond and deliver to him the property.—Keasler Lumber Co. v. Clark, 151 S. W. 345.

REPLICATION.

See Pleading, §§ 162-185, 412.

REPLY.

See Pleading, §§ 162-185, 412.

REPORT.

See Dower, § 99; Reference, §§ 99-103.

RESCISSION.

See Sales, § 128.

RES GESTÆ.

See Criminal Law, § 364; Evidence, §§ 121, 127.

RESTRAINT OF TRADE.

See Monopolies, §§ 12-24.

RESULTING TRUSTS.

See Trusts, §§ 72-89.

REVENUE.

See Taxation.

REVIEW.

See Appeal and Error; Certiorari; Criminal Law, §§ 1028-1173; Exceptions, Bill of; Homicide, §§ 332-340; Judgment, § 335.

REVOCATION.

See Brokers, § 44.

RISKS.

See Master and Servant, §§ 203-226, 280, 288, 295; Trial, § 194.

ROADS.

See Boundaries, § 21; Highways.

ROBBERY.

See Weapons, § 11.

SALES.

See Accord and Satisfaction, § 8; Bills and Notes, § 363; Carriers, § 197; Constitutional Law, § 309; Evidence, §§ 113, 407; Executors and Administrators, §§ 326-388; Frauds, Statute of, §§ 89, 90; Fraudulent Conveyances, § 135; Guardian and Ward, §§ 92, 102; Vendor and Purchaser.

I. REQUISITES AND VALIDITY OF CONTRACT.

§ 23 (Ark.) Where an offer to buy goods is made and the time of acceptance is not limited, the offer may be accepted within a reasonable time.—C. C. Emerson & Co. v. Stevens Grocer Co., 151 S. W. 1003.

III. MODIFICATION OR RESCISSION OF CONTRACT.

(C) Rescission by Buyer.

§ 126 (Mo.App.) A purchaser of shoes, who retained them for more than two weeks after the last consignment, selling them in stock all of the time, delayed an unreasonable time, and cannot then rescind.—Emery v. G. H. Boehmer Shoe Co., 151 S. W. 174.

It is proper for the court, when the unconverted facts show that an unreasonable length of time elapsed before the rescission, to declare the right lost as a matter of law.—Id.

IV. PERFORMANCE OF CONTRACT.

(C) Delivery and Acceptance of Goods.

§ 181 (Ark.) The fact that the seller retained the buyer's check for an unreasonable time without notifying him that it was held pending negotiations as to the terms of the contract was admissible on the issue of the seller's acceptance.—C. C. Emerson & Co. v. Stevens Grocer Co., 151 S. W. 1003.

§ 182 (Ark.) Whether a seller accepted a check accompanying the buyer's order, with the understanding that it was sent on condition that its retention was an acceptance of the order, was for the jury.—C. C. Emerson & Co. v. Stevens Grocer Co., 151 S. W. 1003.

VII. REMEDIES OF SELLER.

(E) Actions for Price or Value.

§ 355 (Mo.App.) Under a general denial defendant, in an action for the price of goods, cannot establish a partial failure of consideration by showing that they were not in accordance with the sample.—Emery v. G. H. Boehmer Shoe Co., 151 S. W. 174.

VIII. REMEDIES OF BUYER.

(C) Actions for Breach of Contract.

§ 411 (Mo.App.) The petition showing agreement that plaintiff should erect a mill on defendant's land for manufacture of hubs, and that defendant should furnish plaintiff timber

to manufacture into hubs, that plaintiff erected the mill, and defendant failed to furnish the timber, states a cause of action.—Martin v. Bunker-Culler Lumber Co., 151 S. W. 984.

§ 418 (Mo.App.) The damages for breach of defendant's contract to sell plaintiff timber for wagon hubs are not limited to the difference between the contract price and the market value, but include loss of profits; it being understood plaintiff was buying the timber to manufacture into hubs to sell, and plaintiff being unable elsewhere to obtain such timber.—Martin v. Bunker-Culler Lumber Co., 151 S. W. 984.

The petition showing agreement that plaintiff should erect a mill on defendant's land for manufacture of hubs, and that defendant should furnish plaintiff timber to manufacture into hubs, that plaintiff erected the mill, and defendant failed to furnish the timber, authorizes recovery of nominal damages.—Id.

§ 421 (Ark.) Instructions in action for breach of a contract to sell and deliver a car load of potatoes held to fairly submit the contentions of the parties as to the effect of the seller's acceptance and retention of the buyer's check.—C. C. Emerson & Co. v. Stevens Grocer Co., 151 S. W. 1003.

IX. CONDITIONAL SALES.

§ 454 (Mo.App.) Contract between consignor and consignee held to show a bailment, and not a conditional sale, within Rev. St. 1909, § 2880, making conditional sales fraudulent as to creditors unless acknowledged or recorded.—Packard Piano Co. v. Williams, 151 S. W. 211.

SCHOOLS AND SCHOOL DISTRICTS.

See Assignments, § 50; Public Lands, § 173.

II. PUBLIC SCHOOLS.

(D) District Property, Contracts, and Liabilities.

§ 68 (Ky.) A school board may erect a school on a site held under a deed providing that, on the abandonment of such site for common school purposes, the site should revert to the grantor. under Ky. St. § 4426a. Section 4437, requiring a fee title, being an earlier statute, and in conflict, does not apply.—Ritter v. Board of Education of Edmonson County, 151 S. W. 5.

In an action to restrain the erecting of a schoolhouse, evidence held to warrant a finding that the board did not abuse its discretion in choosing the old site.—Id.

§ 69 (Ky.) The intention of a school board to change the site of a school and the letting of a contract to build on the new site on which work was begun, but discontinued by order of the board, who decided to build on the old site, was not an abandonment of the old site; school at the time being taught in it.—Ritter v. Board of Education of Edmonson County, 151 S. W. 5.

§ 86 (Tex.Civ.App.) Under Const. art. 16, § 37, and the statutes enacted in pursuance of it, a materialman's notice to school trustees of his claim for material for a school building does not fix a lien on funds in the hands of the trustees.—A. A. Fielder Lumber Co. v. Smith, 151 S. W. 605.

(E) District Debt, Securities, and Taxation.

§ 111 (Mo.App.) In an action to enjoin the removal of a school building, plaintiffs must allege and prove the existence of their property rights and the facts constituting the irreparable injury thereto.—Williams v. School Dist. No. 5, 151 S. W. 506.

Under Rev. St. 1909, § 2634, providing that threatened irreparable injury to property may be enjoined, taxing residents of a school district may restrain the district officers from exceeding their powers in any way that will

injuriously affect plaintiffs, such as by an unauthorized removal of a school building.—Id.

Injunction will not lie to restrain improper or unlawful acts of a school district or its officers, at the suit of a resident merely, but it must be averred that plaintiff is also a taxpayer.—Id.

In the absence of proof that plaintiff will sustain irreparable injury, or special or pecuniary damages, from the removal of a school building, such act will not be enjoined.—Id.

Allegation, in a petition to enjoin the removal of a school building, that the plaintiffs were resident taxpayers, and that the removal was unauthorized, shows a special interest in plaintiffs entitling them to an injunction, and such allegation is put in issue by a general denial.—Id.

SCIRE FACIAS.

See Attachment, § 13; Limitation of Actions, § 39.

SECONDARY EVIDENCE.

See Evidence, §§ 159-183.

SEDUCTION.

II. CRIMINAL RESPONSIBILITY.

§ 46 (Tex.Cr.App.) The corroboration of prosecutrix is sufficient if it tends to connect accused with the commission of the offense, and to satisfy a jury of the truth of the charge, in connection with the testimony of the prosecutrix.—Curry v. State, 151 S. W. 319.

§ 46 (Tex.Cr.App.) In a prosecution for seduction, where prosecutrix alone testified that certain letters offered in evidence at the trial had been written to her by defendant, such letters could not furnish corroborative evidence, since she could not corroborate herself.—Bishop v. State, 151 S. W. 821.

SELF-DEFENSE.

See Homicide, §§ 116, 300.

SEPARATE PROPERTY.

See Husband and Wife, §§ 121, 144.

SEPARATION.

See Divorce.

SERVANTS.

See Master and Servant.

SERVICE.

See Process, §§ 58, 70.

SERVITUDE.

See Easements.

SET-OFF AND COUNTERCLAIM.

See Appeal and Error, § 1070; Dismissal and Nonsuit, § 19; Trial, § 252.

I. NATURE AND GROUNDS OF REMEDY.

§ 13 (Tex.Civ.App.) In an action by a partnership to enjoin collection of a default judgment taken against it as a corporation, defendant could file a cross-action for any debt owing by the partnership.—Spaulding Mfg. Co. v. Kuykendall, 151 S. W. 1122.

§ 20 (Tex.Civ.App.) In an action on certain claims assigned by F., defendant company held not entitled to set off an overpayment made to a construction company for work performed by F., in the absence of an agreement by F. that it might be set off against the defendant's

indebtedness to him for other work.—Gulf, T. & W. Ry. Co. v. Stark, 151 S. W. 641.

SETTING ASIDE.

See Reference, § 103.

SETTLEMENT.

See Accord and Satisfaction, § 11; Guardian and Ward, §§ 148-163.

SEWERS.

See Drains.

SHERIFFS AND CONSTABLES.

See Appeal and Error, § 71; Courts, § 66; Malicious Prosecution, § 18.

III. POWERS, DUTIES, AND LIABILITIES.

§ 137 (Ky.) A petition in an action against a landlord and a constable for wrongful distress held to state a cause of action at common law against the constable.—Board v. Luigart, 151 S. W. 9.

§ 139 (Ky.) An officer who executes an illegal distress warrant or writ of attachment is liable only for the actual or market value of the property wrongfully seized, and cannot be mulcted in double damages.—Board v. Luigart, 151 S. W. 9.

SIGNALS.

See Railroads, § 244.

SIGNATURES.

See Exceptions, Bill of, § 53; Municipal Corporations, § 297.

SIGNS.

See Landlord and Tenant, § 76.

SLANDER.

See Libel and Slander.

SPECIAL OR LOCAL LAWS.

See Statutes, § 104.

SPECIFIC PERFORMANCE.

See Venue, § 5.

I. NATURE AND GROUNDS OF REMEDY IN GENERAL.

§ 6 (Tex.) The right to specific performance must be mutual.—Ansley Realty Co. v. Pope, 151 S. W. 525.

II. CONTRACTS ENFORCEABLE.

§ 32 (Tex.) An executory contract to sell land as an agent is not subject to specific performance.—Ansley Realty Co. v. Pope, 151 S. W. 525.

IV. PROCEEDINGS AND RELIEF.

§ 127 (Tex.Civ.App.) A party may, in the same suit on a contract, pray for performance and, in the alternative, for rescission without being put to the election of either remedy.—Seiber v. Newman, 151 S. W. 585.

SPEED.

See Carriers, § 295.

STANDING TIMBER.

See Logs and Logging.

STATEMENT OF FACTS.

See Appeal and Error, §§ 547, 554, 560, 564, 742; Criminal Law, §§ 1090, 1097-1101.

STATES.

See Constitutional Law, § 26; Escheat; Monopolies, § 3; Public Lands, §§ 172-177.

III. PROPERTY, CONTRACTS, AND LIABILITIES.

§ 88 (Tex.Civ.App.) Under Act Jan. 26, 1905 (Acts 29th Leg. c. 7), giving the Daughters of the Republic of Texas, a private corporation, the "care and custody" of the "Alamo property," owned by the state, *held*, that the corporation took exclusive control and possession within the conditions prescribed by the act.—Conley v. Daughters of the Republic of Texas, 151 S. W. 877.

Act Jan. 26, 1905 (Acts 29th Leg. c. 7), giving to the Daughters of the Republic of Texas exclusive care and custody of the "Alamo property," owned by the state, charged with its repair and maintenance and with plans for remodeling it subject to the Governor's approval, *held* not repealed by an item in the appropriation act of 1911 (Acts 32d Leg. c. 3) appropriating \$5,000 for the improvement of the property.—*Id.*

The superintendency of public buildings is a legislative office which may have its powers increased or restricted or be abolished by the Legislature, and Act Jan. 26, 1905 (Acts 29th Leg. c. 7), which gave the Daughters of the Republic of Texas, a private corporation, the exclusive care and custody of the so-called "Alamo property," charged with its care and maintenance, was constitutional.—*Id.*

It was not a condition precedent to an action to enjoin trespass to real property, owned by the state and given by it into the exclusive possession of a private corporation charged with its maintenance, that the corporation should allege or prove that it was executing the charge reposed in it.—*Id.*

In an action by a private corporation vested by the Legislature with exclusive possession and control of state property to enjoin a trespass, defendants cannot object that the corporation has not acted in good faith with the state.—*Id.*

VI. ACTIONS.

§ 191 (Tex.Civ.App.) State officers trespassing upon property given by legislative enactment to the exclusive custody and possession of a private corporation *held* liable as any other trespasser would be; a suit against them not being a suit against the state.—Conley v. Daughters of the Republic of Texas, 151 S. W. 877.

STATIONS.

See Carriers, § 305.

STATUTE OF FRAUDS.

See Frauds, Statute of.

STATUTE OF LIMITATIONS.

See Limitation of Actions.

STATUTES.

See Evidence, §§ 65, 67; Frauds, Statute of; Limitation of Actions.

For statutes relating to particular subjects, see the various specific topics.

I. ENACTMENT, REQUISITES, AND VALIDITY IN GENERAL.

§ 40 (Ark.) Sp. & Priv. Acts 1911, p. 472, enacted by "the General Assembly of the state of Arkansas," instead of by "the people of the state of Arkansas," as required by the initiative

and referendum amendment to the Constitution, is not thereby rendered unconstitutional.—Adcock v. Coker, 151 S. W. 253.

§ 40 (Ark.) The provision relating to the style of bills contained in the initiative and referendum amendment to the Constitution, amending Const. art. 5, § 1, *held* to only relate to bills initiated by the people and not to repeal Const. art. 5, § 19 (Kirby's Dig. § 18), making the style of all laws, "Be it enacted by the General Assembly of the state of Arkansas," so that bills not initiated by the people are still properly so styled.—Ferrill v. Keel, 151 S. W. 269.

§ 47 (Ark.) Act approved March 9, 1911 (Sp. & Priv. Laws 1911, p. 184), creating the Village Creek and White River levee district, *held* invalid for uncertainty in the description of the territory proposed to be embraced within the district.—Ferrill v. Keel, 151 S. W. 269.

II. GENERAL AND SPECIAL OR LOCAL LAWS.

§ 104 (Ky.) A special act in favor of an attorney, validating a contract between him and the state for rendition of services, is not invalid under Const. § 59, subsec. 13, providing that the Legislature shall pass no local or special act to legalize, except as against the commonwealth, the unlawful or unauthorized act of any officer of the same.—Carroll v. Bosworth, 151 S. W. 916.

While Const. § 58, prohibits an act to audit or allow private claims against the commonwealth, a special act validating a contract made by plaintiff with the state officers, and giving him permission to sue the State Auditor, is not prohibited, because showing on its face that the claim must be audited by the Auditor himself.—*Id.*

III. SUBJECTS AND TITLES OF ACTS.

§ 107 (Ky.) An act entitled "An act permitting C. C. to sue the state for legal services rendered," while also validating a contract between him and the Attorney General for the rendition of such services, is not invalid under Const. § 51, providing that no law shall relate to more than one subject, which shall be expressed in its title.—Carroll v. Bosworth, 151 S. W. 916.

§ 114 (Mo.) Local option law (Laws 1887, p. 179), providing for local option elections, *held* valid, under Const. art. 4, § 28, requiring a single subject and its expression in the title.—State ex rel. Million v. Graham, 151 S. W. 729.

V. REPEAL, SUSPENSION, EXPIRATION, AND REVIVAL.

§ 150 [New, vol. 2 Key-No. Series] (Tex. Civ.App.) Const. art. 3, § 35, which provides that "no bill except general appropriation bills, which may embrace the various subjects and accounts for and on which moneys are appropriated, shall contain more than one subject which shall be expressed in its title," does not authorize the passage of new laws or the repeal of old ones by a general appropriation bill.—Conley v. Daughters of the Republic of Texas, 151 S. W. 877.

§ 154 (Tex.Civ.App.) An item in a general appropriation act could not amend a previous legislative act, since Const. art. 3, § 36, provides that no law shall be amended by reference to its title, but only by re-enactment and publication at length.—Conley v. Daughters of the Republic of Texas, 151 S. W. 877.

§ 159 (Tex.Civ.App.) Repeals by implication are not favored, and a statute will not repeal an existing one unless there is irreconcilable repugnancy, or unless there is an evident design to supersede all prior legislation in connection with the subject-matter and to enact a complete law in regard to it.—Conley v. Daughters of the Republic of Texas, 151 S. W. 877.

VI. CONSTRUCTION AND OPERATION.**(A) General Rules of Construction.**

§ 174 (Mo.App.) A construction should not be entertained which would attribute to the Legislature an intention to apply the statute to an impossible situation.—Crowley v. Crowley, 151 S. W. 512.

§ 181 (Mo.) The primary rule in construing statutes is to ascertain and give effect to the intent.—State ex rel. Tuller v. Seehorn, 151 S. W. 724.

§ 184 (Mo.App.) Where two constructions of a statute are equally permissible, the one which will best carry out the object of the statute will be adopted.—Granite Bituminous Paving Co. v. Parkview Realty & Improvement Co., 151 S. W. 479.

§ 185 (Mo.) Whatever is implied is as much a part of a statute as though expressly inserted therein.—State ex rel. Coleman v. Blair, 151 S. W. 148.

§ 188 (Mo.App.) The plain terms of a statute cannot be frittered away by refined reasoning.—Crowley v. Crowley, 151 S. W. 512.

§ 227 (Mo.) The word "may" is sometimes construed as mandatory, but more frequently as directory.—State ex rel. Coleman v. Blair, 151 S. W. 148.

(D) Retroactive Operation.

§ 267 (Mo.) The amendment of 1909 (Laws 1909, p. 343) to Rev. St. 1899, § 650, giving actions to quiet title, cannot affect judgments recovered prior to such amendment.—Mayhew v. Toddsman, 151 S. W. 436.

VII. PLEADING AND EVIDENCE.

§ 281 (Mo.App.) One relying on the law of a sister state for his cause of action must allege in his pleading what the law is.—Madden v. Missouri Pac. Ry. Co., 151 S. W. 489.

§ 281 (Mo.App.) A foreign law on which a cause of action is based must be pleaded and proven as a fact.—Shelton v. Metropolitan St. Ry. Co., 151 S. W. 493.

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STEALING.

See Larceny.

STIPULATIONS.

See Appeal and Error, § 807.

§ 6 (Tex.Civ.App.) An agreement of counsel, to be enforceable, must be reduced to writing, signed, and filed, as required by district and

county court rule 47 (142 S. W. xxi).—Ingram v. McClure, 151 S. W. 339.

STOCK.

See Corporations, §§ 67, 174, 244, 378.

STOCKHOLDERS.

See Corporations, §§ 174, 244.

STREET RAILROADS.

See Appeal and Error, § 1064; Carriers, §§ 247, 287, 320.

II. REGULATION AND OPERATION.

§ 81 (Mo.App.) Where the trestle of a street railway company was used by the public so constantly and continuously as to raise a presumption of knowledge on the part of the company, its servants are bound to use the same vigilance in looking for travelers at that place as in places where the public has a right to go on the tracks.—*Shelton v. Metropolitan St. Ry. Co.*, 151 S. W. 493.

§ 98 (Mo.App.) A pedestrian who, at night, started to cross a trestle of a street railway without looking for approaching cars which passed at frequent intervals, was guilty of contributory negligence.—*Shelton v. Metropolitan St. Ry. Co.*, 151 S. W. 493.

§ 103 (Mo.App.) The humanitarian rule applies where the employes of a street railroad in charge of a car could have discovered a person on the track, and averted injury to him.—*Shelton v. Metropolitan St. Ry. Co.*, 151 S. W. 493.

§ 117 (Mo.App.) Although a motorman is not required to take precautions as to a person on the track, unless he is apparently oblivious of the approach of the car, if it appears that the traveler was not aware of the approach of a car, and the motorman could have avoided injuring him, the question of negligence is for the jury.—*Shelton v. Metropolitan St. Ry. Co.*, 151 S. W. 493.

STREETS.

See Municipal Corporations, §§ 646-822.

SUBCONTRACTORS.

See Mechanics' Liens, §§ 111, 115, 164; 281.

SUBROGATION.

§ 31 (Ky.) Where a creditor obtains judgment against the principal in F. county, and by a suit thereon in J. county recovers the amount of the first judgment from the surety, it is only necessary that the surety, as a condition precedent to action against the principal after satisfaction of the J. county judgment, should take from the creditor an assignment of the F. county judgment.—*Fidelity & Deposit Co. of Maryland v. Souseley*, 151 S. W. 353.

A surety who pays a judgment against his principal, without taking an assignment thereof, can only recover from the principal upon an implied promise.—*Id.*

Under Ky. St. § 4666, entitling a surety who has satisfied a judgment against his principal to an assignment thereof, such assignment need not be in writing nor made a matter of record.—*Id.*

After a surety's right of action against his principal is barred, he may not revive it by an order of court without notice to the principal; but, when his right of action is not barred, notice to the principal of his intention to obtain an assignment of the creditor's judgment is not necessary, since without such notice the principal may interpose his defenses.—*Id.*

Where a creditor obtaining judgment against a principal in F. county recovered thereon against the surety in J. county, the surety's payment of the J. county judgment and taking the creditor's assignment of the F. county judgment did not extinguish the liability of the principal under the F. county judgment.—*Id.*

The presumption is that a surety's payment of a judgment against the principal does not extinguish it so as to deprive the surety of the right to an assignment thereof.—*Id.*

SUFFRAGE.

See Elections.

SUICIDE.

See Insurance, § 665.

SUNDAY.

See Intoxicating Liquors, §§ 224, 233; Time, § 10.

§ 19 (Ky.) Owners of a horse hired on Sunday for a pleasure drive held not precluded by the invalidity of the contract under Ky. St. § 1321, from suing for the death of the horse from the defendant's negligent driving.—*Hinkel & Edelen v. Pruitt*, 151 S. W. 43.

SUPERSEDEAS.

See Appeal and Error, § 1234.

SUPPORT.

See Liens, § 7.

SURETYSHIP.

See Principal and Surety.

SURPRISE.

See Continuance, § 31; New Trial, § 89.

SURVEYS.

See Boundaries.

SWAMP LANDS.

See Public Lands, § 61.

TAXATION.

See Adverse Possession, § 87; Appeal and Error, § 301; Cancellation of Instruments, § 24; Constitutional Law, § 290; Counties, § 192; Drains, § 76; Fraudulent Conveyances, § 300; Licenses, §§ 7, 15; Municipal Corporations, §§ 450-587; Schools and School Districts, § 111; Telegraphs and Telephones, §§ 10, 30.

V. LEVY AND ASSESSMENT.

(C) Mode of Assessment in General.

§ 363 (Ky.) An assessment of taxes by the county board of supervisors, without notice to the taxpayer, is void.—*Durbin v. Ohio Valley Tie Co.*, 151 S. W. 12.

(G) Review, Correction, or Setting Aside of Assessment.

§ 453 (Ark.) Acts 1911, p. 230, amending Kirby's Dig. § 7003, furnishes an exclusive remedy in case of overvaluation by first applying to the board of equalization, and thereafter by appeal to the county court, and then to the circuit court.—*Clay County v. Bank of Knobel*, 151 S. W. 1013.

Under Kirby's Dig. § 6992, relating to the meeting of the board of equalization, and section 1361 and Acts 1895, p. 36, fixing the terms of the county court of Clay county, and Acts 1911, p. 161, providing for separate county courts for the western district of Clay county, the provisions for the meeting of the equalization board and the session of the county court for Clay county apply to the western district, and a taxpayer in the western district may pursue the remedy prescribed by Acts 1911, p. 230, in case of overvaluation.—*Id.*

VIII. COLLECTION AND ENFORCEMENT AGAINST PERSONS OR PERSONAL PROPERTY.

(B) Summary Remedies and Actions.

§ 595 (Tex.Civ.App.) Where defendant in an action for delinquent taxes made his vendors parties, and prayed for judgment over against them, if plaintiff recovered judgment for taxes, penalties, and costs, judgment against the vendors for the taxes, penalties, and interest was proper.—Gordon v. State, 151 S. W. 867.

(C) Remedies for Wrongful Enforcement.

§ 608 (Tex.Civ.App.) On suit to restrain the collection of taxes, that excessive property was levied on is not available to plaintiff.—McMahan v. Morgan, 151 S. W. 1123.

§ 610 (Tex.Civ.App.) A property owner who has not paid taxes assessed against him, nor offered to pay them, cannot sue to enjoin an excessive levy.—McMahan v. Morgan, 151 S. W. 1123.

§ 611 (Ky.) Evidence, in an action to enjoin a collection of taxes, held to support a finding that the owner had no notice of the assessment by the supervisors.—Durbin v. Ohio Valley Tie Co., 151 S. W. 12.

§ 611 (Tex.Civ.App.) In an action to restrain the collection of taxes, the burden is on plaintiff to show that the taxes are not due and owing by him.—McMahan v. Morgan, 151 S. W. 1123.

TELEGRAPHS AND TELEPHONES.

See Appeal and Error, § 1064; Licenses, § 7; Trial, § 258.

I. ESTABLISHMENT, CONSTRUCTION, AND MAINTENANCE.

§ 10 (Ky.) The imposition by the state board of valuation and assessment of a franchise tax upon a telephone company under Ky. St. § 4077, and the payment to the municipality of its part of the tax, does not give the company which had no franchise any right to use the streets.—Cumberland Telephone & Telegraph Co. v. City of Calhoun, 151 S. W. 659.

§ 15 (Ky.) Though a telephone company was negligent in insulating its wires, it is not liable for a fire caused by lightning carried into a building on the wire, unless but for its negligence the building would not have burned.—Wood v. Cumberland Telephone & Telegraph Co., 151 S. W. 29.

§ 20 (Ky.) In an action to recover damages for a fire alleged to have been caused by the negligent failure of a telephone company to insulate its wires which entered a building, evidence held insufficient to go to the jury.—Wood v. Cumberland Telephone & Telegraph Co., 151 S. W. 29.

In an action for damages for a fire alleged to have been caused by a telephone company's negligence in failing to insulate its wires which entered a building, the plaintiff has the burden of showing that the fire was caused by the company's negligence.—Id.

II. REGULATION AND OPERATION.

§ 30 (Ky.) Where a telephone company, having a franchise for a telephone exchange and to occupy the streets of the municipality, pays a property tax to the city, the municipality cannot levy a license tax or tax on the privilege of conducting its business.—Cumberland Telephone & Telegraph Co. v. City of Calhoun, 151 S. W. 659.

A resolution of the board of trustees of a town to let a telephone company put up telephone poles on certain streets, though acted upon by the company, is not a franchise within Const. § 164, but only a license which may be withdrawn at any time, and hence the mu-

nicipality may impose on it a license or occupation tax.—Id.

As Const. §§ 163, 164, do not require a franchise for the maintenance of a telephone exchange, a license tax imposed on a telephone company, which had no franchise, based upon its maintenance of an exchange, cannot be defeated on the ground that it was occupying the streets without authority.—Id.

§ 37 (Tex.Civ.App.) If the recipient's residence beyond the free delivery limits was not known to the sender of a telegram when he filed it for transmission, the agent at the receiving office should notify the sender so as to give him an opportunity to pay the extra charges.—Western Union Telegraph Co. v. Vance, 151 S. W. 904.

A telephone company was not justified in abandoning all effort to deliver a telegram merely because the recipient was not found at the address stated, and his actual address was beyond the free delivery limits.—Id.

§ 38 (Tex.Civ.App.) That the sender of a telegram did not advise the company that the recipient lived beyond the free delivery limits, nor offered to pay the extra charges for service, was not a defense to an action for negligent delay in delivery.—Western Union Telegraph Co. v. Vance, 151 S. W. 904.

§ 66 (Tex.Civ.App.) Evidence in an action for negligent delay in delivering a telegram held to sustain a finding of negligence in transmitting and delivering the message.—Western Union Telegraph Co. v. Vance, 151 S. W. 904.

Evidence in an action for negligent delay in delivering a telegram announcing the probable death of plaintiff's daughter held to show that plaintiff's inability to reach his daughter's bedside before her death was proximately caused by the negligent transmission and delivery.—Id.

§ 70 (Tex.Civ.App.) The jury has a large discretion in estimating damages to be awarded for mental anguish as from the negligent delivery of a telegram.—Western Union Telegraph Co. v. Vance, 151 S. W. 904.

§ 71 (Tex.Civ.App.) A verdict for \$947.50 for failure to promptly deliver a telegram announcing the death of plaintiff's daughter held not excessive, though the daughter was unconscious from the sending of the message until she died, and could not have recognized plaintiff.—Western Union Telegraph Co. v. Vance, 151 S. W. 904.

TENANCY IN COMMON.

See Partition, § 85.

II. MUTUAL RIGHTS, DUTIES, AND LIABILITIES OF COTENANTS.

§ 15 (Ark.) The possession of a tenant is not adverse to his cotenant.—Keith v. Wheeler, 151 S. W. 284.

§ 28 (Mo.App.) One cotenant, who rents the land and collects the rent, will be liable therefor to the other cotenant.—Crowley v. Crowley, 151 S. W. 512.

III. RIGHTS AND LIABILITIES OF COTENANTS AS TO THIRD PERSONS.

§ 43 (Tex.Civ.App.) In order for a person to ratify a land sale contract executed by his owner, it is essential that he answer or agree to same with knowledge of its material terms.—Parker v. Naylor, 151 S. W. 1096.

TERMINATION.

See Principal and Agent, § 33.

TERMS.

See Courts, § 66.

TESTAMENTARY CAPACITY.

See Wills, § 55.

THEATERS AND SHOWS.

See False Imprisonment, § 15.

THEFT.

See Burglary; Larceny.

THEORY.

See Appeal and Error, § 171.

THREATS.

See Homicide, §§ 118, 158, 300.

TICKETS.

See Carriers, § 270.

TIMBER.

See Logs and Logging.

TIME.

See Appeal and Error, §§ 621, 655, 773, 909, 1006, 1109; Bills and Notes, §§ 92, 139; Contracts, § 212; Criminal Law, § 1092; Eminent Domain, § 124; Exceptions, Bill of, § 38; Executors and Administrators, § 225; Indictment and Information, § 87; Judgment, § 321; Jury, § 25; Motions, § 54; Notice, § 9; Vendor and Purchaser, § 3; Wills, § 782.

§ 9 (Tex.Civ.App.) Where a cause of action subject to the four-year limitation, accrued October 2, 1907, the time to sue expired October 1, 1911; and a suit commenced the following day was barred by limitations.—*Standard v. Thurmond*, 151 S. W. 627.

§ 10 (Tex.Civ.App.) The time within which to commence a suit is not extended because the last day of the period of limitation was Sunday.—*Standard v. Thurmond*, 151 S. W. 627.

TITLE.

See Boundaries, § 43; Courts, § 231; Estoppel, §§ 38, 39; Quieting Title, § 22; Trespass to Try Title.

TORTS.

See Assault and Battery, §§ 13-42; Corporations, § 492; Death; False Imprisonment; Fraud; Judgment, §§ 239, 606; Landlord and Tenant, §§ 164-169, 274; Libel and Slander; Malicious Prosecution; Municipal Corporations, §§ 762-822; Negligence; Nuisance; Railroads, §§ 233-482; Street Railroads; Trespass; Trover and Conversion; Waste, § 4.

§ 10 (Tex.Civ.App.) Acts of defendant, a dealer in eggs, in writing to the express company which employed plaintiff, and whose rules forbade him to engage in such business on his own account, resulting in stopping plaintiff's personal activity in such business, and reducing his profits and in his final discharge, without malice or interference with his customers, held proper competition, and not actionable as an interference with plaintiff's business.—*Swift & Co. v. Allen*, 151 S. W. 645.

TOWNS.

See Weights and Measures, § 8.

TRADING STAMPS.

See Licenses, §§ 7, 15.

TRANSCRIPTS.

See Appeal and Error, §§ 597, 621, 835.

TRESPASS.

See Injunction, §§ 35, 46; Mines and Minerals, § 51; Municipal Corporations, § 691; States, § 191.

II. ACTIONS.

(E) Trial, Judgment, and Review.

§ 87 (Ky.) In an action to recover damages for timber alleged to have been cut and removed from land owned by the plaintiff, the evidence held sufficient to go to the jury on the issue of the plaintiff's title to such lands.—*Lovely v. Kentucky Union Co.*, 151 S. W. 392.

TRESPASS TO TRY TITLE.

See Appeal and Error, § 1029; Evidence, §§ 244, 318; Homestead, § 212; Railroads, § 82.

I. RIGHT OF ACTION AND DEFENSES.

§ 6 (Tex.) Failure of the acknowledgment of a deed by a married woman to state that she did not wish to retract, will not defeat a suit by her remote grantee against a mere intruder, where she lived near the land, and for over 50 years neither she nor her heirs ever questioned the deed.—*Spivy v. March*, 151 S. W. 1037.

II. PROCEEDINGS.

§ 32 (Tex.Civ.App.) Though plaintiff is not required to plead his title, yet if he does so, and it is insufficient, a general demurrer should be sustained.—*National Lumber & Creosoting Co. v. Maris*, 151 S. W. 325.

§ 39 (Tex.Civ.App.) Evidence relating to an interlocking agreement between plaintiff and defendant railroad companies as to a crossing, not touching the land in controversy, was not admissible in trespass to try title.—*Ft. Worth & D. C. Ry. Co. v. Southern Kansas Ry. Co.*, 151 S. W. 850.

§ 40 (Tex.Civ.App.) In trespass to try title to a part of a railroad right of way, a deed from plaintiff to defendant, transferring another part of its right of way, was not admissible.—*Ft. Worth & D. C. Ry. Co. v. Southern Kansas Ry. Co.*, 151 S. W. 850.

§ 40 (Tex.Civ.App.) Plaintiff held entitled to introduce prior deeds in its chain of title to prove title claimed.—*Rider v. Radford*, 151 S. W. 1181.

Where plaintiff claimed title through a deed from a mercantile company to a grocery company in consideration of a credit on debt due the grantee, it was immaterial that the credit was not in fact entered on the grantee's books until after defendant ceased to be a member of the mercantile company.—*Id.*

§ 41 (Tex.Civ.App.) Evidence held to warrant a finding that the numbers of certain surveys were changed in the land office by the commissioner and orders given to the surveyor to make the same changes in the field notes.—*Lee v. Simmons*, 151 S. W. 868.

TRIAL.

See Abortion, § 13; Accord and Satisfaction, § 27; Adverse Possession, § 116; Animals, § 51; Appeal and Error, §§ 216, 232, 262, 274, 548, 649, 718, 750, 843, 852, 1001-1003, 1006, 1009-1011, 1013, 1022, 1046, 1060, 1061-1070; Assault and Battery, §§ 42, 96; Banks and Banking, § 85; Boundaries, §§ 40, 41; Brokers, § 88; Carriers, §§ 320, 321, 383; Continuance; Contracts, § 176; Costs; Criminal Law, §§ 650-871; Damages, §§ 210-216; Death, § 103; Deeds, § 66; Easements, § 37; Explosives; Homicide, §§ 294-310; Husband and Wife, § 298½; Insurance, § 669; Intoxicating Liquors, §§ 238, 239; Jury; Landlord and Tenant, §§ 169, 291; Larceny, § 71; Libel and Slander, § 123; Limitation of Actions, § 199; Mas-

ter and Servant, §§ 286-296; Mortgages, § 480; Municipal Corporations, §§ 706, 822; Negligence, §§ 136-141; New Trial; Partnership, §§ 218, 329; Railroads, §§ 282, 350, 446; Sales, §§ 182, 421; Street Railroads, § 117; Telegraphs and Telephones, § 20; Trespass, § 67; Vendor and Purchaser, § 45; Venue; Waters and Water Courses, § 63.

III. COURSE AND CONDUCT OF TRIAL IN GENERAL.

§ 25 (Ky.) Under Civ. Code Prac. § 526, imposing the burden of proof on the party who would be defeated if no evidence were adduced, a defendant who, though denying malice in making an assault, pleads confession and avoidance has the burden of proof, and hence is entitled to open and close the argument, under section 317, subsec. 6.—*Shirley v. Renick*, 151 S. W. 357.

§ 25 (Ky.) Defendants' motion for leave to make the concluding argument *held* properly overruled, where they denied the allegations of the petition, because the burden was on plaintiff.—*Ætna Life Ins. Co. v. Rustin*, 151 S. W. 366.

IV. RECEPTION OF EVIDENCE.

(A) Introduction, Offer, and Admission of Evidence in General.

§ 41 (Tex.Civ.App.) It is within the court's discretion to permit particular witnesses to remain in the courtroom where the rule is invoked.—*Armstrong Packing Co. v. Clem*, 151 S. W. 576.

In a husband's action for injuries to his wife in which the rule was invoked, the court did not abuse its discretion in permitting both the husband and wife to remain in the courtroom.—*Id.*

(B) Order of Proof, Rebuttal, and Re-opening Case.

§ 62 (Ky.) The trial court has a discretion in permitting introduction of evidence in rebuttal.—*Ætna Life Ins. Co. v. Rustin*, 151 S. W. 366.

(C) Objections, Motions to Strike Out, and Exceptions.

§ 89 (Tex.Civ.App.) In a personal injury action, *held* proper to strike testimony concerning a wound previously received by plaintiff in a difficulty; it not being claimed that such wound was received in the accident sued on.—*Knox v. Robbins*, 151 S. W. 1134.

V. ARGUMENTS AND CONDUCT OF COUNSEL.

§ 124 (Ark.) It was highly improper for plaintiff's counsel to state in argument that a man who had committed the act shown to have been committed by defendant should be in the penitentiary.—*Jenkins v. Quick*, 151 S. W. 1021.

§ 125 (Ky.) It is highly improper for counsel to go without the record for the purpose of appealing to the passion and prejudice of the jurors.—*Chicago, St. L. & N. O. R. Co. v. Rowell*, 151 S. W. 950.

§ 125 (Tex.Civ.App.) In an action for injuries to a child, remarks by plaintiff's counsel that defendants "make me tired in talking about sympathy for this little girl (plaintiff). I wonder how about the bondholders and coupon clippers that own this road"—were improper.—*Ft. Worth & D. C. Ry. Co. v. Wininger*, 151 S. W. 586.

§ 133 (Ark.) Statements of counsel that defendant, though having time to offer, had offered no settlement before suit, *held* not prejudicial, where they were immediately withdrawn, and the jury admonished not to consider them.—*St. Louis, I. M. & S. R. Co. v. Brogan*, 151 S. W. 699.

§ 133 (Ark.) Statement by plaintiff's counsel that defendant ought to go to the penitentiary for his conduct toward plaintiff *held* harmless, where the court told the jury not to consider it, and counsel apologized, and withdrew the statement.—*Jenkins v. Quick*, 151 S. W. 1021.

VI. TAKING CASE OR QUESTION FROM JURY.

(A) Questions of Law or of Fact in General.

§ 139 (Ark.) A directed verdict for defendant is proper only when, under the evidence and all reasonable inferences therefrom, the plaintiff is not in law entitled to recover.—*Wortz v. Ft. Smith Biscuit Co.*, 151 S. W. 691.

§ 139 (Mo.App.) Evidence may be withheld from the jury as unworthy of belief only when it is opposed to the plain, undisputed physical facts.—*Goode v. Central Coal & Coke Co.*, 151 S. W. 508.

§ 140 (Mo.App.) Whether the testimony of witnesses as to the appearance, movements, and attitude of a person walking on an elevated railroad above them as they stood in the street at twilight, and while they could see him merely in silhouette, was entitled to credit, was a question for the jury.—*Shelton v. Metropolitan St. Ry. Co.*, 151 S. W. 493.

§ 143 (Ky.) That defendant's evidence strongly contradicts that of plaintiff does not justify a peremptory instruction for defendant; it being the province of the jury to weigh all the evidence.—*Louisville & N. R. Co. v. Goodwin*, 151 S. W. 376.

(B) Demurrer to Evidence.

§ 155 (Tenn.) A demurrer to evidence withdraws the case from the jury, and submits it to the court to apply the law to the admitted facts; and where the evidence is written, or, though parol, is certain, the other party must join, or waive such evidence.—*King v. Cox*, 151 S. W. 58.

§ 156 (Tenn.) That evidence is conflicting does not prevent a demurrer to the evidence, as all reasonable inferences are in plaintiff's favor.—*King v. Cox*, 151 S. W. 58.

On demurrer to the evidence, all the evidence on damages must be found in the demurrer, and the amount fixed by the court.—*Id.*

(D) Direction of Verdict.

§ 176 (Tenn.) Moving for peremptory instruction is not a waiver of objections to rulings on evidence.—*King v. Cox*, 151 S. W. 58.

§ 177 (Tenn.) Concurring motions by both parties for peremptory instructions do not constitute an agreement that the controversy shall be determined by the court without the jury.—*King v. Cox*, 151 S. W. 58.

§ 178 (Tenn.) Upon sustaining a motion for peremptory instructions, the case may be remanded to the jury for assessment of damages.—*King v. Cox*, 151 S. W. 58.

VII. INSTRUCTIONS TO JURY.

(A) Province of Court and Jury in General.

§ 191 (Mo.App.) In an action for injuries from an automobile, where the only issue was as to its ownership and control, and the evidence upon that issue was conflicting, an instruction assuming its ownership or control was error.—*Warrington v. Bird*, 151 S. W. 754.

§ 191 (Tex.Civ.App.) A charge not to consider the annoyance or harm caused by flies was properly refused as assuming that the slaughterhouse sought to be abated was not responsible for the flies.—*Nations v. Harris*, 151 S. W. 334.

§ 191 (Tex.Civ.App.) An instruction assuming a disputed fact is properly refused.—*Freeman v. Kennerly*, 151 S. W. 680.

§ 191 (Tex.Civ.App.) In an action for injuries to a child while crossing railway tracks, an instruction assuming that the child attempted to cross the defendant's train *held* properly refused.—*Ft. Worth & D. C. Ry. Co. v. Winger*, 151 S. W. 586.

§ 191 (Tex.Civ.App.) Under Rev. St. 1911, art. 1971, an instruction in an action for conversion *held* erroneous as assuming that plaintiff had tendered the correct amount.—*May v. Anthony*, 151 S. W. 602.

In an action for conversion, an instruction *held* erroneous as assuming that defendant had sold the property at the time of the tender.—*Id.*

§ 192 (Tex.Civ.App.) Where the president of an insurance company, also named as the trustee in a deed of trust given to the company, in negotiating the loan, insisted that the insurance should be carried in his company, the court did not err in treating it as undisputed that the company selected itself to carry the insurance.—*Commonwealth Fire Ins. Co. v. Obenchain*, 151 S. W. 611.

§ 194 (Tex.Civ.App.) Where the court fully charged as to the issues of contributory negligence and assumption of risk, the giving at the request of the master of numerous special charges thereon *held* error as a comment on the weight of the evidence.—*Rutlin v. Trinity Oil Co.*, 151 S. W. 584.

§ 194 (Tex.Civ.App.) An instruction on the weight of evidence is properly refused.—*Texas & P. Ry. Co. v. Good*, 151 S. W. 617.

§ 194 (Tex.Civ.App.) A charge that if feeding and watering plaintiff's cattle was made necessary by defendant's negligence in delaying shipment, if it did delay the cattle, then plaintiff, if he paid for the feeding, would be entitled to recover the sum paid, is not on the weight of the evidence as telling the jury that the delay was caused by defendant's negligence.—*St. Louis & S. F. Ry. Co. v. Knox*, 151 S. W. 902.

An instruction that if the jury find for a shipper of cattle his measure of damages is the difference between the market value at the time of arrival in the condition they were in and what would have been their value, had there been no delay or negligence, is not on the weight of the evidence.—*Id.*

§ 194 (Tex.Civ.App.) Where the answer pleaded three issues of contributory negligence, all of which were substantiated by testimony, separate charges thereon were not on the weight of the evidence because giving undue prominence to the issue of contributory negligence.—*Walker v. Metropolitan St. Ry. Co.*, 151 S. W. 1142.

(B) Necessity and Subject-Matter.

§ 203 (Mo.App.) The court, undertaking to give an instruction on the whole case, must cover not only plaintiff's, but also defendant's side.—*Thornton v. Mersereau*, 151 S. W. 212.

§ 203 (Mo.App.) An instruction which is merely a statement of the facts on which plaintiff based her claim of recovery is not erroneous.—*Ledbetter v. City of Kirksville*, 151 S. W. 228.

(C) Form, Requisites, and Sufficiency.

§ 233 (Mo.App.) Where plaintiff states the same cause of action in different counts, the court should charge that, if the jury finds for him on one of the counts, it should find no damages, or at the most mere nominal damages, on the other counts.—*Blackmer & Post Pipe Co. v. Mobile & O. R. Co.*, 151 S. W. 164.

§ 233 (Tex.Civ.App.) An instruction properly submitting an issue need not include all the other material issues submitted by other instructions.—*Anderson v. Crow*, 151 S. W. 1080.

§ 234 (Tex.Civ.App.) Instructions that defendants have the burden of proving their respective

pleas of contributory negligence by a preponderance of evidence *held* proper.—*Texas & P. Ry. Co. v. Good*, 151 S. W. 617.

§ 236 (Mo.) Instruction *held* bad, in that it especially called attention to plaintiff's interest as an inducement to swear falsely, and declared all her testimony against interest to be true, and required all in her behalf to be scrutinized with care.—*Benjamin v. Metropolitan St. Ry. Co.*, 151 S. W. 91.

§ 237 (Tex.Civ.App.) An instruction that, if plaintiff had "established" certain facts, the jury should answer an interrogatory in the affirmative *held* not to require too high a degree of proof.—*Gamble v. Martin*, 151 S. W. 327.

§ 244 (Ark.) It was not error to refuse an instruction stating and emphasizing the purpose for which plaintiff's affidavit in replevin could be considered.—*Jenkins v. Quick*, 151 S. W. 1021.

§ 244 (Mo.App.) An instruction, in an action for commissions for procuring a purchaser, *held* not an undue comment on a single fact.—*Gillfillan v. Schmidt*, 151 S. W. 161.

§ 244 (Mo.App.) An instruction, in an action against a landlord for injuries to the tenant's wife caused by a defect in the premises, *held* not objectionable as an undue comment on the evidence.—*Haywood v. Kuhn*, 151 S. W. 204.

§ 244 (Tex.Civ.App.) In an action for injuries to a child while crossing railroad yards, the court's charge *held* not improper as giving undue emphasis to the question of exemption from contributory negligence on account of the tender years of the plaintiff.—*Ft. Worth & D. C. Ry. Co. v. Winger*, 151 S. W. 586.

§ 244 (Tex.Civ.App.) Instruction, on partnership accounting, that certain facts not amounting to an estoppel might be considered on the question of whether land was partnership property, *held* erroneous as singling out a portion of the evidence.—*Hengy v. Hengy*, 151 S. W. 1127.

(D) Applicability to Pleadings and Evidence.

§ 251 (Ky.) Where a mining company sued for injuries to an employé pleaded contributory negligence in general terms only, an instruction on contributory negligence based on the loading of a car in a particular manner was properly refused.—*Jellico Coal Mining Co. v. Lee*, 151 S. W. 28.

An instruction on acts of contributory negligence contemporaneous with the injury, though not pleaded, is proper, but it is otherwise as to acts occurring before or after the injury.—*Id.*

§ 251 (Tex.Civ.App.) An issue raised by the evidence but not by the pleadings should not be submitted.—*Miller v. Layne & Bowler Co.*, 151 S. W. 341.

§ 251 (Tex.Civ.App.) The refusal of an instruction requested by defendant, relative to an issue not submitted to the jury as a ground of recovery, was not error.—*St. Louis & S. F. R. Co. v. Cartwright*, 151 S. W. 630.

§ 251 (Tex.Civ.App.) A requested instruction which authorizes a recovery for negligence not counted on in the petition is properly refused.—*Walker v. Metropolitan St. Ry. Co.*, 151 S. W. 1142.

§ 252 (Ark.) In an action for the death of a person killed on a railroad track, that the evidence did not show drunkenness of such person *held* not to render improper the giving of an instruction on the duty of the employes on discovering his insensibility to danger from drunkenness or other cause.—*St. Louis & S. F. R. Co. v. Newman*, 151 S. W. 255.

§ 252 (Ky.) In absence of evidence of a passenger's contributory negligence while boarding a car, it was error to instruct on such negli-

gence.—*Samuels v. Louisville Ry. Co.*, 151 S. W. 37.

§ 252 (Ky.) An instruction on contributory negligence of a property owner suing for injuries from an inadequate sewer to the effect that, if there was a drain in plaintiff's basement below the level of the sewer, he could not recover, was properly refused, where there was no evidence that the drain was connected with the sewer.—*City of Louisville v. Kramer's Adm'x*, 151 S. W. 379.

§ 252 (Mo.) An instruction in a boundary case as to the effect of a fence built by previous owners "for their convenience" held not objectionable; there being no evidence of the purpose of such owners in erecting the fence.—*Hilgedick v. Gruebbel*, 151 S. W. 731.

§ 252 (Mo.App.) An instruction that defendants could not recover on their counterclaim, if they knew of the damaged condition of the property at the time they purchased it from plaintiffs, held not erroneous, on the ground that there was no evidence that they knew thereof.—*Mullinax v. Lowry*, 151 S. W. 745.

§ 252 (Tex.Civ.App.) In an action for injuries to a child while crossing railroad tracks, an instruction as to the duty of railroad employes held justified by the evidence.—*Ft. Worth & D. C. Ry. Co. v. Wininger*, 151 S. W. 586.

In an action for injuries to a child received in a railroad yard, instructions on ordinary care and contributory negligence, as affected by the age and intelligence of the person injured held warranted by the evidence.—*Id.*

§ 252 (Tex.Civ.App.) There must be some proof that rules were promulgated for the safety of an inexperienced minor employé, or a specific order given as to the manner in which his work should be carried on, before it is error to refuse to submit an instruction based on contributory negligence for violating such known rules or specific order.—*Armour & Co. v. Morgan*, 151 S. W. 861.

§ 252 (Tex.Civ.App.) Where a peace officer, while acting in his capacity as employé for defendant, who was running a show, arrested plaintiff, in a dispute over a seat, an instruction as to the official duties of a peace officer was properly refused as abstract.—*Rucker v. Barker*, 151 S. W. 871.

§ 252 (Tex.Civ.App.) A requested instruction ignoring issues raised by the evidence is properly refused.—*Anderson v. Crow*, 151 S. W. 1080.

§ 253 (Ark.) An instruction that, if the jury found certain facts, plaintiff should not be regarded as having assumed any danger from the defective appliance, and the jury should find for him if he was injured as he claims is erroneous, as disregarding claim of contributory negligence.—*St. Louis, I. M. & S. Ry. Co. v. Steed*, 151 S. W. 257.

§ 253 (Mo.App.) In an action for services, defended on the ground that plaintiff was a partner, an instruction undertaking to cover the whole case, without submitting the issue of partnership, was erroneous.—*Thornton v. Merseureau*, 151 S. W. 212.

§ 253 (Mo.App.) An instruction that the only question was whether decedent coal miner was killed by a rock fall while working at his place of work was erroneous, as ignoring the issue of whether the dangerous character of the rock should have been discovered by the employer in the exercise of ordinary care.—*Goode v. Central Coal & Coke Co.*, 151 S. W. 508.

§ 253 (Mo.App.) In an action on a note, defended on the ground of failure of consideration and fraud, an instruction submitting the issue of fraud, but leaving out of consideration the question of the materiality of the representations relied on, or whether injury resulted, held erroneous.—*Birch Tree State Bank v. Dowler*, 151 S. W. 784.

§ 253 (Tex.Civ.App.) An instruction in an action for injuries to a railroad employé which ignores Acts 31st Leg. (1st Ex. Sess.) c. 10, relating to comparative contributory negligence, held properly refused.—*Freeman v. Kennerly*, 151 S. W. 580.

(E) Requests or Prayers.

§ 256 (Mo.App.) In an action against a landlord for injuries to the tenant's wife caused by a defect in the premises, the landlord, if desiring a specific instruction on the question of the condition of the premises at the time of the accident and at the time of the letting should have asked it.—*Haywood v. Kuhn*, 151 S. W. 204.

§ 256 (Tex.Civ.App.) An instruction that a telegraph company is held to the exercise of reasonable care and diligence was not error, in the absence of request for a more specific charge, on the ground that the company need only exercise "ordinary care" under the circumstances.—*Western Union Telegraph Co. v. Vance*, 151 S. W. 904.

§ 256 (Tex.Civ.App.) A charge to find for defendant unless certain facts existed was affirmatively erroneous, since a special charge to find for plaintiff upon other facts would have been contradictory thereof.—*Hengy v. Hengy*, 151 S. W. 1127.

Where plaintiff claimed that partnership was dissolved, and a new partnership afterwards formed, an instruction that the old partnership was presumed to continue unless a dissolution was shown by the evidence held correct as far as it went, and failure to instruct as to plaintiff's theory was not reversible error in the absence of a request for special charges.—*Id.*

The failure of the trial court in its charge to apply all of the law applicable to the case should have been cured by offering special charges.—*Id.*

§ 260. An instruction covered by the charge as given is properly refused.

—(Ark.) *Thomas v. Jackson*, 151 S. W. 521; *Johnston-Reynolds Land Co. v. Fuqua*, Id. 693; *St. Louis, I. M. & S. Ry. Co. v. Jacks*, Id. 706; *C. C. Emerson & Co. v. Stevens Grocer Co.*, Id. 1003; *Jenkins v. Quick*, Id. 1021;

(Tex. Civ. App.) *Texas & P. Ry. Co. v. Good*, 151 S. W. 617; *St. Louis & S. F. Ry. Co. v. Knox*, Id. 902; *Anderson v. Crow*, Id. 1080.

§ 260 (Ky.) It is not error to refuse instructions substantially covered by the charge given.—*City of Carlisle v. Campbell*, 151 S. W. 673.

§ 260 (Tex.Civ.App.) In an action for injuries to a brakeman, the refusal to give a charge on contributory negligence held not erroneous in view of the charge given.—*Freeman v. Kennerly*, 151 S. W. 580.

§ 260 (Tex.Civ.App.) A special charge requested was properly refused where the proposition presented was fully covered by the general charge of the court.—*Ft. Worth & D. C. Ry. Co. v. Wininger*, 151 S. W. 586.

§ 260 (Tex.Civ.App.) Where the main charge in a servant's action for injuries required the jury to find both that the failure to provide safeguards was negligence and that such failure was the proximate cause of the plaintiff's injury, a special charge on the issue of proximate cause was not required.—*Armour & Co. v. Morgan*, 151 S. W. 861.

§ 263 (Tex.Civ.App.) It was not error for the court, after stating the case and giving some principles of law applicable thereto, to give such special charges prepared by the parties as were applicable.—*Armstrong Packing Co. v. Clem*, 151 S. W. 576.

(F) Objections and Exceptions.

§ 279 (Ark.) Where an instruction is confusing or misleading, the party aggrieved should

specifically point out such objection, so that the court may correct it.—*C. C. Emerson & Co. v. Stevens Grocer Co.*, 151 S. W. 1003.

(G) Construction and Operation.

§ 295 (Tex.Civ.App.) All parts of instructions must be considered together in determining their meaning.—*Freeman v. Kennerly*, 151 S. W. 580.

§ 296 (Ark.) Where, in other instructions, the jury had been told that their finding of negligence, or not, must be based on the evidence, an instruction defining negligence, and stating that if they believed a certain thing was done, and was negligence, and caused plaintiff's injury, he, unless guilty of contributory negligence, could recover, is not objectionable as leaving the jury to believe defendant negligent, regardless of the evidence.—*Oak Leaf Mill Co. v. Littleton*, 151 S. W. 282.

§ 296 (Ark.) Instruction to find for plaintiff, if his injury resulted from defendant's failure to exercise reasonable care in placing on a switch track the car with which his engine collided, *held* not erroneous, as assuming that defendant was negligent, when followed by other instructions clearly showing the court's intention to submit the question of defendant's negligence.—*St. Louis, I. M. & S. R. Co. v. Brogan*, 151 S. W. 699.

§ 296 (Mo.App.) In an action for commissions for procuring a purchaser of real estate, an instruction *held* not objectionable as leaving the jury to determine the contract of employment, in view of another instruction stating the terms of such contract.—*Gillfillan v. Schmidt*, 151 S. W. 161.

§ 296 (Mo.App.) An erroneous instruction, which directed a verdict on the hypothesis stated, was not cured by contrary instructions.—*Goode v. Central Coal & Coke Co.*, 151 S. W. 508.

§ 296 (Tex.Civ.App.) The giving of a confusing and misleading charge is harmless; numerous special charges clearly instructing in the matter being given.—*Texas & P. Ry. Co. v. Good*, 151 S. W. 617.

§ 296 (Tex.Civ.App.) Under Courts of Civil Appeals Rules, 62a, providing that a judgment shall not be reversed for nonprejudicial error, an erroneous instruction defining a land partnership *held* not reversible error where, considered with another instruction, it could not have misled the jury.—*Parker v. Naylor*, 151 S. W. 1096.

IX. VERDICT.

(A) General Verdict.

§ 329 (Mo.App.) A verdict must be responsive to the issues.—*Advance Thresher Co. v. Speak*, 151 S. W. 235.

(B) Special Interrogatories and Findings.

§ 348 (Tex.Civ.App.) Under *Sayles' Ann. Civ. St.* 1897, arts. 1328, 1333, the case should not be submitted to the jury so as to require a verdict in part general and in part special. Hence, the court having decided not to submit special issues, refusal of two special issues was proper.—*Hengy v. Hengy*, 151 S. W. 1127.

§ 349 (Tex.Civ.App.) Under *Sayles' Ann. Civ. St.* 1897, art. 1333, as amended by Acts 26th Leg. c. 111, the submission of a case on special issues is in the trial court's discretion.—*Hengy v. Hengy*, 151 S. W. 1127.

X. TRIAL BY COURT.

(A) Hearing and Determination of Cause.

§ 386 (Mo.) In a case tried before the court without a jury, the rules of law governing the giving and refusing of instructions are not changed.—*Cousins v. White*, 151 S. W. 737.

TRIAL OF RIGHT OF PROPERTY.

See Execution, § 181.

TROVER AND CONVERSION.

See Bailment, § 16; Trial, § 191.

II. ACTIONS.

(B) Jurisdiction, Parties, Preliminary Proceedings, and Pleading.

§ 34 (Tex.Civ.App.) Where the petition charged that the defendant on or about May 10, 1909, unlawfully converted plaintiff's property, proof of conversion in June or August, 1910, was a fatal variance.—*May v. Anthony*, 151 S. W. 602.

TRUST DEEDS.

See Mortgages.

TRUSTEE PROCESS.

See Garnishment.

TRUSTS.

See Adverse Possession, § 4; Bankruptcy, §§ 142, 302; Charities, § 36; Common Law; Execution, § 41; Injunction, §§ 118, 148, 172; Wills, §§ 602, 673.

I. CREATION, EXISTENCE, AND VALIDITY.

(A) Express Trusts.

§ 41 (Tex.Civ.App.) A party seeking to establish a trust in his favor in land the legal title to which is in another has the burden of proving the facts necessary to constitute a trust.—*Hengy v. Hengy*, 151 S. W. 1127.

§ 44 (Ky.) Evidence *held* to sustain a finding that land was purchased at an execution sale by defendant's intestate for his own benefit, and not in trust for others.—*Hall v. Bartram's Adm'r*, 151 S. W. 40.

(B) Resulting Trusts.

§ 72 (Ark.) A trust results in favor of one purchasing land with his own money and taking title in another's name, unless the nominal purchaser occupies a fiduciary relation such as wife or child.—*Keith v. Wheeler*, 151 S. W. 284.

§ 86 (Ark.) The burden of showing a purchase-money trust is upon the party claiming its existence.—*Keith v. Wheeler*, 151 S. W. 284.

§ 86 (Mo.) One seeking to establish a resulting trust in real estate on the ground that his money went into the purchase thereof, while the legal title was taken in the name of another, has the burden of proving the fact clearly and convincingly.—*Easter v. Easter*, 151 S. W. 413.

§ 89 (Ark.) Evidence *held* to show that land purchased by a father and which he caused to be conveyed to his wife and a stepdaughter amounted to a gift to the stepdaughter so that no trust resulted in favor of the father of which his son after his death could take advantage.—*Keith v. Wheeler*, 151 S. W. 284.

A purchase-money trust can only be established by clear, convincing, and satisfactory evidence.—*Id.*

§ 89 (Mo.) A purchase-money trust can only be established by clear, strong, and unequivocal parol evidence.—*Waddle v. Frazier*, 151 S. W. 87.

§ 89 (Mo.) Evidence *held* not to establish a resulting trust in real estate, on the theory that plaintiff's money went into the purchase of the property.—*Easter v. Easter*, 151 S. W. 413.

(C) Constructive Trusts.

§ 94 (Mo.) Issuance of a patent in correction of a prior patent, which erroneously described the land, *held* to vest in the patentee the legal title in trust for his grantee in a warranty deed, or their representatives.—*Marshall v. Hill*, 151 S. W. 131.

§ 102 (Tex.Civ.App.) Certain stockholders of a corporation, having taken title to certain real property in their own names pursuant to an option belonging to the corporation, *held* constructive trustees of the title for the corporation's benefit.—*National Lumber & Creosoting Co. v. Maris*, 151 S. W. 325.

IV. MANAGEMENT AND DISPOSAL OF TRUST PROPERTY.

§ 193½ (Ky.) A court *held* to properly permit sale of a trust estate, consisting of unproductive property, and the advantageous reinvestment of the proceeds in other property.—*Owen v. Burks*, 151 S. W. 369.

§ 240 (Mo.App.) A minority trustee is not personally liable on a contract which he did not personally make merely because a majority of the trustees authorized it.—*Markel v. Peck*, 151 S. W. 772.

The provision in a will creating a trust and giving trustees power to sell or lease that a majority of the trustees shall govern concerns only the matter of binding the estate, and does not render minority trustees personally liable on contracts made by the majority.—*Id.*

§ 265 (Mo.App.) The only judgment which may be rendered in an action at law against defendants as trustees under a testamentary trust is one based on their personal liability.—*Markel v. Peck*, 151 S. W. 772.

VI. ACCOUNTING AND COMPENSATION OF TRUSTEE.

§ 312 (Ark.) A trustee under an express trust for the care of an imbecile *held* entitled to recover from the estate of the imbecile moneys required to be returned to the purchasers of lands which did not pass to the trustee because of the invalidity of a will.—*Hare v. Sisters of Mercy*, 151 S. W. 515.

ULTRA VIRES.

See Corporations, § 388.

UNDUE INFLUENCE.

See Deeds, §§ 196-211; Wills, §§ 164-168.

UNITED STATES.

See Judgment, § 829; Public Lands, §§ 61, 127;

UNLAWFUL DETAINER.

See Landlord and Tenant, § 291.

USE AND OCCUPATION.

§ 1 (Ark.) Where an attorney for creditors of a tenant took possession of the leased premises with the acquiescence of the landlord, he was liable for use and occupation without any agreement as to the rent.—*Cooley v. Ksir*, 151 S. W. 254.

USURY.**I. USURIOUS CONTRACTS AND TRANSACTIONS.****(A) Nature and Validity.**

§ 57 (Ark.) The payment of a bonus by a borrower to his own agent for procuring a loan does not make the transaction usurious.—*Smith v. Mack*, 151 S. W. 431.

(B) Rights and Remedies of Parties.

§ 113 (Ark.) The burden is upon the party pleading usury to clearly show that the trans-

action was usurious.—*Smith v. Mack*, 151 S. W. 431.

§ 117 (Ark.) Evidence in a foreclosure action on secured notes *held* to sustain findings against the defense of usury.—*Smith v. Mack*, 151 S. W. 431.

VACATION.

See Appeal and Error, § 447; Highways, § 77; Judgment, §§ 138-163.

VARIANCE.

See Bail, § 93; Pleading, § 395.

VENDOR AND PURCHASER.

See Acknowledgment, § 5; Adverse Possession, § 85; Appeal and Error, § 842; Constitutional Law, § 309; Contracts, § 176; Dismissal and Nonsuit, § 19; Estoppel, § 29; Fraud, § 20; Infants, §§ 29, 30; Injunction, §§ 148, 172; Tenancy in Common, § 43; Trusts, §§ 72, 86, 89; Venue, § 5.

I. REQUISITES AND VALIDITY OF CONTRACT.

§ 3 (Tex.) A contract by A. to give B. exclusive sale of land for 90 days, and to execute deed either to B. or persons to whom he might sell, B. to take any land remaining after the expiration of such time, was a contract of sale and not of agency.—*Ansley Realty Co. v. Pope*, 151 S. W. 525.

§ 16 (Tex.Civ.App.) A parol stipulation that a written contract for the sale of land shall not become effective until the consent of the vendor's copartner or principal shall have been obtained is binding.—*Parker v. Naylor*, 151 S. W. 1096.

§ 36 (Mo.App.) A vendor's false representations that the soil was rich and did not need fertilizer, knowing that a good crop could not be produced otherwise, *held* representations of a material fact, as distinguished from an expression of opinion.—*Williamson v. Harris*, 151 S. W. 500.

§ 38 (Tex.Civ.App.) Where a vendor is induced by fraudulent representations to sign a contract under which the purchaser buys "subject to" and not "assuming" a certain debt, the contract is unenforceable though the vendor reads it, but without understanding its legal effect.—*Parker v. Naylor*, 151 S. W. 1096.

§ 45 (Mo.App.) In an action for the price of land defended on the ground of plaintiff's fraudulent representations, *held* on the evidence that whether the purchaser relied upon such representations was for the jury.—*Williamson v. Harris*, 151 S. W. 500.

V. RIGHTS AND LIABILITIES OF PARTIES.**(A) As to Each Other.**

§ 198 (Ky.) Land conveyed after the order for an improvement and the letting of the contract, but before the work is done, is not incumbered by a lien for the cost.—*Long v. Barber Asphalt Paving Co.*, 151 S. W. 6.

(C) Bona Fide Purchasers.

§ 227 (Mo.) A purchaser has actual notice when he knows of the existence of an adverse claim, or is conscious of having the means of knowledge, though he may not use them.—*Marshall v. Hill*, 151 S. W. 131.

§ 228 (Mo.) Where one has actual notice of an equitable claim affecting the legal title, he purchases at his own risk.—*Marshall v. Hill*, 151 S. W. 131.

Where the purchaser from the holder of the legal title has formal notice of an equitable title before payment of the price, he is not a purchaser in good faith, for value, without notice.—*Id.*

§ 231 (Mo.) Purchaser *held* not chargeable with notice of proceedings to procure a corrected patent, or of a chain of title adverse to the patent, from a recital in the recorded patent that it was in lieu of a prior one, "in which the description was erroneous, the record of which has been canceled."—Marshall v. Hill, 151 S. W. 131.

§ 231 (Mo.) The recording of an instrument which is not entitled to registration does not constitute constructive notice.—Heintz v. Moore, 151 S. W. 449.

§ 231 (Tex.Civ.App.) A recorded deed disconnected from the title is not notice.—Gamble v. Martin, 151 S. W. 327.

VI. REMEDIES OF VENDOR.

(A) Lien and Recovery of Land.

§ 277 (Tex.Civ.App.) Though Rev. St. 1895, art. 304, fixes an indorser's liability, without protest, under art. 315, by institution of suit before the first term of the district or county court, a suit to enforce a vendor's lien note and to foreclose the lien was properly brought in the district court at the first term, under Const. 1876, art. 5, § 8 (Sayles' Ann. Civ. St. 1897, art. 1098, subd. 4), giving it original jurisdiction of such suits.—Robinson v. Belt, 151 S. W. 598.

§ 279 (Tex.Civ.App.) A junior mortgagee holding under an unrecorded mortgage, and of whose lien the plaintiff was not advised, was not a necessary party to a suit to foreclose a prior vendor's lien, and his rights were cut off by such foreclosure.—Gamble v. Martin, 151 S. W. 327.

§ 289 (Tex.Civ.App.) Right of a subsequent purchaser or incumbrancer to redeem from foreclosure of a vendor's lien *held* not affected by the judgment where he was not a party.—Gamble v. Martin, 151 S. W. 327.

Where a junior incumbrancer holding under an unrecorded mortgage was not made a party to a suit to foreclose a prior vendor's lien; the burden was on him to show possession or notice to the holder of the vendor's lien in order to sustain his right to redeem.—Id.

(B) Actions for Purchase Money.

§ 308 (Tex.Civ.App.) Notes given as a part of the price of certain land *held* enforceable irrespective of whether plaintiff had knowledge of defendants' occupancy of the premises.—Rider v. Radford, 151 S. W. 1181.

VENUE.

See Witnesses, § 392.

I. NATURE OR SUBJECT OF ACTION.

§ 5 (Tex.Civ.App.) Tested by the averments of a petition, a suit for damages for breach of contract to convey lands, for specific performance, for damages, and for judgment and title and possession *held* a suit for specific performance, and not in the alternative for possession, and as such to require the court to sustain a defendant's plea of privilege to be tried in the county of his residence.—Garrison v. Stokes, 151 S. W. 808.

II. DOMICILE OR RESIDENCE OF PARTIES.

§ 32 (Tex.Civ.App.) Under Rev. St. 1895, art. 1243, providing that a motion to quash is an entry of appearance, and article 1241, declaring that an appearance shall have the effect of service of citation, defendant's motion to quash does not bar a plea of privilege to be sued in another county.—F. T. Ramsey & Son v. Cook, 151 S. W. 346.

The filing of a cross-action against plaintiff and a trial on the merits waived defendant's privilege of being sued in another county.—Id.

III. CHANGE OF VENUE OR PLACE OF TRIAL.

§ 41 (Tex.Civ.App.) Where plaintiff joined as defendant a party who was clearly entitled to a change of venue to another county, and did not dismiss as to such party, the court, having no power under the statute to dismiss as against that party, properly transferred the suit as to all parties.—Garrison v. Stokes, 151 S. W. 808.

§ 77 (Mo.) Change of venue *held* properly denied where, after the application was made and before it was presented, the moving party filed several other motions.—State ex rel. Kimbrell v. People's Ice, Storage & Fuel Co., 151 S. W. 101.

VERDICT.

See Criminal Law, § 871; Trial, §§ 329-349

VOTERS.

See Elections.

WAGES.

See Work and Labor, § 22.

WAIVER.

See Appeal and Error, §§ 242, 301, 917, 919, 1078; Courts, § 37; Jury, § 29; Justices of the Peace, § 84; Logs and Logging, § 3; Pleading, §§ 412, 418; Pledges, § 30; Trial, § 176; Venue, § 32.

WARRANT.

See Arrest, § 63; Counties, §§ 164, 165, 167.

WASTE.

§ 4 (Ky.) "Equitable waste" is such acts as at law would not be esteemed to be waste under the circumstances of the case, but which is so esteemed by a court of equity because of their manifest injury to the inheritance, although not inconsistent with the legal rights of the party committing them. It is a wanton and unconscientious abuse of the rights of the party in possession, ruinous to the interests of other parties; such acts as a prudent man would not do with his own property.—Landers v. Landers, 151 S. W. 386.

§ 5 (Ky.) The owner of a defeasible fee is not chargeable with waste, although equity will sometimes restrain him from committing equitable waste.—Landers v. Landers, 151 S. W. 386.

WATERS AND WATER COURSES.

See Contracts, § 198; Drains; Judgment, § 606; Limitation of Actions, § 32; Navigable Waters; Wills, § 402.

II. NATURAL WATER COURSES.

(B) Obstruction and Detention.

§ 63 (Ark.) An instruction in an action against a railroad company for causing the waters of a creek to overflow the land of plaintiff *held* not erroneous, but susceptible of the meaning that the company is liable only for the part of the injury to which its negligent acts contributed.—St. Louis, I. M. & S. Ry. Co. v. Williams, 151 S. W. 243.

WAYS.

See Boundaries, § 21; Easements.

WEAPONS.

See Arrest, § 63; Assault and Battery, § 56; Criminal Law, §§ 1091, 1172.

§ 11 (Tex.Cr.App.) Accused, who had won at gaming, and who was then robbed, and who

knew that a police officer was within calling distance, but went 700 yards to his residence, returning with a pistol, and himself attempting to arrest the robber, was guilty of unlawfully carrying a pistol.—*Wilson v. State*, 151 S. W. 804.

WEIGHTS AND MEASURES.

§ 8 (Tex.Civ.App.) Neither the statutes creating the office of official weigher nor the amendment of 1905 (Acts 1905, c. 84; Rev. Civ. St. 1911, art. 7834), requiring private weighers doing business at places where there are no public weighers to give bond, prevents an owner of produce from engaging other than official weighers, who were not factors or commission merchants, etc.—*Paschal v. Inman*, 151 S. W. 569.

§ 8 (Tex.Civ.App.) A petition by a public weigher to enjoin an unauthorized weigher held not open to general demurrer for failure to allege that the office of public weigher had been created by the commissioner's court of the county, and that necessary steps had been taken by the voters to the creation of such office.—*Perry v. Carlisle*, 151 S. W. 1155; *Carlisle v. Perry*, Id. 1158.

Under Rev. Civ. St. 1911, art. 7828, supplanting *Sayles' Ann. Civ. St. 1897*, art. 4308, and in view of Pen. Code 1911, art. 996, the petition of a public weigher seeking to enjoin an unauthorized weigher need not allege that the weighing was not done at the requests of the owner in order to entitle him to a preliminary injunction.—Id.

The petition of a public weigher who sought to enjoin an unauthorized weigher from weighing produce which alleged that the plaintiff was the public weigher for the town of S. is not deficient for failing to allege that S. was a city; the word "town" being a generic word which includes cities, boroughs, and villages.—Id.

Under Pen. Code 1911, art. 996, the public weigher of a municipality is entitled to restrain an unauthorized weigher who set up his establishment just outside the municipality so as to weigh property bought and offered for sale therefrom.—Id.

WIDOWS.

See Dower.

WILLS.

See Descent and Distribution; Estoppel, § 91; Execution, § 45; Executors and Administrators, § 138; Jury, § 142; Trusts, §§ 240, 265.

II. TESTAMENTARY CAPACITY.

§ 55 (Ky.) Evidence held to show that testator was not competent to make a will.—*Orothwaite v. Orothwaite*, 151 S. W. 945.

IV. REQUISITES AND VALIDITY.

(A) Nature and Essentials of Testamentary Dispositions.

§ 88 (Ky.) Instruments held to be deeds and not wills.—*Smith v. Scott's Ex'r*, 151 S. W. 42.

§ 88 (Ky.) An instrument in the form of a deed, acknowledged as such, and containing a grant in the present tense, and not authenticated as a will, is not a testamentary instrument.—*Taylor v. Purdy*, 151 S. W. 45.

(C) Execution.

§ 114 (Ky.) A writing of a decedent which is not holographic, and is not attested by witnesses, could not be probated as a part of her will.—*Baldwin's Ex'r v. Barber's Ex'rs*, 151 S. W. 686.

(F) Mistake, Undue Influence, and Fraud.

§ 164 (Ky.) In a will contest for undue influence by testator's third wife, evidence that

he owed the largest part of his fortune to his second wife, and that the will practically disinherited a daughter by her, was admissible.—*Rhea v. Madison*, 151 S. W. 667.

Evidence that testator's third wife had little or no property when she married testator was admissible.—Id.

§ 165 (Ky.) In a will contest for undue influence exerted by testator's wife, evidence of a conversation between testator and his friend held admissible.—*Rhea v. Madison*, 151 S. W. 667.

§ 166 (Ky.) Evidence held to sustain finding of undue influence.—*Rhea v. Madison*, 151 S. W. 667.

V. PROBATE, ESTABLISHMENT, AND ANNULMENT.

(L) Fees and Costs.

§ 402 (Ky.) A court on appeal in a will contest will not fix counsel fees; that being a matter for the lower court upon evidence taken.—*Baldwin's Ex'r v. Barber's Ex'rs*, 151 S. W. 686.

§ 405 (Ky.) A legatee whose portion of an estate was increased by a will contest, and who did not employ an attorney to look after his interest, held chargeable with a pro rata share of attorney's fees, under Ky. St. § 489, providing that in actions to settle an estate the court shall allow legatees reasonable compensation.—*Baldwin's Ex'r v. Barber's Ex'rs*, 151 S. W. 686.

(M) Operation and Effect.

§ 433 (Tex.Civ.App.) Where title to land is claimed by a devise, evidence of the will of the alleged decedent and the proceeding of the county court admitting it to probate is admissible.—*McDoel v. Jordan*, 151 S. W. 1178.

VI. CONSTRUCTION.

(A) General Rules.

§ 441 (Ky.) A testator's intention must be gathered, not only from the instrument itself, but from his relation to the parties in interest, the family arrangements, and circumstances surrounding him.—*Levy's Ex'x v. Leeds*, 151 S. W. 1.

(E) Nature of Estates and Interests Created.

§ 602 (Ky.) A will devising property in trust for life to testatrix's children, and on their death, without issue, before distribution to certain reversionaries, held, after a distribution, to convey a defeasible fee.—*Owen v. Burks*, 151 S. W. 369.

§ 616 (Ky.) Devise to wife for life with power to sell, with remainder in trust for daughter, her share to include a specified house and lot to be occupied by her during her life, held not to limit the wife's right to dispose of such house and lot.—*Levy's Ex'x v. Leeds*, 151 S. W. 1.

(H) Estates in Trust and Powers.

§ 673 (Ark.) A will devising one-half of testatrix's estate to specified Sisters of Mercy "for the support and maintenance" of testatrix's daughter during her life, and after the daughter's death "for the purpose of educating poor Catholic children," created an express trust, and not an absolute gift.—*Hare v. Sisters of Mercy*, 151 S. W. 515.

VII. RIGHTS AND LIABILITIES OF DEVISEES AND LEGATEES.

(C) Advancements, Ademption, Satisfaction, and Lapse.

§ 775 (Ark.) As a will is ambulatory, the death of a legatee during the lifetime of the testator will cause a lapse in the legacy, in the absence of a statute to the contrary, and Kirby's Dig. § 8022, saves from lapse only be-

quests and devises to surviving children or descendants of the testator.—*Galloway v. Darby*, 151 S. W. 1014.

A general provision in a will that all the property devised and bequeathed, unless otherwise specifically stated, shall vest in the devisees, their heirs and assigns, in fee simple, must be construed as words of limitation fixing the estate of such devisees, and not as equivalent to children, and as showing an intention to prevent lapse by prescribing a line of succession.—*Id.*

(D) Election.

§ 782 (Ky.) A widow is not entitled to dower or a distributable share of her husband's estate, where she fails to renounce the provisions of his will in her favor within 12 months from its probate.—*Landers v. Landers*, 151 S. W. 388.

Widow held not required to elect between dower and devise where husband had no devisable interest, and hence a claim of ownership under devise did not preclude her from claiming dower.—*Id.*

(H) Void, Lapsed, and Forfeited Devises and Bequests, and Property and Interests Undisposed of.

§ 858 (Ark.) The distinction between personality and realty having been abolished, a general residuary clause will carry a lapsed devise of realty as well as a bequest of personality.—*Galloway v. Darby*, 151 S. W. 1014.

A general residuary clause, though reciting that it only disposed of property "not hereinbefore specifically devised," will carry a lapsed legacy where the introduction to the will stated that the instrument disposed of all of testator's property.—*Id.*

WITNESSES.

See Appeal and Error, §§ 204, 994, 1002, 1043; Continuance, § 26; Criminal Law, §§ 594-608; Evidence; Libel and Slander, § 38; New Trial, § 90; Obstructing Justice, § 4; Trial, § 41.

II. COMPETENCY.

(D) Confidential Relations and Privileged Communications.

§ 190 (Tex. Civ. App.) Conversations between husband and wife concerning her property rights and the admission of the husband of his wrongful transfer of her separate personality are not privileged communications within Rev. St. 1895, art. 2301.—*First Bank of Springtown v. Hill*, 151 S. W. 652.

§ 193 (Tex. Civ. App.) Communications between husband and wife are not privileged within Rev. St. 1895, art. 2301, when made in the presence of third persons.—*First Bank of Springtown v. Hill*, 151 S. W. 652.

III. EXAMINATION.

(A) Taking Testimony in General.

§ 236 (Tex. Civ. App.) A defendant, in an action for injuries to a child while crossing a railroad yard, held not entitled to complain of the plaintiff's counsel's failure to interrogate the plaintiff as to her appreciation of her danger at the time of the accident.—*Ft. Worth & D. C. Ry. Co. v. Winger*, 151 S. W. 586.

(B) Cross-Examination and Re-examination.

§ 277 (Mo.) Cross-examination of a person accused of defiling a female child concerning a visit by him to the house of a woman of ill repute was proper at tending to discredit his testimony that he was impotent.—*State v. Donnington*, 151 S. W. 975.

§ 277 (Tex. Cr. App.) When a defendant himself brings a former crime into a case, and

seeks to arouse sympathy for himself thereby, then the state may show the real facts, and if on cross-examination it develops that defendant committed another crime, which the state's attorney immediately asked the court to instruct the jury not to consider, there is no error.—*Kelly v. State*, 151 S. W. 304.

§ 277 (Tex. Cr. App.) Where it was claimed that defendant slandered his wife to obtain grounds for a divorce that he might marry M., he was properly cross-examined with reference to his attentions to M.—*Elder v. State*, 151 S. W. 1052.

§ 277 (Tex. Cr. App.) Where defendant testified that he could not remember after 10 o'clock on the night of the offense, the court properly permitted him to be cross-examined as to whether his lack of remembrance was due to a blow received prior to that hour.—*Shaffer v. State*, 151 S. W. 1061.

§ 287 (Tex. Civ. App.) Plaintiff could explain inconsistencies in his impeached testimony.—*Mason v. Missouri, K. & T. Ry. Co. of Texas*, 151 S. W. 350.

IV. CREDIBILITY, IMPEACHMENT, CONTRADICTION, AND CORROBORATION.

(A) In General.

§ 311 (Tex. Civ. App.) Testimony that persons whose depositions had been admitted were negroes was an attempt at impeachment in an improper way.—*Texas & P. Ry. Co. v. Good*, 151 S. W. 617.

(B) Character and Conduct of Witness.

§ 337 (Tex. Cr. App.) The defendant having testified, the state could properly show that he had been arrested on a charge of burglary.—*Black v. State*, 151 S. W. 1053.

§ 344 (Tex. Cr. App.) Accused, on a trial for rape on a female under the age of 15 years, may to affect her credit, show that she had been prior to the alleged offense an inmate of houses of ill fame.—*Bigiben v. State*, 151 S. W. 1044.

Though accused, on a trial for rape on a female under the age of 15 years, showed on her cross-examination that her act with him was the first act committed, he could not impeach her by showing her prior isolated acts of immorality.—*Id.*

§ 346 (Tex. Civ. App.) The credibility of a witness may be impeached by proof that he attempted to have a material witness evade the process of the court.—*First Bank of Springtown v. Hill*, 151 S. W. 652.

§ 347 (Tex. Cr. App.) Where a witness for defendant testified, among other things, that deceased had confessed to him that he had stolen a head of cattle, the state could properly prove that deceased was not indicted for the offense, and that the witness was a member of the grand jury that investigated the case and had not called the attention of the grand jury to the fact of such confession, since it affected his credit.—*Kelly v. State*, 151 S. W. 304.

§ 350 (Ky.) Though defendant sued for assault and battery may be asked if he had been convicted of a felony, he having testified that he had not, further interrogation as to a charge upon which he had been indicted, tried, and acquitted was improper.—*Shields' Adm'r's v. Rowland*, 151 S. W. 408.

§ 359 (Tex. Civ. App.) In the absence of proper objection, the fact that a witness has been convicted of felony may be shown by parol.—*Chambers v. Wyatt*, 151 S. W. 864.

(D) Inconsistent Statements by Witness.

§ 379 (Tex. Civ. App.) In an action on contract, evidence that defendant's agent said that he would advise defendant to settle was not admissible to impeach the testimony of the

agent.—S. W. Slayden & Co. v. Palmo, 151 S. W. 649.

§ 379 (Tex.Civ.App.) In an action by a wife to recover a note constituting her separate property actually transferred by her husband, the husband, testifying that she consented to the transfer, could be impeached by proof of his confession that he had wrongfully transferred the note.—First Bank of Springtown v. Hill, 151 S. W. 652.

§ 380 (Tex.Cr.App.) Under Code Cr. Proc. 1911, art. 815, modifying the rule against impeaching one's own witness, *held*, that the prosecuting attorney was entitled to impeach a witness who had testified injuriously.—Alexander v. State, 151 S. W. 807.

§ 391 (Mo.App.) An answer made by impeaching witness as to statements by plaintiff *held* properly admitted as against the objection that the answer had no bearing on the issues and tended to prejudice the jurors against plaintiff.—Kiel v. Ott, 151 S. W. 182.

The answer of an impeaching witness *held* admissible as tending to give the entire conversation of the witness sought to be impeached.—*Id.*

§ 392 (Ark.) Plaintiff's affidavit in replevin *held* irrelevant, where he did not deny making it, and it did not tend to controvert his testimony.—Jenkins v. Quick, 151 S. W. 1021.

§ 392 (Tex.Cr.App.) Where defendant's witness on cross-examination was asked if he had not made an affidavit to secure a change of venue for defendant, and he admitted doing so, but denied he knew what was in the application, it was proper to show that in his affidavit he had stated he had "been fully informed of and had read the contents of the application, and that the facts stated therein were true."—Kelly v. State, 151 S. W. 304.

(E) Contradiction and Corroboration of Witness.

§ 406 (Mo.) Where it was in issue whether previous owners had agreed upon a boundary line, cross-examination of a witness to the agreement to show that such agreed line was not the true line *held* admissible in contradiction of the witness.—Hilgedick v. Greubbel, 151 S. W. 731.

§ 414 (Tex.Civ.App.) A passenger, in an action for injuries, was entitled to prove statements made after the accident to corroborate his version, which was impeached by evidence of contradictory statements.—Mason v. Missouri, K. & T. Ry. Co. of Texas, 151 S. W. 350.

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